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Subject: comment to CEQ's NEPA Task Force -- 22 August 2002

22 August 2002

COMMENT TO COUNCIL ON ENVIRONMENTAL QUALITY'S NEPA TASK FORCE

INTRODUCTION

In May of this year the President's Council on Environmental Quality [Council] established a Task Force [TF] to review the process and procedures utilized in application of the National Environmental Policy Act [NEPA].

According to notice in the Federal Register, the Council's NEPA TF is actively seeking opportunities to improve the coordination of NEPA processes between all levels of government and the public. While I am convinced that meaningful reform in the execution of the NEPA is sorely needed, I have a sneaking suspicion that the work of this TF will only serve to compound existing systemic problems and further alienate an otherwise interested public. The objectivity and integrity of the NEPA process have been tarnished by the eagerness of federal agencies to cater to vested interests and the habit of submitting unconditionally to the demands of "sovereign" tribal governments.

Nowhere can there be found a more obvious and abject perversion of the NEPA procedures than in the case of the Animas-LaPlata project [A-LP]. The Council's NEPA TF would be well advised to produce a case study of the tortured (though inept) efforts resulting in the voluminous (though qualitatively deficient) Environmental Impact Statement [EIS] documentation for the Bureau of Reclamation's [BOR] A-LP. Consider the fact that there now exists a "Final Supplemental Environmental Impact Statement"--2000, which was preceded by a "Final Supplement to the Final Environmental Statement"--1996, itself preceded by a "Draft Supplement to the Final Environmental Statement"--1992, which was in turn preceded by a "Final Environmental Statement"--1980. This remarkable anomaly alone should be more than enough to set off warning bells and whistles and prompt your careful examination of serious irregularities in the environmental review process for the A-LP, a process which has been self-serving and tainted by corruption and greed.

In particular, I am addressing here the three questions in the TF's key study area "B", which involve Federal and Inter-governmental Collaboration.

My comments are based on years of personal experience with agencies of the federal government and various groups committed to advancement of a feasible and rational alternative to the A-LP.

UTE CONFLICT OF INTEREST AS CO-LEAD IN DEVELOPMENT OF A-LP EIS

Almost three years ago, in its infinite wisdom, the BOR determined that the Ute Indians were capable of leading an objective, dispassionate "final" EIS for the A-LP, a controversial water development project with the purported purpose of directly and primarily benefiting the Colorado Ute tribes by settling their claims to water under the Winters doctrine and allowing for sweetheart 638 tribal contracts to be awarded for the construction of the A-LP itself. The BOR's decision to name the Utes as co-lead in the EIS process was, in fact, ill-considered, since the Utes had previously and publicly pledged allegiance to a particular structural alternative for the A-LP-- adamantly stating that nothing less than a dam and a Ridges Basin Reservoir would be sufficient to satisfy their claims -- claims which continue to be disputed and challenged in Colorado Water Court. The A-LP is not an Indian-only project, and the BOR gave no consideration whatsoever to the need for fairness and impartiality in casting the role of co-lead. Instead, the BOR sanctioned a clearcut conflict of interest by selecting the Utes to act as primary players in development of the EIS, ensuring that the required environmental analyses would be self-fulfilling -- the predestined products of warped science and rank politicization.

When the the Department of the Interior [DOI] misguidedly and inappropriately invoked the Indian Self Determination Act (ISDA), the Utes -- with their attorneys and hand-picked, self-service consultants and contractors -- were paid federal dollars to write their own settlement ticket by controlling the scope, the content, and ultimately the outcome of that "Final Supplemental Environmental Impact Statement" for the A-LP. Nowhere does the ISDA envision empowering one tribe -- with an exclusive

vested interest in a particular outcome -- to take the lead in conducting and directing NEPA analyses in such a manner as to jeopardize the real interests of various other stakeholders and the public at large. Nowhere does the ISDA anticipate or justify the insane interpretation that an affected Indian tribe should be invited to decide how much the public owes it and the manner in which that debt should be satisfied.

Is it standard procedure for the federal government to permit a tribal entity to lead in the NEPA preparation of an Environmental Impact Statement for a proposed action designed primarily for their own benefit, after issuing public pronouncements and declarations indicating strong bias toward a preconceived outcome? Of course not! Why, then, was the BOR/DOI permitted to license the Utes to manage the latest A-LP EIS? And why were the BOR and the Utes allowed to spend some 13 million taxpayer dollars to buy the data and answers they had to have in an A-LP EIS?

Many of the fatal flaws in the A-LP EIS are firmly rooted in the federal government's deep-seated, codependent relationship with the Indians and the BOR's motivation to justify construction of a massive billion-dollar reclamation project for which there is no legitimate purpose or need. Perhaps a General Accounting Office investigation will expose the degree to which such a conflicted tribal interest and the BOR's machinations have been inextricably bound to vested special interests. At the very least, a thorough and disinterested case study of the A-LP by the Council's NEPA TF could be a useful first step in uncovering the truth about this wasteful project.

Closed NEPA Process

Federal agencies preparing the 2000 A-LP EIS conspired to act in violation of the NEPA. The NEPA requires that, in scoping the study of a proposed action, there "shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action," and that the process must include "interested persons (including those who might not be in accord with the action on environmental

grounds)." In the case of the A-LP EIS, however, scoping was anything but "open". This becomes clear with even a cursory reading of documents released to Earth Justice Legal Defense Fund responsive to a complaint filed in connection with the DOI's denial of a Freedom of Information Act (FOIA) request. The complaint alleged the DOI's illegal withholding of the substance of a series of 1998 meetings arranged by the federal government for the purposes of privately and illegally controlling the scope and outcome of the 2000 EIS, and secretly and exclusively crafting amendments to the Colorado Ute Indian Final Water Rights Settlement Agreement.

The minutes of these clandestine meetings reveal the extent to which federal agencies colluded with promoters of the A-LP to circumvent key provisions in the NEPA and disregard regulations guaranteeing the interested public timely access to information and ample opportunity for direct participation in the scoping process.

An examination of these documents, obtained through litigation under the FOIA, demonstrates that the federal government's "preferred" alternative for the A-LP was, in fact, shaped during this exclusive, secret scoping process, which occurred months before the public was ever provided proper Notice of Intent in the Federal Register. In fact, the Secretary of the Interior came out with his administrative proposal before the official scoping sessions had begun, and then used the EIS to validate his alternative. So, in the end, a series of much-trumpeted "official" public scoping hearings for the A-LP EIS (when finally held nearly half a year later) amounted to nothing more than a dog and pony show, making a mockery of the NEPA.

INADEQUATE TREATMENT OF "NO ACTION ALTERNATIVE"

For decades, scare tactics, systematically employed by project promoters (including the BOR) have been carefully orchestrated to see to it that paranoia runs deep into the hearts of senior water rights holders and citizens within Four Corners communities. The proper application of the NEPA in the case of the A-LP would have effectively discredited those

tactics and dispelled those fears. This, unfortunately, has not been the case.

The 2000 A-LP EIS is woefully inadequate because the No Action Alternative was not rigorously explored or objectively evaluated, and the public was not afforded an opportunity to scrutinize the action in question. Instead, the No Action Alternative was purposely given short shrift by the BOR/Ute leaders. The NEPA specifically requires that examination of a proposed action include the thorough analysis of a No Action Alternative, and that the No Action Alternative then be raised as the standard against which all other alternatives to the proposed action are weighed. Satisfactory analysis of a No Action Alternative provides a reliable benchmark, enabling decision makers to compare the magnitude of environmental effects of the various action alternatives.

In the case of the A-LP EIS, however, the BOR/Ute co-lead treated the No Action Alternative dismissively, stubbornly avoiding any serious exploration of possible outcomes should the Colorado Ute tribes choose to either renegotiate or litigate their claims to reserved Winters doctrine rights from the Animas and LaPlata Rivers. The BOR and the Utes have steadfastly refused to examine the No Action Alternative except to say that it would force the Utes to go into court to satisfy their claims. The No Action Alternative has been shunned like the plague on the grounds that if the project were not built just as the Utes have insisted, huge legal costs would be incurred in the process of litigating the tribes' water rights claims. Conveniently, the "hugeness" of these costs has never been described in relationship to the magnitude of the costs of the project itself -- costs which now stand at over \$400 million, with every assurance (based on cost overruns on past Reclamation projects) that the price tag will ultimately exceed \$1 billion. And, while they have been more than willing to engage in a reckless and arbitrary projection of multiple hypothetical scenarios (dude ranches, golf courses and casinos) for the mother lode of Ute water allocated in their "Preferred Alternative", the BOR/Ute co-leadership has deemed it impossible to even predict the various potential outcomes of a litigation of the Ute claims.

For decades, the promoters of A-LP have systematically perpetrated fraud and induced an irrational paranoia in the hearts of senior water rights holders and citizens within the San Juan Basin communities. In the A-LP EIS documentation the BOR/Ute co-leaders have claimed that A-LP must be built or the Utes will go into court and be awarded water from present users and uses based on their purportedly superior 1868 water entitlements. This assertion, which forms the only remaining basis for constructing the A-LP, flies in the face of two U.S. Supreme Court rulings, one as recent as 1999, in which the court denied Ute claims of an 1868 Reservation date. By refusing to take a sober look at the legal merit of Ute water claims in the No Action Alternative, the BOR/Ute co-lead have demonstrated their determination -- come hell or high water -- to staunchly resist a just resolution of tribal claims, apparently because the Ute claims in question lack legitimacy, and there is no sound basis for the quantities of water allocated to the tribes in the A-LP. An entire section in the analysis of the No Action Alternative should have been devoted to court case rulings and theory related to Ute reservation history and an analysis of tribal reserved water rights claims as advanced in the first Ute Settlement Agreement and as renegotiated under cover.

Among the other policies and procedures ignored by the BOR/Ute co-leadership in the development of the A-LP EIS are the DOI's Indian Water Rights Settlement Policy and the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies. Lead agencies are required by the NEPA to follow all pertinent regulations, policies, procedures and directives, but in the case of the A-LP EIS, they ignored long-standing policy; opting, rather, for subterfuge and deceit.

Furthermore, while it may fall outside the scope of the NEPA TF's examination, the degree to which special interests developers and the Utes have been allowed by the BOR to dictate the terms of consultation under Section 7 with the Fish & Wildlife Service in order to manipulate the Endangered Species Act in the promotion of A-LP and the reoperation of Navajo Dam, is a far-reaching matter great import.

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CONCLUSION

Suffice it to say that an interpretation of NEPA which allows for the kind of malice aforethought, fraud and collusion so flagrantly and pervasively perpetrated in the management and generation of the 2000 A-LP EIS, stands as an indictment, not only of the lead agencies and the cooperating Environmental Protection Agency, but of the President's Council on Environmental Quality. I strongly urge you to undertake an in-depth study of the misapplication of the NEPA in the unprecedented case of the A-LP, and to fully investigate the failure of Federal agencies to refer the A-LP EIS to the the CEQ. I would be more than happy to provide the Task Force with additional perspective and documentation to that end.

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