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Navajo settle.
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October 12, 2004

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VIA E-MAIL AND U.S. MAIL

Jim Dunlap
Chairman, Interstate Stream Commission
Bataan Memorial Building, Room 101
P.O. Box 25102
Santa Fe, New Mexico 87504-5102

Re: *Comments of BHP Navajo Coal Company on July 9, 2004 Draft of Navajo Nation – State of New Mexico – United States Settlement Agreement and Related Documents*

Dear Chairman Dunlap:

Enclosed please find a copy of Comments of BHP Navajo Coal Company on the July 9, 2004 Navajo Nation – State of New Mexico – United States Settlement Agreement and Related Documents. We appreciate the opportunity to comment on the July 9, 2004 documents and look forward to working with the Interstate Stream Commission and others to resolve the issues we have raised in our comments.

Please do not hesitate to call me if you should have any questions.

Very truly yours,

Maria O'Brien

C: (via U.S. Mail only)
John D'Antonio
Estevan Lopez
John Whipple
John Utton
Stanley Pollack
John Leeper
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L A W Y E R S

EXECUTIVE SUMMARY

October 12, 2004

**Comments of BHP Navajo Coal Company on July 9, 2004
Draft of Navajo Nation – State of New Mexico – United States
Settlement Agreement and Related Settlement Documents**

1. **The proposed Settlement Documents do not properly or adequately protect all existing uses.**

Paragraph 9.2 of the Settlement Agreement provides an "Alternate Water Source for San Juan River Uses" which provides an appropriate margin of protection to existing non-Indian direct flow users and allows Navajo irrigators access to storage in Navajo reservoir in times of shortage. However, the protection is wholly contingent upon non-Indian irrigators receiving a certain adjudicated right in the future. The contingency inappropriately penalizes municipal and industrial users and removes an appropriate margin of protection for one class of users. **This contingency should be removed.**

Alternatively, one of the following language changes should be incorporated into the Settlement Agreement.

"to the extent the Alternate Water Source of subparagraph 9.2 is necessary to protect non-irrigation water rights when the direct flow is insufficient to supply such current non-irrigation uses and the rights provided to the Nation under subparagraphs 3(e) and 3(f) of the Partial Final Decree, and except, ...".

Another approach would be to add the following sentence as a new section 9.2.7:

"Irrespective of the determinations of irrigation water rights the Court in the San Juan River Adjudication makes for other parties to the Adjudication in accordance with subparagraphs 9.6.1 through 9.6.3, the Alternate Water Source protections of Paragraph 9.2 shall remain applicable to protect municipal and industrial water rights holders."

2. **The leasing and transfer provisions are unclear.**

BHP understands it is the parties' intent to provide maximum flexibility to the Navajo Nation with regard to the leasing and transfer of its decreed water rights. However, the Settlement Documents are ambiguous in several respects with regard to this intent. To clarify the parties' intent BHP proposes revisions to the Settlement Documents contained in Exhibit A attached to BHP's comments.



MODRALL SPERLING

L A W Y E R S

October 12, 2004

**Comments of BHP Navajo Coal Company on July 9, 2004
Draft of Navajo Nation – State of New Mexico – United States
Settlement Agreement and Related Settlement Documents**

Modrall, Spierling, Roehl, Harris, & Sisk, P.A. submits these comments on the July 9, 2004 Draft of the Navajo Nation – State of New Mexico – United States Settlement Agreement and Related Documents (collectively "Settlement Documents") on behalf of BHP Navajo Coal Company ("BHP"). BHP is the owner of 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 water to the Four Corners Power Plant and San Juan Generating Station.¹

BHP submitted comments on January 15, 2004 regarding the previous drafts of the Settlement Documents and appreciates the opportunity to provide these additional comments. BHP incorporates its previous comments by reference. These comments are submitted without prejudice to any position BHP may take in the San Juan Adjudication, or other judicial, administrative or legislative proceedings.

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. **Two principal issues must be addressed in the current draft of the Settlement Documents, however, before BHP can fully support the Settlement Documents in any final form.**²

As an initial administrative matter, BHP observes that the settling parties have not made it easy to track what changes have been made to the Settlement Documents since the latest drafts have no redline revisions and no summary statement of changes was provided. Although a memorandum of responses to public comments was provided, the responses are so general in nature they are not particularly useful. Moreover, although it appears some of BHP's comments have been addressed, key concerns remain outstanding and some of the revisions to the documents have raised additional concerns. In particular, BHP has two primary comments. Following a discussion of those two items, BHP provides additional comments on the individual documents.

¹ Arizona Public Service Company, Operating Agent and part Owner of the Four Corners Power Plant, and Public Service Company of New Mexico, as Operator and part owner of the San Juan Generating Station, support these comments.

² There are many issues raised by the Settlement Documents. These comments will focus only on those issues which could directly and substantially affect BHP and its water supply under Permit 2838.

Primary Comments

1. **The proposed Settlement Documents do not properly or adequately protect all existing uses.**

In its January 15, 2004 comments, BHP raised concerns regarding the amount of acreage adjudicated to the Fruitland and Hogback irrigation projects, and the diversionary allowance provided those projects. See January 14, 2004 Comment 3(d). These concerns remain outstanding. Because of the proposed 1868 priority dates virtually all non-Indian are affected. The Settlement Documents continue to provide no clear justification for either the amount of acreage proposed to be decreed or the high diversionary allowance, which is well above that recognized as an efficient irrigation practice and allowed elsewhere in the Basin or the State. Additionally, although these are federal Bureau of Indian Affairs projects and the acreage proposed to be decreed apparently is premised on that assumption, the projects are assigned 1868 priority dates as opposed to the dates the Projects were developed.

A new provision, (Paragraph 9.2), of the Settlement Agreement entitled "Alternate Water Source for San Juan River Uses" appears to be an attempt to address the concerns raised by BHP and others regarding the adjudication of rights to the Fruitland and Hogback projects and the operation of these projects. This approach seems to be an appropriate step toward ensuring protection of longstanding existing uses in the Basin, while at the same time settling the Nation's claims and allowing water development by the Nation. However, as proposed, the Alternate Water Source provisions do not go far enough. They do not provide sufficient protection to BHP and similarly situated municipal or industrial water users. Accordingly, BHP believes the Settlement Documents should be revised to ensure the Alternate Water Source provisions appropriately protect all existing uses in the Basin.

First, the requirement of alternate sourcing of water is not sufficiently addressed in any Settlement Documents other than the Settlement Agreement. Notably, the proposed Partial Final Decree ("Decree"), the document which will actually decree the rights to the Navajo Nation and bind other parties to the settlement of the Nation's claims, only references the Alternate Water Source obliquely in the context of pre-approving a "transfer" of NIIP water to the Fruitland and Hogback projects in the event of a shortage in the system. See Decree paragraph 5(e)(3). Although the proposed Decree would incorporate the Settlement Agreement, such a significant provision as the Alternate Water Source should be explicitly spelled out in the Decree as an express limitation on the Fruitland and Hogback projects. Similarly, the current draft of the Settlement Act only references the Alternate Water Source for the purpose of authorizing NIIP water to be used for this purpose. See Section 203 of the Act. Because the Act and the Decree represent the key long term elements that will guide the conduct of water uses in the basin, these documents should clearly reflect the commitment governing the Alternate Water Source. This is inadequate as currently framed.

Second, the specific operational triggers and method of implementation for the alternate sourcing is not evident from the Settlement Documents. The current Settlement Documents appear to lay a framework for administration without clearly providing for implementation and operational triggers or providing the greater context within which administration would occur. The administration of the direct flow in the San Juan River is a significant issue. The settlement of the Nation's claims should not operate so as to predetermine how administration of the river may work with regard to any water rights not adjudicated in the proposed Partial Final Decree.

Third and most significantly, as proposed, the Alternate Water Source is wholly contingent upon adjudication to the non-Indian irrigators of the same diversions, farm delivery requirements, and other rights that were adjudicated pursuant to the former 1948 Echo Ditch Decree. See Paragraph 9.6.1(1). The Settlement Agreement plainly provides that the protection afforded by the Alternate Water Source disappears forever as to all water users if the non-Indian irrigators, at some time after the Nation's settlement is effectuated, receive the right to divert and consume more water as a result of the ongoing San Juan Adjudication. BHP, as an industrial user, and the power plants to which it supplies water, would be harmed if irrigators received higher diversionary rates or consumptive irrigation requirements in the adjudication. Yet, if this contingency occurred, as the Settlement Documents are currently framed, BHP would, through no action taken on its part or for its benefit, lose any protection afforded by the Alternate Water Source provision. Not only would this harm the security of BHP's water rights but the timing would be such that BHP would have lost any ability to address the excessive acreage and diversionary requirements adjudicated to the Fruitland and Hogback projects. There is no clearly articulated reason for the protection to be lost to municipal and industrial users if non-Indian agricultural users receive a benefit of some greater decreed rights in the adjudication.³ **This contingency should be removed.** Alternatively, the following language should be added to paragraph 9.2.6(1), fourth line, following the word "except", to ensure the Settlement equitably protects all existing uses:

"to the extent the Alternate Water Source of subparagraph 9.2 is necessary to protect non-irrigation water rights when the direct flow is insufficient to supply such current non-irrigation uses and the rights provided to the Nation under subparagraphs 3(e) and 3(f) of the Partial Final Decree, and except, ...".

Another approach would be to add the following sentence as a new section 9.2.7:

"Irrespective of the determinations of irrigation water rights the Court in the San Juan River Adjudication makes for other parties to the Adjudication in accordance with subparagraphs 9.6.1 through

³ It should be noted that the Navajo irrigators will benefit from the Alternate Water Source provisions by gaining access to reservoir storage.

9.6.3, the Alternate Water Source protections of Paragraph 9.2 shall remain applicable to protect municipal and industrial water rights holders.”

Absent modification, the Alternate Water Source provision remains an unacceptable approach to the necessary goal of ensuring existing uses are not harmed by the proposed Settlement.

2. The leasing and transfer provisions are unclear.

The settling parties have improved the elements of the documents relating to water marketing and to the ability of the Nation to change the place and purpose of use of Navajo Nation decreed water rights. The leasing and transfer provisions contained in the Settlement Documents, however, retain inconsistencies and redundancies as among documents and lack clarity as to the flexibility intended to be afforded the Nation with regard to water marketing. BHP proposes changes to these provisions as set forth in the attached Exhibit A. Other proposed changes or problematic provisions are discussed below.

Generally, the documents are confusing concerning the relationship between subcontracting and leasing. One reading of the documents is that subcontracting is the **only** mechanism available to the Nation to market the water that is subject to the Settlement Contract, and that only non-Contract water (such as the Fruitland-Cambridge and Hogback-Cudei Irrigation Project water) may be leased. Another reading is that the parties intend the Nation to have flexibility to lease or contract any water adjudicated to the Nation in the Partial Final Decree. BHP believes it is most beneficial to the Nation and the market for San Juan River water to provide the greatest flexibility to the Nation so that it may lease and subcontract with third parties.

BHP urges the parties to clarify these critical points and re-craft the related provisions. If, for example, the intent is that water rights subject to the Settlement Contract may only be subcontracted, and not leased, then the parties should consider whether state law should be applicable to subcontracts that would involve water use only on the Reservation or on Navajo trust lands. The provisions of the Partial Final Decree addressed in the proposed revisions in Exhibit A to these Comments suggest that the parties do not intend that state law would apply to on-Reservation transfers, yet the Settlement Contract clearly would require compliance with State law. Clarification of the parties' intention on this significant point is critical.

BHP is concerned that, as drafted, the Partial Final Decree does not clearly provide that NIIP water may be leased and moved to uses both on the reservation (or on other trust lands) and off the reservation on non-trust lands. BHP understood at one time that the parties intended to provide flexibility so that, if it chose to do so, the Nation could move its water usage from NIIP (or NAPI) to other locations in the State of New Mexico – whether on or off the Reservation - and that NIIP water could be used by third parties by way of lease. Accordingly, if that remains the

parties' intent, BHP proposes to provide this flexibility expressly and clarify what process should apply to those changes in place or purpose of use. The process for changes in place of use to off-Reservation, non-trust lands necessarily should involve a greater role for the New Mexico State Engineer in comparison to changes in place of use that remain on trust lands. BHP has proposed changes in Paragraphs 5(e) and 17(c) of the Partial Final Decree and in the other Settlement Documents to clarify these matters. See Exhibit A. Addressing these changes, together with other specific comments below, also would serve to make the Settlement Documents consistent and eliminate potentially redundant approval processes.

Other Comments

BHP provides the following additional specific comments on the individual documents.

Settlement Agreement

1. Paragraph 3.4.2: It is not clear how water rights which are required to be allocated to allottees from "rights adjudicated to the Navajo Nation by the Partial Final Decree" will be documented or what process will be used to ensure such reallocation occurs.
2. Paragraph 9: Please see Primary Comment No. 1 above. Additionally, Paragraph 9 appears to make several predeterminations regarding the administration of direct flow in the San Juan Basin by the State of New Mexico. See, e.g. Subparagraph 9.1. However, the specifics of such administration, which would affect all water users, are not sufficiently articulated. No rules or regulations currently exist for administration in the Basin. Accordingly, agreements in the Settlement Documents among the State, the United States and the Navajo Nation as to how to measure or quantify direct flow are inappropriate. Other water users cannot evaluate the validity of any assumptions or the effect of such provisions in the absence of a larger administrative framework which has yet to be made public. Moreover, the procedural importance of binding the Nation and the United States to certain administrative criteria, which could feasibly change in later proceedings vis-a-vis other water users, is unclear, and the Settlement Documents should not be used as a mechanism for a predetermination regarding how such administration would occur. See, e.g., Subparagraph 9.2.6(2).
3. Paragraph 9.4 provides that the Agreement does not prohibit cooperative water sharing agreements but the other settlement documents do not contain such a provision. For consistency purposes, all relevant documents should contain this provision.
4. Section 11.2 provides that the Agreement can be terminated by mutual consent of the parties. What does this do to third parties? What would termination do to the other documents and the Settlement Act? This appears to be a cavalier approach given the impact of the Settlement and its impact on other users and must be more clearly addressed before the documents are finalized.

Partial Final Decree

1. Paragraphs 3(e), (f): Unless and until the issues with regard to the Alternate Water Source provided in paragraph 9.2 of the Settlement Agreement as described above in Primary Comment No.1 are addressed, BHP reiterates its objections to the acreage, diversionary right and priority date proposed to be adjudicated to the Hogback-Cudei and Fruitland-Cambridge Irrigation Projects.
2. Paragraph 4: The manner in which the "Supplemental Carriage Water" would be implemented or administered remains sufficiently unclear that there is a real risk that, contrary to the apparent intent of the provision, water rights of third parties will be impaired. The paragraph should be reworded 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, it should be clarified that the supplemental carriage water is not only not a "consumptive use right," see Paragraph 4(a), but does not constitute a water right. Finally, the following language should be added at the end of Paragraph 4(d): "at a point which would not impair any existing water rights."
3. Paragraph 3(a): The basis for the increased depletion allowed for NIIP should be explained.
4. Paragraph 5(e): The marketing provisions of the decree remain confusing. See Primary Comment No. 2 and proposed revisions attached as Exhibit A.
5. Paragraphs 3(e) and (f): See Primary Comment No. 1 above regarding the acreage and diversionary right proposed to be adjudicated to the Hogback-Cudei and Fruitland-Cambridge Irrigation Projects. The diversionary right proposed for these projects is well above the accepted diversionary right for irrigation in the Basin. The Decree should not memorialize historic inefficiencies. The new draft proposes the diversionary rate be decreased 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 in its current form. First, 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.
6. Paragraph 5(a): In its January 15, 2004 comments, BHP raised concerns regarding the use of the term "irretrievably lost" absent further clarification or definition. See January 15, 2004 Comments C(1)(b), C(1)(c). These comments have not been addressed.
7. Paragraph 17: See Exhibit A for proposed revisions and related comments.

Settlement Act

1. The provisions of the Settlement Act, (Sections 302, 305 and 306), which address leasing and transfers of the Nation's decreed rights, lack sufficient clarity unless the language of the decree is revised to clarify the apparent intent of the parties to allow leasing and transfer of all decreed water (including NIIP water, see Section 203(a)(3)) for use both off and on Navajo Nation lands. See Primary Comment No. 2, *supra*. Additionally, as discussed above in Primary Comment No. 2 and below in Comment No. 1 to the Settlement Contract, where water is to be used on Navajo lands through the Decree's and Act's leasing mechanism, BHP questions the necessity and utility of a subcontract. See *also* Comment No. 4, *infra*.
2. Section 203(a)(3): As currently written, Section 203(a)(3), (particularly when read in conjunction with 203(a)(4)), is confusing. Language should be added to the last paragraph to explicitly state: "The Secretary is authorized to use capacity of the Navajo Indian Irrigation Project to convey water supplies for uses specified by the Nation pursuant to leases including municipal and industrial uses." As currently worded, the section implies this authority, but no explicit grant is made. See *also* Comment No. 4, *infra*.
3. Section 204: Appropriations for rehabilitation of the Fruitland and Hogback Projects should be conditioned on the projects achieving a specific efficiency consistent with accepted irrigation practices under State law.
4. Section 306: This section, authorizing the leasing only of water rights not subject to the Settlement Contract, once again, appears inconsistent with Paragraph 5(e) of the Partial Final Decree. As written, Section 306 provides Congressional approval to Navajo Nation leasing of non-Settlement Contract water rights only. Accordingly, the Nation could not lease NIIP water (which is subject to the Settlement Contract) to third parties. BHP had read and understood that the settling parties had intended Paragraph 5(e), in part, to facilitate the Navajo Nation's ability to transfer NIIP water to other places and purposes of use **by third parties**. And, Paragraph 5(e) provided the State Engineer with only a limited, consultative role with respect to changes in place of use elsewhere on Navajo Nation trust lands. Given the limited Congressional authorization provided in Section 306 as drafted, the only way for a third party to obtain the rights to use NIIP water is through a subcontract that "is subject to and consistent with the ...requirements and conditions of State law..." see Settlement Contract, Paragraph 11(a). Paragraph 5(e) of the Decree then provides flexibility only for Navajo Nation uses. Is this what the parties intended? Is a subcontract that is subject to State law the only way that the Navajo Nation can market its NIIP water to third parties? BHP does not believe such an interpretation facilitates resolution of issues in the San Juan Basin, yet absent some clarification, there is a risk that the Settlement Documents could be so construed.
5. Section 403: The language of this section is unclear. The Secretary may not make "available [water] to contractors diverting below Navajo Dam inflows to the San

Juan River arising below the dam . . ." out of priority or to the extent such water is otherwise required by direct flow users including Permit 2838 users.

Settlement Contract

1. Section 11: The dictate that state law applies to all subcontracts – for uses both on and off-Reservation -- appears inappropriate in light of other elements of the settlement that indicate state law may not be applicable. See, e.g., Partial Final Decree, ¶ 5(e). If Section 11 remains as is, then the requirements of Paragraph 5(e) of the Partial Final Decree and state law would apply to any on-reservation subcontract of NIIP water. This dual requirement would hamper the Nation's flexibility to subcontract
2. Section 11(e): The equal opportunity language proposed by Section II(e) may be problematic. See January 15, 2004 Comment E(1). Moreover, it is unclear why this subsection is applied to "off Navajo lands."

Conclusion

BHP reiterates its support for the Settlement of the Nation's claims as a general matter. However, unless changes are made to more adequately and equitably protect existing industrial uses in the basin, BHP can not support fully the current version of the Settlement Documents.

Thank you for your consideration of these comments. Please raise any questions you may have.

Respectfully submitted,

**MODRALL, SPERLING, ROEHL, HARRIS,
& SISK, P.A.**

By 

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EXHIBIT A

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

[INTRODUCTORY NOTE: Since §§ 302 and 306 of the Act authorizes lease and transfer of “decreed rights” and this decree defines (presumably) what the “decreed rights” are, this provision should be clear and consistent with the act. Please consider the revisions proposed here together with revisions proposed for Paragraph 17.]

(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 non-irrigation purposes or transferred to other places of use 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 conditions:

(1) ~~The Navajo Nation, without approval of the New Mexico State Engineer or the Court,~~ **[NOTE: BHP understands the settling parties interpret this provision in part to mean that the Navajo Nation can accomplish any other change in place or purpose of use with approval of the State Engineer or court. We do not believe this is sufficiently clear. The double negatives in subparagraph (1) and its subparts make this provision confusing and ambiguous as to what the Nation can or cannot do with State Engineer approval. Please see insert below that proposes subparts (vi) and (vii) to address the problem and replace the old subpart (ii), which we also propose to**

strike.] may change the purpose or place of use of any portion of the rights described in subparagraph 3(a); provided, that:

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

[NOTE: See proposed insert proposing subparts (vi) and (vii) to address the problem and replace the old subpart (ii).]

~~(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 have been 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)(ii)~~ the point of diversion is not changed;

~~(iv)(iii)~~ the depletion quantities specified in subparagraph 3(a) are not exceeded as a result of the changes;

~~(v)(iv)~~ 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)(v) 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)(vi)~~ **[NOTE: The language shown as struck here actually has been moved to the end of sub-section (2).]** ~~no showing is made to the Court that a change would or does impair other water rights in the San Juan River Basin in New Mexico. proposed changes that involve transfers of places of use to locations outside the State of New Mexico or to lands that are not held in trust by the United States for the Navajo Nation as of the date of entry of this decree or to lands that, unless such lands have been declared 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), are subject to approval of the New Mexico State Engineer;~~
and

(vii) proposed changes that involve transfers of places of use to lands in New Mexico that are held in trust by the United States for the Navajo Nation as of the date of entry of this decree or to lands that have been declared 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), are not subject to approval of the New Mexico State Engineer.

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)(vii), 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)(vii) to implement a proposed change in purpose or place of use until it has consulted with the State Engineer and completed the Navajo Nation's administrative process for the proposed change, and no showing is made to the Court that a change would or does impair other water rights in the San Juan River Basin in New Mexico.

[NOTE: Our understanding is that this was intended to apply to

transfers to Navajo trust lands in New Mexico. So, we have focused this provision on such transfers. See Paragraph 5(e)(1)(vii).]

(3) The New Mexico State Engineer may approve changes in purpose or place of use proposed to be made pursuant to subparagraph 5(e)(1)(vi) only in accordance with state law. [NOTE: This applies to transfers to non-trust lands. We assume this is the intent of the state and Nation.]

~~(3)~~(4) 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.

~~(4)~~(5) 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) AND (f)

17. ADMINISTRATION.

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

[INTRODUCTORY NOTE: Paragraph 17 repeats much of what is in Paragraph 5 (1), at least as it relates to Paragraph 3(a) – NIIP water. Please consider either: (a)(e) combining Paragraph 17 (c) with Paragraph 5 (e)(1) or (b) limiting this provision to non-NIIP water (NIIP water is specifically addressed with 5(e)(1).]

(c) The Navajo Nation shall have authority to change the purpose and place of use 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, ~~including such trust lands that are subject to lease or federally granted rights of way,~~ **[NOTE: If this phrase is included here, should it not be included elsewhere? What does it mean if it's here and not in other places? We recommend that this phrase be deleted. Other revisions have begun to address our previous concerns on this point. The concern remains that there should be broader authorization to lease water to third parties.]** subject to the conditions and limitations of subsection 104(h) of the San Juan River Basin in New Mexico Water Projects and Settlement Act (___ Stat. ___) and subparagraphs 5(d)(5), 5(e), 7(c) and 7(g) of this decree; provided, that: **[NOTE: Given the reference here to Paragraph 5(e), it would not seem necessary to repeat the provisions that are in Paragraph 5(e) again here.]**

~~(1) notice is given of any proposed change in purpose or place of use consistent with paragraph 18;~~ **[NOTE: This is identical to Paragraph 5(e)(1)(i).]**

~~(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 have been 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);~~ **[NOTE: This is identical to Paragraph 5(e)(1)(ii).]**

~~*(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;~~ **[NOTE: This is covered more broadly in Paragraph 5(e)(i)(iii).]**

~~*(5) the 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.~~ **[NOTE: This concept is addressed in Paragraph 5(e)(1)(vii).]**

[*NOTE: For the subparagraphs that have asterisks, please consider working with Paragraph 5(e) and incorporate revisions there, as appropriate. Then, this material could be deleted to streamline the decree.]

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, and for reviewing and considering protests and impairment issues that may arise from such 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 administrative process for the proposed change. 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. Other transfers of reserved rights or ground water rights adjudicated by this decree, including transfers that involve a change in the point of diversion on the San Juan River or Animas River or a change in the point of diversion or place of use to a location off lands that are held by the United States in trust for the Navajo Nation, may be made pursuant to application with the New Mexico State Engineer and in accordance with state law.

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

- (1) the transfer of any of the Nation's water rights shall comply with the [other?] provisions of Paragraph 17; **[NOTE: What does "transfer" mean here? Is "transfer" different from change in place of use?]**

(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 a 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.

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: These are proposed revisions to clarify the Navajo Nation's water marketing authority. This should be read in conjunction with related revisions to other Settlement Documents. To clarify the parties' intent concerning water marketing (leasing and subcontracting), the following provision is proposed as an insert to the Settlement Agreement. In conjunction with this proposal, the parties are urged to consider Paragraphs 9.4 and 9.9 further to determine whether they could or should be incorporated into this proposed insert or alternative, deleted from the agreement.]

Insert the following as a new paragraph:

“ ___.0 WATER LEASING AND WATER SUBCONTRACTING

___.1 Authority of Navajo Nation to Lease Reserved Water Rights. Under this Agreement and the related Settlement Act and Partial Final Decree, the parties seek to provide that the Navajo Nation shall have the authority to lease, contract, or otherwise transfer to other parties its reserved water rights 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 leased are to be used on non-Navajo Lands, the change in place and purpose of use shall be approved in accordance with State law. To the extent any Navajo reserved water rights leased are to be used on Navajo Lands, the change in place and purpose of use shall be approved in accordance with the procedure specified in 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 and the related Settlement Act and Settlement Contract, the parties seek to provide that the Navajo Nation shall have the authority to subcontract to other parties 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 approved 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 approved in accordance with the procedure specified in 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, 302, 304, 305 AND 306 OF
THE SETTLEMENT ACT**

**Excerpt relating to Water Marketing
from the Navajo Nation-State of New Mexico
Proposed Settlement Act**

[NOTE: These are proposed revisions to clarify the Navajo Nation's water marketing authority. This should be read in conjunction with related revisions to other settlement documents.]

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):

(1) irrigation works shall be constructed to serve no more than 110,630 acres of land defining the total serviceable area of the Navajo Indian Irrigation Project;

(2) the average diversion by the Navajo Indian Irrigation Project from Navajo Reservoir shall not exceed 508,000 acre-feet per year, or the quantity of water necessary to supply an average depletion of 270,000 acre-feet per year, whichever is less, during any period of ten consecutive years for the principal purpose of irrigation of up to 110,630 acres of land; provided, that the quantities of diversion and depletion in any one year do not exceed the aforesaid ten-year average quantities, respectively, by more than 15 percent;

(3) the Navajo Indian Irrigation Project water supply described in subsection (a)(2) of this section and in Title III of this Act may be used for the

following purposes, in addition to irrigation, within the area served by the Project facilities:

(A) aquaculture purposes, including 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, industrial or commercial 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.

(4) ~~The water rights of the Navajo Nation associated with t~~The Navajo Indian Irrigation Project water supply described in subsection (a)(2) of this section and in Title III of the Act also may be used to implement the alternate water source provisions for Navajo Nation water uses on the San Juan River as described in subparagraph 9.2 of the Settlement Agreement, and may be used for other purposes, including without limitation municipal and industrial uses by others, and ~~or transferred to other places of use by the Navajo Nation or others either within or outside the area served by the Project facilities in accordance with the Settlement Agreement and applicable law Settlement Contract.~~ Use of Navajo Indian Irrigation Project works to convey water for non-irrigation purposes consistent with this subsection shall not be cause for the Secretary to reallocate, or to require repayment of, construction costs of the Project.

(45) 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 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 shall not be cause for the Secretary to reallocate, or to require repayment of, construction costs of the Navajo Indian Irrigation Project.

* * *

TITLE III - SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO

NATION WATER RIGHTS SETTLEMENT

* * *

SEC. 302. FINDINGS AND PURPOSES.

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

(1) in recognition of the commitments made by the United States to the Navajo Nation inherent in the treaties of 1849 and 1868, including the commitment to create a permanent homeland for the Navajo people, and in recognition of the United States' trust responsibility to the Navajo Nation, this Act will protect the water resources of the Navajo Nation and secure to the Nation a perpetual water supply from the San Juan River Basin in New Mexico;

(2) 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;

(3) 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, the United States and other parties;

(4) 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; [NOTE: Here, the Settlement Agreement is referred to as “including its appendices.” Where that qualifier does not appear elsewhere, is the intent not to include those appendices? This may be most relevant to Congress’ intent relative to the role of the Partial Final Decree, which includes critical elements of the way non-Contract water transfers are administered.]

(5) this Act, together with the Settlement Agreement between the Navajo Nation, the State of New Mexico and the United States, the Partial Final Decree [NOTE: If inserted, this may need to be defined further?] 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, transfer, contract, subcontract, or lease the water supply ~~under-provided by~~ its water rights for any beneficial use on or off its lands consistent with applicable state ~~and-or~~ federal law, 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 the terms of the Partial Final Decree, as each of these may be applicable to the proposed use, transfer, subcontract, contract, or lease; and

(7) the Secretary of the Interior, in accordance with the requirements of section 11 of the Act of June 13, 1962 (76 Stat. 96, 99; Public Law 87-483), has determined by hydrologic investigations that sufficient water to implement the Settlement Agreement and to provide for uses in New Mexico under the Navajo-Gallup Water Supply Project is reasonably likely to be available for use in the State of New Mexico from the Upper Colorado River Basin and has transmitted such determination to Congress by letter dated _____.

(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;
- (3) to authorize the lease and transfer by the Navajo Nation of decreed water rights for use by other parties on or off lands held by the United States in trust for the Navajo Nation and its members or held in fee by the Navajo Nation consistent with the Settlement Agreement and applicable law; 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.

(a) SETTLEMENT AGREEMENT. -- The Secretary, acting on behalf of the United States, is authorized to enter into the Settlement Agreement.

(b) SETTLEMENT CONTRACT. -- The Secretary, acting on behalf of the United States, is authorized to enter into the Settlement Contract, but in no event shall such contract be limited by any term of years, or be canceled, terminated or rescinded by the action of any party, except by an Act of Congress hereafter enacted.

(c) APPROVAL OF SETTLEMENT AGREEMENT AND SETTLEMENT CONTRACT. -- The Congress approves, ratifies, and hereby incorporates by reference the Settlement Agreement and the Settlement Contract.

(d) AUTHORITY OF SECRETARY. -- The Secretary of the Interior is authorized to approve or enter into such agreements and to take such measures as the Secretary may deem necessary or appropriate to fulfill the intent of the Settlement Agreement, the Settlement Contract and this Act. The Secretary shall comply with all aspects of the National Environmental Policy Act, the Endangered Species Act and other applicable federal and state laws and regulations in exercising this authority.

SEC. 304. WATER AVAILABLE UNDER SETTLEMENT CONTRACT.

* * *

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

(1) use tail water, waste water and return flows attributable to uses of the water by the Nation or its subcontractors, 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 tail water, waste water and return flows shall be subject to and

consistent with the terms, conditions and limitations of the Settlement Agreement, the Resolution and applicable laws;

(2) change points of diversions, change purposes or places of uses, and transfer rights for 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 or economic needs of the Nation provided, that:

(A) such changes or transfers are subject to and consistent with the terms of the Settlement Agreement and the provisions of section 305 of this Act and the Settlement Contract ~~and this Act~~; and

(B) any changes or transfers of water use by the Navajo Nation affecting one or more of the water development projects authorized by 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, maintenance or replacement costs as specified in Titles I and II of this Act and the Settlement Contract; ~~and~~

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

* * *

SEC. 305. SUBCONTRACTS.

(a) **AUTHORITY OF NAVAJO NATION.** -- The Navajo Nation shall have the authority to enter into subcontracts with third parties ~~to lease for delivery of its water~~ under the Settlement Contract to supply water for 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) the transfers of associated water rights to the uses of water to be served under subcontracts are consistent with the Settlement Agreement and applicable law; ~~and~~

~~(3) the same requirements and conditions of state law, Federal law, interstate compacts and international treaties as otherwise apply to the exercise of water rights held by non-Federal, non-Indian entities. **[NOTE: This language is already in the Settlement Contract. If this stays in, the differing approval processes for Navajo Lands and non-Navajo Lands need to be addressed.]**~~

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 rights it has under the Settlement Contract. The maximum term of any water use subcontract, including all renewals, shall not exceed 99 years in duration.

(c) **APPROVAL OF 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. 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: Is there a reason the Non-Intercourse Act is handled differently here in comparison to Section 306(c)? Is there a risk that the different treatment could lead to different conclusions as to its applicability or compliance with it?]

(e) 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.

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 to other parties 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:

(1) the transfer of water rights to the uses of water to be served under lease, contract or other arrangement consistent with the Settlement Agreement and applicable law; and

(2) the same requirements and conditions of ~~state law,~~ Federal law, interstate compacts and international treaties as otherwise apply to the exercise of water rights held by non-Federal, non-Indian entities;

(3) for leases, contracts or other transfers for use of water on Navajo Lands, the diversion and use of water under those instruments shall comply with the provisions of paragraph of the Partial Final Decree; and

(4) for leases, contracts or other transfers for use of water on non-Navajo Lands, the diversion and use of water under those instruments 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 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 rights decreed to the Nation pursuant to the Settlement Agreement. The maximum term of any water use lease, contract or other arrangement, including all renewals, shall not exceed 99 years in duration.

(c) **NON-INTERCOURSE ACT COMPLIANCE.** -- This section provides Congressional authorization for the lease, contracting and transfer of Navajo Nation

decreed water rights, and shall be deemed to fulfill any requirement that may be imposed by the provisions of section 2116 of the Revised Statutes (25 U.S.C. 177).

(d) FORFEITURE. -- The nonuse of the Navajo Nation's reserved rights by a lessee or contractor to the Nation shall in no event result in a forfeiture, abandonment, relinquishment or other loss of all or any part of the rights decreed to the Nation pursuant to the Settlement Agreement.

End Proposed Revisions to Settlement Act

PROPOSED REVISIONS TO PARAGRAPH 11 OF THE SETTLEMENT CONTRACT

**Excerpt relating to Water Marketing
from the Settlement Contract between
United States and the Navajo Nation**

[NOTE: These are proposed revisions to clarify the Navajo Nation's water marketing authority. This should be read in conjunction with related revisions to other settlement documents.]

SUBCONTRACTING

11. (a) The Navajo Nation may subcontract with 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, 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 Federal law, interstate compact, and international treaty 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 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.

(c) Prior to approving any subcontract, the Secretary shall comply with subsection 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) for subcontracts for use of water on non-Navajo Lands, the diversion and use of water under the subcontract would comply with applicable state law, including applicable permitting and reporting requirements of the New Mexico State Engineer;

(ii) for subcontracts for use of water on Navajo Lands, the diversion and use of water under the subcontract would comply with the provisions of paragraph ___ of the Partial Final Decree;

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

(iv) 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;

(v) 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;

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

(vii) 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-on Is this a typographical error? 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: We are concerned that this language may lead to disputes. It 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, perhaps a more affirmative statement would avoid difficulties or worse in implementation.]**

End Proposed Revisions to Paragraph 11 (Settlement Contract)

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