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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

January 23, 2002

**MEMORANDUM**

TO: RON M. HARRIS  
PRESS OFFICER  
PRESS OFFICE

FROM: JOSEPH F. STOLTZ *JFS*  
ASSISTANT STAFF DIRECTOR  
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF THE FINAL AUDIT REPORT ON  
DEMOCRATIC PARTY OF NEW MEXICO

Attached please find a copy of the final audit report and related documents on Democratic Party of New Mexico that was approved by the Commission on January 8, 2002.

Informational copies of the report have been received by all parties involved and the report may be released to the public.

Attachment as stated

cc: Office of General Counsel  
Office of Public Disclosure  
Reports Analysis Division  
FEC Library

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**REPORT OF THE AUDIT DIVISION  
ON THE  
DEMOCRATIC PARTY OF NEW MEXICO**

Approved January 8, 2002



**FEDERAL ELECTION COMMISSION**

**999 E STREET, N.W.**

**WASHINGTON, D.C.**

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

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**REPORT OF THE AUDIT DIVISION  
ON THE  
DEMOCRATIC PARTY OF NEW MEXICO**

**EXECUTIVE SUMMARY**

The Democratic Party of New Mexico (the Committee) registered with the Federal Election Commission (the Commission) on September 17, 1982 and maintains its headquarters in Albuquerque, NM. The audit was conducted pursuant to 2 U.S.C. Section 438(b), which states that the Commission may conduct audits of any political committee whose reports fail to meet the threshold level of compliance set by the Commission. The findings of the audit were presented to officials at an exit conference held subsequent to the completion of fieldwork on March 2, 2000 and later in an interim audit report. The Committee's response to those findings is included in this final audit report. The following is an overview of the findings contained in the final audit report.

**RECEIPT OF APPARENT EXCESSIVE CONTRIBUTIONS** — 2 USC §§431(8)(A)(i), 441a(a)(1)(C), 11 CFR §§100.7(a)(1)(iii), 103.3(b)(3) and (4), 110.1(k). The audit identified excessive contributions from four individuals totaling \$9,600. In response to the interim audit report, the Committee refunded the excessive contributions. However, one refund check (\$4,000) has not been negotiated by the payee and remains outstanding.

**EXCESSIVE EXPENDITURES ON BEHALF OF A FEDERAL CANDIDATE** — 2 USC §§ 431(9)(A)(i), (17) and (18), 441a(a)(2)(A) and (d)(1), 434(b)(4)(H)(iii) and (6)(B)(iii), 441b and d(a), 11 CFR §§100.22(a), 100.17, 102.5(a)(1)(i), 106.1(a), 106.5(a). The Audit staff identified payments to vendors that appeared to be on behalf of a federal candidate and that totaled in excess of the coordinated expenditure limitation. Based on the Committee's response, the Audit staff concluded that payments totaling \$49,165 represented independent expenditures. The remaining payments, totaling \$72,829, represent the cost of a generic get-out-the-vote effort, not allocable to a specific candidate. As a result, the Committee did not exceed the coordinated expenditure limitation.

**SHARED FUNDRAISING EVENTS** — 11 CFR §§104.10(b)(2), (4), and (5). The Committee disclosed 6 shared fundraising events on Schedule H2 (Allocation Ratios). The Audit staff identified 2 additional shared fundraising events not disclosed on Schedule H2. The Committee could neither provide an accounting of the total receipts or disbursements for any of the shared fundraising events nor documentation supporting its

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calculation of the allocation ratios for those events disclosed on Schedule H2. In response to the interim audit report, the Committee provided documentation to support the allocation ratios and filed amended schedules that materially disclosed all shared fundraising activities.

**REPORTING OF JOINT FUNDRAISING PROCEEDS** — 11 CFR §§102.17(c)(8)(B) and (4)(ii). The Committee participated in separate joint fundraising activities with the Association of State Democratic Chairs/Dollars for Democrats and with the State Party Democratic Victory Fund. Although the Committee's reporting of the transfers of \$76,916 from these entities was materially correct, it did not in every case file memo Schedules A disclosing the associated contributors/contributions. In response of the interim audit report, the Committee filed the requested amended memo Schedules A.

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***REPORT OF THE AUDIT DIVISION  
ON THE  
DEMOCRATIC PARTY OF NEW MEXICO***

**I. BACKGROUND**

**A. AUDIT AUTHORITY**

This report is based on an audit of the Democratic Party of New Mexico (the Committee), undertaken by the Audit Division of the Federal Election Commission in accordance with the provisions of the Federal Election Campaign Act of 1971, as amended (the Act). The audit was conducted pursuant to Section 438(b) of Title 2 of the United States Code which states, in part, that the Commission may conduct audits and field investigations of any political committee required to file a report under Section 434 of this title. Prior to conducting any audit under this subsection, the Commission shall perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act.

**B. AUDIT COVERAGE**

The audit covered the period January 1, 1997 through December 31, 1998. The Committee reported a beginning cash balance on January 1, 1997 of \$1,114; total receipts for the audit period of \$2,111,225; total disbursements for the audit period of \$2,096,582; and an ending cash balance of \$15,757 on December 31, 1998.<sup>1</sup>

**C. CAMPAIGN ORGANIZATION**

The Committee registered with the Federal Election Commission on September 17, 1982 and maintains its headquarters in Albuquerque, NM. The treasurers during the period covered by the audit were Mr. Joseph Cervantes from May 8, 1995 to June 24, 1997 and Mr. Thomas Atcitty from June 25, 1997 through the end of the audit period. The current treasurer is Ms. Judy Baker.

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<sup>1</sup> All amounts presented in this report were rounded to the nearest dollar.

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To manage its financial activity, the Committee maintained five federal accounts and three non-federal accounts. The Committee was financed primarily through transfers from non-federal accounts for joint activity (\$1,482,245), contributions from individuals (\$285,455), transfers from affiliated/other party committees (\$261,900), and contributions from political action committees (\$75,600).

#### D. AUDIT SCOPE AND PROCEDURES

The testing of receipts from individuals with respect to contribution limitations and itemization on Schedules A (Itemized Receipts) was limited due to a lack of any formal aggregation system and the Committee's failure to maintain and/or provide a receipts database. The testing of disbursements with respect to itemization on disclosure reports and the allocation of shared federal/non-federal fundraising receipts and disbursements was also limited. Further, the Committee did not maintain records of all disbursements, i.e., there was no disbursement database or check register, nor did the Committee maintain complete records with respect to specific federal/non-federal fundraising events. With the above limitations considered, the audit included testing of the following general categories:

1. The receipt of contributions or loans in excess of the statutory limitations (Finding II.A.);
2. the receipt of contributions from prohibited sources, such as those from corporations or labor organizations;
3. proper disclosure of contributions from individuals, political committees and other entities, to include the itemization of contributions when required, as well as the completeness and accuracy of the information disclosed (Finding II.D.);
4. proper disclosure of disbursements including the itemization of disbursements when required, as well as the completeness and accuracy of the information disclosed;
5. proper disclosure of committee debts and obligations;
6. review of expenditures made on behalf of federal candidates (Finding II.B.);
7. the accuracy of total reported receipts, disbursements and cash balances as compared to committee bank records;
8. adequate recordkeeping of committee transactions;

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9. proper disclosure of the allocation of costs associated with administrative expenses and activities conducted jointly on behalf of federal and non-federal elections and candidates (Finding II.C.); and,
10. other audit procedures that were deemed necessary under the circumstances.

Unless specifically discussed below, no material non-compliance with statutory or regulatory requirements was detected. It should be noted that the Commission may pursue further any of the matters discussed in this report in an enforcement action.

A matter noted during the audit is pending before the Commission in another context. When the Commission concludes its consideration of this matter, information will be made public in accordance with Commission procedures.

## **II. AUDIT FINDINGS AND RECOMMENDATIONS**

### **A. APPARENT EXCESSIVE CONTRIBUTIONS**

Section 441a(a)(1)(C) of Title 2 of the United States Code states that no person shall make contributions to a political committee that is neither a candidate committee nor a national party committee in any calendar year which, in the aggregate, exceed \$5,000.

Section 431(8)(A)(i) of Title 2 of the United States Code states that the term "contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.

Section 100.7(a)(1)(iii) of Title 11 of the Code of Federal Regulations states, in part, that the term "anything of value" includes all in-kind contributions.

Section 103.3(b)(3) of Title 11 of the Code of Federal Regulations states, in part, that contributions which exceed the contribution limitations may be deposited into a campaign depository or returned to the contributor. If any such contribution is deposited, the treasurer may request redesignation or reattribution of the contribution by the contributor in accordance with 11 CFR 110.1(b) or 110.1(k). If a redesignation or reattribution is not obtained, the treasurer shall, within 60 days of the treasurer's receipt of the contribution, refund the contribution to the contributor.

Section 103.3(b)(4) of Title 11 of the Code of Federal Regulations states, in relevant part, that any contribution which appears to be illegal under 11 CFR 103.3(b)(3), and which is deposited into a campaign depository shall not be used for any disbursements by the political committee until the contribution has been determined to be legal. The political committee must either establish a separate account in a campaign depository for such contributions or maintain sufficient funds to make all such refunds.



Section 110.1(k) of Title 11 of the Code of Federal Regulations states, in part, that any contribution made by more than one person, shall include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing. A contribution made by more than one person that does not indicate the amount to be attributed to each contributor shall be attributed equally to each contributor. If a contribution to a candidate or political committee on its face or when aggregated with other contributions from the same contributor exceeds the limitations on contributions, the treasurer may ask the contributor whether the contribution was intended to be a joint contribution by more than one person. A contribution shall be considered to be reattributed to another contributor: (1) if the treasurer of the recipient political committee asks the contributor whether the contribution is intended to be a joint contribution by more than one person and informs the contributor that he or she may request a return of the excessive portion of the contribution if it is not intended to be a joint contribution; and, (2) within 60 days from the date of the treasurer's receipt of the contribution, the contributors provide a written reattribution of the contribution, which is signed by each contributor, and which indicates the amount to be attributed to each contributor if equal attribution is not intended.

The Audit staff's review of contributions, although limited by the lack of any formal aggregation system or receipts database, identified four apparent excessive contributions from four individuals, totaling \$9,600. The Committee did not deposit any of the excessive contributions into a separate account, nor consistently maintain sufficient funds to refund these contributions. However, one of the contributors was disclosed on Schedule D (Debts and Obligations) as being improperly deposited into the federal account.

During the exit conference, Committee representatives were provided with a schedule detailing the excessive contributions. One representative indicated that she thought the excessive contributions had been transferred to the non-federal account or refunded to the contributors.

Subsequent to the exit conference, the Committee provided documentation that demonstrated excessive contributions of \$4,600 had been transferred to the non-federal account in January and March, 2000 (well in excess of one year after receipt) and the remaining excessive contributions \$5,000 had been reattributed to another contributor. The reattribution occurred approximately 16 months after receipt rather than within the 60 day window provided in the regulations. Based on the records made available, the contributors associated with the \$4,600 transferred to the non-federal account were neither notified of the transfers nor advised that they could request a refund of the excessive amount. Notwithstanding the untimely actions on the part of the Committee, it is the opinion of the Audit staff that refunds to the original contributors relative to the \$9,600 in excessive contributions cited above remains necessary.

In the interim audit report, the Audit staff recommended that the Committee provide evidence and/or documentation that demonstrated the contributions were not excessive. Absent such evidence, it was further recommended that the Committee refund from the federal account the excessive contributions and provide evidence of such refunds (copies of the front and back of the negotiated refund checks). In the case of the excessive contributions transferred to a non-federal account, the Committee was encouraged to reverse these transfers. If sufficient funds were not available to make the refunds, the excessive contribution amounts should have been disclosed as debts owed to the contributors on Schedule D ( Debts and Obligations) until such time that funds became available.

With respect to the contribution that was misdeposited into its federal account, the Committee stated it is baffled as to why it is now being required to refund contributions that have already been disgorged from its federal account. Further, the Commission's procedures set forth at 11 CFR §§103.3(b)(3) and 110.1 are clearly not written to address committees that maintain both federal and non-federal accounts and on their face apply solely to candidate committees. The Committee also stated the Commission's Report Analysis Division notified the Committee that it may have deposited contributions that violated the law into its federal account and recommended a transfer out to its non-federal account or refund would be the appropriate courses of action.

With respect to the contribution that was reattributed untimely, the Committee stated, assuming, arguendo, that it should be permitted to mitigate any failure to receive such redesignation<sup>2</sup> by merely transferring the contribution to a non-federal account, rather than being required to refund the contribution to the contributor.

Finally, the Committee stated notwithstanding the above, it wants to see a swift resolution to this issue and has decided to follow the Audit staff's recommendation.

As previously stated, the Committee did not transfer the excessive portions of the contributions into its non-federal account until January and March 2000, well in excess of one year after receipt. The Committee's position that the Regulations at 11 CFR §§103.3(b) and 110.1 do not apply to party committees is incorrect. The Regulations at Section 103.3 address receipts deposited by a political committee, while Section 110.1(d) specifically addresses contributions made to other political committees (such as state party committees).<sup>3</sup> Conversely, it is the Audit staff's opinion that the Commission's position on a Treasurer's responsibility regarding the receipt of excessive contributions is clear and guidance has been provided in various contexts (see 11 CFR 103.3(b), 110.1(k) and the Campaign Guide for Political Party Committee, August 1996 at page 20).

<sup>2</sup> Redesignation is not an option available to state party committees. The contribution in question was reattributed to another contributor by the Committee.

<sup>3</sup> Section 110.1(b) of the Regulations specifically addresses contributions made to candidate committees.

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The Committee's position that even though the reattribution was not timely and it should be permitted to mitigate this matter by transferring the contribution to the non-federal account is also incorrect. The Regulations do not provide for such an option. Under 11 CFR §103.3(b)(3) if an excessive contribution is deposited, the treasurer may request reattribution of the contribution and if the reattribution is not obtained, the treasurer shall, within 60 days of receipt of the contribution, refund the contribution to the contributor.

The Committee provided documentation that it refunded the excessive contributions. However, one of the refund checks (\$4,000) has not been negotiated. The Committee sent a follow-up letter to the contributor on November 20, 2001. According to a Committee representative, there has been no response to the letter and the refund check remains outstanding. The Audit staff suggested that the Committee disgorge \$4,000 to the U.S. Treasury. The Committee representative advised the Audit staff that the Committee will not make a payment to the U.S. Treasury but will continue to attempt to contact the contributor.

#### **B. EXCESSIVE EXPENDITURES ON BEHALF OF A FEDERAL CANDIDATE**

Section 431(9)(A)(i) of Title 2 of the United States Code states, in part, that the term "expenditure" includes any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office.

Section 431(17) of Title 2 of the United States Code states, in part, that the term "independent expenditure" means an expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made without cooperation or consultation with any candidate.

Section 100.22(a) of Title 11 of the Code of Federal Regulations states, in part, that the term *expressly advocating* means any communication that uses phrases such as "vote for the President," or "support the Democratic nominee" or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s).

Section 431(18) of Title 2 of the United States Code states that the term "clearly identified" means that (A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference.

Section 100.17 of Title 11 of the Code of Federal Regulations states, in part, that the term *clearly identified* means the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as

“the Democratic presidential nominee” or “the Republican candidate for Senate in the State of Georgia.”

Section 441a(a)(2)(A) of Title 2 of the United States Code states that no multicandidate political committee shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000.

Section 441a(d)(1) of Title 2 of the United States Code states, in part, that a State committee of a political party may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in 2 U.S.C. 441a(d)(3).

Section 102.5(a)(1)(i) of Title 11 of the Code of Federal Regulations states, in part, that each organization, including a party committee, which finances political activity in connection with both federal and non-federal elections may establish a separate federal account in a depository in accordance with 11 CFR part 103. Such account shall be treated as a separate federal political committee which shall comply with the requirements of the Act. Only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate federal account. All disbursements, contributions, expenditures and transfers by the committee in connection with any federal election shall be made from its federal account. No transfers may be made to such federal account from any other account(s) maintained by such organization for the purpose of financing activity in connection with non-federal elections, except as provided in 11 CFR 106.5(g).

Section 106.1(a) of Title 11 of the Code of Federal Regulations states, in part, that expenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. An expenditure made on behalf of more than one clearly identified federal candidate shall be reported pursuant to 11 CFR 104.10(a).

Section 434(b)(4)(H)(iii) and (6)(B)(iii) of Title 2 of the United States Code states, in part, that for any political committee other than an authorized committee, each report filed under this section shall disclose the name and address of each person who receives any disbursement during the reporting period in an aggregate amount or value in excess of \$200 within the calendar year in connection with an independent expenditure by the reporting committee, together with the date, amount, and purpose of any such independent expenditure and a statement which indicates whether such independent expenditure is in support of, or in opposition to, a candidate, as well as the name and office sought by such candidate, and a certification, under penalty of perjury, whether such independent expenditure is made in cooperation, consultation, or concert, with, or at the request or suggestion of, any candidate or any authorized committee or agent of such committee.

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Section 441d(a) of Title 2 of the United States Code states, in part, that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall clearly state who paid for the communication and whether the communication was authorized by a candidate, or an authorized political committee of a candidate.

Section 106.5(a) of Title 11 of the Code of Federal Regulations states, in part, that party committees that make disbursements in connection with federal and non-federal elections shall make those disbursements entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5. Political committees that have established separate federal and non-federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate expenses between those accounts according to this section. Committees shall allocate expenses for the following categories of activity: administrative expenses including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate; the direct costs of a fundraising program where federal and non-federal funds are collected; state and local party activities exempt from the definitions of *contribution* and *expenditure* under 11 CFR 100.7(b) (9), (15) or (17), and 100.8(b) (10), (16) or (18) (*exempt activities*); and generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

Section 441b of Title 2 of the United States Code states, in part, that it is unlawful for any national bank, corporation, or labor organization to make a contribution or expenditure in connection with any election at which a Representative in Congress is to be voted for.

#### Expenditures On Behalf of Tom Udall

In the state of New Mexico, the coordinated expenditure limitation applicable to the Committee for a congressional candidate in the 1998 general election was \$32,550. The Democratic Congressional Campaign Committee (DCCC) could have also made coordinated expenditures totaling \$32,550 on behalf of the same candidate. By letter dated October 9, 1998, the DCCC assigned up to \$30,000 of its coordinated expenditure limitation<sup>4</sup> to the Committee for the sole purpose of making expenditures on behalf of Tom Udall.<sup>5</sup> Accordingly, the Committee had a "combined 2 U.S.C. §441a(d)(3) limit" on behalf of Tom

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<sup>4</sup> The Committee did not have a copy of the document which designated the DCCC as agent of the Democratic National Committee for purposes of making coordinated expenditures on its behalf. However, reports filed by the DCCC contain the following language: This Committee has been designated to make coordinated expenditures by the Democratic National Committee.

<sup>5</sup> Tom Udall was the Democratic candidate for the United States House of Representatives, from the State of New Mexico, 3<sup>rd</sup> District, for the 1998 election.

Udall of \$62,550. It should be noted that the Committee reported an expenditure on behalf of Tom Udall pursuant to 2 U.S.C. §441a(d)(3) in the amount of \$30,000, while the DCCC reported making expenditures pursuant to 2 U.S.C. §441a(d)(3) on behalf of Tom Udall totaling \$23,155. It is not clear why the DCCC assigned almost all of its limit to the Committee and then reported making the above expenditures.

Additional expenditures made on behalf of Tom Udall included:

**1. Terris & Jaye Political Media & Strategy**

The Audit staff identified 6 disbursements made from the Committee's federal account to Terris & Jaye Political Media & Strategy (Terris & Jaye) and the U. S. Postal Service totaling \$49,165 relative to printing and postage costs for 3 brochures. The Committee disclosed the purpose for 5 of the payments as exempt activities. One payment for \$11,209 was not reported. Records provided by the Committee included invoices from Terris & Jaye and copies of the 3 brochures. The brochures discussed the differences between Bill Redmond and Tom Udall, (opposing candidates vying for the 3rd Congressional District seat) and urged the reader to vote for Tom Udall. The records made available to the Audit staff did not appear to contain any indication that coordination between the Committee and the candidate or his authorized committee had occurred.

The invoices included the following:

Payment must be received before mail drops. Price includes copy, design, concept photography, pre-press, printing, labels, labeling, mail house, sales tax and shipping.

In order for such payments to be considered exempt from the definition of expenditure, the use of volunteers with respect to the mailing of the brochures must be established.

At the exit conference the Committee was provided with details pertaining to the Terris & Jaye payments. In response, the Committee provided a signed statement from one of the owners of Terris & Jaye, who related that he had supervised production of the 3 mail pieces. He further stated:

"It was the intention of the Democratic Party of New Mexico that volunteers would be involved in the mailing of the brochures so that the activity would be 'exempt' as that term is defined by the Federal Election Commission. We understood that to qualify as exempt volunteers had to affix the mailing labels to the brochures, sort the mailings into trays and bundle the mail. When the brochures were ready to be delivered to Albuquerque, I would contact a representative of the party so that

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volunteers could be recruited to do the tasks described above. It was my understanding that volunteers were, in fact, used in connection with these mailings.”

While the above statement sets forth the vendor’s understanding of the Committee’s intentions concerning the use of volunteers, it does not demonstrate nor provide evidence that volunteers were actually used.

Further, the Committee provided pictures of two unidentified individuals who appear to be handing bulk mail and a picture of one of the individuals holding a copy of one of the three brochures. Both individuals have Tom Udall stickers attached to their attire.

In the interim audit report, the Audit staff recommended the Committee provide evidence that demonstrated the expenditures in question were not coordinated expenditures made on behalf of Tom Udall. This documentation should have included affidavits from volunteers and/or Committee personnel who had personal knowledge pertaining to these mailings, and statements from Terris & Jaye that explained the invoices that included such terms as “printing, labels, labeling and mail house.” In the absence of such evidence, the aforementioned expenses, totaling \$49,165, would be viewed as expenditures on behalf of Tom Udall or contributions to his campaign for election. In addition, the Audit staff recommended the Committee file the appropriate amended Schedule B to disclose the disbursement of \$11,209.

In response to the interim audit report, the Committee stated that the affidavit provided in response to the exit conference from Eric Jaye, consultant for the Committee, and pictures of volunteers, was a diligent effort to demonstrate volunteer involvement with the mailings undertaken by Terris & Jaye. The Committee further stated that the documentation provided at the time of the exit conference represented their effort to obtain sufficient documentation, and it was unlikely that the Committee can provide any further documentation. Further, the Committee stated, that the documentation provided at the time of the exit conference was sufficient to demonstrate the required level of volunteer involvement in mailings produced by Terris & Jaye.

With respect to the affidavit from Eric Jaye of Terris & Jaye, the interim audit report was clear as to why the affidavit did not demonstrate nor provide evidence that volunteers were actually used. As stated, the affidavit merely reduced to writing Mr. Jaye’s understanding of the Committee’s intentions with respect to volunteer use. More importantly, the Committee’s response did not address the Terris & Jaye invoices that described the service provided as printing, labels, labeling and mail house, all of which indicate that volunteers were not used. In view of the above, pictures made available relative to only one of the three mailing is not sufficient to demonstrate the use of volunteer activity.

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Finally, the Committee filed an amended Schedule B to include the \$11,209 payment to Terris & Jaye that had not been reported.<sup>6</sup>

Based on the above, the Audit staff has concluded the aforementioned expenses to Terris & Jaye, totaling \$49,165, cannot be viewed as exempt. Further, absent evidence of coordination these expenses cannot be charged to the limitation at 2 U.S.C. §441a(d)(3). Therefore, the expenses can only be viewed as independent expenditures (in favor of Tom Udall) that should have been reported on Schedule E (Independent Expenditures). These expenses were paid from the federal account.

## 2. Burnside and Associates

The Audit staff identified a payment to Burnside and Associates for \$33,329. The Committee disclosed this payment on Schedule H4 (Joint Federal/Non-federal Activity Schedule) and allocated the expense between the federal and non-federal accounts based on the ballot composition ratio. The reported purpose was "generic party mailing (encouragement to Vote Democratic)." The vendor invoice, dated October 27, 1998, attached to a copy of the Committee's check (\$33,329) documented only a portion of this payment (\$14,500 for canvass and staff). There was no invoice or other vendor generated documentation for the remainder (\$18,829).

Further, another invoice in the amount of \$39,500, dated September 1, 1998, indicated that a \$14,500 payment had been made relative to a project identified as "AV Mail (Printing and Postage)". The remainder of the invoiced amount appears to be related to the production of the "AV Mail." This payment (\$14,500) was disclosed on Schedule H4 and allocated based on the ballot composition ratio; the reported purpose was "Political Consultant."

In response to our request for a sample of the "AV Mail," the Committee provided a copy of the same invoice, with the words "Tom Udall Door Hanger" hand printed on the invoice along with a copy of a door hanger. Information pertaining to the hours of operation for polling places was included as well as a picture of Tom Udall, the words - Tom Udall, U.S. Congress, and the statement "It would be a honor and a privilege to serve you in Congress and I ask for your support."

<sup>6</sup> The Committee stated that in May 2000, the Tenth Circuit Court of Appeals declared 2 U.S.C. Section 441a(d)(3) unconstitutional. FEC v. Colorado Republicans Federal Campaign Committee, 213 F.3d 1221 (10<sup>th</sup> Cir.), cert. granted, 148 L.Ed 238 (2000), argued on February 28, 2001. The Committee also stated that although the Commission has appealed this decision to the Supreme Court, the Commission did not seek a stay from the Circuit Court. Further, since New Mexico is within the 10<sup>th</sup> Circuit, the Commission is precluded from pursuing any violation of 441a(d)(3) against the DPNM unless, and until the Supreme Court reverses this decision. The recent Supreme Court decision which held that the coordinated party expenditure limits at 2 U.S.C. Section 441 a(d)(3) are constitutional renders the Committee argument moot.

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At the exit conference, Committee representatives were provided with a schedule and were requested to provide documentation in support of the \$33,329 payment and clarification pertaining to the Tom Udall door hanger.

Subsequently, the Committee stated the following:

“Please note that all activities undertaken by Burnside & Associates were for generic get-out-the-vote activities, including voter registration and absentee ballot efforts... Please note that it is our understanding that the ‘Udall door hanger,’ which was attached to a Burnside invoice forwarded to the [Committee] was attached to that invoice in error, and that the door hanger was paid for directly by the Udall campaign... Furthermore, the written notation of ‘Udall door hanger’ on a Burnside invoice was a notation made by [a] current [Committee] staff member ... which was made during the FEC audit process, and was not a notation made by either Burnside, or any [Committee] staff member during 1998.”

The Committee also provided a statement signed by the staff member acknowledging she mistakenly wrote “Tom Udall door hanger” on the invoice.

It should be noted that a review of the disclosure reports filed by the Udall for Us All Committee, the authorized committee for Tom Udall, for the period July 1, 1998 to December 31, 1999, failed to identify any payment to Burnside and Associates.

In the interim audit report, the Audit staff recommended that the Committee provide documentation in support of the \$18,829 portion of the \$33,329 payment, along with clarification from the Udall for Us All Committee pertaining to the Tom Udall door hanger and a sample copy of the “AV Mail.” Absent vendor-generated documentation (supporting the payment of \$18,829) which should have included sample copies of printed materials, if any, and a sample copy of the “AV Mail,” as well as further clarification and evidence concerning the use of volunteers, the aforementioned expenses, totaling \$72,829, would be viewed as either coordinated expenditures on behalf of Tom Udall or contributions to his campaign for election or independent expenditures.

In response to the interim audit report, the Committee reiterates that it did not request, authorize or pay for this door hanger and that the absentee ballot program was generic in nature and did not advocate the election or defeat of any federal candidates. The Committee subsequently provided an affidavit from the former Chairperson stating that he has personal knowledge of the coordinated campaign run by the Committee in 1998. The affidavit further states that he never authorized – and would not have authorized – preparation of a candidate-specific door hanger such as this by the coordinated campaign and that this was not authorized or paid for by the coordinated campaign of the Committee.

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The affidavit in conjunction with documentation made available in response to the interim audit report demonstrated that the vendor prepared and distributed absentee ballot applications and coordinated a telephone and in-person canvassing program in an effort to identify likely Democratic voters.

The Audit staff agrees that mailing related to the absentee ballot applications represents a generic get-out-the-vote effort, not allocable to a specific candidate. With respect to the telephone and in-person canvassing program, the Committee provided a copy of the "Canvass Walk Script." The purpose of the script appears to be twofold. The initial effort is to give a potential voter a vote-by-mail application, but only if he/she is willing to support the Party's candidate. Potential voters who state they will not support the Party's candidate or are undecided are not given a vote-by-mail application. The second phase of this effort is to poll the "undecided" and "no" potential voters as to whether they will vote for the congressional candidate (Tom Udall), its candidate for Governor, Supreme Court Justice or State Auditor. Each candidate for the above offices is named. A tally is kept of each potential voter that indicates he or she will vote for a particular candidate.

As previously stated, the records made available to the Audit staff during fieldwork did not appear to contain any indication that coordination between the Committee and the candidate or his authorized committee had occurred. Even though the secondary purpose of the "Canvass Walk Script" is candidate specific there is still no evidence of express advocacy. Therefore, it is the opinion of the Audit staff that the cost represents a generic get-out-the-vote effort, not allocable to a specific candidate and, that the Committee has not exceeded the 2 U.S.C. 441a(d)(3) limitation.

### C. SHARED FUNDRAISING EVENTS

Section 104.10(b)(2) of Title 11 of the Code of Federal Regulations states, in part, that a political committee that has established separate federal and non-federal accounts shall allocate between those accounts its costs for fundraising according to 11 CFR 106.5 and in each report disclosing a disbursement for the direct costs of a fundraising program or an exempt activity, the committee shall state the allocation ratio calculated for the program or activity and shall explain the manner in which the ratio was derived.

Section 104.10(b)(4) of Title 11 of the Code of Federal Regulations states, in part, that a political committee that pays allocable expenses shall also report each disbursement from its federal account or its separate allocation account in payment for a joint federal and non-federal expense or activity. In the report covering the period in which the disbursement occurred, the committee shall state the full name and address of each person to whom the disbursement was made, and the date, amount and purpose of each such disbursement. If the disbursement includes payment for the allocable costs of more than one activity, the committee shall itemize the disbursement, showing the amounts designated for

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payment of administrative expenses and generic voter drives, and for each fundraising program or exempt activity. The committee shall also report the total amount expended by the committee that year, to date, for each category of activity.

Section 104.10(b)(5) of Title 11 of the Code of Federal Regulations states that the treasurer shall retain all documents supporting the committee's allocated disbursements for three years, in accordance with 11 CFR 104.14.

The Committee disclosed 6 shared fundraising events on Schedule H2 (Allocation Ratios). The Audit staff identified 2 additional events (The Ron Brown Fundraiser and the Rio Grand Group Lunches); the respective contributions were deposited into both federal and non-federal accounts. The Committee did not disclose either event on Schedule H2.

The Committee could not provide an accounting of the total receipts or disbursements for any of the shared fundraising events. Nor could the Committee provide documentation supporting its calculation of the allocation ratios for those events disclosed on Schedule H2. The Audit staff identified event expenses that were disclosed on Schedules H4 and allocated between the federal and non-federal accounts based on both the event allocation ratio (disclosed on Schedule H2) and the ballot ratio (disclosed on Schedule H1).

Committee representatives were provided with schedules detailing the shared fundraising events. Subsequently, the Committee provided a written response in which they related "[t]he [Committee] is continuing to search for information that will document the calculation of the fundraising ratios utilized for fundraising activity during the 1998 election cycle."

In the interim audit report, the Audit staff recommended that the Committee provide the following:

- an accounting of all shared fundraising receipts, including workpapers identifying deposits made to the federal and non-federal accounts;
- an accounting of all shared fundraising expenses;
- detailed workpapers supporting the correct allocation ratio for each shared fundraising event, including the Ron Brown Fundraiser and the Rio Grand Group Lunches; and,
- based on the above, the Committee, within the same 30 day period, file amended Schedules H2 and H4 as appropriate.

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In response to the interim audit report, the Committee provided a spreadsheet that identified 10 shared fundraising events, including the Ron Brown Fundraiser and Rio Grande Group Lunches. The spreadsheet included: the event name; event date; total federal and non-federal receipts; and, total federal and non-federal expenses. In addition, the Committee provided a detailed schedule of all receipts, disbursements and the allocation ratio for each event. The detailed schedules were supported with copies of deposit information and contributor checks.

Finally, the Committee provided amended Schedules H2 and Schedules H4 that based on the documentation made available in response to the interim audit report materially disclosed the Committee's shared fundraising activities.

#### **D. REPORTING OF JOINT FUNDRAISING PROCEEDS**

Section 102.17(c)(8)(B) of Title 11 of the Code of Federal Regulations states that after distribution of net proceeds, each political committee participating in a joint fundraising activity shall report its share of net proceeds received as a transfer-in from the fundraising representative. Each participating political committee shall also file a memo Schedule A itemizing its share of gross receipts as contributions from original contributors to the extent required under 11 CFR 104.3(a).

Section 102.17(c)(4)(ii) of Title 11 of the Code of Federal Regulations states that the fundraising representative shall collect and retain contributor information with regard to gross proceeds as required under 11 CFR 102.8 and shall also forward such information to participating political committees. The fundraising representative shall also keep a record of the total amount of contributions received from prohibited sources, if any, and of all transfers of prohibited contributions to participants that can accept them.

The Committee participated in separate joint fundraising activities with the Association of State Democratic Chairs/Dollars for Democrats (ASDC) and with the State Party Democratic Victory Fund (VF). The Committee received a number of transfers from these entities totaling \$33,416 and \$43,500 respectively, representing its share of the net proceeds from each joint fundraising activity. Although the Committee materially reported the transfers, it did not in every case file memo Schedules A disclosing the associated contributors/contributions.

In the interim audit report, the Audit staff recommended that the Committee file amended memo Schedules A by reporting period related to joint fundraising activities with ASDC and VF.

In response to the interim audit report, the Committee filed the requested amended memo Schedules A.

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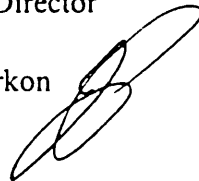


FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20461

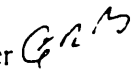
November 20, 2001

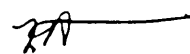
MEMORANDUM


TO: Robert J. Costa  
Deputy Staff Director

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton  
General Counsel

BY: Gregory R. Baker   
Acting Associate General Counsel

Lorenzo Holloway   
Assistant General Counsel

Susan L. Kay   
Attorney

SUBJECT: Proposed Final Audit Report on the Democratic Party of New Mexico  
(LRA# 573)

I. INTRODUCTION

The Office of General Counsel reviewed the proposed Final Audit Report on the Democratic Party of New Mexico ("the Committee") submitted to this Office on October 19, 2000. The following memorandum summarizes our comments on the proposed Report.<sup>1</sup> We concur with the findings in the proposed Report that are not discussed in the following memorandum. If you have any questions, please contact Susan Kay, the attorney assigned to this audit.

<sup>1</sup> The Office of General Counsel recommends that the Commission consider this document in open session since the report does not include matters exempt from public disclosure. See 11 C.F.R. § 2.4.

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## II. EXCESSIVE EXPENDITURES ON BEHALF OF FEDERAL CANDIDATES (Finding II.B.)

The Committee made six disbursements from its federal account for costs associated with printing and postage for three brochures that urged the reader to vote for Tom Udall, the Democratic candidate for Congress from New Mexico, 3<sup>rd</sup> District, in the 1998 election. These disbursements, totaling \$45,165, were made to Terris & Jaye Political Media & Strategy (Terris and Jaye) and the United States Postal Service.

The Committee reported these expenditures as exempt activity. However, the Audit Division concludes that these disbursements do not constitute exempt activity since the Committee did not show that volunteers were used with respect to the mailing. Section 100.8(b)(16)(iv) requires that volunteers distribute campaign materials in order for an activity to qualify as exempt. See 11 C.F.R. § 100.8(b)(16)(iv). Invoices from Terris and Jaye provided to the Audit Division state that “[p]ayment must be received before mail drops. Price includes copy, design, concept photography, pre-press, printing, labels, labeling, mail house, sales tax and shipping.” The Audit Division believes that this indicates that Terris and Jaye was responsible for distributing the campaign materials. According to the Committee’s response to the Interim Audit Report, it provided an affidavit from an owner of Terris and Jaye stating that volunteers were used for the mailings.<sup>2</sup> The Committee’s response also indicates that it submitted photographs of volunteers that were used in connection with the mailings. However, nothing was submitted to explain the invoices and the Audit Division believes the statement by Terris and Jaye only sets forth the vendor’s understanding of the Committee’s intentions, but does not demonstrate that volunteers were actually used.

This Office agrees that the available evidence is insufficient to show the Committee used volunteers. This Office notes that in addition to setting forth the Committee’s intentions, the statement submitted by Terris and Jaye indicates it was the owner’s understanding that volunteers were used in connection with the mailings. However, Terris and Jaye does not have any personal knowledge as to whether volunteers were used to distribute the campaign materials. In addition, this Office notes that the invoice does not conclusively demonstrate that Terris and Jaye actually distributed the campaign materials. Nevertheless, the Committee does not adequately explain the

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<sup>2</sup> The statement by Terris states:

It was the intention of the Democratic Party of New Mexico that volunteers would be involved in the mailing of the brochures so that the activity would be ‘exempt’ as that term is defined by the Federal Election Commission. We understand that to qualify as exempt volunteers had to affix the mailing labels to the brochures, sort the mailing into trays and bundle the mail. When the brochures were ready to be delivered to Albuquerque, I would contact a representative of the party so that volunteers could be recruited to do the tasks described above. It was my understanding that volunteers were, in fact, used in connection with these mailings.

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language in the invoice that leads the Audit Division to believe that Terris and Jay distributed the campaign materials.

Further, this Office understands from the Audit Division that the photographs submitted by the Committee are not sufficient to show that volunteers were used for these mailings. However, the proposed Audit Report does not discuss the photographs. Because the Committee submitted the photographs as evidence to show that volunteers were used to distribute the campaign materials, this Office believes the photographs should be discussed in the Report. Therefore, this Office advises the Audit Division to revise the Audit Report to describe the photographs that were submitted and evaluate whether they show that volunteers were used with respect to this mailing.<sup>3</sup>

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<sup>3</sup> Since the Audit Division concludes that the expenditures on behalf of federal candidates at issue are independent expenditures (Terris and Jaye) and generic expenditures (Burnside), the Office of General Counsel recommends that the Audit Division remove the language on page 9 that states the expenditures "appear to be either coordinated expenditures made on behalf of Tom Udall or contributions to his campaign for election." This language is inconsistent with the Audit Division's final conclusions with respect to these expenditures.

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FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

January 15, 2002

Ms. Judy Baker, Treasurer  
Democratic Party of New Mexico  
5317 Menaul Blvd, NE  
Albuquerque, NM 87110

Dear Ms. Baker:

Attached please find the Report of the Audit Division on the Democratic Party of New Mexico. The Commission approved the report on January 8, 2002.

The Commission approved Final Audit Report will be placed on the public record on January 23, 2002. Should you have any questions regarding the public release of the report, please contact the Commission's Press Office at (202) 694-1220. Any questions you have related to matters covered during the audit or in the report should be directed to Mary Moss or Thomas J. Nurthen of the Audit Division at (202) 694-1200 or toll free at (800) 424-9530.

Sincerely,

A handwritten signature in black ink, appearing to read "Joseph F. Stoltz".

Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

Attachment as stated

cc: Neil P. Reiff, Counsel

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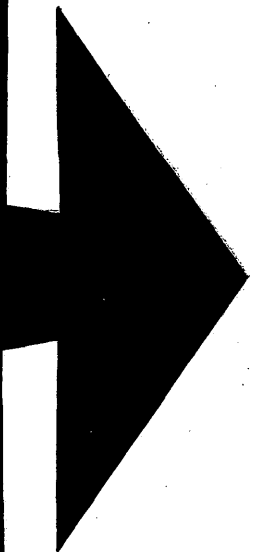
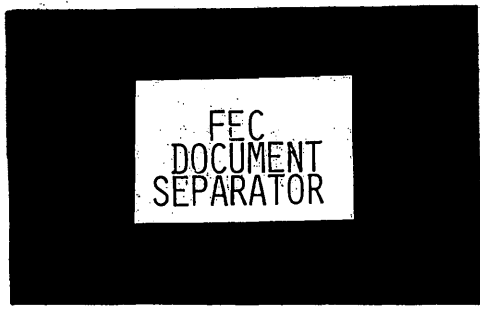
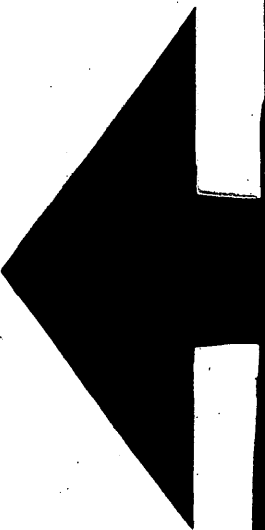
CHRONOLOGY

DEMOCRATIC PARTY OF NEW MEXICO

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|--|------------------|
| Audit Fieldwork                                  | 10/25/99 -3/2/00 |
| Interim Audit Report to<br>the Committee         | 2/8/01           |
| Response Received to the<br>Interim Audit Report | 4/17/01          |
| Final Audit Report<br>Approved                   | 1/8/02           |

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FEC  
DOCUMENT  
SEPARATOR