

Date: 8-6-2004

Total Pages: Cover + 3

PLEASE DELIVER IMMEDIATELY

TO Mr. John Whipple
TSC

FAX

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John -
Reference 8-9-04 BID meeting
Question/Discussion Issues

Other comments & questions to be
faxed upon receipt.

Shanks
Carroll


8-6-04

Added

Risley - Settlement Summary, Provision Comments,
Consequences, & Conclusions

Carroll

<Orig Cover + 6 pages
+ Agenda 1 page>

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DRAFT AGENDA Special Meeting August 9th, 2004

I. Call to Order

II. Roll Call

III. REGULAR MEETING

APPROVAL OF AGENDA

READING OF NOTICE OF MEETING

Notice was published in the Farmington Daily Times August 1st, 2004 under meetings.

AGENDA ITEMS

1. Opening Remarks
2. Navajo Settlement Overview - Mr. John Whipple - ISC with emphasis on impact On B.I.D. Irrigators, users and future operations.
3. Invited Participants - Comments, Questions/Responses
 - A. Mr. Bob Oxford
 - B. Mr. Gary Horner
 - C. Mr. Gary Risley
4. Board Member Questions
5. Public Comments/Questions (As time permits)

CLOSED EXECUTIVE SESSION

The Bloomfield Irrigation District may go into Closed Executive Session pursuant to the provisions of the New Mexico Open Meetings Act.

1. Navajo Settlement

ADJOURN

**Navajo Settlement
Summary Comments to Bloomfield Irrigation District**

Date: August 6, 2004

To: Bloomfield Irrigation District

From: Gary Risley, Esq., Miller Starvert P.A.

Introduction.

I regret being unable to attend the specially called board meeting, but the meeting was scheduled during the week of a long-scheduled vacation for which I had non-refundable tickets. In lieu of a lengthy analysis of the revised settlement agreement, I have opted to present major points in an abbreviated format. I would appreciate the opportunity to present a fuller overview to the Board in the near future, and would request the Board take no action until we have the opportunity to discuss the legal ramifications of any procedural or substantive actions in executive session.

Summary of Settlement.

1. The settlement as proposed would adjudicate to the Navajo Nation approximately 56% of the water available to New Mexico under the Upper Colorado Compact. Almost all of this water is currently being used or is available for use upon the reservation – the effect of the settlement would be change the title of the water from the United States to the Navajo Nation.
2. The "new" water in the settlement is the water allocated to the Navajo-Gallup pipeline project in the amount of 22,650 acre/feet per year.
3. Other than water for the Fruitland and Hogback Ditches, the Navajos have agreed in the settlement to effectively "go to the back of the bus" and accept a 1955 priority or later for their water which would be delivered by the United States out of Navajo Lake. They have also agreed to "share shortages" in times when the Secretary of Interior declares a shortage in the Lake by accepting the percentage reduction declared by the Secretary.
4. The Navajos have agreed not to attack Echo Ditch Decree rights, and may only challenge current Echo Ditch rights holders based upon a forfeiture or abandonment action based upon conduct from 1948 forward.
5. The Navajos have agreed that in years of shortage (i.e. insufficient flows in the river) to supplement the Hogback and Fruitland Ditches (which claim an 1868 priority) with lake water from their allotment up to a maximum of 15,000 acre feet a year. This has the effect, based upon historical data, of eliminating the necessity of a priority call on the river once every two years.

and instead should result in a priority call once every ninety years. This provision gives the non-Indian users effectively 15,000 acre-feet of storage in Navajo Lake. The late summer flows of water into the lake routinely drop down below 400 cfs.

6. In exchange for using lake water to supplement demand for Hogback Fruitland, a condition has been placed in the agreement that direct flow users (non-Indian water rights holders) cannot claim that water released from the lake in excess of the inflow to the lake is available for appropriation by them. There is a NM Supreme Court case to the contrary, so this provision could, if the position was sustained, be a waiver of rights under that case. On the other hand, the Bureau of Reclamation and Navajos don't want to release water from the lake under this agreement for purposes of delivering water under this agreement, only to have it slurped up by others along the way.
7. The Settlement calls for Congress and New Mexico to provide up to one billion dollars to be spent on projects on the Navajo Reservation, including the Navajo-Gallup pipeline.
8. If any more water is found to be available in the San Juan Basin, 50% of those waters will be awarded to the Navajos.
9. The Navajos also have agreed to submit certain water transfer situations to the jurisdiction of the State Engineer. Any transfer of water off of the Reservation would require State Engineer approval, and any transfer to an out of state user would require State Engineer approval (the Navajos would have to show no harm or impairment to other water rights holders.)

Comments on Various Provisions.

1. It is said that a camel is a horse designed by committee. *In many ways, a settlement agreement is like the camel* – it can be ugly and difficult to deal with or accept, but it gets you where you need to go. This settlement has provisions that are difficult for the writer to swallow: The Gallup pipeline, 50% of any new-found water going to the Navajos, a billion dollars in government spending, for example. One must, however, look at settlements, not with concern over what the other side gets, but rather, with an eye as to how it is going to effect one's individual interest.
2. The BID offered several comments upon the original settlement. *Most, not all, of those comments were incorporated in the new agreement*, although not necessarily in the manner suggested by BID.
3. The fact that *the Navajos are accepting 1955 or later priority on almost all their claimed water is a huge benefit for the BID*, where almost all rights predate the 1955 permits.

4. The Navajos will draw the vast majority of their water from the Lake, instead of being direct flow users, again a huge benefit to the BID.
5. The Navajos concession to not attack the Echo Ditch decree rights is a concession of almost *immeasurable* significance.
6. The provision for utilizing lake water to supplement river water for Hogback Fruitland means *avoiding priority administration* every other year. The State Engineer currently plans to require ditches to administer priorities themselves, which would be an expense estimated to be in excess of \$40,000 for the BID.
7. The condition that state water rights holders cannot claim that any water in the river (even is lake water released in excess of the in-flow into the lake) is a *significant legal concession*. In practicality, however, with the BID's high priority and early diversion point below the dam, the writer wonders if in a real world situation the BID would ever need to invoke that argument, particularly with the Hogback and Fruitland ditches using lake water as necessary to meet their needs.
8. Mr. Bob Oxford claims the settlement agreement awards all return flows to the BOR. The writer does not find this within the Settlement.
9. Mr. Gary Horner has claimed in published reports that the settlement will dry up the non-Indian users. In fact, it does the opposite. While there is little, if any, water left for expansion of our communities, there was none prior to this settlement. The Upper Colorado Compact awarded the United States all previously unappropriated water, and the GSE has long held that there was no more water available to appropriate in the San Juan Basin. So the settlement changes little, if anything, in that regard. Title to the water is being transferred from the United States to the Navajos.
10. Settlement will remove a cloud over the current water rights held by non-Indian users and may lead to an increase in the value of those rights.
11. The agreement by the Navajos to submit to GSE controls in numerous situations is very significant. Mr. Horner has incorrectly stated that the Navajos can unilaterally transfer water out of state. The settlement requires State Engineer approval for such an action, as well as providing some controls for other off-reservation transfers.

What are the consequences of successfully derailing the Settlement?

1. The Navajos recognition of the Echo Ditch Decree rights will be withdrawn. No court can force them to accept the decree. It is believed that not only

could, but that the Navajos will, vigorously attack those rights if the settlement is derailed. How many people can prove the original date of first use of the rights they hold today? What evidence is available?

2. *The Navajos awarded rights would be "direct flow" rights, not rights drawn from stored lake water.* In earlier negotiations, the cities and agricultural users were extremely worried about the effect of the 321 cfs diversion right of Fruitland/Hogback. In many years this 1868 diversion right would force everyone else to cease or curtail diverting of water in August, September, and October.
3. Assume the irrigators achieved tremendous success in the courtroom and the Navajos only won enough acreage to equal an area 3 times the size of the Fruitland/Hogback diversions. Since these would be direct flow rights, probably with an 1868 priority date, the Navajo Nation would have the right to divert approximately 960 cfs. *This scenario would dry up the Basin during the irrigation season except for the peak spring flood season.* So contrary to assertions, it is not the settlement that would dry up the basin, but a minor award to the Navajo Nation that would dry up the basin. And there is no assurance that in addition to the water awarded in the litigation that the federal government will not continue to fund and supply water to the NAPI projects – a double whammy to the BID and other non-Indian users.
4. *What would happen if the Navajos are successful in winning the entire area covered by the NAPI project? The NAPI alone demands an 1800 cfs diversion.* If won in court, this would be a direct flow right, not a federal contract for lake water; and, if awarded an 1868 priority, would wipe out all agricultural irrigators and would dry up the cities in the summer. Can one rationally risk that outcome when the settlement avoids that result?
5. *The cost to litigate the Navajos claims would be hundreds of thousands, if not a million dollars.* The writer has spoken to individuals involved in similar litigation, although not on a scale of the Navajo's claims, and their costs have approached or run over one million dollars.
6. *The controls conceded to the State Engineer by the Navajo Nation, including the right to control out-of-state transfers, would go away.* As a federal water rights holder, the position of the Navajo Nation as a "sovereign" has been to claim that the state of New Mexico has no jurisdiction over water adjudicated to them. The scope of power of the State Engineer to limit or control off-reservation transfers of Indian water rights would be litigated with the possibility that the OSE would be able to exercise little or no control over Navajo water.
7. An attack on the settlement may not destroy the whole process, but it is anticipated the Navajos would insist on going back to the original draft of the settlement, which is far less favorable to the non-Indian users. *The Navajos.*

reasonably so, anticipated that by granting the concessions contained in the second draft following public comment that much of the political opposition would be eliminated. Without that consideration, there is little reason for them to accept those changes.

8. *There is an argument that the Navajo Nation traded their reserved rights for the NAPI project. In light of past litigations and the expense of litigating the matter, the probability of a 100 percent victory on this point must be acknowledged to be very small. This is not to say it may not be a valid argument, but it is an extremely dangerous to gamble everything on a single argument in a lawsuit. As described above, the results of a loss on that point could be devastating to the BID.*

Conclusion.

It is in the best interests of the BID to support the settlement. There are a few points that might be tweaked, but as a whole the document works to the District's advantage.

The consequences even of "winning", unless a total 100% victory is obtained, are devastating to the average user on the ditch. The consequences of "losing", with the Navajos being awarded a majority of their claims, could destroy the economic viability of the County.

Is the settlement fully in compliance with current New Mexico? Maybe, maybe not. That is not the issue. Statutes can be amended. Fighting over technical points is not in the interest of the District.

I will close with a story. Several years ago I read an article about the head of the mechanics union at Eastern Airlines. During its last days, Eastern was seeking concessions from its unions to try to save the company. Every union except the mechanics, represented by this gentleman, agreed to concessions. Because the mechanics would not agree to concessions, the deal fell apart, Eastern went bankrupt, and was liquidated in bankruptcy. The union representative was proud of what he had done. "I showed them!", he said. More than 10,000 people put out of work, including his fellow mechanics, and untold number of small companies forced into bankruptcy because Eastern could not pay them. But he proved his point!

I trust the Bloomfield Irrigation District is not like the union representative