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To: Rep. Lucky Varela, Chairman, Legislative Finance Committee
Rep. James Roger Madalena, Co-Chairman, Interim Indian Affairs Committee
Sen. John Pinto, Co-Chairman, Interim Indian Affairs Committee
Sen. Phil A. Griego, Chairman, Water and Natural Resources Committee

From: John R. D'Antonio, Jr., State Engineer
Estevan Lopez, Interstate Stream Commission Director

Re: 2011 Indian Water Rights Settlement Fund Report

The 2005 Indian Water Rights Settlement Fund Act requires the State Engineer and the Interstate Stream Commission to report by November 15th every year to the Interim Indian Affairs Committee and to the Legislative Finance Committee on the following three subjects:

1. The status of proposed Indian water rights settlements requiring state financing;
2. The distribution of funds from the Indian water rights settlement fund to implement approved settlements; and
3. Recommendations on appropriations to the fund necessary to timely implement Indian water rights settlements.

2005 N.M. Laws, ch. 172, §1.B; NMSA 1978, § 72-1-11 (B). This memorandum presents the report of the State Engineer and the Interstate Stream Commission for 2011.

1. Status of Proposed Indian Water Rights Settlements – § 72-1-11 (B)(1)

New Mexico presently has three Indian water rights settlements pending: the Navajo Nation Settlement in the San Juan River adjudication, the Settlement Agreement with the Pueblos of Nambé, Pojoaque, Tesuque, and San Ildefonso in the *Aamodt* adjudication, and the Taos Pueblo Settlement in the Rio Pueblo de Taos/Rio Hondo adjudication.

For each of these three settlements, a settlement agreement was executed in 2005 or 2006 by the affected tribe or Pueblos, the State of New Mexico, and in some cases other local water right

owning parties. Copies of the three settlement agreements and related documents can be found at: www.ose.state.nm.us/legal_ose_proposed_settlements.html. The United States, though a participant in the negotiations that led up to the Taos Pueblo and the *Aamodt* agreements, has only signed the Navajo Nation Settlement Agreement. The Secretary of the U.S. Department of Interior has not yet executed the *Aamodt* Pueblos Settlement Agreement or the Taos Pueblo Settlement Agreement.

A. Navajo Nation Settlement

On April 19, 2005, the Navajo Nation and the State of New Mexico executed a settlement agreement to resolve the claims of the Navajo Nation for use of waters in the San Juan River Basin in northwestern New Mexico. The Navajo Settlement will provide associated water development projects for the benefit of the Navajo Nation and non-Indian communities in exchange for a release of Navajo claims to water that potentially could have displaced existing non-Indian water rights in the basin. One of the primary elements of the settlement is the Northwestern New Mexico Rural Water Supply Project (also known as the Navajo-Gallup Water Supply Project) that includes a pipeline to be constructed by the Bureau of Reclamation to bring a renewable surface water supply from Navajo Reservoir to Navajo and non-Indian communities in northwestern New Mexico.

Developments regarding the Navajo Settlement include:

Federal Legislation. On March 30, 2009, President Obama signed S.22, federal legislation passed by Congress that authorizes the Navajo Settlement, including the Navajo-Gallup Water Supply Project, and authorizes the appropriation of federal funds to plan, design and construct the Project (Northwestern New Mexico Rural Water Projects Act, Public Law 111-11, Title X, Subtitle B). This Act also establishes the "Reclamation Water Settlement Fund," to implement Indian Water Rights settlement agreements approved by Congress.

Conformed Settlement Agreement. P.L. 111-11 authorizes the Secretary of Interior to execute, on behalf of the United States, a revised settlement agreement consistent with the Act ("conformed settlement agreement") with the State of New Mexico and the Navajo Nation. The conformed settlement agreement was executed on December 17, 2010 and includes proposed Partial Final Judgments and Decrees for entry in the San Juan River adjudication, *State of New Mexico ex rel. State Engineer v. United States, et al.*, San Juan County Dist. Ct. No. CV-75-184.

Environmental Impact Statement. On July 6, 2009, the Planning Report and Final Environmental Impact Statement for the Navajo-Gallup Water Supply Project was filed with the Environmental Protection Agency and released to the public. On October 1, 2009, Secretary of Interior Ken Salazar signed the Record of Decision making official the environmental impact statement for the Project.

Settlement "Implementation Team". Since May 2009, the State of New Mexico, through the Interstate Stream Commission and the Office of the State Engineer, has been actively participating in the Navajo Settlement Implementation Team. The purpose of the Team

is to accomplish the settlement implementation deadlines set forth in the federal authorizing legislation. Other Implementation Team participants include the Department of Interior, Bureau of Reclamation (Team Leader), the Navajo Nation, the City of Gallup, the Department of Justice and the Bureau of Indian Affairs. The Implementation Team and its various sub-teams meet regularly.

Settlement Project Costs. The federal legislation authorized to be appropriated $870,000,000 to the federal government to plan, design and construct the Navajo-Gallup Water Supply Project. This amount has now increased to just under $1 billion due to indexing which was also authorized.

State Contribution. The legislation requires a $50 million ("cost share") contribution by the state toward Project construction costs. Additionally, the state may, but is not obligated to provide $10 million for non-Indian ditch rehabilitation. This $10 million is not included in the state's $50 million cost share obligation.

On June 7, 2011, the Board of Finance made available to the Indian Water Rights Settlement Fund $10 million, based on the earlier certification by the ISC. At least $8.6 million of which will be used for Navajo Settlement implementation and will be applicable to the state's cost share contribution.

On June 27, 2011, the state and the federal government, through the Secretary of the Interior, executed a cost-share agreement for the state's portion of Project construction costs; that is, $50 million, less funds the state already has contributed that are determined to have reduced overall Project costs. To date, the state has appropriated approximately $31.2 million toward elements of the Project. The United States, through the Bureau of Reclamation, has represented to ISC staff that it anticipates that the state will receive credit at least 75% of its total expenditures which will result in a considerable reduction to the state's overall cost share obligation.

Currently, the State, through the ISC, is negotiating an intergovernmental agreement between the New Mexico Environment Department, the New Mexico Finance Authority, and the City of Gallup, consistent with the June 27, 2011, cost share agreement, to determine respective responsibilities related to the State Cost share credit requests for funds expended on the Navajo-Gallup Water Supply Project.

Federal Implementation. Since enactment of the federal authorizing legislation, the Bureau of Reclamation has been working diligently with the state and the other stakeholders to implement the Navajo Settlement, including construction of the Project which will begin in earnest in 2012. In late 2010, as part of the Claims Resolution Act, Public Law 111-291 (authorizing the Aamodt and Taos Settlements: see below) $180 million of direct federal funding was provided for the Navajo-Gallup Water Supply Project. For federal fiscal year 2012, the federal executive budget recommendation for the Project is $35.2 million.

Process for Court Approval. On October 3, 2011, the court held a status conference in the San Juan River Adjudication *inter se* proceeding. The statutory deadline for entry of the

Partial Final Decree (the final judgment of decree setting forth the water rights of the Navajo Nation in the San Juan Basin in New Mexico) by the adjudication court is December 31, 2013.

B. *Aamodt* Pueblos Settlement

On May 3, 2006, the State of New Mexico, the Pueblos of Nambé, Tesuque, Pojoaque, and San Ildefonso, the County of Santa Fe and the City of Santa Fe executed a Settlement Agreement designed to resolve the claims of the four Pueblos to the use of waters in the Nambé-Pojoaque-Tesuque stream system in north central New Mexico.

When fully implemented, the Settlement Agreement will finally adjudicate the water rights of the four Pueblos in the ongoing adjudication of water rights in the Nambé-Pojoaque-Tesuque stream system ("N-P-T"), *State of New Mexico ex rel. State Engineer v. Aamodt, et al.,* U.S.D.C. No. 66cv06639 MV/LCS. For the most part, these Pueblo water rights will be adjudicated with senior priorities. The Settlement also will protect non-Pueblo junior water rights from future Pueblo priority calls through a complex set of agreements based on four major concepts. First, the Pueblos agree to forbear from making priority calls against non-Pueblo surface water rights except under certain circumstances, thereby preserving existing surface water uses in the N-P-T. Second, the United States will acquire up to 2,500 acre feet of additional water for the Pueblos' economic development, intended, in part, to compensate them for the water they would not be able to take as a result of their forbearance. Third, a pipeline will be constructed to deliver water to Pueblo and non-Pueblo users in the basin from the Rio Grande. Fourth, non-Pueblo parties currently using domestic wells may choose to stop using groundwater and instead hook up to the pipeline for their domestic water uses.

Since last year's Report, developments regarding the *Aamodt* Settlement include:

Federal Legislation. Federal legislation approving the Settlement Agreement was enacted into law on December 8, 2010, when President Barack Obama signed the *Claims Resolution Act of 2010,* Title VI of which is the *Aamodt Litigation Settlement Act.* P.L. No. 111-291, § 601, et seq. (hereafter "Settlement Act").

Conforming the Settlement Agreement to the Legislation. In some respects, provisions of the federal legislation differ from the Settlement Agreement signed in 2006, and for that reason the Settlement Parties are now tasked with editing the Settlement Agreement to conform it to the legislation.

The Settlement Implementation Team . Since January 2011, the Settlement Parties have met several times to conform the Settlement Agreement. Settlement implementation meetings are scheduled through November 2011, which should result in the Settlement Parties coming together on a final conformed Settlement Agreement by about that time.

Other Documents. Three other associated documents will have to be completed by the Settlement Parties during this same time frame as well: 1) the Cost Sharing and System Integration Agreement; 2) a Partial Final Decree; and 3) an Interim Administrative Order. These

documents are being worked on at the Settlement implementation meetings as well, and are expected to be completed on the same schedule as the conformed Settlement Agreement.

Signatures. After the Settlement Parties have reached agreement on a final conformed Settlement Agreement to present to their principals, additional time will be necessary to secure appropriate signatures for the conformed Settlement Agreement (e.g., signatures of appropriate government representatives from each governmental body). The remaining time required to complete the modifications to the Settlement Agreement, complete the other three documents, and obtain the necessary signatures from the principals is expected to be approximately six months.

Public Implementation Meetings. The implementation meetings described above are open to the public, and have been regularly attended by interested parties. These public implementation meetings have proven to be a source of public knowledge and understanding of the terms of the Settlement, and time is set aside at each meeting to attempt to answer the questions that residents still have. The County of Santa Fe has undertaken to publish notice of these meetings on its website, in addition to the most recent revised versions of the draft Settlement Agreement for interested parties to access and download in advance of the implementation meetings.

Settlement Project Costs. Preliminary revised cost allocation figures for *Aamodt* show a total fifty-year cost for the project, including projected OM & R costs of $42.5 million, of $250.2 million, of which the proposed federal cost-share would be $174.3 million, and a proposed non-federal cost share of $75.4 million, of which $25.4 million is proposed to be borne by Santa Fe County and $50 million by the State. The non-federal funding would pay for the non-Indian portion of the proposed pipeline that would deliver potable water from a purification plant near Otowi, through the Nambé-Pojoaque-Tesuque valley to each of the Pueblos and non-Indian communities along its route.

Terms of the allocations of San Juan-Chama Project Water, budgeted costs, and the process for Court approval of the Settlement remain substantially as described in the 2010 Report.

C. Taos Pueblo Settlement

On May 30, 2006, in a signing ceremony at Taos Pueblo, the Pueblo, the State of New Mexico, and several Taos-area water right owning parties executed a settlement agreement designed to resolve the claims of Taos Pueblo to the use of waters in the Rio Pueblo de Taos and Rio Hondo stream systems in north central New Mexico. In addition to the Pueblo and the State, the local settlement parties include the Taos Valley Acequia Association, the Town of Taos, El Prado Water and Sanitation District, and twelve Taos area mutual domestic water consumer associations. The Taos settlement agreement, when fully implemented, will adjudicate Taos Pueblo's claims and expedite the adjudication of non-Pueblo claims to water rights in the ongoing Taos area water rights adjudication suit, *State of New Mexico ex rel. State Engineer v. Abeyta, et al.*, U.S.D.C. No. 69cv07896 BB and 69cv7939 BB, Consolidated. In addition to the resolving claims of Taos Pueblo, the settlement agreement addresses several issues of concern to non-Indian water right owners, including the preservation of existing acequia water uses,

preservation of historic water sharing arrangements between the Pueblo and non-Indian acequias on the Rio Lucero and Rio Pueblo, and the allocation of San Juan-Chama Project water available for the settlement.

Since last year's Report, developments regarding the Taos Pueblo Settlement include:

Federal Legislation. Federal legislation approving the Settlement Agreement was enacted into law on December 8, 2010, when President Barack Obama signed the *Claims Resolution Act of 2010,* Title V of which is the *Taos Pueblo Indian Water Rights Settlement Act*. P.L. No. 111-291, § 501, et seq. (hereafter "Settlement Act").

Conforming the Settlement Agreement to the Legislation. Some provisions of the federal legislation differ from the Settlement Agreement signed in 2006, and for that reason the Settlement Parties are now tasked with editing the Settlement Agreement to conform it to the legislation.

Settlement Implementation Team. Since January 2011, the Settlement Parties have met several times a month to conform the settlement agreement. The process is continuing, with settlement implementation meetings scheduled through December 2011.

Other Items. The court has approved a motion to approve an order establishing procedures and deadlines for court approval of the Settlement Agreement and Partial Final Decree. In addition, the Parties are completing negotiations on the Partial Final Decree.

Signatures. After the Settlement Parties have reached agreement on a final conformed Settlement Agreement to present to their principals, additional time will be necessary to secure appropriate signatures for the conformed Settlement Agreement (e.g., signatures of appropriate government representatives from each governmental body). The remaining time required to complete modifications to the Settlement Agreement, complete the other three documents, and obtain the necessary signatures from the principals is expected to be approximately six months.

San Juan-Chama Project Water. Unallocated water from the San Juan-Chama Project will be used as a source to fulfill settlement water supply needs for both the *Aamodt* and Taos Pueblo settlements. 1,079 acre-feet will be used for water supply contracts pursuant to the *Aamodt* settlement, and 2,621 acre-feet will be used for water supply contracts pursuant to the Taos Pueblo settlement.

Settlement Project Costs. The terms of the Settlement Act set the total federal contribution for Pueblo benefits and mutual benefit projects at $124 million. Of that amount, $88 million would fund the Pueblo Water Development Fund and $36 million would fund mutual benefit projects necessary to implement the settlement. The local settlement parties would receive $13.2 million of state funding for the mutual benefit settlement projects and up to $6.9 million for acquisition of water rights.

2. Distribution of monies from the Indian Water Rights Settlement Fund – § 72-1-11 (B)(2)

Severance Tax Bond (STB) issued in the amount of $10 million, $1.4 million allocated to the Taos local parties for water rights acquisition and $8.6 million for Navajo Settlement implementation.

At the special session in 2011, the legislature appropriated to the fund $15 million in STB authorization. The ISC likely will certify to the Board of Finance the December 2011 sale of the bonds from the fund.

3. Funding Recommendations – § 72-1-11 (B)(3)

As shown on the attached table, the State Engineer and Director of the Interstate Stream Commission recommend funding of $15 million in each of the next 5 fiscal years to meet the State's cost share obligation.