

Rec'd from Maria O'Brien  
-suggested edits from BHP

(NOTE: The original provision was reorganized into subsections and, as noted below one sentence was moved before redline revisions were provided. To redline those reorganization matters would clutter the document and make it hard to read. No language was deleted or edited other than as shown in redlined form.)

SJ-17  
Navajo So.

**Excerpt from 12/5/03 Navajo Nation-State of New Mexico-United States Draft Partial Final Judgment and Decree**

\* \* \*

15. Administration. (a) The Navajo Nation shall have jurisdiction to administer and regulate the leasing, contracting, use, and transfer of place and purpose of use of reserved water rights adjudicated by this partial decree and not subordinated pursuant to paragraph 4 on lands held by the United States in trust for the Navajo Nation in New Mexico, including such lands subject to lease or federally-granted rights-of-way; provided, that the Navajo Nation shall not allow changes in the exercise of rights that would impair non-Navajo Nation water rights.

(b) The Navajo Nation shall have jurisdiction to administer and regulate the use of water pursuant to its water rights acquired under state law or the Settlement Contract approved by section 303 of the San Juan River Basin in New Mexico Water Projects and Settlement Act, \_\_\_ Stat. \_\_\_; provided, that ~~such~~ use of such water complies with the terms of this decree, rights adjudicated by this decree or is approved by the New Mexico State Engineer.

(c) **[NOTE: This is the sentence that was moved.]** The Navajo

Nation may also change the point of diversion or place of use of a water right adjudicated to it by this partial decree to a location in New Mexico outside the boundaries of the Navajo Reservation and to lands ~~lands in New Mexico, including lands not~~ held by the United States in trust for the Navajo Nation ~~and lands held in fee ownership by the Navajo Nation~~, in accordance with either state law or the Settlement Contract. **[NOTE: First, tribal fee lands have the same status as other fee lands from the perspective of federal or state law (absent some restriction on alienation); so it would not appear to be necessary to differentiate them. Second, the revisions just seek to clarify.]**

(d) The Navajo Nation may acquire and transfer, in accordance with state and federal law, the use of water rights that are not included in this decree and that are acquired under state law; provided, that such rights retain the priority date of the decreed, licensed or permitted right so acquired, and that the New Mexico State Engineer shall retain jurisdiction to administer and regulate the use and transfer of water rights which are acquired under state law.

(e) The Navajo Nation's water rights adjudicated herein shall not be leased, exchanged, forborne or otherwise transferred for use directly or indirectly outside the boundaries of the State of New Mexico without the consent of the State of New Mexico acting through the New Mexico Interstate Stream Commission and unless in compliance with applicable law.

(f) Nothing in this decree shall be construed to establish, address, prejudice or prevent any party from litigating whether or to what extent any law or compact does or does not permit, govern, or apply to the lease, exchange, forbearance or transfer of the Navajo Nation's water rights for use directly or indirectly in an area outside the State of New Mexico.

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**Excerpts from 12/5/03 Navajo Nation-State of New Mexico-  
United States Draft Settlement Act**

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**SEC. 103. AUTHORIZATION OF NAVAJO-GALLUP WATER SUPPLY  
PROJECT.**

\* \* \*

(e) USE OF NAVAJO INDIAN IRRIGATION PROJECT FACILITIES. --  
Notwithstanding any provision of the Act of June 13, 1962, 76 Stat. 96, 97,  
~~the~~ Secretary is authorized without limitation to use capacity of the Navajo  
Indian Irrigation Project works to convey water supplies decreed for purposes of  
the Navajo-Gallup Water Supply Project or for other uses or purposes  
~~authorized by this title.~~ Use of Navajo Indian Irrigation Project works to convey  
water for the Navajo-Gallup Water Supply Project or for other purposes shall  
not be cause for the Secretary to reallocate construction costs of the Navajo  
Indian Irrigation Project. **[NOTE: As some of the revised language  
suggests, this paragraph appears to represent an amendment to the  
1962 Act. Consider whether this paragraph (subsection) should really  
be part of Section 203.]**

\* \* \*

**SEC. 202. FINDINGS AND PURPOSES.**

\* \* \*

(b) PURPOSES. -- The purposes of this Act are:

\* \* \*

(3) to authorize use of Navajo Indian Irrigation Project water and facilities for agricultural, municipal, industrial, commercial, domestic and stock purposes, including residential uses ~~other than irrigation and for conveyance of water under the Navajo Gallup Water Supply Project;~~

\* \* \*

**SEC. 203. NAVAJO INDIAN IRRIGATION PROJECT.**

(a) AMENDMENTS TO ACT OF JUNE 13, 1962 -- The Secretary is authorized to continue to construct, operate and maintain the Navajo Indian Irrigation Project, with the following amendments to the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483): **[NOTE: As raised before, consider moving Section 103(e) into this provision.]**

\* \* \*

(3) the Navajo Indian Irrigation Project water supply described in ~~¶~~Title III of this Act is for agricultural purposes and it may be used for any of the following purposes, in addition to irrigation, within the area served by the Project facilities

(A) aquaculture purposes, including without limitation rearing of fish in support of the San Juan River Basin Recovery Implementation Program authorized by the Act of October 30, 2000 (114 Stat. 1602, Public Law 106-392);

(B) domestic, municipal, industrial, or commercial, or domestic purposes ~~relating to agricultural production and processing~~; and

(C) the generation of hydroelectric power as an incident to the diversion of water by the Project for the foregoing purposes.

\* \* \*

### **SEC. 302. FINDINGS AND PURPOSES.**

(a) FINDINGS. -- Congress hereby finds and declares that:

(1) the Navajo Nation has substantial and multiple claims against the State of New Mexico, the United States, and other parties, related to water rights in the San Juan River Basin in New Mexico for lands held in trust for the Nation or its members by the United States and for lands held in fee by the Nation;

(2) a full and final settlement of the water rights claims of the Navajo Nation to the use of waters of the San Juan River Basin in and from the State of New Mexico will inure to the benefit of the Navajo Nation, the State of New Mexico, ~~and the United States,~~ and other parties;

(3) the Navajo Nation and the State of New Mexico have

negotiated and approved a settlement of the water rights claims of the Navajo Nation to the use of waters of the San Juan River Basin in New Mexico as expressed in this Act, and both the Navajo Nation and the New Mexico Interstate Stream Commission have adopted resolutions approving the Settlement Agreement, including its Appendices;

(4) the United States has a trust responsibility to the Navajo Nation to protect the water resources of the Navajo Nation and to ensure that the Navajo Nation has an adequate water supply to meet the needs of a permanent homeland for the Navajo Nation and its members;

**[NOTE: This language would seem to make clear that the Nation's decreed rights are trust property, and therefore subject to the provisions of the Non-Intercourse Act. This raises a question whether existing statutory authority (Indian Business Leasing Act, Indian Mineral Leasing Act, etc.) permits the Navajo Nation to lease water or otherwise contract with third parties to permit the use of Navajo Nation water rights by such entities. It is not clear that the existing statutes authorize such water contracting or leasing. Therefore, this legislation should provide that authorization, both for subcontracts under the Settlement Contract, and for other types of anticipated transactions. At this point, as is true with the Jicarilla deal, the only congressional**

**authorization is for subcontracts. Other settlements provide express leasing authority.]**

(5) this Act, together with the Settlement Agreement between the Navajo Nation, the State of New Mexico and the United States and the Settlement Contract between the Navajo Nation and the United States, is intended to provide for the full, fair and final resolution of the water rights claims of the Navajo Nation to waters of the San Juan River Basin in the State of New Mexico, and to secure to the Navajo Nation a perpetual water supply and actual water uses for and on its lands in northwestern New Mexico;

(6) the Navajo Nation may use the water supply under its water rights for any purpose inside and outside the boundaries of its lands the Navajo Reservation consistent with applicable state and federal law and ~~not~~ inconsistent with the terms of the Settlement Agreement between the Navajo Nation, the State of New Mexico and the United States and the terms of the Settlement Contract between the Nation and the United States; and

\* \* \*

(b) PURPOSES. – The purposes of this Act are:

(1) to approve and incorporate by reference the Settlement Agreement;



(2) to approve and incorporate by reference the Settlement Contract; and

(3) to authorize the lease or transfer by the Navajo Nation of those decreed water rights that are not subject to the Settlement Contract for any purposes and in any places within the boundaries of the Navajo Reservation and on lands held in trust for or in fee by the Navajo Nation, including lands subject to lease or rights-of-way; and

(4) to authorize the actions and appropriations necessary for the United States to fulfill its obligations under the Settlement Contract and this Act.

\* \* \*

**SEC. 303. SETTLEMENT AGREEMENT AND CONTRACT APPROVAL.**

\* \* \*

**Proposed new subsection (e) in Section 303:**

(e) If any party to the San Juan River Adjudication, State of New Mexico ex rel. State Engineer v. United States, San Juan County Cause No. 75-184, brings an action in any court of the United States or any State court relating directly or indirectly to the interpretation or enforcement of this Act, the Settlement Agreement or the Settlement Contract, including any subcontract, and names the United States or the Navajo Nation as a party:

(1) the United States, the Navajo Nation, or both, may be joined

in any such action; and

(2) any claim by the United States or the Navajo Nation to sovereign immunity from the action is waived, but only for the limited and sole purpose of such interpretation and enforcement. [NOTE: This is modeled after the Zuni and Gila River settlement legislation.]

**SEC. 304. WATER AVAILABLE UNDER SETTLEMENT CONTRACT.**

(a) AMOUNTS OF WATER AVAILABLE. -- Water made available annually under the Settlement Contract approved by section 303 of this Act is in the following amounts under water rights held by the Secretary for the following projects in New Mexico supplied from Navajo Reservoir and the San Juan River, including its tributaries; provided, that the diversion to the Navajo Nation pursuant to the Settlement Contract under each of the below specified projects shall not exceed the quantity of water necessary to supply the below identified amount of depletion for each project as stated in titles I and II of this Act:

	Diversion (acre-feet/year)	Depletion (acre-feet/year)
Navajo Indian Irrigation Project .....	508,000	267,000
Navajo-Gallup Water Supply Project .....	22,650	20,780
Animas-La Plata Project .....	<u>4,680</u>	<u>2,340</u>
Total .....	535,330	290,120

The diversion and use of water pursuant to the Settlement Contract shall be subject to and consistent with the terms, conditions and limitations of the Settlement Agreement and this Act.

(b) AMENDMENTS TO SETTLEMENT CONTRACT. -- The Secretary may, with the consent of the Navajo Nation, enter into amendments to the Settlement Contract which would in the Secretary's judgment facilitate beneficial use by the Navajo Nation or its contractors or lessees of the Navajo Nation's decreed water rights and is be in the interest of water conservation and in the spirit of this settlement of the claims of the Navajo Nation, but the amounts of water made available for diversions and depletions under the Settlement Contract shall not exceed the amounts set forth in subsection (a) of this section. **[NOTE: We are unsure what water conservation means in this context, but assume it means beneficial use with standard reclamation law conservation principles.]**

(c) RIGHTS OF THE NAVAJO NATION. -- The Navajo Nation shall be entitled under the Settlement Contract to:

(1) use any and all return flows attributable to uses of the water by the Nation or its contractors, as long as the water depletions do not exceed the amounts set forth in subsection (a) of this section; provided, that the use of said return flows shall be subject to and consistent with the terms, conditions and limitations of the Settlement Agreement, the

Resolution and applicable laws; and

(2) transfer diversions and depletions authorized by this Act, except for those for use in the State of Arizona authorized by title I of this Act, to other uses or purposes in the State of New Mexico to meet water resource needs of the Nation; provided, that:

(A) such transfers are subject to and consistent with the terms of the Settlement Agreement and this Act; and

(B) any transfers of water use by the Navajo Nation affecting one or more of the water development projects authorized in titles I and II of this Act shall not alter the obligations of the United States, the Navajo Nation, or other parties to pay or repay project construction, operation or maintenance costs as specified in titles I and II of this Act and the Settlement Contract.

(3) subcontract with third parties to supply water under the Settlement Contract in accordance with Section 305 of this Act.

\* \* \*

**SEC. 305. SUBCONTRACTS AND OTHER THIRD PARTY TRANSFERS.**

(a) AUTHORITY OF NAVAJO NATION. ~~--- The Navajo Nation shall have the following authority: When water made available for uses in the State of New Mexico under the Settlement Contract approved by this title is not being used by the Navajo Nation, t~~ (1)The Nation is authorized to may subcontract

with third parties, subject to the approval of the Secretary in accordance with this section and the Settlement Contract, to supply water for beneficial use in the State of New Mexico inside and outside of the boundaries of the Navajo Reservation ~~Navajo lands~~, subject to and not inconsistent with the same requirements and conditions of State law, applicable Federal law, interstate compacts and international law as apply to the exercise of water rights held by non-Federal, non-Indian entities.

(2) The Navajo Nation is authorized to lease, contract or otherwise transfer its decreed water rights that are not subject to the Settlement Contract to third parties and to other places and for other purposes of use within the boundaries of the Navajo Reservation and on trust or fee lands of the Navajo Nation within the State of New Mexico, without the approval of the Secretary of the Interior.

(3) Nothing in this Act shall be construed to establish, address, prejudice or prevent any party from litigating whether or to what extent any of the aforementioned laws do or do not permit, govern, or apply to the use of the Nation's water designated in this Act for use in one State in an area located outside that State.

(b) MAXIMUM TERM. -- The Navajo Nation shall not permanently alienate any of its decreed water rights, including its ~~any rights it has~~ under the Settlement Contract. The maximum term of any water use subcontract, lease

or transfer, including all renewals, shall not exceed 99 years in duration.

(c) APPROVAL OF SUBCONTRACTS BY SECRETARY. -- The Secretary shall approve or disapprove any subcontracts submitted to him for approval within 180 days after submission or 60 days after compliance, if required, with section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)), or any other requirement of Federal law, whichever is later. Any party to a subcontract may enforce the provision of this subsection pursuant to section 1361 of title 28, United State Code.

(d) PREEMPTION. -- The authorization provided for in this section and the approval authority of the Secretary provided for in this section shall not amend, construe, supersede or preempt any Federal law, interstate compact or international treaty that pertains to the Colorado River or its tributaries, including the appropriation, use, development, storage, regulation, allocation, conservation, exportation or quality of those waters.

(e) NON-INTERCOURSE ACT COMPLIANCE. - Title III of this Settlement Act is intended to provide congressional authorization for the lease, transfer, or subcontracting of Navajo Nation water rights as required by ~~the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177) shall not apply to any water made available under the Settlement Contract.~~ **[NOTE: The former sentence would seem to imply that "transfers" or leases outside the Contract ARE subject to the Non-Intercourse Act. Given the other**

**proposed revisions, it seems a better concept would be to state that this Act constitutes congressional authorization for the leasing, contracting, subcontracting, etc. of Navajo Nation water.]**

(ef) FORFEITURE. -- The nonuse of the water supply secured herein by a subcontractor of the Navajo Nation shall in no event result in a forfeiture, abandonment, relinquishment or other loss of all or any part of the rights exercised by the Nation under the Settlement Contract or as otherwise authorized by this Act.

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EXPLANATORY RECITALS

*Witnesseth, That:*

\* \* \*

Whereas, to preserve opportunities for the Navajo Nation to develop while at the same time allowing for other economic development in New Mexico, it is the intent of this contract that the Navajo Nation, ~~if it does not put to use the water supply secured to it under this contract,~~ may exercise the right to market ~~such~~its water subject to the provisions of this contract and the ~~agreement between the Navajo Nation and the State of New Mexico setting forth a stipulated and binding settlement agreement as to the rights of the Nation to use and administer waters of the San Juan River Basin in New Mexico, signed by the State of New Mexico and the Navajo Nation on~~ \_\_\_\_\_ and executed by the Secretary on \_\_\_\_\_; and

\* \* \*

WATER DELIVERY PROVISIONS

4. (a) The United States agrees to deliver, or make available for delivery, to the Navajo Nation water for diversion of up to 530,650 acre-feet of water per year, on average, during any period of ten consecutive years, from the Navajo Reservoir Supply in accordance



with the provisions of the Settlement Agreement and this contract. Of the water to be made available under this subsection, the Nation may divert or receive:

(i) up to 508,000 acre-feet per year, on average, during any period of ten consecutive years, directly from Navajo Reservoir at the intake to the Navajo Indian Irrigation Project main canal for delivery to the Navajo Indian Irrigation Project or such points of diversion established pursuant to subcontracts entered into under section 11(a); and

(ii) up to 22,650 acre-feet in any one year from either the Navajo Reservoir at the intake to the Navajo Indian Irrigation Project main canal or a Navajo-Gallup Water Supply Project diversion on the San Juan River, or both in combination, for delivery to communities, recipients or subcontractors allotted water by the Navajo Nation under its water rights for the Navajo-Gallup Water Supply Project uses in New Mexico.

\* \* \*

(g) The water delivery rights recognized by this contract shall be perpetual, and the Navajo Nation ~~has~~shall have the right to subcontract with third parties for the delivery and use of water made available under this contract as provided in section 11.

\* \* \*

## SUBCONTRACTING

11. (a) ~~When water made available under this contract is not being used by the Navajo Nation, t~~The Navajo Nation may subcontract with third parties, subject to the provisions of the Settlement Agreement and approval of the Secretary in accordance with this section, to supply water for beneficial use inside and outside the boundaries of the Navajo Reservation~~outside of Navajo Lands~~ in the State of New Mexico, subject to and not inconsistent with ~~the same requirements and conditions of State law, and any applicable Federal or State law,~~ interstate compact, and international law ~~as apply to the exercise of water rights held by non-federal, non-Indian entities.~~ Nothing in this contract shall be construed to establish, address, or prejudice whether, or to prevent any party from litigating whether, or to the extent to which, any of the aforementioned laws do or do not permit, govern, or apply to the use of the Nation's water outside the State.

(b) Subcontracts made by the Navajo Nation with third parties shall be subject to the provisions of the Settlement Agreement and this contract, and must include terms of use, purchase, measurement, operations and default. A copy of each proposed subcontract shall be filed with the Contracting Officer and the New Mexico Interstate Stream Commission prior to [why "prior to"?) being executed by the Nation, and two copies of each executed subcontract shall be filed with

the Contracting Officer and one copy with the New Mexico Interstate Stream Commission.

(c) Prior to approving any subcontract, the Secretary shall comply with section 102(2)(C) of the National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C).

(d) The Secretary shall approve any subcontract submitted by the Navajo Nation if the Secretary determines that:

(i) the diversion and use of water under the subcontract would comply with applicable state law, including ~~any~~ applicable permitting and reporting requirements of the New Mexico State Engineer;

(ii) the sum of the term of the subcontract plus all renewables is no more than 99 years;

(iii) the use of water under the subcontract is not inconsistent with the provisions of the Endangered Species Act or other provisions of federal law designed to protect the environment;

(iv) the subcontract is sufficiently specific as to the amount of water and points of diversion to enable the Contracting Officer to account for the water as it is diverted; or, in the alternative, that the subcontract reserves the Contracting Officer's right to review and approve future diversions sought under the subcontract, such review and approval to be consistent with this contract;

(v) the delivery obligations under the subcontract are not inconsistent with other obligations of the Secretary to deliver water under preexisting contracts; and

(vi) the subcontract is in the best interests of the Nation.

(e) The Navajo Nation agrees to include the following equal opportunity language in any subcontract for use of water off the Reservation:

(i) Except for subcontractors located on or near an Indian Reservation with publicly announced employment preferences for Indians living on or near an Indian Reservation in compliance with Title VII....., ~~T~~the subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Except as provided above, ~~T~~the subcontractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to race, color, religion, sex or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship.

(ii) Except as provided in subsection (i), the subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

(iii) The Nation will take such action with respect to any subcontractor as the Contracting Officer may direct as a means of enforcing such provisions, including sanctions for noncompliance; provided, however, if the Nation becomes involved in, or is threatened with, litigation with a subcontractor as a result of such direction, the Nation may request the United States to enter into such litigation to protect the interest of the United States.

Nothing in this section shall be read as prohibiting the Nation from requiring that subcontractors give preferential employment to members of the Navajo Nation. **[NOTE: We are not sure what this means, particularly when the Contract is being incorporated in the Settlement Act.]**