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FROM: Steve Cone <scone@infoway.lib.nm.us> | [Save Address](#)

DATE: Mon, 05 Jan 2004 06:06:48 -0700

TO: <jwhipple@ose.state.nm.us>, <johnleeper@navajo.org>, <laurab@daily-times.com>, <jims@daily-times.com>, <barryh@daily-times.com>, <markl@daily-times.com>, <chasby@durangoherald.com>, <will@durangotelegraph.com>, <daler@durangoherald.com>, <emcintyre@gjds.com>, <msoraghan@Denverpost.com>, <barryh@daily-times.com>, <gallpind@cia-g.com>

SUBJECT: final comment RE: proposed Navajo Nation Water Rights Settlement Agreement

In the shuffling madness
Of the locomotive breath,
Runs the all - time loser,
Headlong to his death.
He feels the piston scraping -
Steam breaking on his brow -
Old Charlie stole the handle and
The train won't stop going -
No way to slow down.
" **Locomotive Breath**" -- [Aqualung](#) --Jethro Tull

"At the hearing they had on the Arizona Water Settlement Act in late September, Sen Domenici, who chairs the committee, basically came in and said to the full committee 'If you expect that these bills are going to go through without little New Mexico getting what New Mexico needs for water, then you're all greatly mistaken.' **The metaphor here is that there's a legislative train that's got all of these big bills and the senate would like to get this [Navajo Nation Water Rights Settlement Agreement] onto that train.** This is something that the senator really wants. This is something I think he sees as part of his legacy." (emphasis added)
-- Stanley Pollack, Navajo Nation Water Rights Counsel

TO:
The Navajo Nation
The New Mexico Interstate Stream Commission

FROM:
Steve Cone, for "electors Concerned about Animas Water" -- CAW --
Phil Doe
Jack W. Scott
Matthew A. Cone

MATTHEW A. COLE

5 January 2004

RE:

**Proposed San Juan River Basin in New Mexico
Navajo Nation Water Rights Settlement Agreement**

Introduction

God only knows what will become of this comment! Since you do not intend to include it in the creation of a public record, and you do not consider it your obligation to provide a direct response, this effort appears to be an exercise in futility, if not lunacy. At your December meeting in Farmington you expressed an urgent desire for hasty settlement agreement. You said the Gila gravy train is leaving the station loaded with big bills for Arizona and California. Senator Domenici, the conductor, has called "All aboard!". Your proposed "San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement" will be Domenici's legacy, you say, and his train just won't stop going -- there is no way to slow it down. The thirty day review period for public comment on your proposed settlement is woefully inadequate, you do admit but you say there's no other way. If these Navajo claims are not resolved quickly, you say, existing non-Navajo water users in the Basin could be "displaced" or have their economic well-being "seriously impaired". Use of the fear factor has worked wonders to secure other Indian water rights settlements, and you're betting it will be the ticket here, too.

But ramming a done-deal down people's throats is not what most folks regard as a neighborly, collaborative approach. You were in such an all-fired hurry that the Public and other interested parties have been denied opportunities to contribute meaningfully toward any serious changes in this proposed settlement. Well, regrettable as it may be, you say, that's just a price of doing business because there is now no time to lose.

At least you have been consistent in your approach -- blocking everyone's access for years to all of the proceedings and records leading up to your proposed settlement.

The State Engineer's general counsel D.L. Sanders stated unequivocally over two years ago that all of the State's negotiation meetings with the Navajo Nation and the Navajo-San Juan Federal Indian Water Rights Team would be completely closed to the public and the media and that such prime stakeholders as the City of Gallup, San Juan County, the Ute Mountain Ute Tribe, the Jicarilla Apache Nation, the cities of Farmington, Bloomfield and Aztec, and agricultural water user groups within the Basin would not be welcome to attend and were to have no seats at the negotiation table.

The State, the Navajo Nation and Federal officials have waited far too long to engage other Tribal and non-Navajo parties to determine whether the settlement agreement is workable and politically viable. In a personal letter dated 22 August 2001, almost two and-a-half years ago, a Navajo medicine man expressed his deep concerns about the State's covert negotiations with the Tribe and the Federal Government:

"We are not provided any information, nor are we participating in any way. We have a vacuum effect, and we do not know any particulars. I feel like a prisoner denied access to information to help in preparing my defense strategies. There is an appearance that

to information to help in preparing my defense strategies. There is an appearance that the settlement is to the advantage of big business and government. The little guy is being left out in favor of the big folk."

This five-year history of secrecy in negotiations represents a deep and abiding injustice directed toward the many legitimate stakeholders and citizens -- Indian and non-Indian alike-- who have been summarily excluded from the process at every turn. For over five years, there has been no place at the table for members of the San Juan Basin community who have been disregarded and discounted in no uncertain terms. The closed and covert nature of the negotiations -- your penchant for exclusivity-- is a disservice to your constituents and an absolutely intolerable abuse of the public trust.

The entire negotiation process has been deeply rooted in bad faith. You have worked secret with Federal Government officials and on the sly with New Mexico's Congressional delegation, all the while denying due process to indispensable parties of interest -- public entities, commercial concerns, taxpayer and environmental groups.

You have conducted the public's business of negotiating a settlement of Navajo claim to water from the San Juan River in private. State and Tribal officials evidently believe that water is too important a public resource to let the people have a voice in its allocation. The Office of the State Engineer, officials of the Interstate Stream Commission, and the Navajo Nation do not have authority to effectuate a settlement agreement that is contrary to State law. New Mexico state law does not allow the Governor or the Attorney General to endorse a settlement which would unilaterally cede the State Engineer's authority and relinquish his responsibilities to the Federal Government and the sovereign Navajo Nation. The State Engineer has for years refused and failed to act on numerous water right transfer requests by the cities and rural water districts in the Basin. How would the proposed settlement agreement affect the status of pending water right transfer requests or applications within the San Juan Basin?

Justification for Claims in the Proposed Settlement

The proposed San Juan settlement agreement shows total diversions for Navajo water projects at 626,470 acre feet and total depletions at 322,190 acre feet annually. This massive allocation of New Mexico's surface waters has yet to be justified to the Public from a technical standpoint. The citizens of New Mexico have a legal right to know the technical bases for the tribal entitlements proposed in a Navajo settlement, and officials have an obligation to provide this information. The technical component of any settlement entails scientific questions, such as, "How much water is needed by the Tribe?" and, "What are the bases for quantification of the Tribe's entitlement to water

No one -- not the New Mexico State Engineer, not the Navajo Nation, not the Bureau of Reclamation -- has the means of accurately measuring or verifying quantities of water depleted from a stream system. Only diversion quantities can be reliably calculated.

The New Mexico State Engineer's Office does not possess the methodology or technology necessary to calculate consumptive usage, just as it is unable to determine the magnitude or source of return flows to a system. The 10-year averaging of diversions/depletions provided for in the proposed settlement involves a carry-over allowance which is contrary to State law and the public interest.

allowance which is contrary to State law and the public interest.

On October 24, 1995, former Navajo Nation President Albert Hale opined that, "[t]he Navajo Nation possesses sufficient "practicably irrigable acreage" ["PIA"] within the San Juan River Basin to fully utilize the entire flow of the San Juan River." What is the State Engineer's assessment of the Navajo Nation's PIA in the San Juan Basin? It is a secret that the Navajo Indian Irrigation Project ["NIIP"] is a recurring fiscal nightmare. Recently the Navajo Nation was forced to allocate \$10 million to offset operating deficits associated with NIIP. NIIP and the Navajo Agricultural Products Industry's ["NAPI"] audits reveal losses of millions of dollars annually on the operation of farm Blocks 1-8. The Navajo Nation is already the fifteenth largest recipient of Federal crop subsidies nationally. Given the regularity of these losses, it seems only reasonable to predict that the irrigation of additional acreage in NAPI Blocks 9-11 would be similar unprofitable, resulting in even greater losses. So, increasing irrigation on the NAPI/NIIP will only add to the staggering Public costs. *

Navajo PIA along with Navajo demographics in the San Juan Basin should be carefully evaluated in the determination of Navajo water entitlements in any settlement agreement. While the arability of significant portions of Navajo reservation land within the San Juan Basin is indisputable, the actual ³practicability² of irrigating much of the land remains highly debatable. This issue of "practicability" is not only pertinent to tracts checkerboarded within the San Juan Basin. It is pertinent to the NAPI farm blocks themselves -- both those in production and those to come.

It is important to note that, no sooner had the Navajo Nation gained the State of New Mexico's support for the proposed settlement, than correspondence dated on or about December 7th from President Joe Shirley, Jr., was sent to Secretary of the Department of the Interior Gale Norton requesting a "Memorandum of Understanding" that all of the 508,000 acre-feet of diversion to be allocated to the NIIP/NAPI could be fully depleted with no requirement placed on the Tribe to provide any return flows whatsoever to the San Juan River. That letter has not yet been made public and is the subject of an active federal FOIA request. [see attached "FOIA Shirley letter"]

Federal Register, Vol.55, No.48, 9223 et seq

Both the Navajo Nation and the State of New Mexico are well-aware of the Department of the Interior's *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* .

Documents from former State Engineer Tom Turney's negotiation notebook, obtained through "New Mexico Inspection of Public Records Act" requests, provide a detailed description of these "Federal Negotiating Guidelines". Likewise, the Navajo Nation recognizes the overriding authority of these *Criteria and Procedures* , stating, "The projected costs of these [wet water] projects is substantial and the primary source of funding will invariably come from the federal government. However, the Department of the Interior's Criteria for Settlement of Indian Water Rights requires a substantial state and local contribution. The Navajo team understands that this settlement will require creative innovation, and that it may require a combination of Federal and State programmatic funding sources."

Federal employees assigned to a formal Negotiating Team are required to adhere to a

.../... assigned to a formal negotiating team are required to adhere to and comply with the DOI's "Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims", Federal Register, Vol.55, No.48, 9223 et seq [see attached "Policy 55FR9223"], as prescribed in a formal executive "Policy Statement" March 12, 1990 ["Policy"]. The DOI Policy holds that, in settling Indian water rights claims, the Federal government shall ensure that Indians receive equivalent benefits for rights which they, and the United States as trustee, may release as part of settlement. The United States has pervasive Endangered Species Act and Tribal commitments and trust responsibilities within the San Juan River Basin -- these are overlapping and interconnected concerns which have not been adequately addressed or accommodated in negotiation of the proposed Navajo settlement. [see attached "FOI, DOI Navajo Fed Team"]

The Office of Management and Budget ["OMB"] is assigned a definite and indispensable role in the proper execution of the Federal Policy, but federal FOIA requests have failed to produce any records showing OMB has been involved as necessary. [see attached "FOIA OMB role Navajo Fed Team"] The Government's Policy at 55FR9223, criterion no. 6, states:

"Settlements should include non-Federal cost-sharing proportionate to the benefits received by the non-Federal parties."

Section 105 Water Repayment Contracts, (d)(3) and (e)(1) & (2) of the proposed Bill authorizing the Navajo-Gallup Water Supply Project allows for Federal subsidies of up to 75 percent to both the City of Gallup and the Jicarilla Apache Tribe, requiring as little as 25 percent cost-share for the substantial benefits those non-Federal parties are to receive through construction of the Project. [see attached "Gallup cost-share"]

Gallup city officials are in Washington today to persuade Congress to pay for almost all of the proposed Navajo-Gallup Water Supply Project, claiming that even a 25 percent repayment obligation would be too rich for the City's blood.

Over a year ago, the Secretary of the Department of the Interior established the "Navajo-San Juan River Federal Indian Water Rights Negotiation Team" ["Team"] for the purpose of negotiating a settlement of the claims of The Navajo Nation [also "Nation"] to waters within the San Juan River Basin of Northwest New Mexico. The Team, headed initially by DOI Solicitor Michael Schoessler (and subsequently by the Bureau of Reclamation's ["BOR"] Brian Parry), in concert with Joy Nicholopoulos (Fish & Wildlife Service), Brad Bridgewater (Department of Justice) and the Bureau of Indian Affairs' John Cawley, have imposed absolute secrecy while conducting a series of closed-door meetings with the Nation and the State of New Mexico [also "State"] in the "Navajo-San Juan River Federal Indian Water Rights Negotiation" ["Negotiation"] [see attached "10/22/02 letter to Michael Schoessler"] As a direct result of the Team's covert activity, many legitimate stakeholders, the Public, and representatives of the media have been arbitrarily excluded and denied due process rights -- being barred, as they have been, from proceedings which may ultimately involve the expenditure of hundreds of millions of State and Federal dollars and undermine the value of certain personal property holdings.

Why didn't Federal Negotiating Team members make themselves available at the State's and the Nation's recent public meetings to discuss their formal negotiation efforts under the Policy's Criteria & Procedures? What happened to Brian Parry?

What happened to Joy Nicholopoulos? What happened to Michael Schoessler? Why

... happened to Brad Bridgewater? Tribal attorney Stanley Pollack has stated that the Navajo don't think "the Feds" contribute much to the settlement negotiations. How can this be true if both the funding and the framework for the negotiations are controlled and directed by the Federal Government?

The binding DOI Policy for negotiating settlements of tribal water claims has been in force and preserved intact for some fourteen years -- not once having been the subject of amendment, modification, supersession or revocation. Sadly, DOI has a bleak history of haphazard and selective enforcement of its Policy, resulting in repeated betrayal of the public trust. Although the Policy requires an integrated and concurrent examination of competing claims in the San Juan River system because four Indian Tribes having pending reserved rights claims to a severely restricted water supply, the DOI has grossly and methodically misapplied its own Criteria & Procedures by negotiating in piecemeal fashion with the Jicarilla Apache, the Ute Mountain Ute and the Southern Ute Indian Tribes. Now, apparently, this deliberate failure with respect to Policy execution is about to be repeated by the DOI Team with The Navajo Nation and the State of New Mexico in the current settlement negotiations.

In October 2003 the Western States Water Council and the Native American Rights Foundation held their biennial "*Indian Water Rights Settlement Symposium*" in Durango, Colorado. Timothy Glidden, author of the Federal Government's long-standing Policy Statement on the negotiation of Indian water rights claims, stated that it would be impossible to make progress in tribal settlement if a variety of interest groups and stakeholders were made formal members of a Negotiation Team. In other words, Mr. Glidden (former Chairman, Working Group on Indian Water Rights Settlements, and now Contractor to the U.S. Department of the Interior, Secretary's Office of Indian Water Rights) contends that the political, technical and financial momentum for securing a settlement is generated, by-and-large, through the intentional exclusion of the Public, the media and various parties with legal standing in the ultimate resolution and disposition of the tribal water claims. Glidden's pronouncement is at odds with the fact that nothing in the Policy's Criteria & Procedures direct the Interior Department to exclude the media, the Public or other interested parties from participation in the process of negotiating the settlement of Indian water claims. As stated above, direct requests by the Public over a year ago to participate in the settlement discussions were not granted. [see attached "12/09/02 letter to Michael Schoessler"]

Numerous Freedom of Information Act [FOIA] requests have confirmed that Federal Policy has not, in fact, been followed in the Navajo settlement negotiations, just as it was not followed in the settlement negotiations with the Jicarilla Apache, the Ute Mountain Ute, or the Southern Ute tribes. So, while an adopted federal policy setting forth the Criteria and Procedures for Indian Water Rights Settlements² has been in place and binding for over a decade, it has been wantonly abandoned in tribal negotiations in the San Juan Basin -- twisted and riddled with bias in order to advance special interests in Indian water claims at the expense of the environment, senior water right holders, and the taxpaying public. It has become increasingly obvious that the State and the Federal Government are allowing non-Indian water developers to successfully use the pretext of Indian water rights settlement negotiations as leverage to engage in water speculation, further strangling western rivers and crippling the taxpaying public.

The citizens of New Mexico are not being well-served. The Office of the NM State Engineer has not completed the required Hydrographic Survey of the San Juan River Basin in New Mexico. This survey is a legal prerequisite to full and final adjudication of water rights in the San Juan River System. A Hydrographic Survey must be completed as a means of obtaining a reliable quantification of Navajo reserved rights prior to negotiation of an equitable settlement of Tribal claims to waters of the San Juan River. Data from that Hydrographic Survey is indispensable to the application of an effective hydrologic modeling tool and proper administration of the State's water resources. The rush toward settlement of Navajo claims prior to completion and publication of the Hydrographic Survey of the San Juan Basin is ill-advised as it flies the face of State water law.

Additionally, in the Final Biological Opinion for the Animas-La Plata Project/Colorado and New Mexico, June 19, 2000, states on page 10, under "Conservation Measures":
2. Conservation measure number one and many other projects in the San Juan River Basin rely on the hydrology modeling that was done for the San Juan flow recommendations (Holden, 1999) and for the Animas-La Plata Project. RiverWare was selected as the model to simulate flows in the San Juan River and to model the effects of water development in the basin. Modification of the model to simulate the effects of the Animas-La Plata Project was an extension of the RiverWare model. The San Juan Recovery Implementation Program recently designated the responsibility of maintaining and updating the model to Reclamation. Reclamation is now the "keeper of the model. As such, Reclamation would be responsible for maintaining the model and its data, within the guidelines provided by the Recovery Program's committees. The model is one of the tools being used in preparation of the Navajo Operation EIS. Modeling Group, consisting of people trained and experienced in hydrology, has been established to help on the operation EIS and includes the Corps of Engineers, New Mexico Interstate Stream Commission, San Juan Water Commission, Bureau of Indian Affairs, City of Farmington, Jicarilla Apache Tribe, the Navajo Nation, Southwestern Water Conservation District, Fish and Wildlife Service, and the Colorado Water Conservation Board. Many of the same people serve on the Recovery Program committees. This group of hydrologists provides the expertise and appropriate forum to continually peer review the model and its results from many perspectives.

In order to insure the accuracy of the model, Reclamation will take actions necessary to have an independent review of the model conducted. Reclamation will coordinate the review with the Service and seek the Service's concurrence with the model results. The review and the coordination will be completed within one year of the date of this biological opinion. (emphasis added)

A review of records of meetings and conference calls documented on the F&WS website for the San Juan River Basin Recovery Implementation Program indicates that Reclamation did not complete the "review and coordination" in a timely manner as required in the ALP "Biological Opinion".

Fish and Wildlife Service [F&WS]: "Biological Opinion" for the Animas-La Plata Project

The Final Supplemental Environmental Impact Statement for the Animas-La Plata

The Final Supplemental Environmental Impact Statement for the Thomas-La Plata Project/Colorado Ute Indian Water Rights Settlement includes the Biological Opinion of the F&WS. That the BOR is failing to fulfill conservation measures agreed to in the "Biological Opinion" and defined in the July 2000 Record of Decision for the ALP, is borne out by the minutes of recent meetings of the Biology and Coordination Committees of the San Juan River Basin Recovery Implementation Program ["SJRBRIP"]. [see attached <http://southwest.fws.gov/sjrip/Documents/MeetingSummaries/BCSept152003.pdf> and <http://southwest.fws.gov/sjrip/Documents/MeetingSummaries/CCOct032003Draft.pdf>]. In deference to the select "water interests" (developers) represented on the SJRBRIP, prior to completion of the Navajo Reservoir Reoperation EIS, and without reinitiating the required formal section 7 consultation as provided in 50 CFR sec. 402.16, the BOR has undertaken to reoperate Navajo Reservoir. This premature reoperation of Navajo Reservoir by the BOR is causing adverse affects and potential jeopardy due to the agency's failure meet the revised flow recommendation necessary to mimic the natural hydrograph of the San Juan River to benefit endangered species and their designated critical habitat.

San Juan River Basin Adjudication

What is the State's best assessment of the probable outcome if the Navajo claims are litigated? What are the Navajo Nation's and the Federal Government's best assessment of the probable outcome of the Navajo claims if litigated? This information must become public knowledge if the proposed settlement agreement is to be given any further serious consideration.

It is important to recognize that there has been no quantification or settlement of water claims of the Ute Mountain Ute Indian Tribe (UMUIT) for reserved rights on that portion of their reservation (about twenty percent) located in New Mexico. The UMUIT have expressed an intention to press their claim to additional Winters rights with a priority date of 1868 to water from the San Juan River in the active New Mexico's San Juan Adjudication case. Any UMUIT entitlements to San Juan River water may be seriously impacted by the proposed Navajo settlement agreement, as they rest on competing claims. If the Department of the Interior were to faithfully observe its own Criteria for Settlement of Indian Water Rights, competing Tribal claims to waters of the San Juan River would be evaluated simultaneously, not consecutively. Not only would that proper implementation of the Policy avoid the dreaded "unintended effect," but it would save untold millions, if not billions of taxpayer dollars required later to undue foreseeable and unnecessary errors. Obviously, the rights of other water users in the Basin could also be seriously impaired by the Federal Government's failure to apply the Policy as adopted to the settlement of Navajo water claims.

Costs of Settlement Negotiation Process

It is time for the State, the Federal Government and the Tribe to make public the records of all costs associated with the long-running negotiation process. For at least the past five years Tribal, State and Federal taxpayer funds have been allocated to support Navajo settlement discussions and negotiations. The Public is due a full

support Navajo settlement discussions and negotiations. The Table is due a full breakdown of all cost records including billings and payments for accommodations, staff time, attorney costs and fees, technical support, consultant fees (i.e., the SEO & Interstate Stream Commission's Phil Mutz), and mediator fees (i.e., Lucy Moore, Western Network).

638 Contracting & the Indian Educational Assistance and Self Determination Act ["ISDA"]

Apparently the Section 638 contracting process under the ISDA is contributing to skyrocketing costs of the Animas La Plata Project ["ALP"] -- now likely to cost Federal taxpayers over one billion dollars. The Bureau of Reclamation is currently conducting an in-house investigation of criminality and irregularities in the estimation of project costs and implementation of the ISDA in the A-LP, which the Navajo Nation sponsor. A Senate hearing is planned for March, which, while fitting, is rife with irony since the Bureau of Reclamation and the Department of the Interior actually lied about costs in the A-LP FSEIS to sell the Project to Congress. When lies become the currency of Government, citizens can no longer afford the truth.

According to documents recently obtained by *The Durango Herald* under the federal Freedom of Information Act, the cost of the Navajo Nation Municipal Pipeline component of the ALP Project is currently pegged at \$47 million -- up a whopping 15 percent since May of 2002. Additional significant increases in the pipeline cost are expected by the BOR. Other ALP projectworks to benefit the Navajo Nation have experienced huge cost increases as well, due to inaccuracies and omissions in cost estimates. In settling Indian water rights claims through negotiation as opposed to litigation, the Federal Government has articulated a goal of seeking to make sure that Indians receive **equivalent** benefits for rights which they, and the United States as trustee, may release as part of a settlement. The corollary to this, of course, is that Federal taxpayers should expect to receive assurance that the rights released by the Tribe are legitimate and equivalent in value to the benefits which are provided to the Tribe by the Government as part of a settlement. The increased costs and commensurate values of ALP project works designed to benefit the Navajo Nation must now be carefully recalculated and factored into a renegotiation of a Navajo settlement agreement proposal.

Above all else, it is important to speak frankly now to avoid any repetition of such deception in estimates of construction and operation costs for those projects contemplated in the Navajo settlement agreement proposal. Therefore, it is time to make public the project cost estimates for the Navajo-Gallup Water Supply Project and other projectworks features associated with the proposed Navajo settlement agreement. Any pre-existing arrangement or provisions contemplated within the terms of the proposed settlement agreement for the Jicarilla Apache Tribe or the Navajo Nation to exercise rights to preferential Section 638 contracting for projectworks under the ISDA will have a far-reaching impact on the ultimate costs of settling the Navajo water claims. Discuss any opportunities available to the two Tribes under the ISDA and the potential cost increases connected with those opportunities.

Tribal Attorneys Dan Israel, Scott McElroy and Stanley Doleck

Tribal Attorneys Dan Israel, Scott McElroy and Stanley Pollack

Concerns regarding potential conflicts of interest in the work of tribal attorneys associated with the proposed Navajo settlement agreement and other water matters in the San Juan River Basin should be more thoroughly investigated. Dan Israel, longtime Ute Mountain Ute Indian Tribal attorney, has now also been representing the City of Gallup as legal consultant, advancing Gallup's interest in construction of the Navajo-Gallup Water Supply Project. [see attached "08/05/00 Gallup Independent article"] As discussed above, some twenty percent of the UMUIT reservation lies in New Mexico. The Navajo Nation and the UMUIT are both parties to the San Juan River Adjudication case, and the two tribes' water rights claims have not been settled. These competing tribal claims and the City of Gallup's vested interest in a Navajo settlement on the San Juan suggest the potential for a conflict of interest in Mr. Israel's work.

Another issue involves allegations probed in a document released 16 May 2001 entitled, "Report of the Water Subcommittees of the Resources Committee and Government Services Committee of the Navajo Nation Council". The subcommittees report notes that "[Stanley] Pollack also directs the activities of the Navajo Nation contract water attorney, Scott McElroy, Greene, Meyer, and McElroy . . ." (emphasis added) Mr. McElroy also serves as water attorney for the Southern Ute Indian Tribe in efforts to settle that Tribe's competing reserved rights claims to water the San Juan River Basin. In their report, the subcommittees make a specific recommendation on page 10 as follows:

"The Joint Subcommittees recommend that the Committees take further testimony and receive additional exhibits relative to the manner in which the Navajo Nation contracts with Greene, Meyer & McElroy for legal services connected with Navajo Nation water rights matters." (emphasis added)

It is important at this time that all parties with interests in the proposed Navajo settlement agreement have the opportunity to review the allegations, exhibits, testimony and findings regarding any actual improprieties or possible conflict of interest of the Navajo Nation's contract water attorney Scott McElroy, working under the supervision of Navajo Nation Water Rights Counsel Stanley Pollack. In particular, the "further testimony and additional exhibits" called for by the Joint Subcommittees need to be made public.

N.M. State Engineer Permit No. 2883

Apparently the *quid pro quo* connected with the San Juan Water Commission's ["Commission"] blessing of the proposed Navajo settlement agreement is the acceptance by the Navajo Nation of the Commission's application for water associated with New Mexico State Engineer Permit Number 2883 (15,400 AFY). [see attached "NM SEO Permit 2883 quid pro quo"]

The "Colorado Ute Settlement Act Amendments of 2000", Public Law 106-554 -- Appendix D, 114 Stat. 2763A-263 states at "SEC.15. New Mexico and Navajo Nation Matters.", "(a) ASSIGNMENT OF WATER PERMIT. -- Upon the request of the State Engineer of the State of New Mexico, the Secretary shall, as soon as practicable, in a manner consistent with applicable law, assign, without consideration, to the New Mexico Animas-La Plata Project beneficiaries or to the New Mexico Interstate Stream

MEXICO Animas-La Plata Project beneficiaries of to the New Mexico Interstate Stream Commission in accordance with the request of the State Engineer, the Department of the Interior's interest in New Mexico State Engineer Permit Number 2883, dated May 1, 1956, in order to fulfill the New Mexico non-Navajo purposes of the Animas-La Plata Project, so long as the permit assignment does not affect the application of the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) to the use of the water involved."

Jim Dunlap, the Commission's Vice Chairman, is now also the Chairman of the New Mexico Interstate Stream Commission, which provides him with unfettered access to the closed negotiations of the proposed Navajo settlement agreement being conducted by the Federal Team. He is also a Board Member of the Upper La Plata Rural Water District, a New Mexico ALP beneficiary with an emerging interest in legislation proposing federal subsidization of an extensive Federally-constructed regional distribution system in the La Plata Valley in the San Juan Basin. The potential for conflict of interest here seems obvious -- and alarming. Yes, Mr. Dunlap has made a living selling tractors, but in this case it would seem that he has had ample opportunity to engage in some surreptitious horse trading. If Mr. Dunlap's offices in the San Juan Water Commission, the Upper La Plata Rural Water District, the New Mexico Rural Water Association, or the National Rural Water Association have influenced in any way his participation as Chairman of the New Mexico Interstate Stream Commission the Navajo-San Juan River Federal Indian Water Rights Negotiation, the best time to find out about that is right now.

On January 18, 2001, the Navajo Nation opposed "Application for Permit to appropriate the Public Surface waters of the State of New Mexico" [Application], File No. 4818, filed by L. Randy Kirkpatrick, Executive Director of the Commission. A fair and frank discussion of New Mexico State Engineer Permit Number 2883 should include an examination of the history and current status of Permit 2883, any priority date(s) involved, the question of the validity of the Permit, any stated beneficial use(s), and all identified diversion points. Apart from the ALP Project -- as currently configured -- how much water connected with Permit File No. 2883 remains to be returned to fulfill the "New Mexico non-Navajo purposes of the Animas-La Plata Project"? How is the water in Permit File No. 2883 connected to Navajo Nation Indian Trust Assets and the current Navajo-San Juan River Federal Indian Water Rights Negotiation?

The "excess" water in Permit File No. 2883 has been eyed by the Navajo Nation as a prime potential source for settlement in negotiating a resolution of the Navajos claims to San Juan River water. The San Juan Water Commission and the rural domestic water users Mr. Dunlap represents want that water, too. Did the Federal Government Negotiation Team use the balance of water in Permit 2883 to negotiate a settlement in satisfaction of Navajo claims to water in the San Juan River? Has the "excess" water in New Mexico Permit File No. 2883 been the subject of any formal or informal consultation under Section 7 of the ESA?

The issue of the New Mexico State Engineer Permits associated with the Bureau of Reclamation is crucial to resolution of water rights claims within the Basin. Neither Jim Dunlap nor his Interstate Stream Commission consultant Phil Mutz have authority to grant a water right to the BOR. The BOR must go through the same process as anyone else in the State of New Mexico in order to show beneficial use. All of the

anyone else in the State of New Mexico in order to show beneficial use. All of the New Mexico State Engineer Permits involving water stored by the BOR should be re-evaluated closely by the State Engineer in the legal context of beneficial use before any further action is taken in the matter of the proposed Navajo Nation Water Rights Settlement Agreement.

Conclusion

Serious potential economic, social, and environmental impacts associated with the proposed Navajo Nation Water Rights Settlement Agreement are reason enough to put the brakes on this runaway train now. Now is the time to account for the real costs to taxpayers associated with this settlement agreement proposal -- costs in the form of lost power revenues, the degradation of water quality (salinity & selenium), and the capital interest on a huge debt.

The reckless timeline tied to this proposal does a disservice to Navajo citizens and others in that it is strictly a bad and ill-conceived political ploy trying to gain authorization by Congress for a settlement that may never be implemented, may never be funded, or may never receive appropriations from Congress, and thus may never come to fruition. In this way, the proposed settlement is and becomes the lie to everyone.

Further application of the failed policies of traditional western water development to the San Juan Basin will only result in additional damage, higher costs and desiccation as the special interests of energy and power corporations are serviced and the Four Corners is further cast in its role as National Sacrifice Area . [see attached "Durango Telegraph"] Your best bet would be to use some common sense and stop railroading the public before Murphy's Law kicks in, and, "The light at the end of the tunnel is really just the headlamp of an oncoming train."

[FOIA Shirley letter \(Binary attachment\)](#)

[FOIA Shirley letter \(Text attachment\)](#)

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