

December 5, 2003, Discussion Draft – Navajo Nation Water Rights Settlement

Disclaimer. It is expressly understood that the governing bodies or authorities of the proposed signatories have not approved this draft settlement agreement, including the draft partial final decree, draft settlement act, draft settlement contract and draft executive summary. The New Mexico Interstate Stream Commission staff prepared the draft depletion schedule. These draft documents are provided for discussion purposes only.

SAN JUAN RIVER BASIN IN NEW MEXICO

NAVAJO NATION WATER RIGHTS SETTLEMENT AGREEMENT

NOTE: The following settlement concepts and any other written or oral communications are covered by Rule 408 of the New Mexico and Federal Rules of Evidence.

This Agreement is entered into as of the dates executed below, by and among the State of New Mexico, the United States of America, acting through the Secretary of the Interior, and the Navajo Nation.

1.0 RECITALS

- 1.1 Proceedings to determine the nature and extent of the rights to water of the Navajo Nation in the San Juan River Basin in New Mexico are pending in the San Juan River Adjudication.
- 1.2 Recognizing that final resolution of the proceedings in the San Juan River Adjudication may take many years, entail great expense, prolong uncertainty concerning the availability of water supplies, and seriously impair the long-term economic well-being of all water users in the San Juan River Basin in New Mexico, the Parties to this Agreement desire to arrive at a settlement regarding the water rights of the Navajo Nation and to seek entry of a partial final decree of

those rights in the San Juan River Adjudication, setting forth the Navajo Nation's right to use and administer waters of the San Juan River Basin in New Mexico.

1.3 In fulfillment of its trust responsibility to Indian tribes and to promote tribal sovereignty and economic self-sufficiency, it is the policy of the United States to settle water rights claims of Indian tribes without lengthy and costly litigation.

1.4 This settlement will secure to the Navajo Nation a perpetual water supply in the San Juan River Basin of New Mexico.

NOW, THEREFORE, in consideration of mutual and dependent covenants and conditions contained herein that each Party acknowledges inures to its respective benefit, the State of New Mexico, the Navajo Nation and the United States agree as follows:

2.0 DEFINITIONS

As used in this Agreement, the term:

2.1 "Act" or "Settlement Act" means the proposed San Juan River Basin in New Mexico Water Projects and Settlement Act, a copy of which is attached at Appendix 2;

2.2 "Agreement" or "Settlement Agreement" means this Agreement and the three Appendices hereto, which are incorporated herein by this reference;

2.3 "Allottees" means individual members of the Navajo Nation for whom the United States holds in trust title to lands allotted by public land orders or otherwise;

2.4 "Contract" or "Settlement Contract" means a contract between the United States and the Navajo Nation setting forth certain commitments, rights, and obligations of the United States and the Navajo Nation in providing for the resolution of all

water rights claims of the Navajo Nation to waters of the San Juan River Basin in New Mexico, a copy of which is attached at Appendix 3;

- 2.5 “Navajo Dam and Reservoir” means Navajo Dam and the reservoir created by the impoundment of the San Juan River at Navajo Dam as authorized by the Act of Congress of April 11, 1956, the Colorado River Storage Project Act, Public Law 84-485 (70 Stat. 105), as amended;
- 2.6 “Navajo-Gallup Water Supply Project” means the Project substantially described in the March 2001 technical memorandum for the Project prepared by the Navajo Nation Department of Water Resources and the April 2002 appraisal report for the Project prepared by the United States Bureau of Reclamation, as conditioned, modified and limited by the Settlement Act;
- 2.7 “Navajo Lands” means lands set aside as reservation lands for the Navajo People, whether by treaty, statute, executive order or public land order. Also included in this definition are lands that are held in trust for the Navajo Nation by the United States, held in trust for members of the Navajo Nation by the United States, or held in fee ownership by the Navajo Nation;
- 2.8 “Navajo Nation” means a body politic and federally-recognized Indian nation as provided for in section 101(2) of the Federally Recognized Indian Tribe List of 1994 (Public Law 103-454, 25 U.S.C. 497a(2)), also known variously as the “Navajo Tribe,” the “Navajo Tribe of Arizona, New Mexico & Utah,” and the “Navajo Tribe of Indians” and other similar names, and includes all bands of Navajo Indians and chapters of the Navajo Nation;

- 2.9 “Partial Final Decree” means a final and binding judgment and decree entered by the Court in the San Juan River Adjudication setting forth the rights of the Navajo Nation to use and administer waters of the San Juan River Basin in New Mexico, the form of which is attached as Appendix 1;
- 2.10 “Parties” means the State of New Mexico, the United States and the Nation;
- 2.11 “Report” means the Joint Hydrographic Survey Report prepared by the United States and the State of New Mexico to determine certain reserved rights of the Navajo Nation and the Navajo Nation’s rights acquired under state law, as called for by paragraphs 6 and 7 of the Partial Final Decree, respectively, and to provide the information required to administer subparagraph 3.4 of this Agreement;
- 2.12 “San Juan River Adjudication” means the general stream adjudication of the San Juan River Basin in New Mexico being determined in *New Mexico v. United States*, No. 75-184, District Court of San Juan County;
- 2.13 “San Juan River Basin in New Mexico” means all areas located within the physical drainage of the San Juan River and its tributaries within the State of New Mexico; and
- 2.14 “Upper Basin States” means the States of Arizona, Colorado, New Mexico, Utah and Wyoming.

3.0 PARTIAL FINAL DECREE

- 3.1 Terms and Conditions of the Partial Final Decree. The Parties have negotiated and agree to the terms and conditions contained in paragraphs 1 through 5 and 8 through 18 of the Partial Final Decree. Furthermore, the Parties agree to the

form of paragraphs 6 and 7 of the Partial Final Decree and to the procedure described in subparagraph 3.2 of this Agreement for determining the quantification of the Navajo Nation's rights under those respective paragraphs.

3.2 Joint Hydrographic Survey Report. The basis for quantification of the Navajo Nation's rights under paragraphs 6 and 7 of the Partial Final Decree shall be a Joint Hydrographic Survey Report describing historic and existing water uses on Navajo Lands, including on lands of Allottees. The Report shall be prepared cooperatively and jointly under the supervision of the United States and the State of New Mexico and shall document the data and information called for by paragraphs 6 and 7 of the Partial Final Decree. The funds reasonably necessary to complete the Report shall be appropriated to the Bureau of Indian Affairs, pursuant to subsection 307(b) of the Settlement Act. If the State of New Mexico and the United States are unable to agree on the method of preparation, contents or other aspects of the Report, the Parties agree to resolve the matter by submitting the dispute(s) to the Court in the San Juan River Adjudication or, by mutual agreement, to an alternative dispute resolution process.

3.3 Entry of the Partial Final Decree. Once the Report is complete, the Parties shall complete paragraphs 6 and 7 of the Partial Final Decree based on the contents of the Report. The Parties then shall file a joint motion with the Court in the San Juan River Adjudication for entry of the Partial Final Decree. The joint motion shall request Court approval of procedures to make the Partial Final Decree final and binding on all claimants to the waters of the San Juan River Basin in New Mexico.

3.4 Effect of the Partial Final Decree in Relation to Allottees. Allottees are not bound by the Partial Final Decree from making claims to water rights in the San Juan River Basin in New Mexico. Allottees may make claims to, and may be adjudicated, individual water rights in the Basin for historic and existing uses as may be documented by the Joint Hydrographic Survey Report prepared pursuant to subparagraph 3.2. To the extent that water rights are adjudicated for Allottees for uses in the San Juan River Basin in New Mexico that are in addition to the historic and existing uses identified for allotted lands by the Report and in addition to the rights provided for and adjudicated to the Navajo Nation by the Partial Final Decree, such additional water rights shall be fulfilled or serviced by transfers of water rights adjudicated to the Navajo Nation by the Partial Final Decree or shall be offset by a corresponding and equivalent reduction of use of water rights adjudicated to the Navajo Nation by the Partial Final Decree. In addition, any water rights for historic and existing uses that are adjudicated for Allottees whose lands are within the exterior boundaries of lands held in trust for the benefit of the Navajo Nation shall be fulfilled or serviced by transfers of water rights adjudicated to the Navajo Nation by the Partial Final Decree or shall be offset by a corresponding and equivalent reduction of use of water rights adjudicated to the Navajo Nation by the Partial Final Decree. The Navajo Nation shall be responsible for enforcement of this provision.

4.0 SETTLEMENT ACT

- 4.1 Proposed Legislation. Federal legislation is necessary to provide the authorizations, approvals, terms, restrictions, procedures and appropriations to carry out this Agreement.
- 4.2 Conditions. The Settlement Act must be enacted into law in substantially the form of Appendix 2 by October 31, 2006. This date shall be extended if reasonably necessary to provide Congress additional time to consider and act upon the Settlement Act. In addition, the milestones stated in subsection 308(a) of the Settlement Act must be met.

5.0 SETTLEMENT CONTRACT

- 5.1 Determination of Water Availability. Pursuant to the Act of June 13, 1962 (Public Law 87-483, 76 Stat. 100), approval of the Settlement Contract is subject to the Secretary of the Interior submitting a determination to the United States Congress declaring that sufficient water is reasonably likely to be available to New Mexico under the apportionment made by the Upper Colorado River Basin Compact (63 Stat. 31) for the Navajo Nation's uses in New Mexico under the Navajo-Gallup Water Supply Project and for existing and authorized Navajo and non-Navajo uses from the San Juan River Basin in New Mexico. The State of New Mexico, acting through the New Mexico Interstate Stream Commission, has prepared a schedule of anticipated depletions from the Upper Basin under its apportionment that reflects the Settlement Agreement, and will submit the depletion schedule to the United States Bureau of Reclamation for its and the Secretary's consideration in this matter.

5.2 Contract between the United States and the Navajo Nation. In order to implement this Agreement and carry out the Settlement Act, once enacted, the Navajo Nation and the United States must enter into the Settlement Contract in substantially the form of Appendix 3 upon passage of the Act into law.

6.0 TRUST FUND

6.1 Deposits by the State of New Mexico. The State of New Mexico must deposit into the Navajo Nation Water Resources Development Trust Fund authorized by section 9 of the Settlement Act \$3 million per year in each of the first five fiscal years which commence following the date of passage of the Settlement Act into law and \$2 million per year in each of the five fiscal years next following the first five fiscal years referred to herein.

6.2 Deposits by the United States. The United States must deposit into the Navajo Nation Water Resources Development Trust Fund authorized by section 9 of the Settlement Act \$3 million per year in each of the first five fiscal years which commence following the date of passage of the Settlement Act into law and \$2 million per year in each of the five fiscal years next following the first five fiscal years referred to herein.

7.0 WAIVERS AND RELEASE OF CLAIMS

7.1 Waiver and Release of Claims by the Navajo Nation and the United States. The Navajo Nation, on behalf of itself and its members, and the United States, acting in its capacity as Trustee for the Navajo Nation but not as Trustee for or on behalf of Allottees, agree to waive and release:

- 7.1.1 all claims for water rights that the Navajo Nation, or the United States on behalf of the Navajo Nation, asserted or could have asserted in the San Juan River Adjudication;
- 7.1.2 all claims for damages, losses or injuries to water rights or claims of interference, diversion or taking of water for lands within the San Juan River Basin in New Mexico that accrued at any time up to and including the date of entry of the Partial Final Decree that the Navajo Nation, or the United States on behalf of the Navajo Nation, may have asserted or could assert;
- 7.1.3 all claims against the State of New Mexico, or claims for the waters of the San Juan River Basin in New Mexico, that may arise or could have arisen because of claims by the Navajo Nation, or the United States on behalf of the Navajo Nation, against other states or for water from the Upper Colorado River Basin; and
- 7.1.4 all claims arising out of or resulting from the negotiation or the adoption of this Agreement, appendices to this Agreement, or any specific terms and provisions thereof, against the State of New Mexico, its agencies, agents or employees.

7.2 Waiver and Release of Claims by the Navajo Nation against the United States.

The Navajo Nation, on behalf of itself and its members, agrees to waive and release:

- 7.2.1 all causes of action against the United States, its agencies, or employees, arising out of claims for water rights that were asserted, or could have been asserted, by the United States in the San Juan River Adjudication;
- 7.2.2 all claims for damages, losses or injuries to water rights or claims of interference, diversion or taking of water for lands within the San Juan River Basin in New Mexico that accrued against the United States, its agencies, agents or employees at any time up to and including the date of entry of the Partial Final Decree that the Navajo Nation may have asserted or could assert;
- 7.2.3 all claims arising out of or resulting from the negotiation or the adoption of this Agreement, appendices to this Agreement, or any specific terms and provisions thereof, against the United States, its agencies, agents or employees; and
- 7.2.4 all claims the Navajo Nation may have against the United States arising out of past delays associated with the construction of the Navajo Indian Irrigation Project, the operation and maintenance of the Project, or the implementation of the Act of June 13, 1962 (Public Law 87-483, 76 Stat. 100).

7.3 Effectiveness of Waivers.

- 7.3.1 Nothing herein acknowledges the existence or validity of any claims that are being waived and released.

7.3.2 The waivers herein will become effective upon entry of the Partial Final Decree.

7.4 Reservation of Rights and Retention of Claims. Notwithstanding the waivers and releases described in subparagraphs 7.1 and 7.2, the Navajo Nation shall retain:

7.4.1 all claims for water rights or injuries to water rights arising out of activities occurring outside the San Juan River Basin in New Mexico, subject to subparagraphs 8.2, 8.3, 8.4 and 8.5 of this Agreement;

7.4.2 all claims for enforcement of this Agreement, including its appendices, through such legal and equitable remedies as may be available in any court of competent jurisdiction;

7.4.3 all rights to use and protect water rights acquired pursuant to state law, to the extent not inconsistent with the Partial Final Decree and this Agreement; and

7.4.4 all rights not specifically waived and released pursuant to this Agreement.

8.0 OTHER PROVISIONS

8.1 Notice of Applications. The State of New Mexico, acting through the Office of the State Engineer, shall provide the Navajo Nation Department of Water Resources with notice of all applications filed with the New Mexico State Engineer to appropriate water or to change the place of use, point of diversion or purpose of use of water in the San Juan River Basin in New Mexico, said notice to be provided concurrent with publication of such applications; except, that the State of New Mexico shall not be required to provide the Navajo Nation with notice of

applications to appropriate groundwater for minor stock, domestic, mineral or construction purposes filed with the State Engineer pursuant to section 72-12-1, NMSA 1978.

- 8.2 Determination of Additional Allocation. Pursuant to the Act of June 13, 1962 (Public Law 87-483, 76 Stat. 100), the Secretary of the Interior has determined that the yield available to the Upper Basin States under the apportionment of water to the Upper Basin by Article III of the Colorado River Compact is at least 6.0 million acre-feet of water annually (Hydrologic Determination approved by the Secretary of the Interior on February 2, 1989). If in the future it is determined that the firm yield available to the Upper Basin States exceeds 6.0 million acre-feet of water annually, the New Mexico Interstate Stream Commission will determine the additional allocation of water that can be made available for use within the State of New Mexico's Upper Colorado River Basin Compact apportionment. The additional allocation, if any, shall be shared equally between the Navajo Nation for Navajo water uses and the New Mexico Interstate Stream Commission for non-Navajo water uses, unless the Navajo Nation or the State of New Mexico, acting through the New Mexico Interstate Stream Commission, shows to the Court in the San Juan River Adjudication that equal shares are inequitable. The additional allocation shall be supplied through the rights acquired by the Secretary of the Interior pursuant to New Mexico State Engineer File Nos. 2848, 2849, 2873, 2917 combined, and 3215.
- 8.3 Diversions in Other Basins Referenced in the Settlement Act. This Agreement shall not be nullified and shall continue in force regardless of the status of

diversions of groundwater in the Little Colorado River Basin and Rio Grande Basin for uses associated with wells to be constructed or rehabilitated pursuant to subsection 106(b) of the Settlement Act, the status of water rights for such diversion and use of groundwater in these basins, or the status of appropriations for construction or rehabilitation of such wells.

- 8.4 Fulfillment of Rights in Other Basins with Water from San Juan River Basin. This Agreement shall not be construed to interpret, alter or otherwise affect the quantification of claims or rights of the Navajo Nation to the diversion and use of water outside the San Juan River Basin in New Mexico. To the extent that water is diverted from the San Juan River Basin and delivered to supply a portion of the Navajo Nation uses in the Little Colorado River Basin in New Mexico or the Rio Grande Basin in New Mexico, such deliveries shall be deemed to fulfill or service that portion of the water rights in the latter two basins that the Navajo Nation may have for those uses. Navajo Nation water rights in the latter two basins shall not be exercised, transferred, leased or otherwise used only so long as, and to the extent that, the rights are being serviced by the delivery of water diverted from the San Juan River Basin. Also, Navajo Nation water rights in the Little Colorado River and Rio Grande basins shall not be subject to forfeiture, abandonment or irretrievable loss to the Navajo Nation for reason of being supplied water from the San Juan River Basin in lieu of using water diverted from the Little Colorado River or Rio Grande basins.
- 8.5 Uses in Other States. The San Juan River and its tributaries shall be administered consistent with Articles IX and XIV of the Upper Colorado River

Basin Compact (63 Stat. 31). The United States may provide water for diversion to the State of Arizona for uses in that state under the Navajo-Gallup Water Supply Project as authorized by section 104 of the Settlement Act and pursuant to paragraph 5 of the Partial Final Decree. This Agreement shall not be nullified and shall continue in full force regardless of the status of diversions of water to the State of Arizona under the Navajo-Gallup Water Supply Project and regardless of the status of water rights of the Navajo Nation for uses of water in states other than New Mexico.

In witness whereof, the parties hereto have duly executed this Agreement.

THE STATE OF NEW MEXICO

By: _____ Date: _____
Governor

_____ Date: _____
Attorney General

_____ Date: _____
Chairman, Interstate Stream Commission

_____ Date: _____
State Engineer

THE NAVAJO NATION

By: _____ Date: _____
President

_____ Date: _____
Attorney General

THE UNITED STATES OF AMERICA

By: _____ Date: _____
Secretary of the Interior