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## **INDIAN WATER RIGHTS SETTLEMENTS BRINGING CERTAINTY TO UNCERTAIN WATER RESOURCES**

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I've been asked to speak about Indian water rights settlements in New Mexico. I am not sure why they asked me to talk about such settlements, since I am hardly an expert. The Navajo Nation has been working on its water rights settlements since 1996, and we still have a long way to go. If you want to hear from an expert you will want to talk with my friends here from the Jicarilla Apache Nation. They are the only tribe in New Mexico that has successfully gone from start to finish in terms of concluding a settlement. Their settlement legislation was approved by Congress in

1992, and their settlement decree was approved by the court in 1999.

I would like to share with you some perspectives I have on the settlement process based on my experience in the settlement negotiations between the Navajo Nation and the State of New Mexico. Although most of you are not from the San Juan River basin and may have little interest in the specifics of that deal, there are some lessons to be learned from the settlement process we have been through. In keeping with the theme of the conference – water resources

in the past, present, and future – I would like to talk about the settlement process in terms of the past, present, and future.

### **The Past – Starting the Discussions**

Some of you were in Farmington for the 41<sup>st</sup> WRI conference. At that conference, in September 1996, Navajo Nation President Hale announced that he had invited New Mexico Governor Johnson to engage in settlement discussions to resolve the long outstanding claims of the Navajo Nation to the San Juan River. This was extremely important, not just to the Navajo Nation, but to the state of New Mexico. The Navajo Nation is the largest water user in the state of New Mexico, using the bulk of the water from the San Juan

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River, the largest water resource in the state of New Mexico. The San Juan River basin is in the northwest corner of the state, and the city of Farmington is the largest community in the basin. So in Farmington in 1996, the settlement process began when an olive branch was extended.

The Navajo Nation and the State of New Mexico were urged to put aside their “water wars” rhetoric in order to find common ground for all water users in the basin. Subsequently a Memorandum of Agreement was signed by Governor Johnson and President Hale to pursue the exploration of whether a settlement made sense of these particular claims.

I was also a speaker at that conference, and I outlined a roadmap of the various issues to be addressed as a necessary predicate to a Navajo settlement. Back in 1996, there were a myriad of outstanding issues in the San Juan River basin. The Jicarilla settlement had been approved by Congress and a settlement contract had been executed for a water supply out of Navajo Reservoir. But, the Jicarilla settlement decree had yet to be approved by the court, and the Jicarillas had a water supply from Navajo Reservoir but no way to use their settlement water. The Navajo Nation was also embroiled in a protest over Navajo Reservoir contracts with the Department of the Interior. The Department was trying to renew various Navajo

Reservoir water contracts, including a contract with the Public Service Company of New Mexico. That contract threatened a supply of water that would be necessary for a Navajo settlement and Navajo water development. Before discussions with the State of New Mexico could be productive, it was important to resolve this issue. Ultimately, we combined the issue of the PNM water contract with the Jicarilla settlement by bringing the company and the tribe together through a subcontract. The subcontract provided a mechanism for the Jicarilla Apaches to put some of their settlement water to use and provided a firm supply of water for PNM, which freed up a block of water in the Navajo Reservoir supply, making that block of water available for use ultimately in a Navajo Settlement. That water is now part of the supply for the proposed Navajo-Gallup Project in the proposed San Juan settlement.

Another outstanding issue was the proposed Animas-La Plata Project, which prior to 1996 the Navajo Nation did not fully support. Ultimately, the Navajo Nation got on board with Animas-La Plata as a project participant. We worked out a water supply for the project through an agreement with our neighbors in New Mexico and Colorado and laid the foundation for regional support of a Navajo San Juan River settlement.

Endangered species issues were an important constraint on water development in the basin in the early to mid 1990s, and it was unclear at the time of the Farmington conference whether there would ever be additional water development in the basin as a result of endangered fish. In the early 1990s, water developers were inclined to oppose all efforts of the U.S. Fish and Wildlife Service to recover the endangered species. However, there were those who had the vision to see that the problem of the endangered species would not simply go away and that collaborative efforts between the states, the tribes, the water users, and the Service would be necessary to recover endangered species.

Chuck DuMars presented a wonderful tribute to the great Al Utton yesterday. Al Utton was one of the visionaries who recognized that recovery of endangered species was essential to ensure the continued development of water in the San Juan River basin, and he was instrumental in the development of the San Juan River Recovery Implementation Program. Although the future of water development in the basin was uncertain in 1996, through that recovery program progress was made, and in 1999 Fish and Wildlife

Service opined that the Navajo Indian Irrigation Project, the largest water user in the basin, could be fully developed without jeopardizing the survival of the endangered fish. Although the endangered species issues are not likely to go away, the foundation was laid for a process to ensure both the recovery of native fish while proceeding with water development, particularly water development by Native American tribes.

### **The Present – The Settlement Process**

The Farmington conference and the resolution of the issues identified at that conference represented an important past in the settlement process. By way of the present, I would like to discuss how the Navajo Nation and the State of New Mexico have worked and are continuing to work on the formulation of a settlement of the Navajo water rights claims.

The negotiations of the Navajo claims were very, very difficult, because as I mentioned, the Navajo Nation is the largest water user in the State of New Mexico and has the largest claim to water in the state. These claims are based not only on the existing uses of water by the Navajo Nation but also include claims under the *Winters Doctrine* for reserved water rights based on practicably irrigable acreage and on other theories. The magnitude of these water rights claims not only puts the rights of all of the water users in the basin in jeopardy, it puts the State in jeopardy of not being able to meet its compact obligations described earlier here in Estevan Lopez' talk concerning the Upper Colorado River Basin Compact.

As I said, these negotiations have been very, very difficult. They have also taken quite some time. For the first couple of years, the state and the tribe met several times, and with each meeting there was a better understanding of each other's positions and needs. It was like a dance or a courtship. But we knew the State of New Mexico was serious about developing a relationship with the Navajo Nation when State Engineer John D'Antonio brought Al Utton's son, John, into the negotiations on behalf of the State. Chuck DuMars spoke of Al Utton as a person of impeccable integrity and civility, and his son John brought those same qualities to the settlement discussions. It is a fitting tribute to Al Utton that his son John played and continues to play an instrumental role in the settlement process. I say this, not because John bought me a couple of margaritas at La Posta the other night, but because he brought so many skills to the negotiations.

I remember negotiations in John's office in Albuquerque, and we would be pondering various problems in the settlement documents. We would look out the window, and John would say, "look at the horizon, if you look closely you will see a big green spot, so pay attention." Miraculously a big green spot appeared, but then I had to turn to John and say, "John that is not a green spot, that's a balloon and we're in the middle of the balloon fiesta." In any event, the negotiations were fun, but difficult.

So what does the proposed Navajo settlement really look like? The settlement confirms the Navajo Nation's rights to water in three basic categories. First, the water for the Navajo Indian Irrigation Project is clearly defined and quantified. Although Congress authorized the project in 1962, it did not define clearly what the Navajo water rights would be for that project. There are three different opinions from the Solicitor of the Department of the Interior that attempt to opine as to the nature of those rights. The settlement quantifies those rights in a way that provides greater certainty to Navajo and non-Navajo water users. Second, the settlement quantifies what are also the substantial water rights the Navajos have from historic and existing irrigation projects; projects that were developed in the nineteenth century and continue to be used today. And third, the settlement recognizes a water supply for the proposed Navajo-Gallup Water Supply Project that I mentioned earlier. The actual settlement package consists of numerous documents; the most important document is Settlement Agreement between the Navajo Nation and the State of New Mexico which was executed this past April. The Settlement Agreement provides an "umbrella" for all of the components of the settlement, and includes an agreement to address a myriad of issues of common concern to the State and to the Nation, including the administration of water rights, the leasing and transfer of water rights, groundwater development, and the settlement of all claims.

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The Settlement Agreement contains several appendices that are key supporting documents, including proposed decrees that define with specificity the water rights, a water contract for Navajo Reservoir water, and the proposed legislation for Congress to authorize the settlement, including authorization of the Navajo-Gallup Water Supply Project and authorization of the funding necessary to implement the settlement.

### **The Future – Congress and the Courts**

The agreement with the state is not the final step. Conceptually, water rights settlements involve money and water. This is because tribes typically lack the financial resources to fully develop the water rights

that they may claim in water rights litigation or adjudications. Thus, tribes will often compromise the water rights they might receive by virtue of litigation, so-called “paper water” rights, in favor of receiving the financial resources to develop somewhat smaller water rights and put those so-called “wet water” rights to

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practical and beneficial uses. The proposed Navajo settlement follows this model and Congress is being asked to provide most of the funding for the settlement, including the construction of the Navajo Gallup Water Supply Project to provide drinking water to Navajo communities in New Mexico and to the City of Gallup. Congressional approval of this expensive project and this expensive settlement will require a strong commitment of the political resources of the State of New Mexico and the Navajo Nation. This process could take years. More on the political process later.

Once Congress approves the legislation to authorize funding the settlement, the money part of the deal is done, although it will take continued efforts to ensure that the authorized appropriations are actually made by future Congresses. The next step in the process is to finalize the water part of the settlement. A final court decree is required to quantify the extent and nature of the Navajo water rights, so those rights can be administered along with all other rights adjudicated in

the basin. At that stage in the process, the other water users in the basin will have the opportunity to object to the water rights of the Navajo Nation. Once again, the court’s approval of a final settlement decree may take more years to achieve. But wait, the process is still not complete. In addition to Congressional and court approval, the settlement is contingent on certain things being done, including the construction of certain water projects. Those projects will require a contract for water out of the Navajo Reservoir supply, so the settlement also will require a contract with the Secretary of the Interior for that supply.

So this settlement is a package, a bundle. For the settlement to work, Congress has to appropriate the money. The decree has to be entered. The projects have to be built. There are a lot of contingencies. In fact, we have optimistically set the year of 2026 as the year the final settlement becomes effective. Hopefully, I will not still be working for the Navajo Nation on this. Perhaps at a future WRRI conference, a young lawyer working for the Navajo Nation can report that all of these planned efforts were in fact successful.

### **Guns, Lawyers, and Money.**

With the Navajo settlement as a framework, let’s talk more generally about why settlements are important and why settlements should be pursued. In addition to the “Past, Present and Future” theme of this conference, the sub-theme is “Guns, Lawyers, and Money.” The reason settlements should be pursued is that without settlements the alternative is “Guns, Lawyers, and Money.” Let’s talk about money first. Litigation is extraordinarily expensive. In the San Juan River basin there are an estimated 18,000 different claimants. The adjudication was filed in 1975, and only one water right has been adjudicated to a final decree. That water right belongs to the Jicarilla Apache Nation by virtue of a water rights settlement. The adjudication process is extremely expensive and time consuming. The hope is that through settlements you can streamline the process, but that remains to be seen. Settlements can still be protracted, involving a lot of lawyer time and a lot of money. As discussed above, even if everything goes as planned, the Navajo Nation’s water rights settlement may not become final for another twenty years

However, a settlement allows the parties the flexibility to obtain benefits that cannot be achieved through litigation. The final result of litigation is merely a piece of paper; a decree. The court’s decree says

that these parties are entitled to these rights, and that is it. It is a fairly limited process. A settlement, by way of contrast, offers the possibility of benefits accruing to both the Indian and non-Indian water users that are not necessarily available litigation. Let me give you a couple of examples. In the proposed Navajo settlement, the role of the State Engineer with respect to the administration of the Navajo water rights is very well-defined. In comparison, the general stream adjudication for the San Juan River basin will adjudicate the rights of the various parties, but the powers and limits of the State Engineer to administer the Navajo water uses within the basin could conceivably require separate litigation.

In addition, the proposed settlement contains a mechanism that provides certain protections of non-Indian water uses without significantly diminishing the paramount water right of the Navajo Nation. The settlement recognizes that the Navajo Nation possesses the most senior right to run-of-the-river diversions from the San Juan River and such rights are substantially larger than any other water user. The settlement would also recognize the Navajo Nation as the largest water user with storage rights in Navajo Reservoir. Under natural flow conditions, flows in the San Juan River drop precipitously in the late summer months jeopardizing all but the most senior water users of irrigation water. Without storage rights, the Navajo Nation could place a call on the upstream junior irrigators so that flows diverted to non-Indian farmers would be curtailed to satisfy the downstream senior water rights of the Navajo farmers. However, through the operation of the settlement, the Navajo Nation would utilize water from Navajo Reservoir to satisfy Navajo run-of-the-river rights instead of curtailing the upstream non-Indian farmers. Based on the hydrologic records, we believe that the risk of calls on the non-Navajo farmers would be reduced from forty-five percent of the irrigation years to just five percent of the years. No amount of water rights litigation could create such an elegant solution. This settlement solution creates far more certainty for all water users than litigation could ever produce.

Settlements also offer a vehicle for tribes to obtain “wet water” development in lieu of the “paper water” rights available through litigation. At the end of the day, or the decade, or several decades, of litigation, all that the tribe has is a piece of paper that describes a certain quantity of water that the tribe can use if the tribe has the means to put the water to beneficial use.

But where the tribe lacks financial resources to put that water to beneficial use, even a positive litigation outcome may not be worth all the guns, lawyers and money in the basin. The basic paradigm that many tribes have followed has been to trade a portion of the “paper water” rights that would be claimed in litigation for the benefit of a small amount of “wet water” development by virtue of a settlement. The swapping of “paper water” for “wet water” has fueled many Indian water rights settlements and provides potential win-win scenarios for all the water users.

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Settlements are also attractive because they provide a certainty that is not necessarily available in litigation. I previously referred to uncertainties that arise out of the future administration of water rights and the uncertainties to water supplies that may arise from calls against the non-Indian water users. Then there is the uncertainty of litigation that never seems to end. After thirty years of litigation in the San Juan River basin no one, other than the Jicarilla Apaches, has a water right with any degree of certainty. Settlements can resolve the large claims of the tribes which create the uncertainty for all other water users in the basin. Chuck DuMars talked yesterday about parties that are driven toward settlements to avoid uncertain outcomes in a risk adverse process, and I agree. Litigation is a crapshoot for all the parties, but settlements can provide not only certainty as to your own rights but also certainty over the cloud that may exist over the entire basin by virtue of unquantified *Winters* rights claims by tribes.

Although we may discuss settlements as an alternative to litigation, it is my theory that in the context of Indian water rights cases, all litigation will ultimately result in a settlement. For example, the *Big Horn* adjudication involved the water rights of the Northern Arapahoes and the Shoshones living on the Wind River Reservation in Wyoming. The tribes were determined to litigate their water rights and the case went to trial from start to finish. Then after the trial, there were appeals through the state courts. Eventually the case went to the U.S. Supreme Court. Today, what is the

status of the tribes' water rights? They have not put their water rights to beneficial use and engaged in protracted litigation with the state of Wyoming over the administration of such water rights and whether the rights could be devoted to instream flows. That litigation also went back to the Wyoming Supreme Court. In the end, the tribes are beginning to realize that to get anything done, they will have to negotiate the resolution of these issues rather than continue an

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endless litigation process. This has sent a strong signal to other tribes that if you they want certainty, if they want “wet water,” then perhaps litigation is not the way to go.

These principles are not unique to the water rights of tribes. The most famous water rights case of the twenty

th century is *Arizona v. California*. What happened in *Arizona v. California*? Arizona did not ratify the Colorado River Compact because she was concerned that California, as a much larger and prior appropriator, might get the right under the prior appropriation doctrine to almost all of the water that was apportioned to the lower basin. Arizona opted for “guns, lawyers, and money.” She sued California in a series of cases each entitled *Arizona v. California*. The most famous of which is the one filed in 1952, in which Arizona claimed that the Boulder Canyon Project Act of 1929 effectively apportioned the waters of the Lower Colorado River Basin to Arizona, California, and Nevada. In its decision in 1963, the Supreme Court agreed with Arizona on virtually every issue. Arizona wanted to limit California to the 4.4 million acre-feet of water apportioned by the Boulder Canyon Project Act despite the fact that California was growing and growing. The Supreme Court agreed. Arizona wanted to exclude the one million acre-feet of tributary water awarded to the Lower Basin from the 2.8 million acre-feet apportioned to Arizona. The Supreme Court agreed. By all measures, Arizona kicked California’s butt in this litigation.

So as a result of *Arizona v. California*, Arizona obtained a “paper water” right of 2.8 million acre-feet

of water. Of course, the question that remained was how would Arizona put this water to beneficial use? The dream of Arizona was to build an aqueduct from the Colorado River to bring water the heart of Arizona for use in Phoenix and Tucson. Of course such a project would require the expenditure of billions of dollars. Where could Arizona possibly get that kind of money? Uncle Sam. So, the day after the Supreme Court announced its decision in 1963, Arizona Senators Hayden and Goldwater of Arizona introduced legislation to authorize the Central Arizona Project. Now these Senators were a couple of pretty powerful guys, but they were no match for California and its forty-five congressmen. So when it came time for Arizona to put her water to beneficial use, she had to make a deal with the devil California, the state that just got its butt kicked in court by Arizona. As a result, Arizona was forced to make a deal with California as part of the Colorado River Basin Project Act of 1968. Arizona’s water right for the Central Arizona Project is subordinated to all the other water uses on the Colorado River in the Lower Basin. In other words, the Central Arizona Project is the junior water user. That means that California gets every drop of its 4.4 million acre-feet, before Arizona’s Central Project can take a single drop of water. In the end, Arizona made a settlement with her enemy from the litigation. The lesson is that when it comes to “wet water” development, if you don’t have the financial wherewithal to put the water to beneficial use, you must be prepared to settle with the very people you were willing to litigate against.

What does this mean for the Navajo Nation? Navajo can go to court, assert huge claims, jeopardize the water supply for the non-Indians and threaten the ability of the state to comply with its compact obligations. But the Navajo Nation needs drinking water for its people. On a reservation where almost half the people must haul their drinking water, the Navajo Nation needs costly municipal water infrastructure. The centerpiece of the proposed settlement is the Navajo-Gallup Water Supply Project. Of course the Navajo Nation could try to ask Congress to fund such a project without a settlement. But what is the first thing the New Mexico Congressional delegation would ask – “Do your neighbors support this bill?” Simply put, the Navajo Nation would have a difficult time telling the delegation that it wants to continue to litigate, to dry up the non-Indian communities, and to put New Mexico’s apportionment at risk while asking for Congressional support for

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Navajo municipal water infrastructure. What would happen if Navajo went that route? The delegation would call up our friends in Farmington, and all of the other good folks in the San Juan Basin that we are litigating with and ask them what they think of the project. Everyone is going to say, “How can you build a project for the Navajos when they are clobbering us in court?”

So in order to create certainty, settlements are a necessity. No matter how much you fight in court, at the end of the day when it comes time to build water infrastructure and Congressional funding is needed, you still must make a deal with the same people you would fight with in court. Ultimately, the paradigm right now is that water cases will eventually result in a settlement. You either settle now or settle later. With the advent of tribal gaming and additional revenues that are flowing in tribal government, perhaps that paradigm will change in the future. For now, tribes will either have to settle now or settle later.

Does the future portend guns, lawyers, and money? I would like to think that we have made a lot of success in reaching this Settlement Agreement with the State of New Mexico. To paraphrase Winston Churchill, perhaps we are not at the beginning of the end, but at least we are at the end of the beginning. The settlement process continues as we now must convince Congress to spend the money necessary for the settlement. Our settlement is expensive. Municipal water infrastructure is expensive, but I would submit to you that it is even more costly not to settle this case. New Mexico does not need more years and decades of litigation or having its water supply and the water uses of all the water users put at risk.

As the State Engineer mentioned, we signed an agreement on April 19<sup>th</sup> of this past year. The United States did not sign the agreement. The United States does not want to spend money. We have to go to Congress, and we have to have Congress tell the Secretary to sign the agreement, spend the money, and build the projects. Hopefully we can get it done. Hopefully the future will not be guns or litigation. Hopefully we will have these issues resolved. I look forward to hopefully reporting back a more favorable outcome to this conference in the future. Thank you very much.

*Information on the proposed Navajo settlement can be found at: [http://www.ose.state.nm.us/legal\\_ose\\_proposed\\_settlements\\_sj.html](http://www.ose.state.nm.us/legal_ose_proposed_settlements_sj.html)*