

7 March 2007

SJ-17,

Comment

To: The Navajo Nation

From: Steve Cone

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<http://www.alpcentral.com>

Re: December 5, 2003, Discussion Draft - Navajo Nation

Water Rights Settlement

Seventeen months ago, your Federal Trustee appointed a formal Navajo-San Juan River Federal Indian Water Rights Negotiation Team to resolve disputed claims by the Navajo Nation to water rights in the San Juan River. For nearly a year and a half this Trustee Team has conducted your negotiation sessions behind closed doors — in absolute secrecy — barring Navajo and non-Navajo stakeholders alike, banning all other interested parties and citizens.

In establishing this Team, the United States — as your Trustee — agreed to abide by and strictly adhere to a Policy noticed by the Department of the Interior in the Federal Register on March 12, 1990, at 55FR9223. This Policy is a carefully constructed handbook — a set of specific "Criteria and Procedures". The Policy is a blueprint for the participation of the Navajo Team in the negotiation of a settlement

of your reserve right claims to water from the San Juan River.

The "Criteria and Procedures" were designed under Bush I as a gameplan to ensure the negotiation of a just settlement "conducive to longterm harmony and cooperation among all interested parties." (emphasis added)

Why is it, then, that so many necessary interested parties — both Navajo and non-Navajo — have been, and continue to be, excluded from this negotiation process by the State, the Nation, and the Federal Team?

Maybe we should ask. Let's see if any members of your Trustee Team are with us tonight. I'll take roll. . . .

Team Leader, Michael Schoessler, Attorney Advisor,
Department of the Interior, Office of the Solicitor

. . . ABSENT

Team Member, Brian Parry, Bureau of Reclamation

. . . ABSENT

Team Member, Brad Bridgewater, Department of Justice

. . . ABSENT

Team Member, John Cawley, Bureau of Indian Affairs

. . . ABSENT

Team Member, Joy Nicholopoulos, Fish & Wildlife Service

. . . ABSENT

All of them absent — missing in action — derelict in their duties as Tribal Trustees.

1. Why won't the Federal Team appear in public?

What do these Tribal Trustees have to hide?

Could it be that the Team works to protect special interests, not Tribal assets or the public trust?

Responses to Freedom of Information Act - FOIA - requests to the Department of the Interior and the Office of Management and Budget indicate that the Navajo Team has disregarded its charge by failing to apply Federal Policy to protect Navajo Indian Trust Assets.

Here are some examples:

- * Under existing Federal Policy, the Team was required to notify the Office of Management and Budget, in writing, of the rationale for potential negotiation. NO SUCH NOTIFICATION TOOK PLACE — This Team is missing in action and derelict in its duties as Tribal Trustee.
- * Under existing Federal Policy, the Team was required — within nine months — to submit a fact-finding report to the Office of Management and Budget, outlining the current status of litigation and other pertinent matters.

NO SUCH FACT-FINDING REPORT WAS SUBMITTED. This Team is missing in action and derelict in its duties as Tribal Trustee.

* Under existing Federal Policy, the Team was required to conduct and present to the Interior Department an assessment of the positions of all parties and a recommended Federal negotiating position. The assessment was to include costs presuming no settlement, an analysis of the value of the water claim for the Navajo, and costs presuming settlement.

NO SUCH ASSESSMENT, RECOMMENDATION OR ANALYSIS WAS PRESENTED. This Team is missing in action and derelict in its duties as Tribal Trustee.

* Under existing Federal Policy, the Team was to present the Secretary of the Interior with a recommended negotiating position containing the recommended contribution by the Federal Government, the strategy for funding the Federal contribution to the settlement, and the legal and financial views of the Office of Management and Budget and the Department of Justice.

NO SUCH NEGOTIATING POSITION RECOMMENDATION WAS PRESENTED. This Team is missing in action and derelict in its duty as Tribal Trustee.

The negotiating Team, which continues to meet secretly with you and the State and hide from the Public, represents the worst kind of government — government which does the people's business in private and will not be held accountable.

What is the basis for this settlement from a technical standpoint? The folks who will pay for and be impacted by your settlement — both non-Navajo and Navajo — have a right to know the technical justification for the tribal entitlements proposed, and officials have an obligation to provide this information. The technical component of any settlement entails the answers to 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?"

On October 24, 1995, former Navajo Nation President Albert Hale opined that, "The 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 studies exist to undergird the magnitude of this claim? What is the New Mexico State Engineer's assessment of the Navajo Nation's PIA in the San Juan Basin? What is the US Department of Justice's assessment of the Navajo Nation's PIA in the San Juan Basin? All parties have been silent on the subject of PIA, which is the cornerstone for quantifying tribal reserved

rights. This silence is fueling suspicion that the proposed settlement will not provide the Navajo Nation with substitute equivalent benefits for rights to be released.

The San Juan River Adjudication should not be dodged, skirted, or undermined by conducting these exclusive, sub-file negotiations between select and favored parties to the court proceedings. What are the Navajo Nation's and the United States of America's best assessment of the probable outcome of the Navajo San Juan claims if pressed in litigation? What is the State of New Mexico's best assessment of the probable outcome of the Navajo claims if litigated? This information must be shared with the public if the proposed settlement is to be given any further serious consideration.

It is important to recognize that there has been no quantification or settlement of the claims of the Ute Mtn. Ute Indian Tribe to reserved water rights on that portion of their reservation — about 20% — located in New Mexico. The Ute Mountain Utes have expressed an intention to litigate their claim to additional Winters rights with a commanding priority date of 1868

to water from the San Juan River in the active New Mexico San Juan River Basin adjudication.

The Ute Mountain Utes claim that the establishment of their reservation predates the Navajo Nation and that Ute rights are, in fact, senior. Any Ute Mountain Ute entitlements to San Juan River water, therefore, may be seriously impacted by the proposed Navajo settlement agreement, as they rest on competing claims to an overappropriated, dwindling supply of San Juan River water.

If the Department of the Interior were to faithfully observe its own "Criteria and Procedures for Settlement of Indian Water Rights", these competing tribal claims to San Juan River water would be evaluated concurrently and not in isolation. A proper implementation of the Federal Policy would avoid the dreaded unintended effect and save untold millions — if not billions — of tax dollars.

The City of Albuquerque submitted comments on your proposed settlement on January 4, 2003. Their comments cite Navajo Tribal Council Resolution No. CJ-1-55 which was published on pages 394 & 395 of the 1955 Navajo Project New Mexico Feasibility Report. Albuquerque contends this Council Resolution constitutes a waiver of Navajo reserved rights claims with enactment of the San Juan/Chama Project Act in 1962. Are terms in your proposed

Settlement in direct conflict with the Navajo Tribal Council's intent as expressed in Council Resolution No. CJ-1-55?

In a letter to Interior Secretary Gale Norton dated December 7, 2003, President Joe Shirley proposes a 17-point Memorandum of Understanding attempting to bootstrap onto NIP certain financial demands, including large compensatory payments by the Federal Government to the Navajo Nation.

President Shirley also seeks authority from the Federal Government to deplete the full 508,000 acre-feet allocated to NIP. How would requirements set forth in the President's letter extend and expand provisions in the draft settlement? How would such a Memorandum of Understanding between the Navajo Nation and the United States of America compromise the authority of the State Engineer to administer water within the State of New Mexico?