

SJ-17
Navajo Settle.

John Whipple

From: utton
Sent: Monday, January 24, 2005 4:36 PM
To: John Whipple
Subject: Fwd: Additional comments on Navajo Nation draft settlement documents



Memo regarding BHP Proposed
comments on Nava...revisions to NN-NM..

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..... Forwarded Message

From: "Maria O'Brien" <mobrien@modrall.com>
To: "Stanley M. Pollack" <spollack@cia-g.com>, "John Utton"
<utton@newmexico.com>
Date: Mon, 24 Jan 2005 14:07:30 -0700
Subj: Additional comments on Navajo Nation draft settlement documents

Stanley and John,

As I mentioned to both of you, BHP prepared some additional comments on the December drafts of the settlement documents which we submitted to Mike Connor and Nate Gentry. As you can see, and as we have previously discussed, our remaining comments are for the most part proposed language changes on areas where we believe we have conceptual agreement. We met with Mike and Nate last week to address our comments and also to express support for the settlement assuming it remains generally in its current form and addresses our remaining comments. We intend to remain engaged in the legislative process, including monitoring any changes which may be proposed by other parties.

Please let me know if you would like to discuss any of the issues we raise.

Maria

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

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MODRALL SPERLING

L A W Y E R S

January 17, 2005

**Comments of BHP Navajo Coal Company on December 10, 2004
Draft of Navajo Nation – State of New Mexico – United States
Settlement Agreement and Related Settlement Documents**

This memorandum provides BHP Navajo Coal Company's ("BHP") comments on the December 10, 2004 Draft of the Navajo Nation – State of New Mexico – United States Settlement Agreement and Related Documents (collectively "Settlement Documents"). BHP is the owner of a significant water right in the San Juan Basin pursuant to New Mexico State Engineer Permit No. 2838 ("Permit 2838"), which provides rights to the use of the surface and groundwater of the San Juan Basin. BHP and its affiliate, San Juan Coal Company, own and operate coal mines in the San Juan Basin, New Mexico and utilize Permit 2838 to supply water for their operations, as well as to supply the sole source of water to the Four Corners Power Plant, operated by Arizona Public Service Company, and San Juan Generating Station, operated by Public Service Company of New Mexico. APS and PNM join in BHP's comments.

BHP submitted public comments on January 15, 2004 and October 12, 2004 regarding previous drafts of the Settlement Documents. The comments provided herein reflect remaining concerns regarding the language and import of the Settlement Documents. As it has stated publicly, BHP continues to support the efforts of the State, the Navajo Nation, and the federal government to settle the claims of the Nation to the waters of the San Juan Basin in New Mexico. Settlement of the Nation's claim in an equitable manner will provide a great benefit to all water users in the basin. However, BHP believes there remain some issues which require clarification and amplification in order to ensure appropriate protection of existing uses in the Basin and to ensure the maximum flexibility to the Navajo Nation with regard to the transfer and marketing of its decreed rights. BHP's main comment remains that the transfer and marketing provisions of the Settlement Documents are potentially confusing and ambiguous. Other comments (not of any less significance) follow regarding specific language in the various Settlement Documents.

1. The transfer and marketing provisions of the Settlement Documents may be confusing and ambiguous.

In Exhibit A to these comments, BHP provides proposed changes to the Settlement documents regarding the transfer and marketing of the Nation's decreed rights.

Sections 305 and 306 of the Settlement Act authorize leases and subcontracts, as appropriate, for use of water by third parties on non-Navajo Lands. This is a good thing. However, in each case, this statutory authorization is subject to the Partial

Final Decree, among other documents. If the Decree does not provide the full authority that Congress provides in the Act, then the Nation cannot exercise the rights that Congress provided in light of the fact that the exercise of the congressionally provided authority is subject to any limitations in the Decree.

The drafts do not provide all the flexibility that BHP suggested in prior comments, nor are the drafts as we read them necessarily fully consistent with the comments prepared by the Office of the New Mexico State Engineer which were circulated with the December 10, 2004 Settlement Documents. Despite the preparation of voluminous responses to public comments the responses do not address some of BHP's prior comments or suggestions relating to water marketing, subcontracting and leasing. Although the settling parties have been generous in making themselves available when possible to answer questions and discuss concerns, BHP has remaining suggestions to further clarify the documents to accomplish what we understand to be the parties' intent. Absent such clarification we fear the Settlement Documents remain ambiguous on the critical issue of water marketing.

2. Other comments.

BHP provides the following additional comments specific to individual Settlement Documents.

Settlement Agreement

1. Section 9.2. BHP's October 12, 2004 comments indicated that a contingency relating to the "Alternate Water Source" was unacceptable. This contingency has been removed. However, some language in this section remains problematic and should be revised. Absent revisions, the language may detrimentally affect existing water users and appears to attempt to predetermine the rights of BHP and other direct flow users to the direct flow of the San Juan River. In its October 12, 2004 comments BHP indicated that provisions which seek to predetermine the administration of the Basin in a way that was binding on other users or created contingencies was inappropriate. The current version of Section 9.2 appears to contain some problematic language in this regard.

First, Section 9.2.6 appears to be stating the provisions of section 11 of the Act of June 13, 1962. However, the language in the Settlement Agreement strays from the actual language and intent of section 11 in at least one significant respect. Section 11 provides in pertinent part that ""No person shall have or be entitled to have the use . . . of water stored in Navajo Reservoir . . . to the use of which the United States is entitled . . . except under contract [with the] Secretary . . ." (emphasis added). The language of section 9.2.6 substitutes the word "released" for the word "stored" and does not indicate that the water at issue is only that to which the United States is entitled. The United States is not entitled to all waters released from the Reservoir and there remains ongoing discussion and debate in the Basin regarding the appropriate measurement of direct flow in the San Juan River as opposed to stored water. The language in the Settlement Agreement

should be modified to more accurately track the language and intent of the Act of June 13, 1962

Section 9.2.6(1) has been added since the previous draft and should be deleted. That language provides that the Alternate Water Source is contingent on administration of direct flow rights in the Basin in a particular manner. The Settlement Agreement, and in particular the Alternate Water Source should not be contingent on the State Engineer agreeing to administer the Basin in a way that affects users such as BHP without allowing those affected with an opportunity to comment or object. As noted, the measurement and administration of direct flow in the river vis-à-vis Reservoir "releases" remains an unresolved issue and should not be predetermined in any way in the settlement of the Nation's claim as to the rights of other users.

2. Section 11.2.3. Although the language of section 11.2.3 has been modified in response to BHP's October 12, 2004, Comment 4, the language should be further modified to add the following language at the end of the sentence "after notice to all parties and an opportunity for objection."
3. Any additional concerns regarding the language of the Settlement Agreement are raised in the form of proposed changes in the attached Exhibit A.

Partial Final Decree

1. Paragraph 4. Supplemental Carriage Water. Although this provision has been somewhat modified apparently in response to BHP's October 12th comments, further revisions consistent with BHP's previous comments should be made. The manner in which the "Supplemental Carriage Water" would be implemented or administered remains unclear and there is a risk that, contrary to the apparent intent of the provision, water rights of third parties will be impaired. The paragraph should be further amended to clarify that such diversion will not impair "either directly or indirectly" other water rights in New Mexico. This language was in the initial draft and should be put back in. Additionally, the following language should be added at the end of Paragraph 4(e): "at a point which would not impair any existing water rights."
2. Paragraph 5(h). The Decree should not memorialize historic inefficiencies of the historic uses by the Nation on the San Juan River. The Partial Final Decree continues to propose that the diversionary rate for the Fruitland and Hogback irrigation projects be decreased only in the event "the Court determines that rehabilitation and maintenance of the Project has resulted in a lesser flow rate being needed to supply the peak demand of the Project" Paragraph 5(h). However, this language is insufficient. It retains the ability of the Fruitland and Hogback projects to operate inefficiently and appears to place the burden on other water users to demonstrate to the Court that a lesser diversion rate is appropriate. Moreover, even if such a showing were made, the proposed decree sets a floor on the diversion rate which may or may not relate to the true efficiency of the projects. This would appear to run contrary to the beneficial use and corollary prohibition on waste provided by State water law. At a minimum BHP suggests that any appropriations

provided to the Fruitland and Hogback projects through the Settlement Act, be conditioned on the projects achieving a specific efficiency with accepted irrigation practices consistent with state law.

3. Paragraph 5(a). In its previous comments, BHP raised concerns regarding the use of the term “irretrievably lost” absent further clarification or definition. These comments have not been addressed. BHP understands that the parties interpret this language to mean that if a portion of the right is “irretrievably lost” that part of the right can revert back to the 1868 priority date. BHP does not believe this is an appropriate interpretation and requests clarification regarding this critical term.
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We look forward to discussing these concerns further with you.

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MODRALL SPERLING

L A W Y E R S

January 17, 2005

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**BHP NAVAJO COAL COMPANY'S
PROPOSED REVISIONS TO NAVAJO NATION-NEW MEXICO
SAN JUAN RIVER SETTLEMENT PAPERS**

PROPOSED REVISION TO PARTIAL FINAL DECREE, PARAGRAPH 5(e)

(e) The Navajo Nation's water rights described in subparagraph 3(a), which are to be serviced under the Settlement Contract as described in subparagraphs (a) and (b) of this paragraph, may be used for any beneficial use, including but not limited to non-irrigation purposes, or transferred to other places of use subject to consistent with the provisions of subsection 203(a) of the San Juan River Basin in New Mexico Water Projects and Settlement Act (Stat.), paragraph 17 of this decree and the following additional conditions:

[NOTE: The provisions that are proposed for deletion here, including subparagraphs (1)(i), (ii), (iii), and (vii) are covered in Paragraph 17 of this Decree. The language in the opening paragraph of 5(e) applies Paragraph 17 conditions to NIIP/Section 3(a) water. Therefore, the inclusion of these more general provisions also included elsewhere, is confusing and may create potential ambiguities. Further, with respect to the former 5(e)(1)(vii), that language was different from the language in the comparable provision of Paragraph 17, yet we do not understand that the parties intended any different meaning or result. Accordingly, to eliminate any confusion or potential ambiguity, eliminating the parallel provisions is appropriate.] (1) The Navajo Nation, without approval of the New Mexico State Engineer or the Court, may change the purpose or place of use of any portion of the rights described in subparagraph 3(a); provided, that:

EXHIBIT A

~~(i) notice is provided of any proposed change in purpose or place of use consistent with paragraph 18;~~

~~(ii) such changes do not involve transfers of places of use to locations outside the State of New Mexico, or to lands that are not held by the United States in trust for the Navajo Nation as of the date of entry of this decree, unless such lands are subsequently declared by the Secretary of the Interior to be held in trust by the United States for the Navajo Nation pursuant to section 3 of the Act of June 13, 1962 (76 Stat. 96), as amended by the Act of September 25, 1970 (84 Stat. 867);~~

~~(iii) the point of diversion is not changed;~~

~~(1)(iv) the depletion quantities specified in subparagraph 3(a) are not exceeded as a result of any change in place or purpose of use the changes;~~

~~(v)(2) the average annual diversion during any period of ten consecutive years for all uses made under the rights provided in subparagraph 3(a), including uses provided under the alternate water source provisions of subparagraph 9.2 of the Settlement Agreement, in the aggregate does not exceed 353,000 acre-feet per year;~~

~~(vi)(3) the total diversion for all uses made under the rights provided in subparagraph 3(a), including uses provided under the alternate water source provisions of subparagraph 9.2 of the Settlement Agreement, in the aggregate does not exceed 405,950 acre-feet in any one year; and~~

~~(vii) no showing is made to and accepted by the Court pursuant to subparagraph 5(e)(2) that a change would or does impair other water rights in the San Juan River Basin in New Mexico.~~

~~(4) Any change pursuant to this subsection in the purpose or place of use of a portion of the rights described in subparagraph 3(a) that would result in the total annual diversion or depletion amounts in the aggregate for all uses made under the rights described in subparagraph 3(a) exceeding the historic aggregate diversion or depletion amounts, respectively, under said rights shall not be presumed to impair other water rights solely because of the increase in annual use amounts.~~

~~(2) The Navajo Nation shall provide an administrative process for receiving from Navajo and non-Navajo water users protests of changes in purpose or place of use proposed to be made pursuant to subparagraph 5(e)(1), and for reviewing and considering protests and impairment issues that may arise from such changes. The administrative process shall include consultation with the New Mexico State Engineer on proposed changes. The Navajo Nation shall not exercise its authority under subparagraph 5(e)(1) to implement a proposed change in purpose or place of use until it has consulted with the State Engineer and completed the Nation's administrative process for the proposed change. Appeals of Navajo Nation decisions or actions made pursuant to the administrative process may be reviewed by the Court. [NOTE: This subparagraph also is covered in Paragraph 17. Its inclusion here creates the impression that a different process is applicable to NIIP water as compared with~~

other rights adjudicated in favor of the Nation through the Decree.

Deleting this provision here also streamlines the document.]

(35) The uses of water to make the depletions and diversions described in subparagraphs 3(d), 3(e) and 3(f) that are supplied under the Settlement Contract pursuant to the alternate water source provisions of subparagraph 9.2 of the Settlement Agreement, and that are accounted under the rights described in subparagraph 3(a) of this decree for the Navajo Indian Irrigation Project in accordance with said provisions, are hereby approved by the Court.

(46) The Navajo Nation may divert more than an average of 353,000 acre-feet per year during any period of ten consecutive years, or more than 405,950 acre-feet in any one year, for the aggregate of all uses under the rights provided in subparagraph 3(a), including uses provided under the alternate water source provisions of subparagraph 9.2 of the Settlement Agreement, only pursuant to application with the New Mexico State Engineer and subject to non-impairment of other water rights in New Mexico in accordance with state law, unless the rights provided in subparagraph 3(a) are used solely for irrigation purposes on the Navajo Indian Irrigation Project and to implement subparagraph 9.2 of the Settlement Agreement.

End of Proposed Change to Paragraph 5(e)

PROPOSED REVISION TO PARTIAL FINAL DECREE,
PARAGRAPHS 17 (c) - (f)

17. ADMINISTRATION.

The Navajo Nation shall have authority to administer the ~~Nation's~~ diversion and use of Navajo Nation water under the rights adjudicated by this decree as follows:

* * *

(c) The Navajo Nation, without the approval of the New Mexico State Engineer, shall have authority to change the purpose and place of use for any beneficial use by the Navajo Nation, its members, or other persons of any portion of its reserved rights described by paragraphs 3, 7(a) and 8 and its ground water rights described by subparagraph 7(b)(1) on lands held by the United States in trust for the Navajo Nation in New Mexico, subject to the conditions and any applicable limitations of subsection 104(h) of the San Juan River Basin in New Mexico Water Projects and Settlement Act (___ Stat. ___) and any applicable limitations of subparagraphs 5(d)(5), 5(e), 7(c) and 7(g) of this decree; provided, that:

(1) notice is given of any proposed change in purpose or place of use consistent with paragraph 18;

(2) such changes do not involve transfers of places of use to locations outside the State of New Mexico, or to lands that are not held by the United States in trust for the Navajo Nation as of the date of entry of this decree, unless such lands are subsequently declared by the Secretary of the Interior to be held in trust by the United States for the Navajo Nation

pursuant to section 3 of the Act of June 13, 1962 (76 Stat. 96), as amended by the Act of September 25, 1970 (84 Stat. 867);

(3) the source of water supply is not changed;

(4) the point of diversion is not changed if the diversion is from the San Juan River or the Animas River;

(5) the applicable diversion and depletion quantities specified in paragraphs 3, 7(a) and 8 for the subject reserved right are not exceeded as a result of such changes; and

(6) such changes would not impair other water rights; and

(7) prior to undertaking any changes under this subparagraph 17(c), ~~the Navajo Nation shall provide an administrative process for receiving from Navajo and non-Navajo water users protests of changes in purpose or place of use proposed to be made pursuant to this subparagraph 17(c), and for reviewing and considering protests and impairment issues that may arise from such proposed changes. The administrative process shall include the Navajo Nation consulting with the New Mexico State Engineer on proposed changes and impairment issues. The Navajo Nation shall not exercise its authority under this subparagraph to implement a proposed change in purpose or place of use until it has consulted with the State Engineer and completed the tribal administrative process for the proposed change. **[NOTE: This next sentence was moved to the beginning of Paragraph 17 (d).** ~~The Court retains jurisdiction to resolve disputes, if any, between the Navajo Nation, the New Mexico State Engineer or other parties to this case regarding~~~~

~~whether changes allowed by the Navajo Nation in the purpose and place of use of its reserved rights comply with the above stated criteria. [NOTE:~~

~~**The last sentence of subparagraph (c), beginning “Other transfers...” has been moved to a new subparagraph 17(f).]**~~

(d) The Court retains jurisdiction to resolve disputes, if any, between the Navajo Nation, the New Mexico State Engineer or other parties to this case regarding whether changes allowed by the Navajo Nation in the purpose and place of use of its reserved rights comply with the above stated criteria. The following standards of review shall be recognized by the Court in its review of any Navajo Nation decisions or actions made pursuant to subparagraphs 5(e), 7(b)(1) or 17(c), such that the Court may reverse a Navajo Nation decision only if:

- (1) the Nation acted fraudulently, arbitrarily or capriciously;
- (2) the decision of the Nation is not supported by substantial evidence based on the whole record on appeal;
- (3) the action of the Nation was outside the scope of its authority under the decree; or
- (4) the action of the Nation was otherwise not in accordance with this decree or applicable law.

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

acquired under state law, including the rights adjudicated under subparagraph 7(b)(2) and paragraph 9 of this decree.

(f) Other Transfers for any beneficial use by the Navajo Nation, its members or other persons of reserved rights or ground water rights adjudicated by this decree, including transfers that which (1) involve a change in the point of diversion on the San Juan River, the Animas River or to a location off lands that are held by the United States in trust for the Navajo Nation; or (2) that involve a change in the place of use to a location off lands that are held by the United States in trust for the Navajo Nation or its members, may be made pursuant to application with the New Mexico State Engineer and in accordance with state law. [NOTE: As written Subparagraph 17(f)(1) is ambiguous. Clarification of the parties' intent may be appropriate.]

(fg) The Navajo Nation shall have authority to administer and regulate the leasing and subcontracting of the Nation's water rights adjudicated by this decree; provided, that:

(1) any change in the purpose and place of use or a change in the point of diversion of any of the Nation's water rights shall comply with the applicable provisions of Paragraph 17;

(2) the provisions of section 305 of the San Juan River Basin in New Mexico Water Projects and Settlement Act (___ Stat. ___) shall apply to any subcontract between the Navajo Nation and any other person ~~third party~~ of the Nation's rights to the delivery of water under the Settlement Contract between the United States and the Navajo Nation referred to in

subparagraph 5(a), including the requirement that the Secretary of the Interior must approve such subcontracts;

(3) the provisions of section 306 of the San Juan River Basin in New Mexico Water Projects and Settlement Act (___ Stat. ___) shall apply to leases, ~~contracts~~ or other agreements that the Navajo Nation may enter to provide water to any other person from the Nation's water rights adjudicated under this decree that are not subject to the Settlement Contract between the Navajo Nation and the United States; and

(4) the development and use of groundwater by the Navajo nation shall comply with the provisions of paragraph 7.

The non-use of the Navajo Nation's reserved rights by a ~~leasee~~ lessee or subcontractor ~~to~~ of the Nation shall in no event result in a forfeiture, abandonment, relinquishment or other loss of all or any part of the reserved rights described in paragraphs 3, 7(a), 8 and 10 of this decree.

End Proposed Changes to Paragraphs 17(c) and (f)

**PROPOSED NEW SECTION FOR
SAN JUAN RIVER BASIN IN NEW MEXICO
NAVAJO NATION WATER RIGHTS SETTLEMENT AGREEMENT**

NOTE: To clarify the parties' intent concerning water marketing (leasing and subcontracting), the following provision is proposed as an insert to the Settlement Agreement.

Insert the following as a new paragraph:

.0 WATER LEASING AND WATER SUBCONTRACTING

.1 Authority of the Navajo Nation to Lease Reserved Water Rights not Subject to the Settlement Contract. Under this Agreement, the Settlement Act, the Partial Final Decree, and the Supplemental Partial Final Decree, the parties seek to provide the Navajo Nation the authority to lease or otherwise transfer to other persons its reserved water rights that are not subject to the Settlement Contract for use in New Mexico on Navajo Lands or on lands that are not Navajo Lands, without further approval of the United States. To the extent any Navajo reserved water rights that are not subject to the Settlement Contract are leased for use on non-Navajo Lands, the change in place and purpose of use shall be subject to approval in accordance with State law. To the extent any Navajo reserved water rights that are not subject to the Settlement Contract are leased for use on Navajo Lands, the change in place and purpose of use shall be subject to approval in accordance with the procedure specified in Paragraph 17 of the Partial Final Decree, which establishes a tribal administrative process in which the New Mexico State Engineer would play a consulting role. This leasing authority applies only to those Navajo Nation rights that are not governed by the Settlement Contract.

.2 Authority of the Navajo Nation to Sub-contract Water Rights Subject to the Settlement Contract. Under this Agreement, the Settlement Act, the Partial Final Decree, the Supplemental Partial Final Decree, and the Settlement Contract, the parties seek to provide that the Navajo Nation shall have the authority to subcontract to other persons the water rights it holds under the Settlement Contract for use in New Mexico on Navajo Lands or on lands that are not Navajo Lands. To the extent any Navajo Settlement Contract water rights to be subcontracted are to be used on non-Navajo Lands, the change in place and purpose of use shall be subject to approval in accordance with State law, and any necessary approvals of the Secretary pursuant to the Settlement Contract. To the extent any Navajo Settlement Contract water rights leased are to be used on Navajo Lands, the change in place and purpose of use shall be subject to approval in accordance with the procedure specified in the paragraph 17 of the Partial Final Decree, which establishes a tribal administrative process in which the New Mexico State Engineer would play a consulting role, and any necessary approvals of the Secretary pursuant to the Settlement Contract.

End Proposed New Section to Settlement Agreement

PROPOSED REVISIONS TO SECTIONS 203, 305 and 306
OF THE SETTLEMENT ACT

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):

* * *

(4) The Navajo Indian Irrigation Project water supply described in subsection (a)(2) of this section and in Title III of the Act also ~~shall~~ may be used to implement the alternate water source provisions described in subparagraph 9.2 of the Settlement Agreement, and may be used for other purposes, including but not limited to municipal and industrial uses by other persons, and transferred to other places of use by the Navajo Nation, its members, or other persons either within or outside the area served by the Project facilities in accordance with the Settlement Agreement, the Partial Final Decree described in paragraph 3.0 of the Settlement Agreement, the Settlement Contract, and other applicable law.

(5) The Secretary is authorized to use capacity of the Navajo Indian Irrigation Project works to convey water supplies for purposes of the Navajo-Gallup Water Supply Project authorized by Title I of this Act and to convey water supplies for uses specified in leases or subcontracts, including uses for municipal and industrial purposes, consistent with~~for purposes described in~~ subsection (a)(4) of this section. Use of Navajo Indian Irrigation Project works

to convey water for the Navajo-Gallup Water Supply Project or for other non-irrigation purposes consistent with subsection (a)(4) of this section shall not be cause for the Secretary to reallocate, or to require repayment of, constructions costs of the Navajo Indian Irrigation Project.

* * *

SEC. 305. SUBCONTRACTS.

(a) AUTHORITY OF NAVAJO NATION. -- The Navajo Nation shall have the authority to enter into subcontracts with ~~third parties~~ other persons for the delivery of its water under the Settlement Contract to supply water for any beneficial uses in the State of New Mexico on or off lands held by the United States in trust for the Navajo Nation or its members or lands held in fee by the Navajo Nation, subject to:

(1) the approval of all subcontracts by the Secretary in accordance with this section and the Settlement Contract; and

(2) compliance with the Settlement Agreement, the Partial Final Decree described in paragraph 3.0 of the Settlement Agreement, and other applicable law.

For subcontracts involving a change in place of use of water on Navajo Lands, the diversion and use of water shall comply with the applicable provisions of subparagraph 5(e)(1) and Paragraph 17 of the Partial Final Decree described in paragraph 3.0 of the Settlement Agreement. For subcontracts involving a change in place of use of water to non-Navajo Lands, the diversion and use of water shall comply with applicable state law, including applicable permitting and reporting requirements of the New Mexico State Engineer. Nothing in this Act shall be construed to establish, address, prejudice or prevent any ~~party~~ person 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.

* * *

SEC. 306. WATER LEASES NOT REQUIRING SUBCONTRACTS.

(a) AUTHORITY OF NAVAJO NATION. -- The Navajo Nation shall have the authority, without approval of the Secretary, to lease, ~~contract~~ or otherwise transfer for any beneficial uses to other persons and to other purposes or places of use in the State of New Mexico, either on or off lands that are held by the United States in trust for the Navajo Nation or its members or held in fee by the Navajo Nation, water rights decreed to the Nation pursuant to the Settlement Agreement that are not subject to the Settlement Contract. The authority of the Navajo Nation under this subsection shall be subject to compliance with the Settlement Agreement, the Partial Final Decree described in paragraph 3.0 of the Settlement Agreement, the Supplemental Partial Final Decree described in paragraph 4.0 of the Settlement Agreement, and other applicable law. Nothing in this Act shall be construed to establish, address, prejudice or prevent any interested person from litigating whether or to what extent any law does or does 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. For leases or other transfers involving a change in place of use of water on Navajo Lands, the diversion and use of water shall comply with the provisions of Paragraph 17 of the Partial Final Decree described in paragraph 3.0 of the Settlement Agreement. For leases or other transfers involving a change in place of use of water to non-Navajo Lands, the diversion and use of water shall comply with

applicable state law, including applicable permitting and reporting requirements of the New Mexico State Engineer.

* * *

End Proposed Revisions to Settlement Act

PROPOSED REVISIONS TO PARAGRAPH 11 OF THE SETTLEMENT CONTRACT

SUBCONTRACTING

11. (a) The Navajo Nation may subcontract with other persons ~~third parties~~, subject to the provisions of the San Juan River Basin in New Mexico Water Projects and Settlement Act (___ Stat. ____), the Settlement Agreement, the partial final decree referred to in section 2 of this contract, and approval of the Secretary in accordance with this section, to supply water for beneficial use on or off Navajo Lands in the State of New Mexico, subject to and consistent with the same requirements and conditions of ~~State law, and any~~ applicable state or Federal law, interstate compact, and international treaty as apply to the exercise of water rights held by non-federal, non-Indian entities.

[NOTE: As drafted, this provision imposes state law. The proposed revision imposes it only if applicable otherwise. Without the revision, the settlement contract language appears to conflict with or override provisions of the Decree, where state law does not apply in certain circumstances.]

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 other person ~~third parties~~ shall be subject to the provisions of the San Juan River Basin in New Mexico Water Projects and Settlement Act (____ Stat. ____), the Settlement Agreement, the partial final decree referred to in section 2, 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 at least 30 days prior to being executed by the Nation; provided, that proposed emergency subcontracts may be filed with less than 30 days notice. Two copies of each executed subcontract shall be filed with the Contracting Officer and one copy with the New Mexico Interstate Stream Commission.

* * *

(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 the Settlement Agreement, the partial final decree referred to in section 2 of this contract, and other applicable law, including any applicable permitting and reporting requirements of the New Mexico State Engineer;

* * *

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

(i) The subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. 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) 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: BHP remains concerned that this language may lead to disputes. The language is not a positive authorization for the Nation to impose a tribal member preference. Rather, it simply says that "nothing in this section" prohibits a tribal member preference. Presently, however, the EEOC and the Ninth Circuit have held that federal law does not permit tribal member preferences. If the Nation wants the authority to impose tribal member preferences and other parties agree,

perhaps a more affirmative statement would help avoid future problems. This is a potential problem for the regulated community.]

End Proposed Revisions to Paragraph 11 (Settlement Contract)

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