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Friday, March 30, 2007

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**Navajo Water Deal Isn't a 'Giveaway'**

By Tim Vollmann  
Albuquerque attorney

Sunday's op-ed piece, "San Juan Deal Drains N.M. Dry," authored by Mike Sullivan, criticizing the proposed settlement of Navajo Nation water rights on the San Juan River, is so false and misleading that it should not have merited publication without first requiring the author to demonstrate the accuracy of his assertions.

The premise of Sullivan's article is that "giving away" 56 percent of San Juan River Basin flows to the Navajo Nation threatens the water supplies of 1.8 million New Mexicans statewide. He cries "there is a crisis on the San Juan that will soon affect the entire state" and "the rest of us will be facing an immediate and unsolvable water crisis." Such hysteria is absurd.

The San Juan River is on the other side of the Continental Divide from the Rio Grande Basin, where most New Mexicans live. The only San Juan River water which may come across the divide is San Juan Chama Project (SJCP) water, 110,630 acre-feet per year, approximately 17 percent of the water apportioned to New Mexico by the Upper Colorado River Basin Compact. In fact, that water comes from diversions in the state of Colorado, and no additional diversions to the east side will be authorized by Congress without the concurrence of Colorado leaders, a political impossibility. So New Mexicans on the Rio Grande have no basis for an expectation of more water from the northwest corner of the state. Sullivan's "crisis" is a myth.

Sullivan also claims SJCP contractors on the Rio Grande, including Albuquerque, will be put at great risk by the settlement. But the settlement would not change a 1962 law by which shortages on the San Juan River are shared between the SJCP and certain San Juan Basin water users, including the Navajo

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Nation, which is already entitled to divert 508,000 acre-feet of water for the Navajo Indian Irrigation Project (NIIP) under the '62 law.

This takes us to the most misleading aspect of Sullivan's article. He treats the proposed settlement as a "giveaway" of New Mexico water to a few Navajos and suggests that water should be apportioned on "an equal basis with everyone else in the state." This is a canard, as Sullivan well knows the state Constitution awards water rights on the basis of beneficial use, not equal population. The older Navajo claim is not bound by the newer state Constitution. The Navajo claim is based on its 1868 Treaty with the United States. Under a 1908 Supreme Court decision, *Winters v. United States* (which Sullivan refers to as "an obscure series of federal court cases") the tribe is entitled to enough water to serve the primary purposes of its reservation.

Because the Navajo claim is so substantial, the SJCP wasn't authorized by Congress until the Tribal Council agreed 50 years ago not to assert its priority right to prevent diversion to the Rio Grande Basin. Hence, the shortage-sharing provision in Section 11 of the 1962 authorizing Act.

Here the reader may find Sullivan's single credible point: The Navajo claim was supposedly settled in 1962 when NIIP was authorized along with the SJCP. The problem for him and other San Juan River water users is neither the authorizing act nor the Navajo Nation contract with the Secretary of the Interior says the tribe's water right claims would be settled by the delivery of the 508,000 acre-feet.

Yet Sullivan doesn't support the supposed 1962 settlement either! He wants Congress to stop funding NIIP because it is wasteful. So even if the construction of NIIP would settle Navajo water right claims, he wants the state and federal governments to breach the settlement deal. Not smart. In 1988 when an inspector general's report criticized the NIIP project, Gov. Garrey Carruthers was among the first to support further NIIP funding— because the state engineer knew that failing to deliver the water to which the Navajo Nation is entitled under the 1962 law would undermine the argument the tribe's claims had already been settled.

So Sullivan not only calls on New Mexicans to support violation of the Navajo Treaty of 1868, he would also advocate violation of the 1962 Act, which he claims had already fairly settled all the Navajo claims.

The proposed settlement is based on risk assessment: If the Navajo Nation wins its claim to most or all of the water of the San Juan River Basin, then other water users (in the San Juan River Basin only) will be left high and dry. If the state prevails in proving the 1962 Act finally settled Navajo claims, then the Navajo Nation will still be entitled to divert 508,000 acre-feet for NIIP. The settlement is a compromise. Sullivan's characterization of the settlement as a "giveaway" is wrong, and his hysterical scenarios are totally false.

Albuquerque attorney Tim Vollmann is an adjunct professor at the University of New Mexico and teaches Indian water law.

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