

## Comment OO-01

**ATTENTION:**

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**CITIZENS PROGRESSIVE ALLIANCE**

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COMMENT 28 June 2007**

**RE:**

**NAVAJO-GALLUP WATER SUPPLY PROJECT  
Draft Environmental Impact Statement [PROJECT]  
and  
PROPOSED SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO  
WATER RIGHTS SETTLEMENT AGREEMENT ["PROPOSED  
SETTLEMENT"]  
and  
THE NORTHWEST NEW MEXICO RURAL WATER PROJECTS ACT  
[S1171]**

New Mexico Senators Domenici and Bingaman, Navajo Nation President Joe Shirley, Governor Bill Richardson, and the City of Gallup are all in a helluva hurry to get their hands on billions of Federal tax dollars! They warn that if the Navajo Nation's claims to San Juan River water in New Mexico are not resolved quickly existing non-Navajo water users in the San Juan 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 they are betting it will be the ticket again here, too. But, issues related to the three documents cited

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above must be closely examined and resolved before any further action is taken.

### HYDROLOGIC DETERMINATION

After decades of data collection and interpretation, including tree ring studies by the University of Arizona and the U.S. Geological Survey, it is well understood that when the Colorado River was first divvied-up, overly generous allocations to the seven Colorado River Basin States were based on erroneous predictions. Now rather than conducting a more objective, honest analysis of water availability, the Bureau's water experts are tempting fate by repeating the same mistake with a logic so twisted as to defy reason. On June 8th Secretary of the Interior Dirk Kempthorne, presumably after due and sober consideration, concurred with the Bureau of Reclamation's ["Bureau"] new Hydrologic Determination ["Determination"] that the amount of water needed for the Navajo-Gallup Water Supply Project - centerpiece of the proposed Navajo Nation water rights settlement on the San Juan - is now available --- has been found, magically as it were, by factoring in reduced evaporation rates due to our most recent drought. So, abracadabra, presto-chango - we have new water! Since less water is evaporating, the logic goes, more water must be available. Eureka! Less is more!

Just stop to think for a minute about the unmitigated gall of Bureau hydrologists and New Mexico water managers demanding the Public take seriously such an argument. How in the world could reduced evaporation rates from reservoirs at historically low levels constitute proof that there is additional, "new water" in the already over-allocated Colorado River system. This magical math in the Bureau's new Determination is most suspect, as it has all the earmarks of a preordained outcome designed primarily to satisfy the appetites of developers for rampant, unsustainable growth. If true, indictments would be in order.

Smoke and mirrors may work wonders to tilt the playing field toward the profits of vested interests, but at the end of the day, the

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public cannot drink fuzzy math or the cost of political favors. This revamped Determination is essential for further water development of the San Juan River because New Mexico has bumped up against the ceiling of its share of Colorado River Compact Allocations. Based on numerous controversial assumptions, the Determination represents a boon to development interests, as it invites New Mexico to further deplete and effectively desiccate the San Juan River, jeopardizing the hydrologic future of the San Juan Basin and portending catastrophe for the Colorado River system. This new Determination is an assault on common sense and represents the Bureau's latest scheme to be foisted on the unwitting taxpayers of this country. As such, we believe it is only prudent for the National Academy of Sciences to review the modeling and analysis which led to the Bureau's Determination.

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**NAVAJO WATER RIGHTS CLAIMS**

The Proposed Settlement 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. This should not be required as an article of faith. 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 Bureau hydrologists -- 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

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proposed settlement involves a carry-over 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? What is the Bureau's assessment of the Navajo Nation's PIA in the San Juan Basin? It is no 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 similarly 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 realistic settlement agreement. While the arability of significant portions of Navajo reservation land within the San Juan Basin is indisputable, the actual "practicability" of irrigating much of that land remains highly debatable. This issue of "practicability" is not only pertinent to tracts checkered within the San Juan Basin. It is pertinent to the NAPI farm blocks themselves -- both those in production and those to come.

According to the Winters doctrine, as upheld in *Arizona v. California* by the Supreme Court, a Tribe shall have right to water sufficient to irrigate all of the practicably irrigable acreage ["PIA"] within the borders of its reservation. The Supreme Court in *Arizona v. California* ruled that application of the PIA standard is the only "feasible and fair way" by which reserved water rights for a Tribe can be measured. Clearly, the only "feasible and fair" way to

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quantify the Navajo right on the San Juan - and the first and foremost task - is to measure the PIA of the Navajo reservation lands in the San Juan Basin. This must be done as a matter of fairness and accuracy in order to determine the Navajo tribal water right, but to date requisite technical studies for assessing Navajo PIA in the San Juan River Basin do not even exist, and the basis for the Project and Proposed Settlement is anybody's guess. Fear tactics by Project promoters regarding the possible outcome of prolonged and contentious litigation has become an old saw similar to the color-coded Terror Alerts of Homeland Security. A PIA analysis is pivotal as a basis for the negotiation of any settlement.

**NAVAJO INDIAN IRRIGATION PROJECT [NIIP]**

The Navajo-Gallup Water Supply Project, which would cost as much as three billion dollars if typical Bureau cost overruns materialize, is designed to settle the Navajo Nation's claims to the San Juan River in New Mexico. But it is hardly a secret that the Navajo Indian Irrigation Project [NIIP], the biggest straw in the San Juan River, habitually drowns in red ink. NIIP has lost millions of dollars annually, despite the fact that all capital costs and much of the operational budget, continue to be borne by Federal taxpayers.

An independent review of the Navajo Indian Irrigation Project must be conducted before any more public money is squandered on it. All indications are that the NIIP is a failure, that it is propped up every year by millions of Federal tax dollars so as to protect the guilty and postpone a long overdue review. The project may benefit a few Federal and Navajo bureaucrats, but it leaves little if anything for the average Navajo. We steadfastly think Federal assistance should be tailored to benefit the people of the Navajo Nation, not designed to aggrandize worn out Federal bureaucracies such as the Bureau of Reclamation and the Bureau of Indian Affairs.

NIIP is by any reasonable measurement an endless bundle of subsidies, one piled on top the other in almost endless succession. For example, the American people still pay the annual operating costs of NIIP even though the project is several decades old and



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Interior policy expressly forbids it. In a letter to then Secretary Gail Norton, Navajo President Joe Shirley asserted those costs come to about \$6 million annually and that they must continue indefinitely. We also know that while the Navajo lease NIIP irrigation land for farming by non-Navajo, they have received well over \$15 million in Federal farm subsidy payments in the last few years. Even so, the Navajo Nation, as poor as it is, recently had to come up with over \$10 million in bailout funds for the tribal farming enterprise. Does this look like the kind of operation worth an investment of hundreds of millions, if not billions, of dollars more? What does this say about the practicality of irrigating the Navajo Reservation lands high above the San Juan River and the real extent of their water right under the Winters doctrine? Will the Navajo become accustomed to more and even greater losses? This would be a logical presumption knowing what we do about the history of this operation.

### **THE NORTHWEST NEW MEXICO RURAL WATER PROJECTS ACT [S1171]**

The Northwestern New Mexico Rural Water Projects Act [S1171] seeks to couple the Proposed Settlement of Navajo claims to water on the San Juan River with a free ride for those seeking to repair deteriorating rural water systems in northwest New Mexico. In S1171, Section 201, Reclamation Water Settlement Fund [“Fund”], seems to be written to buy supportive silence for the Project and Settlement by providing funds to rehabilitate old facilities. This may be an effective means of squelching opposition, but what is the rationale for provisions in S1171 directing the Bureau to administer subsidies for the repair of such rural water systems, when this mission is clearly within the purview of the Department of Agriculture, which has historically been charged with these responsibilities for Rural Development?

Implementation of S1171 is in no way feasible if the referenced Fund cannot be shown to be reliably flush. The Public must be provided with certification from OMB or others competent in principles of accounting that the Fund is, in fact, solvent, with

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adequate liquidity to withstand the significant, longterm drawdown envisioned in S1171. If the Fund is siphoned as foreseen in S1171, the nature of the impacts on other social programs currently dependent on the Fund must be fully assessed and mitigated.

### ARIZONA ISSUES

The State of Arizona opposes S1171. The failure of Interior to implement the Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims in the Proposed Settlement undermines the State of Arizona's attempt to reach a settlement with the Navajo Nation. Window Rock, Arizona and Gallup, New Mexico are located in the Lower Basin. Inclusion of these locales within the Project service area is at odds with the 1922 Colorado River Compact and an unprecedented departure from the traditional interpretation of the Law of the River. Window Rock is eligible for water from the Central Arizona Project. Since it is unclear how allocations will be made, we request a full accounting of the water involved in the Project. What portion comes from New Mexico's Compact allocation? What portion comes from Colorado's Compact allocation? What portion comes from Arizona's Compact allocation?

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### CITY OF GALLUP

Apparently, New Mexico state representative Patti Lundstrom, who testified to Congress this week, expects American taxpayers to join hands and march lockstep to ante-up at least seventy-five percent of the Project costs for the City of Gallup. This is most presumptuous and highly objectionable, as it involves a complete breach of longstanding Reclamation law requiring all municipal & industrial water costs to be paid with interest by project beneficiaries.

How are the interests of the City of Gallup pertinent to the settlement of Navajo claims on the San Juan River? Claims by the Navajo Nation to the San Juan River have absolutely nothing to do

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with the City of Gallup. So, why is Gallup being shoehorned into this project and the proposed Settlement? They can't afford it, and they are not eligible for or entitled to the massive federal government subsidies (pork) this multi-billion dollar Project would require. Yes, billions! Remember we are talking about the Bureau after all (think Animas-La Plata Project). If the Navajo Nation wants to send its NIIP irrigation water to Gallup, so be it, but if the Federal Government is to be an honest broker, American taxpayers should not be required to support any part of the Navajo-Gallup Water Supply Project that is unworkable or uneconomic.

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### ANTICIPATED COST OF THE PROJECT

No one is being told how much this Project could cost. In order to protect any Federal taxpayer investment, a sensitivity analysis of cost estimates for this multi-billion dollar Project must be completed. The record should reflect that the Bureau refused our request for such a sensitivity analysis of the Animas-La Plata Project ["ALP"], and then within months revealed that their cost estimates were off by fifty percent -- this before construction had even begun. It is our understanding, with no users for most of ALP water and absolutely no way to deliver the water to these make-believe users, that the costs (even without the interest calculation) already exceed by 100 percent the original cost estimate. Further, all of the recent big Bureau projects surpassed by at least 300 percent their original cost estimates. We refer to the Dallas Creek Project, the Dolores Project, and Central Arizona Project. Given the dismal state of the Federal budget, adequate assurances are necessary to insure the cost estimates given to Congress are not grossly underestimated. Independent Peer Review is a crucial component in this process. In this regard, publication of the interest on this debt over the 100 year life of the project should also be documented and made available to the Public

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### NAVAJO DEPLETION GUARANTEE



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Describe the Navajo Depletion Guarantee in detail, and explain how it could affect the operation of the Project.

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### PIPELINE LATERAL SYSTEM

Who will pay for the network of pipeline laterals to the Navajo Chapters intended to be served by the Project?

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### SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES

The Senate Committee on Energy and Natural Resources held a hearing on June 28th on Senate Bill 1171, the Northwestern New Mexico Rural Water Projects Act. Ranking member Senator Pete Domenici, in his best "Iglesias" form, threatened Bureau Commissioner Robert Johnson ("I'm ready to proceed, and we'll see if you're needed."), whined about reasonable objections about the Project's high costs by the Office of Management & Budget, and could be heard muttering off-mike that he ought to ask the Army Corps of Engineers to do what the Department of Interior would not. The Domenici/Bingaman bill seeks to raid the Reclamation Fund at a time when the balance of that account is extremely low due to reduced power revenues. CRSP power users will, no doubt, be less than thrilled with this arrangement.

### THE CRITERIA AND PROCEDURES FOR THE FEDERAL GOVERNMENT'S PARTICIPATION IN THE NEGOTIATION OF INDIAN WATER RIGHTS SETTLEMENTS [55FR9223/POLICY] 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

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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 expected 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 a 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.

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 in the Proposed Settlement. 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."

Language in 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-

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Federal parties are to receive through construction of the Project. In fact, Gallup city officials have been to Washington 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.

Four years 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 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 in the "Navajo-San Juan River Federal Indian Water Rights Negotiation". 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 billions of State and Federal dollars and undermine the value of certain personal property holdings.

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, supercession or revocation. Sadly, DOI has a dismal history of haphazard and selective enforcement of its Policy, resulting in repeated, irreversible 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,

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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 ongoing 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 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 any interested party 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 Settlements" 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



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of Indian water rights settlement negotiations as leverage to engage in water speculation, further strangling western rivers and crippling the taxpaying public.

Any settlement worth its salt must follow the guidelines established by the Department of Interior as set forth in its published policy for negotiating and settling Indian water rights, The Criteria and Procedures, 55FR9223, published in the Federal Register of March 12, 1990. Among other things this policy establishes that Indian settlements involving a single river system, in this case the San Juan, must be done so as to simultaneously evaluate and negotiate all Indian claims on that river system. Obviously, the clear intent is to avoid the dreaded unintended effect through piecemeal negotiations, awards, and settlements and secondary taxpayer costs of undoing what was mistakenly done through ignorance and bureaucratic imperiousness.

We cited 55FR9223 with regard to both the Animas-La Plata Project and the Navajo Reoperation EIS. We were ignored. In fact, one of the attorneys for Interior, Michael Connors, Esq., now a trusted aid to Senator Bingamon and presumed author of much of S1171, told us that, while the policy still stood, it only had to be observed when the Department of Interior found it convenient to do so. It is past time, whether convenient or not, for 55FR9223 to be taken seriously.

55FR9223 reads as noticed as follows:

Federal Register / Vol. 55, No. 48 / Monday, March 12, 1990 /  
Notices page 9223

**DEPARTMENT OF THE INTERIOR**

Working Group in Indian Water Settlements; Criteria and Procedures  
for the Participation of the Federal Government in the Negotiations  
for the Settlement of Indian Water Rights Claims

**AGENCY:** Department of the Interior

**ACTION:** Policy Statement

**SUMMARY:** It is the policy of this Administration, as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through



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negotiated settlements rather than litigation. Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlement of claims concerning Indian water resources.

**EFFECTIVE DATE:** March 12, 1990.

**ADDRESSES:** Comments may be addressed to: Mr. Tim Glidden, Department of the Interior, MS6217-MIB, 18th and C Streets, NW., Washington, D.C. 20240

**FOR FURTHER INFORMATION CONTACT:** Mr. Tim Glidden, Chairman, Working Group on Indian Water Settlements, 202-343-7351

**SUPPLEMENTAL INFORMATION:** These criteria and procedures were developed by the Working Group on Indian Water Settlements from the Department of the Interior.

These criteria and procedures supersede all prior Departmental policy regarding Indian water settlement negotiations. The criteria provide a framework for negotiating settlements so that (1) The United States will be able to participate in water settlements consistent with the Federal Government's responsibilities as trustee to Indians; (2) Indians receive equivalent benefits for rights they, and the United States as trustee, may release as part of a settlement; (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) The settlement contains appropriate cost-sharing by all parties benefiting from the settlement.

Dated: March 6, 1990

Timothy Glidden

Chairman, Working Group on Indian Water Settlements.

Criteria and Procedures for Indian Water Rights Settlements

### **Preamble**

Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.

It is the policy of this administration, as set forth by President Bush on June 21, 1989, in his statement signing into law H.R.932, the

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1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation.

Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlements of claims concerning Indian water resources. These criteria and procedures supersede all prior Departmental policy regarding Indian water settlement negotiations. The criteria provide a framework for negotiating settlements so that (1) The United States will be able to participate in water settlements consistent with the Federal Government's responsibilities as trustee to Indians; (2) Indians receive equivalent benefits for rights they, and the United States as trustee, may release as part of a settlement; (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) The settlement contains appropriate cost-sharing by all parties benefiting from the settlement.

### Criteria

1. These criteria are applicable to all negotiations involving Indian water rights claims settlements in which the Federal Government participates. Claims to be settled through negotiations may include, but are not limited to, claims:
  - (a) By tribes and U.S. Government to quantify reserved Indian water rights.
  - (b) By tribes against the U.S. Government.
  - (c) By tribes and the U.S. Government against third parties.
2. The Department of the Interior will support legislation authorizing those agreements to which it is a signatory party.
3. Settlements should be completed in such a way that all outstanding water claims are resolved and finality is achieved.
4. The total cost of the settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.
5. Federal contributions to a settlement should not exceed the sum of the following two elements:
  - a. First, calculable legal exposure--litigation costs and judgment obligations if the case is lost: Federal and non-Federal exposure

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should be calculated on a present value basis taking into account the size of the claim, value of the water, timing of the award, and likelihood of loss.

b. Second, additional costs related to Federal trust or programmatic responsibilities (assuming the U.S. obligation as trustee can be compared to existing precedence.)--Federal contributions relating to programmatic responsibilities should be justified as to why such contributions cannot be funded through the normal budget process.

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

7. Settlements should be structured to promote economic efficiency on reservations and tribal self-sufficiency.

8. Operating capabilities and various resources of the Federal and non-Federal parties to the claims negotiations should be considered in structuring a settlement (e.g. operating criteria and water conservation in Federal and non-Federal projects).

9. If Federal cash contributions are part of a settlement and once such contributions are certified as deposited in the appropriate tribal treasury, the U.S. shall not bear any obligation or liability regarding the investment, management or use of such funds.

10. Federal participation in Indian water rights negotiations should be conducive to long-term harmony and cooperation among all interested parties through respect for the sovereignty of the States and tribes in their respective jurisdiction.

11. Settlements should generally not include:

a. Local contributions derived from issuing bonds backed by or guaranteed by the Federal Government

b. Crediting to the non-Federal share normal project revenues that would be received in absence of a cost-share agreement.

c. Crediting non-Federal operation maintenance, and rehabilitation (OM&R) payments to non-Federal construction cost obligations.

d. Imposition by the Federal Government of fees or charges requiring authorization in order to finance the non-Federal share.

e. Federal subsidy of OM&R costs of Indian and non-Indian parties.

f. U.S. participation in an economically unjustified irrigation investment; however, investments for delivery of water for households, gardens, or domestic livestock may be exempted from this criterion.

g. Per capita distribution of trust funds.

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- h. Crediting to the Federal share existing annual program funding to tribes.
- i. Penalties for failure to meet a construction schedule. Interest should not accrue unless the settlement does not get budgeted for as specified in item 15 below.
- j. Exemptions from Reclamation law.
- 12. All tangible and intangible costs to the Federal Government and to non-Federal parties, including the forgiveness of non-Federal reimbursement requirements to the Federal Government and items contributed per item 8 above should be included in calculating their respective contributions to the settlement.
- 13. All financial calculations shall use a discount rate equivalent to the current water resources planning discount rate as published annually in the Federal Register.
- 14. All contractual and statutory responsibilities of the Secretary that affect or could be affected by a specific negotiation will be reviewed.
- 15. Settlement agreements should include the following standard language: Federal financial contributions to a settlement will normally be budgeted for, subject to the availability of funds, by October 1 of the year following the year of enactment of the authorizing legislation (e.g., for a settlement enacted into law in August 1990, funding to implement it would normally be contained in the FY 1992 Budget request and, if appropriated, be available for obligation on October 1, 1991).
- 16. Settlements requiring payment of a substantial Federal contribution should include standard language providing for the costs to be spread-out over more than one year.

### **Procedures**

#### **Phase I-- Fact Finding**

- 1. The Department of the Interior (Department) will consider initiation of formal claims settlement negotiations when the Indian tribe and non-Federal parties involved have formally requested negotiations of the Secretary of the Interior (Secretary).
  - 2. The Department will consult with the Department of Justice (Justice) concerning the legal considerations in forming a negotiating team. If Department decides to establish a team, the Office of Management and Budget (OMB) and Justice shall be
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notified, in writing. Justice should generally be a member of any negotiating team.

a. The Department's notification should include the rationale for potential negotiations, i.e., pending litigation and other background information about the claim already available, makeup of the team (reason that Justice is not a member of a team, if applicable), and non-Federal participants in the settlement process.

b. The date of the notification marks the beginning of the fact-finding period.

3. Not later than nine months after notification, a fact-finding report outlining the current status of litigation and other pertinent matters will be submitted by the team to the Department, OMB, and Justice. The fact-finding report should contain information that profiles the claim and potential negotiations. The report should include:

a. A list of all involved parties and their positions.

b. The legal history, if any, of the claim, including such relevant matters as prior or potential litigation or court decisions, or rulings by the Indian Claims Commission.

c. A summary and evaluation of the claims asserted for the Indians.

d. Relevant information on the non-Federal parties and their positions to the claim.

e. A geographical description of the reservation and drainage basin involved, including maps and diagrams.

f. A review and analysis of pertinent existing contracts, statutes, regulations, and legal precedent that may have an impact on the settlement.

g. A description and analysis of the history of the United States' trust activities on the Indian reservation.

4. During Phase I, II, and III, the Government (through negotiating team or otherwise) will not concede or make representations on likely U.S. positions or considerations.

### **Phase II-Assessment and Recommendations**

1. As soon as possible, the negotiating team, in concert with Justice, will conduct and present to the Department an assessment of the positions of all parties and a recommended negotiating position. The purpose of the assessment is to (1) measure all costs presuming no settlement, and, (2) measure complete settlement costs to all the parties. The assessment should include:



## Comment OO-01 – continued

- a. Costs presuming no settlement-- Estimates for quantifying costs associated with all pending or potential litigation in question, including claims against the United States and claims against other non-Federal parties together with an assessment of the risk to all parties from any aspect of the claim and all pending litigation without a settlement. A best/worst/most likely probability analysis of the litigation outcome should be developed.
- b. An analysis of the value of the water claim for the Indians.
- c. Costs Presuming Settlement-- quantification of alternative settlement costs to all parties. This includes an analysis showing how contributions, other than those strictly associated with litigation, could lead to settlement (e.g., facilities to use water, alternative uses of water, and alternative financial considerations). \_
- 2. All analysis in the settlement should be presented in present value terms using the planning rate used for evaluating Federal water resource projects.

### **Phase III--Briefings and Negotiating Position**

- 1. The Working Group on Indian Water Settlements will present to the Secretary a recommended negotiating position. It should contain:
  - a. The recommended negotiating position and contribution by the Federal Government. \_
  - b. A strategy for funding the Federal contribution to the settlement.
  - c. Any legal or financial views of Justice or OMB.
  - d. Tentative position on major issues expected to arise.
- 2. Following the Secretary's approval of the Government's negotiating position, Justice and OMB will be notified before negotiations commence.

### **Phase IV--Negotiations Toward Settlement**

- 1. OMB and Justice will be updated periodically on the status of negotiations.
- 2. If the proposed cost to the U.S. of settlement increases beyond the amount decided in Phase III, if the negotiations are going to exceed the estimated time (or break down), or if Interior proposes to make significant changes in the Government negotiating position or in the U.S. contribution to the settlement, the original

Comment OO-01 – continued

recommendation and negotiating position will be revised using the procedures identified above.

3. Briefings may be given to the Congressional delegations and the Committees consistent with the Government's negotiating position.

**[FR Doc.90-5532 Filed 3-9-90:8:45 am] BILLING CODE 4310-RP-M**

The general Public, interested parties and legitimate stakeholders tried desperately for years to gain access to negotiations leading to the Proposed Settlement, the Project, and S1171, to no avail.

Witness this letter to Michael Schoessler, DOI Team Leader Navajo-San Juan River Federal Indian Water Rights Negotiation Team:

9 December 2002

electors Concerned about Animas Water -- CAW

1217 Chaco Avenue \_Farmington, NM 87401

(505) 327-0743

Michael Schoessler, Team Leader

Navajo-San Juan River Federal Indian Water Rights Negotiation Team

U.S. Department of the Interior

Office of the Solicitor

505 Marquette Ave. NW Suite 1800

Albuquerque, NM 87102

**SUBJECT: Navajo-San Juan River Federal Indian Water Rights  
Negotiation (Negotiation)**

Dear Michael:

Thank you for responding in advance of this week's meeting of your Navajo-San Juan River Federal Indian Water Rights Negotiation Team (Team). As you know, CAW has expressed an interest in the subject Negotiation, particularly regarding the Department of the Interior's (DOI) application of its policy for the negotiation and settlements of claims concerning Indian water resources, 55FR9223 (Policy). Your observation that this Policy has been inconsistently or haphazardly applied over the past decade confirms our worst fears.

## Comment OO-01 – continued

At the same time, we are encouraged by your expressed intention to strictly adhere to the Policy as established in the "Criteria & Procedures" during your Team's ongoing two-year effort with the subject Negotiation. I suppose it would be reasonable to assume that, initially anyway, DOI personnel assigned to other negotiation teams had similar intentions of enforcing the required "Criteria & Procedures", but then, for one reason or another, found it more convenient, advantageous, or politically expedient to abandon their responsibility to uphold that Policy.

In our opinion, only a full and careful implementation of the Policy in the subject Negotiation will fulfill the Secretary's obligation under the federal Indian trust responsibility. Indian Trust Assets (ITAs) in connection with Navajo Nation water rights claims to the San Juan River cannot be accurately assessed and adequately protected if the DOI's slipshod approach to Policy enforcement resurfaces in the subject Negotiation. Certainly the American people will be ill-served by any perpetuation of this willy-nilly system which leaves so much to chance, if not outright subterfuge.

We sincerely appreciate your willingness to present the requests in CAW's October 22nd letter to the non-Federal parties for consideration and action at this week's negotiation session. However, your view that the Team has no independent ability or authority to provide for the involvement of additional non-Federal parties in the subject Negotiation seems to be incompatible with the "Criteria & Procedures" of the Policy.

In fact, the Policy does not make allowance for the arbitrary exclusion of individual stakeholders or entities with competing claims and interests as a prerequisite to the subject Negotiation. Neither does the Policy support your determination that the current negotiations shall be closed to the public and conducted in absolute secrecy.

If the subject Negotiation is to be kept free of bias and prejudice, the Team must act swiftly with authority to allow for the participation of additional interested parties, including legitimate stakeholders.

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## Comment OO-01 – continued

Once again, we appreciate your time and consideration in this matter.

Sincerely,

Steve Cone and Verna Forbes Willson for  
Electors Concerned about Animas Water -- CAW  
cc: Brian Parry  
John Cawley  
Tom Turney  
John Whipple  
Stanley Pollack  
Ernie Coriz

THE STARK CONCLUSION TO ALL OF THIS IS AS FOLLOWS:  
IF THE ADOPTED POLICY OF THE UNITED STATES GOVERNMENT  
FOR PARTICIPATION IN THE NEGOTIATION OF INDIAN WATER  
RIGHTS SETTLEMENTS, 55FR9223, IS NOT TO BE FAITHFULLY  
AND THOROUGHLY IMPLEMENTED TO REACH A JUST  
SETTLEMENT, THEN LITIGATION IS MUCH PREFERRABLE TO THE  
SECRECY AND SUBTERFUGE WHICH HAVE BECOME THE RULE.

### LONG HOLLOW RESERVOIR PROJECT

How will the intent to expand water use on the La Plata River in Colorado be reconciled with and integrated into the Proposed Settlement and S1171? Is it the opinion of the Bureau that increased diversion and storage on the La Plata in the proposed Long Hollow Reservoir will also increase flows to the Colorado mainstem?

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### ALTERNATIVES

The Department of the Interior conceded this week in Senate testimony that the process for selecting the various alternatives

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## Comment OO-01 – continued

identified and analyzed in the Project DEIS was inadequate. A new DEIS must be prepared based on the revelation that the Bureau will not support **any** of the Project alternatives examined in its own DEIS. Despite the New Mexico senators' attempts to fast-track S1171, The Criteria & Procedures of 55FR9223 must be implemented in coordination with the Department of Justice and the Office of Management and Budget, in order to ensure that Federal Trust responsibilities are honored. The 55FR9223 Policy includes provisions for an economic evaluation with a high level of assurance that the Public's money is being well spent. The Criteria & Procedures of 55FR9223 represent a safeguard against fiscal waste and promote the negotiation of a just settlement for all parties.

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