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Seeking the Water Jackpot

For almost a century, the Navajo Tribe has been left out of the Colorado River water game. Now, they're ready to play their hand.

Feature story - From the March 17, 2008 issue of High Country News by Matt Jenkins



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GALLUP, NEW MEXICO

In early February, a series of fierce storms racked the Navajo Nation, which sprawls across more than 27,000 square miles of Arizona, New Mexico and Utah. At dawn, the highways were burnished to an icy sheen that sent cars pinballing into ditches. As each day warmed, the misery took on a new quality: The dirt roads that crisscross the reservation melted into *hash glish di'tsidi liba'*

, a goopy gray gumbo that sucked pickup trucks into a death grip. By late afternoon, on the cusp of the next storm, many Navajos, still stuck up to their axles in mud, were simultaneously sandblasted with wind-driven grit.

The tribe's woes don't end with the weather. Half the Navajos on the reservation are unemployed, and that number may actually be as high as 67 percent - no one can say for sure. More than 70 percent of those who do have jobs work for government agencies. The closure of a coal mine later this year, on top of another mine shutdown two years ago, will likely reduce tribal revenues by a third. Per capita income on the reservation is a little more than \$8,000 a year.

Navajos often speak of the cosmic geography of the Four Sacred Mountains, which mark the boundaries of their ancestral homeland. But the lives of many people here are shaped by a more pragmatic geography, centered on a coin-op water dispenser in a muddy turnaround behind a city maintenance building in downtown Gallup, N.M. A water pipe with a piece of yellow fire hose hanging off the end sticks out the back of the building. Navajos load water tanks and blue plastic 55-gallon drums into the beds of their pickups and come here for drinking water. On weekends, the line can stretch around the block.

But on a bitter-cold Friday afternoon, the whole operation was seriously dorked. Ernest Leslie, who had driven 22 miles from Tohatchi, couldn't get any water because a quarter was jammed in the coin slot. He tried to coax another coin into the machine with the tip of his pocketknife, but it popped back out like a bad joke and landed in the mud at his feet. "Huh," Leslie said. He looked down at the quarter. "Sometimes we have problems like this."

Even as the Southwest's cities have flourished with water from the Colorado River, the Navajo Tribe has stood on the sidelines, holding an empty bucket - and waiting. For decades, it seems, the tribe has been just one good plan away from prosperity. Now, however, the Navajo Nation is beginning to assert its right to claim water from the river. Many Navajos feel that the tribe could soon transform water from something that eats up their quarters at 50 gallons a pop to a virtual jackpot. But as tantalizing as the prospect of river water is, it is also opening painful rifts on the reservation.

The capital of the Navajo Nation

is a town called Window Rock, on the eastern edge of the reservation in Arizona. It is a slow-paced place with a couple of gas stations, a supermarket, and a clutch of mom-and-pop storefronts that serve up squash soup and roast mutton.

Lena Fowler lives on the other side of the reservation, but came to town in February for a tribal council meeting. A member of the tribe's water rights commission, she has a cool intensity and a vaguely sexy set of crow's-feet at the corners of her eyes. Fowler began by explaining how the language of white-dominated water law, saddled with abstruse notions like "*qui prior est in tempore, potior est in jure*

" - Latin for "first in time, first in right" - often defies translation into Navajo. Then she conceded that water may, in fact, be a language unto itself.

"And when you speak water," she said, "people get real emotional.

"For us, for most of our Navajo people, they wake up in the morning (and) they go out and they pray. And once they're done," she said, "they turn around and have to figure out how much water they have: Is it safe to drink the water at the windmill? Or do I have to go buy Clorox to treat it with? That's where we are today."

The Navajo Nation sits almost exactly in the center of the 244,000-square-mile Colorado River Basin, and it occupies fully one-tenth of the basin's area. Yet when the seven Colorado River states met to divide the river's water between themselves in 1922, they neglected to invite either the Navajo or any of the other Indian tribes with reservations in the basin.

"Agreements were being made before we even knew how to speak English," Fowler said. Indians weren't

recognized as United States citizens until two years after the Colorado River Compact was signed in 1922. It wasn't until almost three decades after the Indian Citizenship Act was passed that Navajos were finally allowed to vote.

When they excluded tribes from the Compact negotiations, however, the seven states disregarded an important fact. In 1908, the U.S. Supreme Court had - paradoxically - dealt Indians a powerful trump card. In what is known as the Winters decision, the court granted Indian tribes the right to retroactively claim water sufficient to create what would later be termed a "permanent homeland."

Water rights are ranked by chronological priority, and the priority date of a tribal claim is tied to the year that a particular tribe's reservation was established. In the Navajos' case, that was 1868. If the Navajos received so-called Winters rights, their water rights during times of drought would take priority over those of the West's more recently established urban centers.

Qui prior est in tempore, as the saying goes, potior est in jure

The seven states' negotiators acknowledged the Indians' dormant power in one small way: They added the "wild Indian article" to the water Compact. The article - whose name came from then-Secretary of Commerce Herbert Hoover, the facilitator of the negotiations - reads: "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."

With those 20 words, the negotiators punted all their gnarly Indian problems sometime into the future. "The states have basically ignored that there are Native claims to the river," Fowler said. In the 86 years since the Compact was signed, the downstream cities of Los Angeles, San Diego, Phoenix and Las Vegas have boomed, while the Navajo have been left parked in a dusty time warp high on the Colorado Plateau.

"Even today, it's like there's a curtain," she said. "(The seven states) are over there, making decisions, knowing full well that we're here. They can see our silhouette."

Hoover's wild Indian clause put off the Indian water rights question for as long as possible. But the costs of that delay, compounded over time, are now coming due. The Navajo Nation is moving to claim its water rights in New Mexico, and may soon do so in Arizona and Utah as well.

Indian tribes can sue for water rights - or they can negotiate settlements with individual states, and then take them to Congress for approval. That's the path that the Navajo Nation has taken in New Mexico. In 2004, the tribe and the state announced a settlement agreement that would award the Navajo 326,000 acre-feet of water from the San Juan River, a major tributary of the Colorado. (An acre-foot is enough for about two families in Phoenix or Las Vegas for a year.) The settlement also authorizes more than \$800 million in federal and state money to build a pipeline that will take the water to the east side of the reservation and to the city of Gallup. The Navajo Nation is now seeking congressional approval of the deal, the tribe's first step toward asserting its rightful claims on the Colorado.

"We have learned the language. We have learned the laws. We learned the court system," Fowler said. "Now we're saying, 'Hey! We're back. We're here to reclaim our water rights.' "

In Window Rock,

the tribal government operates out of a cluster of rustic-looking buildings a stone's throw from the towering sandstone arch after which the town is named. There's a BEWARE OF FALLING ROCKS sign next to the stone-and-timber hogan where the tribal council meets.

Stanley Pollack, an assistant attorney general for the Navajo Nation's Department of Justice, works out of an unprepossessing, barracks-style building nearby. Pollack exhibits definite left-leaning sensibilities, but he also observes the staid rituals of water lawyering. He keeps a turquoise bolo tie and a gray tweed jacket ready for tribal council briefings. He is also a *bilagaana*

- a white - and, as a result, occupies a very complicated place in the Navajo water cosmology.

Pollack, who is 54, arrived here in 1985. Four years later, he suddenly found himself preparing legal briefs for the prosecution of the tribal chairman, Peter MacDonald, on corruption charges that would eventually land MacDonald in federal prison. It was a turbulent time: At one point, MacDonald's supporters rioted in Window Rock and tribal police shot two of them dead.

Pollack is reticent about the experience, but it was obviously a bracing one for him. He worked around the clock, protected by bodyguards from the American Indian Movement, better known for its 1973 standoff at Wounded Knee on the Pine Ridge Reservation. At night as they stood watch outside, the guards warmed themselves by setting fires in empty oil drums. Whenever Pollack took a break, he says, "I'd go out and talk to them and look at the stars. It was really cool."

Compared to the MacDonald drama, you'd think the process of defending the tribal water rights, which now absorbs all of Pollack's time, would be a pretty humdrum affair. But it's not. He's had rocks thrown through his office window, and been called the Navajos' Number One Enemy. And, in 2001, a flier appeared in chapter houses - the reservation's equivalent of town halls - with Pollack's likeness X-ed out and "Osama bin Pollack" written underneath.

Pollack keeps a lot of this stuff in a ring-bound binder in his office. One flier calls him - with more vehemence than orthographical precision - a "water rights sabbotager" and "one of the lawyer oppressors of the Navajo people who's helped cheat us out of hundreds of millions of water rights that is rightfully ours." Another reads: "Pollack infiltrated our government and has us on the path to a form of water rights holocaust."

After I read that one aloud, Pollack - who is Jewish - looked a little chagrined and said, "Oh yeah, genocide."

Pollack would really rather not talk about any of this. "It was just 100 percent libelous crap," he says. "Just totally reckless." But the homegrown opposition he has faced attests to the depth of emotion that water inspires - and to local unhappiness with Pollack's role as a compromiser and, to a large extent, a realist.

One wall of Pollack's office is lined with mean-looking filing cabinets, and the rest of the room is filled with steel bookshelves packed with court documents and all manner of hydrologic divination. It is from this mass of paper that Pollack is slowly assembling a Colorado River claim.

A year and a half ago, as the water settlement with New Mexico was working its way toward Congress, Pollack put the federal government and the seven states on notice that the tribe could also justifiably use 336,856 acre-feet in Arizona. When we talked, Pollack indicated that the tribe might claim 80,000 to 100,000 acre-feet in Utah, as well. If you throw in the water from tributaries, that would put the total size of the Navajo Colorado River water right at somewhere around 800,000 acre-feet.

That is a lot of water - one-and-a-half times more than Las Vegas has rights to. And, because much of the Navajo water would have an 1868 priority date, several big, powerful water users would be booted to the back of the line behind the tribe during a drought. The city of Las Vegas and the Central Arizona Project, or CAP, whose massive canal supplies water to Phoenix and Tucson, already have the worst water-rights priorities on the river. With the Navajo ahead of them in the hierarchy, they'd face an even more serious risk of being cut off.

Pollack has been steadily making it harder for the seven states to continue ignoring the tribe. In 2003,

the Navajo Nation filed a lawsuit against the states and the U.S. secretary of the Interior to prevent any further water allocations until the Navajo claims are resolved. Pollack and a team of Navajo negotiators have been in ongoing talks with representatives from Arizona, Las Vegas and Southern California over that lawsuit.

But Arizona, in particular, has been pushing back. Because the CAP is so vulnerable to water shortage, the state has been pressuring the Navajo Nation to reduce the size of its water claims. Last fall, the director of the state's water-resources department appeared before Congress to testify against the Navajo-New Mexico settlement, saying it shouldn't be approved unless the tribe also settles its claims with Arizona.

"Arizona's playing the leverage game," Pollack said - seeking to get a deal that the tribe might not otherwise make "on the assumption that because Navajo wants this New Mexico settlement, they'll make concessions to benefit Arizona."

The Navajo Nation's decision to seek water through a settlement, rather than by going to court, reflects a broader trend in Indian Country. Over the past decade and a half, tribes have increasingly turned to settlements, in part because the U.S. Supreme Court has become increasingly hostile to Indian rights. Still, the Navajo are keeping their options open. Last summer, Navajo President Joe Shirley traveled to Washington, D.C., to warn Congress that "if the (New Mexico) settlement were to fail, and the Navajo Nation were forced to pursue the litigation of its claims, the United States would still be exposed to horrific liabilities even if the Navajo Nation were to obtain only modest water rights."

Back on the reservation, however, Pollack was being dogged by critics who accused him of selling out the tribe. Some insisted that the Navajo Nation should settle for nothing less than every last drop of water in the Colorado River.

Peter MacDonald was released from prison

and returned to the reservation in 2001. Many Navajos see him as a folk hero, a sort of leader-in-exile, and he seems to be constantly on the road. When we talked by phone, he was headed to Phoenix for the dedication of a Navajo veterans' memorial there.

In the late 1970s, when MacDonald was tribal chairman, he commissioned a study that, he hoped, would form the backbone of a Navajo water claim. Water-rights studies tend to be pretty tedious things, but this one conjured up a vision that was positively messianic.

Rather than focus on the 18-million-acre Navajo reservation to determine what water the tribe might claim, MacDonald directed his engineers to consider the entirety of what he calls "the Navajo holy land": An area roughly twice the size of the reservation itself that lies between the Four Sacred Mountains, which stretch from Flagstaff, Ariz., to the San Luis Valley in Colorado. That territory includes not only the Colorado River and two of its main tributaries - the San Juan and Little Colorado - but the Rio Grande as well.

"Navajos were there even before the states were created," MacDonald said. "So by the Winters Doctrine, Navajo has first and primary right to all that water within the Four Sacred Mountains." (He neglected to mention that the area also includes the ancestral territory of the Hopi, Utes, Zuni, Jicarilla Apache and the 19 Indian pueblos on the Rio Grande.)

MacDonald's engineers began figuring out exactly how much water the tribe could claim, by calculating its "practicably irrigable acreage," or PIA. In 1964, the U.S. Supreme Court had endorsed PIA as a way to determine the size of water-rights claims made under the Winters Doctrine. A PIA determination evaluates how much of a tribe's land can be "practicably" - meaning economically - irrigated, and then uses a formula to derive a total water right for the reservation.

There can be a big difference between what's irrigable and what's *practicably* irrigable, but the engineers didn't get too hung up on observing that distinction. They ultimately determined that, as MacDonald put it, "Navajo has claim to every drop of the water that's presently being used by New Mexico, Arizona, California, Nevada, Utah, Colorado and Wyoming." As he said this, I suddenly had a vision of the world turning upside down: the *bilagaanas*

forced to drive to the watering point with 55-gallon drums in the backs of their Volvos and Range Rovers, a roll of quarters in their pockets to fill up their backyard swimming pools and keep their lawns lush.

On a roll, MacDonald instructed the engineers to draw up plans for a Navajo version of the Central Arizona Project. But for all the talk about creating an irrigated agrarian utopia in the desert, the real idea, he allowed, was this: For decades, all the thirsty cities downstream had been using water - Navajo water - for free. Once the tribe won its water-rights claim, the cities could keep using the water - but only if they finally started paying the Indians for the use of what was rightfully theirs.

"We were ready to go to court" to win that water, MacDonald said. But the dream faded with his own arraignment, and the blueprints for the project apparently vanished into thin air. And now that he was

out of prison, all this business about a settlement with New Mexico was pissing him off. "It's like you had a hundred head of sheep, and somebody stole them from you," MacDonald said. "Finally, you find your sheep in somebody else's corral. So you go and say, 'Hey, these are my sheep! Look at the brands, look at the earmarks: They're all mine.' And the guy who stole them says, 'Let's have a settlement here. I'll give you three of these sheep back.' "

But even though the blueprints for an Indian CAP have gone missing, the *idea* still casts an enthralling spell over more than a few Navajos.

The rumors first came roaring up

eight years ago with the appearance of a mimeographed pamphlet, an open letter entitled "Lawyers, Water Rights, Betrayals and the Fate of the Navajo Nation." It was written in the name of a group called the Dine Sovereignty Defense Association, or DSDA. (Dine is the Navajo word for Navajo, and the group's acronym is pronounced "DEZ-duh.") Thanks to the fury of its leafleting campaign, I came to think of DSDA as a sort of Irish Republican Army, minus the bombs and kneecapping.

The letter, which did not mention Pollack by name, alleged that "one or more of the Nation's lawyers are secretly working for outsiders." The water rights issue "amounts to a national emergency for the Navajo people," it said. It asserted - with a phrase that recurred like the come-on in a Nigerian Internet scam - that a Navajo water claim "has a potential value of 100s of \$millions and more."

The author of the letter was a guy named Jack Utter, another *bilagaana* who is a hydrologist for the Navajo Nation's Water Resources Department in Fort Defiance, a couple miles north of Window Rock. Utter works out of a cramped office in the back of a mobile unit parked behind the water resources building - a forbidding spot that feels a little like Antarctica's McMurdo Station. Utter is animated by the thrill of conspiracy, and he keeps a copy of Paulo Freire's anti-imperialist screed *Pedagogy of the Oppressed*

- which largely draws its inspiration from the British colonization of India - close at hand.

In the years since he wrote the letter, Utter has become circumspect to the point of silence, but his theme of colonial victimization resonates deeply on the reservation. During the 1960s and 1970s - call it the high era of Western natural resources treachery - the tribe was cheated in a massive royalty deal with a company called Peabody Coal. Indian Country has also long grappled with the federal government's failure to honor its trust responsibility to the tribes. Elouise Cobell, a Blackfeet Indian woman, has doggedly fought for years to prove that the federal government mismanaged as much as \$176 billion in oil-and-gas royalties owed to Indians across the country.

But there was an added dimension here. Navajo grassroots groups like DSDA were also fighting against what they saw as a breach of trust at home. In 2003, Norman Brown, who was then president of a group called Dine Nationalists, told me that "when we talk about breach of trust, we talk about breach of trust within our own tribal organizations" - by which he meant the tribal government.

Not long after the Lawyers-and-Betrayal letter appeared in 2000, DSDA - as part of a broader grassroots coalition called Dine Bidziil, or Navajo Strength - called for major reform in the Navajo government. The groups weren't going after anyone with AK-47s, but they did seem to constitute a genuine insurgency.

Much of their wrath focused on the tribal council, but DSDA also targeted four white lawyers, including Pollack. The group placed an ad in the *Navajo Times*

that called the tribal government "a colonial government that is run by WHITE POWER" - this one did mention Pollack by name - and bumper stickers began to appear that read "Four Lawyers Out / Dine Freedom In."

People on both sides of the fight reported having their tires slashed and the lug nuts on their wheels loosened. There was an allegation that someone had slipped poisoned cough drops into a tribal council member's desk drawer. There were dark rumors that the *'adlaaniis*

- the notorious Navajo drunks - had been recruited into the fight. Several people made mention of witchcraft and "evil way" ceremonies secretly held in the remotest reaches of the reservation.

Finally, when the votes were counted in the 2000 tribal election, more than half of the council's 88 delegates were unseated. Pollack survived: After weathering subpoenas to appear before two tribal council subcommittees, he was exonerated from the charges in the Lawyers-and-Betrayals letter. The three other white lawyers left, however. Then DSDA and Dine Bidziil melted back into the shadows.

The annual tribal fair, held each September in Window Rock, is one of the few times when Navajos from across the reservation come together in one place. Last year, some of the old DSDA hands ran into each other there and shared concerns that their government had again grown complacent. Not long afterward, a tribal member named Ron Milford resurrected the fight with a letter to the *Navajo Times*

that insisted, "We must maximize Navajo water rights now."

A low-level war in the local newspapers followed, and I'm pretty sure Lena Fowler rolled her eyes when I happened to mention it. "They give an open mic to people like Ron Milford, and somehow he becomes credible enough for you to interview him," she said. "I'm tired of these one-sided stories where it's all about" - she switched to the Navajo word for "rumor" and repeated it like an incantation - "*jini, jini, jini*"

On a sloppy, miserable day, I went looking for Milford. He was in Tuba City, three hours from Window Rock, on the reservation's west side. I had just reached the ramshackle houses on the edge of town when another storm hit, and the world went *leezh lichii go' bilni'yol*

- a bloody maelstrom of red dust.

Half an hour later, I sat with Milford and another DSDA organizer named Max Goldtooth at a table in the back of a restaurant called The Hogan. Outside, the weather had turned again. Now it was *chiil bilni'yol*

: blowing snow like a mother. Forty minutes into our conversation, all the lights went out.

The three of us sat huddled in the back of the restaurant as the storm raged outside. "Our starting point should be 5 million acre-feet of water," Milford said. That was considerably less than Peter MacDonald's idea of a winning number, but it was still more water than the entire state of California is entitled to, and nearly twice as much as Arizona gets.

As Milford and Goldtooth talked, I could appreciate their resentment about water getting sucked away to fuel prosperity everywhere but on the Navajo Nation. Fifty-five miles north of us was the Navajo Generating Station, which burns Navajo coal and provides royalties for the tribe. But, Milford said, "All that power goes right to those big pumps (on the Colorado River) that pump water into the canals" - the Central Arizona Project's mainline - "and down to Phoenix and Tucson."

The tribe's quest to build its economy has been fitful, at best. Last year, the tribal council approved the Navajo Nation's first casino and began negotiating a \$100 million loan from JPMorgan Chase to finance the project. But the deal became controversial when the bank asked the tribe to pledge \$125 million worth of its assets as collateral.

"They have money here if they assert their water rights," Goldtooth said. "There's money flowing all around us. We're sittin' on a national treasure here."

When he said that, I could pretty well imagine the sound of a slot machine pumping out streams of quarters.

"If we had receipts from leasing water and stuff like that, we would be investing in our infrastructure," Milford continued. "We could pump a *lot*

of money into different things."

But instead, they watched as more and more of the river's water rolled away downstream. Just last year, the seven Colorado River states negotiated a new round of drought-protection agreements for themselves. "Now that global warming and everything has spanked them in the butt, they're over here divvying up what's *left*

," Milford said. "I bet they're just smiling from ear to ear because Navajo is not gonna file this big ol' claim for the water that we said we were entitled to."

Milford had, however, thought his way forward through the bitter paradoxes of the situation to a position of strategic advantage. Water demand from the seven states has been growing steadily since 1922. If the Navajo ever *did*

get the water, that mounting demand would make it even more valuable for the tribe.

There was a certain Red Power strain to Milford's argument, but he was also starting to sound an awful lot like a water broker. In fact, by this point he had thought his way pretty well into a supply-and-demand graph. "Two factors will raise the price of that water," Milford said: "Global warming. And drought."

His eyes lit up, and the slot machine in my head went nuts.

But after we paid for the meal, we went outside to discover that the world had turned to ice. Neither Milford nor Goldtooth had an ice-scraper in his truck, and Goldtooth snapped his I.D. card in half trying to scrape the frozen spackle off his windshield.

There is an aphorism

that occasionally bobs up in water circles and goes like this: The Navajos would rather have 100 percent of nothing than 50 percent of something.

It is an uncomfortable thing to hear, but it may hold some truth.

Back in the 1980s, after Peter MacDonald's engineers drew up the plans for an Indian Central Arizona Project, he spent several years trying to persuade the federal government to fund it. The Bureau of Reclamation repeatedly lowballed the cost estimate and, finally, Sen. Pete Domenici, R-N.M. - who is now co-sponsoring the Navajo-New Mexico settlement legislation - asked MacDonald to accept the lowball figure. MacDonald refused: "I said, 'If that's the case, we may have to do it ourselves.'"

That was roughly two decades ago, before MacDonald's trip to prison and everything that followed. When MacDonald and I talked in February, I asked how him how, exactly, he had planned to finance the project without federal help.

He answered that the tribe could take the seven Colorado River states to court for illegally using Navajo water. The tribe, he said, would *fine*

the states - "we'll charge them maybe 1 or 2 or 3 cents a gallon and add (that) all up." It wouldn't matter if it took 20 or even 30 years to resolve the case, he said: The Navajo Nation could request that the court require the states to put money in escrow until it was decided. MacDonald had deployed the strategy once already, when he sued Peabody Coal for lost royalties, and the tribe wound up with about a billion dollars.

Yet that strategy was not a sure-fire thing, and Lena Fowler's words echoed inside my head: "Some Navajos out there say, 'This is 100 percent ours,' " she'd said. "Let's say we claim all of that 100 percent. Now where are we going to get the money to put our water to use?" - to build the pipelines it would take to actually get water to people's homes.

"That's what a settlement does," Fowler said. "When you negotiate, that's what you're negotiating for."

In 2002, MacDonald's daughter, Hope MacDonald Lone Tree, was elected to the Navajo tribal council. Since then, she has shouldered her father's cause. Still, I couldn't help but think that the pair was marching their tribe down a cruel, hard trail: Toward a vision of water in the distance, without a pipe in sight.

When Pollack and I talked

in Window Rock, he had just returned from another negotiating session with water bosses from Arizona, Las Vegas and Southern California. "Nobody seemed to be happy," he said. "And when nobody's happy, it's usually a good sign. It means you're coming to 'yes.'"

But Pollack had also been thinking about the opposition he faces on the reservation. "People hear 'Winters,' " he said, "and (they) say: 'Well, Winters stands for the proposition that the tribes get all the water.' That's not what Winters says. It says that water was reserved to create a permanent homeland for tribes."

We talked about how the idea of practicably irrigable acreage lay at the heart of the whopping claims that Peter MacDonald and Ron Milford were calling for. "PIA has been sort of guiding doctrine in terms of trying to put together the basics for (previous Indian) claims," Pollack said. "But PIA isn't necessarily always consistent with a permanent homeland."

In fact, PIA looked more and more like an anachronism, a perverse insistence on turning Indians into farmers at exactly the same time that, in much of the West, agriculture is losing ground to cities. Relying on the principle to claim water - even if that water might ultimately be leased to cities downstream - seemed a problematic tactic.

That irony appeared to have been lost on Milford when we'd met at The Hogan, where he had conjured up the same sort of agro-utopian vision that Peter MacDonald had. In the 1960s, the Navajo had won Congressional approval of a big irrigation project near Farmington, N.M. Despite having been heavily subsidized by the federal government, the project only managed to squeak out a profit during the past couple of years. Maybe. Nobody could say that for sure, either. Still, Milford felt the project could be cloned all over the reservation. "There's a lot of open space out here," he'd said. "Down toward Leupp and all of that area? There's tons of flat property down there, you know? You can imagine fields running clear down to Winslow."

But I had talked with white farmers along the San Juan River who were losing money and had to work in the local oil-and-gas supply business to make ends meet. It was a little weird to hear Milford argue that his people's water claim should be calculated according to a standard that would give them enough water to farm their huge reservation. It struck me as an insistence on the Navajos' right to go broke.

Pollack suggested one practical alternative to PIA. In the Pacific Northwest, for instance, the "salmon

tribes" such as the Nez Perce and the Yakama have used their treaties to argue for water rights sufficient to protect the salmon runs on which they'd long depended. "What we've said is, 'Look at the fishing cases. Look at what the courts have done there. They've said the real key isn't PIA. The real key is the water necessary to create the permanent homeland.' "

In Navajo's case, Pollack said, mining was a far more realistic moneymaker than agriculture. But, he added, there was a more pressing issue. "In a settlement, you have to put the rhetoric aside and figure out what your goals and objectives are," he said. "And if your goal and objective is to get drinking water to people, claiming millions and millions of acre-feet of water doesn't get drinking water to the hogans."

Pollack regularly works extremely long hours, a habit that I couldn't help but think was a carryover from his days on the Peter MacDonald case. He keeps one of the "Four Lawyers Out" bumper stickers pinned up in his office, like a trophy. And it was clear that, despite Pollack's reluctance to talk about the attacks he'd weathered, they were something that was never far from his mind.

As I gathered my things to go, Pollack shifted into closing-arguments mode. "These are people that have had a lot stolen from them. And they've come up on the short end of the stick all the time," he said. MacDonald and his followers were, he conceded, hawking a pretty alluring vision. "It's this casino mentality of getting free money. If somebody comes along and says, 'Water is your casino' ... you know: 'Your water's worth billions of dollars, and if you just get rid of Pollack, you, too, can be a millionaire!'

"You know? They're like, 'Well, shit. Why *do*

we have this guy here? I want to be a millionaire.' "

Matt Jenkins is a contributing editor of High Country News. Leigh T. Jimmie is a freelance photographer in Sanders, Arizona, on the Navajo Nation.

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Add Comment

The trade a couple years ago to New Mexico was approx. 200,000 acre feet of San Juan River, Navajo water in return for a rural water system for much of the reservation.

Great trade for all really, with the Feds of course supposed to pay for that water infrastructure.

There is are special Fed Programs with the USDA which help /finance build rural water systems.

Those programs are USDA Rural Development, Water and Environmental Programs. Somehow it seems rather odd that several rural water systems for areas of the Navajo have not already begun construction even 25 years ago, with the current USDA programs in place since then.

I feel it will be fairly cost effective to actually build a Rural Navajo Water system. There are some Huge underground aquifers spaced at good locations throughout the reservation. The right drilling produces artesian wells in some spots too.

So it seems the key is to focus on those underground aquifer sources instead of river water for the system or systems (with water source locations spread out it cuts pipe laying costs by large amounts).

I think if the rural water system does not get serious soon the Navajo should simply keep the 200,000 acre feet of water they were going to trade for the system, and sell that water down the river.

Sell it to Arizona or Nevada, take the money and the Navajo finance and build their own rural water system.

Net affect is still positive for the Navajo because they get rural water.

The only loser is the State of New Mexico because they do not get the 200,000 acre feet of water. Keep in mind New Mexico could come to the bidding party and BUY the River water from the Navajo just like Arizona and Nevada can.

Reply

There is great fact here, weighed down by the writer's irrelevant personal opinion. Navajo Nation and the Puebloans have first right to water in the desert; water is worth more than gold to a thirsty man.

There are many that can see both sides to this never ending argument yet wish Mr. Pollack was more aggressive in his defense of Navajo Nation's inherent right. The job of a DOJ lawyer is to advise to the best of their ability for the interest of the nation, generations before and behind; the job of a leader is to direct the staff with vision. Mr. Pollack is not Dine', in a day and age when Navajo Nation homegrows sharp lawyers lost to the cities, it makes no sense not to trade up and send him out to pasture. Unfortunately Navajo Nation has lost leaders like MacDonald, that would fight for the nation against the Yei'ii Tso' of today.

Congrats to High Country for producing such thought provoking articles.

Reply

I agree that Matt Jenkins did seem to have a bias against the grassroots Dine folks on the outside of the tribal bureaucracy. And maybe the activists are a little unfair to the white lawyer - after all there are also Indian lawyers, water consultants and bureaucrats who are equally ready to cut deals.

In these water deals involving tribal rights the devil tends to be in the details. McDonald's inflated claim probably does not pass the legal laugh test but that begs the question: what is a realistic claim for the Navago Reservation? The article never approached this issue. Too bad.

Nor did it focus on the larger question of what role the people themselves - and not just those alive today but also the generations to come - should play in decisions whether and when to negotiate and what sort of deals to cut. When one looks closely at tribe-fed-state water deals across the West the missing element is the People. Where are the educational processes designed to empower the people to understand what is at stake, what is proposed and the alternatives? Where is the consultation with elders (those who speak for future generations)? And where are the referendums whereby the people can let their will be known?

If Mr. Pollack and the tribal leaders for whom he works are at fault it is because they have not taken the extra step of educating - and thereby empowering - the people. This is nothing new in Indian Country.

It is often the case that tribes do not do well when negotiating with feds, states and water interests behind closed doors. Democracy is a messier process but - when the people are empowered by unbiased education on the issues - they will do better than their elected leaders and the hired (often white) lawyers who negotiate in their name.

History will judge whether the (predominantly) white lawyers and consultants negotiating the current round of western water deals will be seen as heroes of Indigenous peoples or as representatives of a colonial power intent on extending the long history of appropriation of Indigenous resources by conquering societies. That judgment should not be based on ideology but rather on the specifics of the deals that are made and on whether the process of tribal approval is truly democratic.

Reply

An interesting side note of MacDonald's downfall coincides with his battle against Sen. Goldwater and the assassination of Don Bolles, an investigative reporter with the Arizona Republic and his research into plots to overthrow "the most powerful Indian in America." Some people claim MacDonald was victim of entrapment, set up ruthlessly by the federal government (BIA), Sen. Goldwater, and their Navajo allies in an attempt to stop MacDonald from continued successful litigation against powerful mining interests and banks from Phoenix, part of the so-called Phoenix 40. Those banks and business interests were more interested in dividing the Navajo and Hopi nations and seizing control of the coal and water rights in the Black Mesa region. Had MacDonald been able to continue a more aggressive approach to water back then one wonders what would have been the result today? Today our Navajo leaders beg to Congress and allow large companies and the federal government to rape our land and to call the shots on a right Navajo Nation and the Puebloans can lay first claim to.

Reply

Great news for the Navajo Tribe in NM. In 50 years when all the sun bathing whites in Phoenix are severely dehydrated from the over allocation of water in the Colorado River I bet the Navajo Tribe will hold their ancestral ground to farm with and drink the water that belongs to them.

I am white and I support the tribes getting their people out of poverty. The water rights will help them accomplish just that.

Jared Considine

Orange County, CA

Reply

In my opinion what matters here most is not how much water the Navajo have a right to, or how much they can prosper from it, but how much they really need to begin an economic upgrade on their reservation(s). They can begin proving how much they care for the cause by acquiring a new quarter machine where they retrieve their water. Then pave some of those roads that lead to it and back from wherever the residences are and so on and so forth. Maybe they could build a reservoir if it is viable. That would impress how much the water is needed there. Water litigation is a mostly terra incognita territory and can take forever to resolve especially for an Indian Nation nobody really notices or cares much about anyways living out there in there 100 year old hogans in the desert out there in no-mans land. Or maybe they'll be exemplary for this type of proceeding when water becomes really scarce.

Reply

At the time Bolles was murdered, there was also a petition against McDonald signed by a significant number of tribal representatives--rumors of vigilante groups were rampant and profoundly frightening. Bolles death served to enflame fear of cultural resistance to big money and Peabody Coal Company mining of deep aquifer waters and low sulfur coal for Las Vegas, et all. The depth of that patronizing deal with the Hopi and Navajo tribal councils "to help the Indians" is really in the cultural genocide of self-reliant peoples. Now, the result, mental illness, alcoholism, meth and dope, bitter self-deprecating humor and, ever present rumors and the psychological power of witchcraft.

But the conduct of respect and traditional knowledge has survived just as the truth always does. The memory of water as the gift of the Holy Ones is still expressed in the arts and poetry, in the schools, homes and the language.

Given all this, the fundamental point of water rights is " a permanent home." That means, as an elder sees it, healthy land, healthy mountains, healthy carpets of vegetation and animal life-and in turn healthy people. The health of the mountains, Black Mesa and its aquifers are the most fundamental goal of "practical irrigation" for the people to return to the peaceful times. The mountains are the reservoirs of springs of strength -- the pipes to communities can only supplement that deepest truth.

Reply

