

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED

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STATE OF NEW MEXICO  
SAN JUAN COUNTY  
THE ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,  
  
Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *et al.*,  
  
Defendants,

THE JICARILLA APACHE TRIBE AND THE  
NAVAJO NATION,

Defendant-Intervenors.

CV-75-184  
HON. JAMES J. WECHSLER  
Presiding Judge

SAN JUAN RIVER  
GENERAL STREAM  
ADJUDICATION

Claims of the Navajo Nation  
Case No. AB-07-1

NAME OF PARTY: State of New Mexico *ex rel.* State Engineer (“the State”)

DESCRIPTIVE SUMMARY: The State submits its Memorandum in Support of Motion for Entry of Partial Final Decrees.

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**STATE OF NEW MEXICO’S MEMORANDUM IN  
SUPPORT OF SETTLEMENT MOTION FOR  
ENTRY OF PARTIAL FINAL DECREES**

The State of New Mexico *ex rel.* State Engineer (“State”) submits this *Memorandum in Support of the Settlement Motion of the United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees*, filed January 2, 2011. The State requests that the Court grant the Settlement Motion and enter the proposed Partial

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Final Decree and the proposed Supplemental Partial Final Decree (collectively “Proposed Decrees”).

## I. OVERVIEW

The State has entered into an agreement to settle the largest federal reserved water right in New Mexico, that of the Navajo Nation to the waters of the San Juan River Basin. The United States Supreme Court has held that reservation Indian tribes have the right to sufficient water to provide for a permanent homeland, known as the Federal Indian Reserved Water Rights Doctrine or the *Winters* Doctrine. Under the *Winters* Doctrine, the amount of the Navajo Nation’s reserved water rights is based on the amount necessary to meet the needs of the reservation, not on actual historic beneficial use, and the priority date relates to the date the United States created the reservation. This is in contrast to water rights based on the Prior Appropriation Doctrine under New Mexico state law, under which water rights are established only by and in the amount of water actually placed to beneficial use, and the priority date relates to the date such use was initiated.

One western water law expert has described the conflict between Federal Indian Reserved Water Rights and state law-based water rights as follows:

Because *Winters* rights are federal rights, they are unaffected by state water laws. For example, in a prior appropriation state, their priority date is not the date of first use, as it is for other appropriators, but rather the date of the reservation. And just as their validity does not depend on state-defined beneficial uses, *Winters* rights are not lost by nonuse; they are immune from state forfeiture and abandonment rules. Thus, state water rights holders who have been using water on which Indians have superior claims are likely to view the assertion of *Winters* rights as extremely destabilizing.

Beck, *Waters and Water Rights*, § 37.02(a)(1) (citations omitted). In discussing the threat posed by federal reserved rights to state-law based rights, the New Mexico Court

of Appeals recently observed in an appeal of the Commissioner of Public Land's claim to federal reserved water rights in this adjudication:

Such dormant and indefinite rights can be very problematic when it comes to adjudicating and administering water rights in an arid state, such as New Mexico. Many stream systems in such states are already fully appropriated, and a determination that federal reserved water rights exist often requires "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." [*United States v. New Mexico*, 438 U.S. 696, 705, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978)]. Further, as demonstrated by this case, claims to federal reserved water rights are potentially very large with very early priority dates and can therefore be highly disruptive to rights existing under state law. See [*United States v. Jesse*, 744 P.2d 491, 494 (Colo.1987) (en banc)]. ("Because the priority date of the [federal] reserved right relates back to the date of the reservation, reserved water rights threaten existing appropriators with divestment of their rights without compensation.").

*See State of N.M. ex rel. State Engineer v. Comm'r of Pub. Lands*, 2009-NMCA-004, 145 N.M. 433, 441, 200 P.3d 86, 94 (filed 2008), *cert. denied*, *State Engineer v. Comm'r of Pub. Lands*, 145 N.M. 531, 202 P.3d 124 (2008), and *cert. denied*, *N.M. Comm'r of Pub. Lands v. N.M. ex rel. State Engineer*, 129 S.Ct. 2075, 173 L.Ed.2d 1134 (2009).

The proposed Navajo Nation water rights settlement reconciles the conflict between federal and state law and diffuses the significant risk to existing state law-based water rights owners. The settlement does this by providing for the adjudication of the Navajo Nation's water rights in an amount and with certain conditions that protect other water rights owners. Without the settlement, the Court could recognize a much larger water right for the Navajo Nation with the most senior priority in the San Juan River Basin, and other water rights owners would have none of the protections they are afforded under the settlement. With the settlement, the Navajo Nation accepts essentially the quantity that it currently has a right to use or develop. In addition, the Navajo Nation

agrees to greatly limit priority calls and to accept restrictions on its uses in order to protect other water right owners.

Under the settlement, the Navajo Nation foregoes quantification based on the practicably irrigable acreage (“PIA”) standard as established in *Arizona v. California*, 373 U.S. 546, 600 (1963), in exchange for funding and construction of the Navajo-Gallup Water Supply Project (“NGWSP” or “Navajo-Gallup Project”) to provide municipal and domestic water to much of the reservation in New Mexico. In addition, the Navajo Nation agrees to subordinate the priority dates for the vast majority of its water rights, by using water stored under a junior priority in Navajo Reservoir and Lake Nighthorse and by limiting exercise of its senior right to the direct flow of the river, which is the supply for most non-Navajo water uses in the basin. In this manner, the settlement protects junior non-Navajo water rights from Navajo Nation priority calls.

Table 1 provides a summary comparison of total depletions and diversions of: (1) amounts claimed by the United States and filed with the Court on January 3, 2011, amended April 13, 2012 (“US Claims”); (2) the *Reconnaissance-Level Reserved Water Rights Quantification in the San Juan and Colorado River Basins for the Navajo Nation in New Mexico, prepared by Natural Resources Consulting Engineers, Inc., for the Navajo Nation Department of Justice*, March 2004 (“NRCE Report”); (3) the Navajo Nation’s current water right based upon the State’s *Technical Assessment of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement* (“Technical Assessment”) dated September 6, 2012 and the State’s *Quantification Analysis for the Proposed Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation*, (“Quantification Analysis”) April 2, 2012; and (4) amounts set forth in the Proposed Decrees.

<b>Table 1. Summary Comparison of Total Diversions and Depletions (AFY)</b>				
	<b>US Claims</b>	<b>NRCE Report</b>	<b>Current Right</b>	<b>Proposed Decree</b>
<b>Total Diversions</b>	<b>937,608</b>	<b>772,142</b>	<b>697,154</b>	<b>480,729</b>
<b>Total Depletions</b>	<b>595,257</b>	<b>534,859</b>	<b>339,175</b>	<b>334,542</b>

As described in the Technical Assessment and Quantitative Analysis, the State quantified the Navajo Nation’s “Current Right” based on historic and existing Navajo Nation water uses and existing authorizations for additional uses of water. It does not include additional water for future use that could be asserted as necessary for a permanent homeland under the *Winters* Doctrine. As Table 1 shows, the total amount of depletions proposed by the settlement is slightly less than the total depletions of the Navajo Nation’s current right.

Without the settlement, the State believes the Navajo Nation would be adjudicated water rights in an amount at least equal to, but likely significantly greater than, the total amount proposed by the settlement. Because the courts have consistently recognized water rights for future uses under the *Winters* Doctrine, there is a high probability, if litigated, the total amount recognized by this Court would be in excess of the settlement amount. Such an award would also result in a priority date senior to all other water rights and would allow the Navajo Nation to call for direct flows of the San Juan River without the conditions and restrictions included in the proposed settlement to protect other water rights from curtailment.

**II. THE COURT SHOULD ENTER THE DECREES.**

By its *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decree and Respective Burdens*, entered April 19, 2012, the Court set forth

four prongs that the Settling Parties must demonstrate for the Court to enter the Proposed Decrees adjudicating the Navajo Nation's water rights in accordance with the Settlement Agreement:

The Settling Parties shall have the burden of production and the burden of persuasion to demonstrate that (a) the Settlement Agreement is the product of good faith, arms-length negotiations, (b) the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights, (c) there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial, and (d) the Settlement Agreement is consistent with public policy and applicable law.

As argued below, the parties have met their burden, and the Court should enter the Proposed Decrees.

**A. The Settlement Agreement Is the Product of Good Faith, Arms-Length Negotiations.**

Negotiation of the Navajo settlement was a lengthy and difficult process. Attached to this Memorandum Brief is the Affidavit of John J. Whipple ("Whipple Affidavit"), which chronicles in detail the years of negotiation and legislative and governmental processes required to reach a final settlement. The State, the Navajo Nation and the United States are the only signatories to the Settlement Agreement but they always recognized the importance of involving other water users as part of a public process. From drafting of settlement documents to proceedings before Congress and then during the Court's expedited *inter se* proceeding, the process has afforded substantive and meaning public participation.

Initial settlement discussions began after execution of a memorandum of agreement between the State of New Mexico and the Navajo Nation signed by Governor Gary Johnson and President Albert Hale on July 23, 1997. The purpose of these initial discussions was to determine whether a negotiated decree for the adjudication of the

water right claims of the Navajo Nation in the San Juan River Basin in New Mexico was possible. On October 31, 2001 the parties signed a second Memorandum of Agreement confirming their mutual interest in pursuing settlement and agreeing to devote additional resources to that end. The 2001 Memorandum Agreement emphasized the importance of public participation by non-Navajo parties, and that any agreement should: "Recognize the political reality that there is non-Indian dependence on water in the San Juan Basin and that a settlement will require non-Indian support; [and] Provide stability for Indians and non-Indians within the San Juan Basin." See **Exhibit 4** to Whipple Affidavit, *Memorandum of Agreement* executed by Governor Gary Johnson and President Kelsey Begaye, October 31, 2001 at paras. 10(d) & (e).

By December 2003, the State and the Navajo Nation had drafted the initial settlement agreement. The State then invited public input on the terms of the settlement. From December 2003 through January 2005, the State released three separate drafts of the settlement documents for public review and held numerous public meetings to receive comments and respond to water users' concerns.

The State released the first draft for public comment on December 5, 2003. After consideration of the comments received, the State and the Navajo Nation negotiated revisions to the proposed settlement documents, and on July 9, 2004 released the revised documents for a second round of public review and comment. The State also prepared and released a written response to public comments regarding the initial December 5, 2003 settlement documents, explaining which issues led to further negotiations and the resulting revisions. The State then conducted another public meeting in Farmington on August 2, 2004 to explain the revisions and the issues they addressed, as well as receive additional public comment regarding the July 9, 2004 draft settlement documents. On

August 18, 2004, the New Mexico Interstate Stream Commission (“ISC”) held its regular meeting in Farmington to receive public comments on the July 9, 2004 revised draft settlement documents. *See Whipple Affidavit at paras. 50-53.*

In response to the comments received in August 2004, final drafts of the proposed settlement documents were released for public review and comment on December 10, 2004. The State again prepared and released a lengthy written response to public comments that the ISC had received during the previous year. The ISC heard public comments on the December 10, 2004 final drafts of the documents at its regular meeting in Farmington on January 12, 2005, where it passed a resolution approving the terms and provisions of the December 10, 2004 drafts of the settlement documents. Based upon these approved documents, the State of New Mexico and the Navajo Nation signed the initial version of San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement on April 19, 2005. *See Whipple Affidavit at paras. 54-56.*

On December 7, 2006, the New Mexico Congressional delegation introduced federal legislation to authorize the settlement and construction of the Navajo-Gallup Project. The federal legislative process provided for additional public participation and input, including submittal of formal testimony. The Northwestern New Mexico Rural Water Projects Act (Public Law 111-11, Title X, Subtitle B) was enacted by Congress and signed into law by the President in March 2009 (“Settlement Act”). The State of New Mexico, the Navajo Nation and the United States in December 2010 signed the *San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement* (“Settlement Agreement”) that was revised to conform to the provisions of the Settlement Act. Consistent with the Settlement Agreement’s requirement that most Navajo water uses be supplied from storage in federal projects, as discussed below, the Navajo Nation



and the United States also executed a contract for delivery of water from federal projects, including water supply for the Navajo-Gallup Project from Navajo Reservoir (“Settlement Contract”). See Whipple Affidavit at paras. 68-73.

The proposed *Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* that is Appendix 1 to the Settlement Agreement (“Proposed Decree”) was submitted to the Court in January 2011. The settlement parties subsequently negotiated a quantification of the proposed *Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (“Proposed Supplemental Decree”), which was submitted to the Court on April 2, 2012. Together these two proposed decrees describe the water rights of the Navajo Nation for the diversion and use of water in the San Juan River Basin in New Mexico to be adjudicated under the settlement.

**B. The Provisions Contained in the Settlement Agreement and the Proposed Decrees Will Reduce or Eliminate Impacts on Junior Water Rights.**

One of the State’s key objectives in settling the claims of the Navajo Nation is to protect existing non-Navajo water uses. Without settlement, the Court could recognize a large senior Navajo Nation water right that in times of shortage would require curtailment of non-Navajo uses. The settlement limits the quantity of the Navajo Nation’s rights and subordinates the exercise of 90% of their irrigation surface water rights to a junior priority, in addition to other conditions and restrictions. As a result, the Proposed Decrees substantially reduce or eliminate impacts on other water users, compared to a litigated outcome, where the Court would very likely recognize larger quantities and would not afford the many protections obtained by the State in the settlement.

The State's Technical Assessment and Quantitative Analysis and the Affidavit of John Whipple describe in detail the factual and technical bases for protections to non-Navajo water users. These protections are further discussed and summarized below.

***1. Limitations on Quantities of Navajo Nation's Water Rights***

The settlement limits the quantity of water rights adjudicated to the Navajo Nation. This, in and of itself, is one of the most important protections that the settlement will achieve. As discussed in section II(C), the Navajo Nation is giving up expansive claims to additional water rights under the *Winters* Doctrine. Except for uses under the Navajo-Gallup Project, the Proposed Decrees recognize historic and existing uses, or uses that were authorized many years ago.

Under the Proposed Decree, the Court would adjudicate the Navajo Nation essentially two categories of water rights: (1) a right to deplete 299,250 afy for the irrigation of 122,795 acres; and (2) a right to deplete 26,506 afy for domestic, commercial, municipal and industrial uses ("DCMI"). All of the irrigation rights proposed to be adjudicated are based on long-standing federally authorized irrigation projects. The Hogback-Cudei Irrigation Project ("Hogback Project") first began irrigation in the early 1900s; the Fruitland-Cambridge Irrigation Project ("Fruitland Project") began irrigation in the 1930s after consolidating prior Navajo irrigation commenced in the early 1900s; and planning for the Navajo Indian Irrigation Project ("NIIP") took place beginning in the 1930s and 1940s, with Congressional approval in 1962.

Other than these long-existing irrigation projects, the Proposed Decrees recognize no federal reserved water rights for future irrigation purposes. The largest irrigation right is for NIIP, which has the existing legal right to irrigate 110,630 acres. *See* Public Law

87-483 authorizing the NIIP; State Engineer File No. 2849. The project is more than two-thirds completed, and construction of irrigation facilities continues with the addition of up to a few thousand acres of irrigation every year. The proposed water rights for the Hogback and Fruitland Projects are based on BIA-permitted acreage within their existing boundaries. The only increased amount of water not based on an existing project is the 20,780 afy of depletion for municipal and domestic uses for the Navajo-Gallup Project, to be supplied from a contract for federal project water with a 1955 priority date.

Even with the additional amount of water for the Navajo-Gallup Project, the total settlement quantities are less than the Navajo Nation's current water right. This is because the Proposed Decrees place tight restrictions on both diversions and depletions. As discussed in section II(C)(3), the Proposed Decree effectively limits diversions by NIIP to 353,000 afy instead of the federal statutory amount of 508,000 afy and, furthermore, limits NIIP depletions to 270,000 afy of the flow of the San Juan River, which will require both at-site and incidental depletions combined to not exceed the total depletion limit of 270,000 afy. Without this protection, the total of at-site NIIP depletions and incidental depletions, including lost return flows that never reach the river, would likely exceed 270,000 afy by tens of thousands of acre-feet per year. Similarly, the proposed diversion and depletion limitations on the Hogback and Fruitland Projects will require careful and efficient management of irrigation to stay within the prescribed limits. The Proposed Decrees also recognizes smaller quantities for other uses such as tributary irrigation and heavy industrial and commercial uses. Consequently, the proposed quantities are equivalent or less than the current right. See sections II(C)(3) & (4).

The 2007 Hydrologic Determination also shows that the settlement quantities, even with the addition of the Navajo-Gallup Project, fit within the depletions available to

New Mexico under the Upper Colorado River Basin Compact. Before Congress enacted the Settlement Act, the Secretary of the Interior approved the 2007 Hydrologic Determination prepared by the Bureau of Reclamation. The 2007 Hydrologic Determination concluded that the United States could issue a contract from reservoir supply to the Navajo Nation for the Navajo-Gallup Project, based on a finding that it is reasonably likely that sufficient water will be available from the reservoir to supply the project. *See Whipple Affidavit, Exhibit 5.*

The 2007 Hydrologic Determination incorporated the New Mexico Interstate Stream Commission's 2006 depletion schedule, which adopted conservatively high depletion estimates by assuming: (a) the full depletion amounts for the proposed water rights for the Navajo Nation; and (b) depletion amounts for non-Indian ditches based on an assumption of full irrigation. The depletion schedule assumed the 1965-condition acreage for Echo Ditch Decree ditches and full project acreage on the Hammond Irrigation Project. This is a conservative assumption because the total irrigated acreage in the San Juan and Animas River valleys has declined significantly in the last 50 years. For example, irrigation in the Animas River valley declined by approximately 10,000 acres from 1965 to 2003. *See Whipple Affidavit at para. 40, Exhibit 6, Responses to Public Comments, Appendix B, page B-10.* Even with these and other conservative assumptions, the 2007 Hydrologic Determination shows the total settlement quantities fit within New Mexico's apportionment without displacing existing and authorized non-Navajo water uses.

## ***2. Subordination of Priority Dates and Use of Water from Storage***

The Settlement Agreement and the Proposed Decrees contain a number of provisions that eliminate or reduce the effect of the Navajo Nation's senior priority

dates. The Navajo Nation agrees to subordinate priority dates for most of its water rights, agrees to take most of its water from storage instead of direct flow and agrees to shortage sharing in times of low flows. The Proposed Decree adjudicates a priority date of 1868 for the reserved rights but imposes administrative conditions that severely limit their exercise. For most of the Navajo Nation uses, comprised of NIIP and the Navajo-Gallup Project, the Navajo Nation gives up its right to assert a senior priority unless supply from Navajo Reservoir is “irretrievably lost” as discussed below. For the Hogback and Fruitland Projects, the Navajo Nation would retain the right to assert an 1868 priority but only after exhausting “alternative water” in storage, as discussed in section (3) below.

Under the *Winters* doctrine, the Navajo Nation could claim priority dates for its water rights as early as 1849 (the date of its peace treaty) or 1868 (the date of the original reservation). The US Claims assert a time immemorial priority date. These dates would be senior to all other water rights in the basin. The State might succeed in arguing that a small portion of the Navajo rights have a late 1800s or early 1900s priority date, based on the dates of extensions to the original reservation. However, in the Mescalero Apache case the New Mexico Court of Appeals related the priority of the Tribe’s water rights to its initial treaty and not to the later date the reservation was created. *See Lewis*, 116 N.M. 194. That holding provides direct authority for the Navajo Nation to argue that the priority date for its reserved right is as early as 1849.

By contrast, the settlement adjudicates an 1868 priority date for the Navajo Nation’s reserved water rights, but subordinates the exercise of a vast majority of those rights, for NIIP and Navajo-Gallup Project, to the Navajo Reservoir’s junior priority date of 1955. Water for NIIP (353,000 afy of diversion) and the Navajo-Gallup Project

(22,650 afy of diversion) will be supplied from the Navajo Reservoir and will share in shortages with other Reclamation contractors. As a result, about 80 percent of the Navajo Nation's diversions will be satisfied by water released from storage, rather than directly from the San Juan River.

Only if the Navajo Reservoir water supply is "irretrievably lost" may the Navajo Nation assert the reserved priority date of 1868. The Court previously approved this approach to subordination of priority dates in the *Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe*, entered February 22, 1999, Paragraph 3 ("Jicarilla Decree"). As in the Jicarilla Decree, the Proposed Decree provides that "irretrievable loss" is limited to a permanent loss of supply from Navajo Reservoir storage:

The Navajo Nation may assert or exercise the reserved rights described in paragraphs 3(a), 3(b) or 3(c) [for the NIIP, the Navajo-Gallup Project or the ALP, respectively,] if and only if the Navajo Nation's respective rights to divert water under the Settlement Contract are irretrievably lost. The temporary loss of the use of part or all of the Navajo Nation's right to divert water under the Settlement Contract, including, but not limited to, loss resulting from a judicial determination that a particular use is speculative or constitutes waste and loss because a particular use is denied or prohibited by applicable law, shall not constitute irretrievable loss. Also, forbearance or reduction of Navajo Nation uses pursuant to the provisions of this Decree or the Settlement Agreement shall not constitute irretrievable loss.

*See* Proposed Decree at Paragraph 5(a). The Nation is precluded from asserting a senior priority for either NIIP or the Navajo-Gallup Project, so long as water for those projects is supplied under the Navajo Nation's Reclamation contract. Shortage of supply to either NIIP or the Navajo-Gallup Project does not constitute "irretrievable loss" and, therefore, will not nullify the subordination of the reserved right priority.

Likewise, under Paragraph 5(a) of the Proposed Decree, the Navajo Nation's water rights for ALP will be administered with a priority date of May 1956 rather than a reserved priority date of 1868, and will share in shortages with other Reclamation contractors in accordance with the Animas-La Plata Project Compact consented to by Congress in the Colorado River Basin Project Act (Public Law 90-537).

Table 2 categorizes the Navajo Nation's water rights to the mainstem San Juan River, as stated in the Proposed Decree, showing source of supply for each category.

<b>Table 2 Navajo Nation Settlement Proposed Decree San Juan River Mainstem by Source of Supply</b>						
<b>Category of Use</b>	<b>Water from US Projects with Reservoir Storage (afy)</b>		<b>Water from Direct Flow (afy)</b>		<b>Ground Water (afy)</b>	
	<b>Diversion</b>	<b>Depletion</b>	<b>Diversion</b>	<b>Depletion</b>	<b>Diversion</b>	<b>Depletion</b>
<b>Navajo Indian Irrigation Project (existing &amp; future)</b>	353,000 (508,000)	270,000	0	0	0	0
<b>Navajo-Gallup Water Supply Project (new)</b>	22,650	20,780	0	0	0	0
<b>Animas-La Plata Project (future)</b>	4,680	2,340	0	0	0	0
<b>Fruitland- Cambridge Irrigation Project (existing)</b>	0	0	18,180 (100 cfs)	7,970	0	0
<b>Hogback-Cudei Irrigation Project (existing)</b>	0	0	48,550 (221 cfs)	21,280	0	0
<b>San Juan River municipal/industrial uses (existing &amp; future)</b>	0	0	2,600 (5 cfs)	1,300	0	0
<b>Reserved ground water uses (existing &amp; future)</b>	0	0	0	0	2,000	2,000
<b>TOTALS</b>	<b>380,330 (535,330)</b>	<b>293,125</b>	<b>69,330</b>	<b>30,550</b>	<b>2,000</b>	<b>2,000</b>

In total, the subordinated water rights for NIIP, the Navajo-Gallup Project and ALP total about 80 percent of diversions and 90 percent of depletions of all water rights in the Proposed Decree.

**2. *“Alternate Water” and Other Stored Water Will Limit Calls on Direct Flow.***

The settlement imposes a second important restriction by limiting potential priority calls for the Hogback and Fruitland Projects, which make up most of the remaining 20 percent of diversions and 10 percent of depletions of the Navajo Nation’s mainstem rights. Although the Navajo Nation is not agreeing to subordinate the priority of this portion of its water rights, it is agreeing to limit the possibility of priority calls by first using “alternate water” from storage before making a call against junior direct-flow diverters. This settlement protection greatly reduces potential priority calls against junior water rights.

The Proposed Decree recognizes a direct-flow right for the Hogback and Fruitland Projects to irrigate a combined total of 12,165 acres with a priority date of 1868. The Navajo Nation, however, agrees to limit priority calls for the Hogback and Fruitland Projects, under Paragraph 9.2 of the Settlement Agreement, by first calling on “alternate water” from storage in times of shortage. Instead of making priority calls against up-stream junior diverters, the Navajo Nation agrees to supply the projects with up to 12,000 afy of water stored in Navajo Reservoir that is otherwise available for NIIP. Only if all of the available “alternate water” is used up during the irrigation season may the Navajo Nation make a priority call.

Even though the amount of “alternate water” may be reduced or eliminated in a given year if there are shortages to Navajo Reservoir contractors, the State’s analysis shows the “alternate water” protections will drastically reduce the potential for Hogback



and Fruitland priority calls. Based on the hydrologic record, the “alternate water” protection will reduce the possibility of future priority calls from a potential of one out of every two years to one out of every twenty years, on average, or approximately 5 percent of the years. See Whipple Affidavit at paras. 61-63 and **Exhibit 6**, Responses to Public Comments, Appendix D). Thus, the “alternate water” would be sufficient in most years to avoid altogether a Navajo priority call.

In addition to “alternate water”, the Settlement Agreement contains a separate protection for direct-flow diverters when inflow into Navajo Reservoir drops below 225 cubic-feet-per-second (cfs) and the reservoir has sufficient storage. Under these circumstances, the Navajo Nation and the United States agree that stored water may be released to augment bypassed direct flow to make up to 225 cfs available for direct-flow diversions below the reservoir, even though the inflow is less than that. Paragraph 9.1 of the Settlement Agreement provides in part:

Administration of Navajo Reservoir Releases. Subject to applicable federal law, whenever total storage in Navajo Reservoir is anticipated to exceed, or does exceed, a 1,000,000 acre-feet threshold at the end of May of the current year, ... the Navajo Nation and the United States, acting in its capacity as trustee for the Navajo Nation, will not challenge the New Mexico State Engineer during the irrigation season making available to direct-flow water users on the San Juan River below Navajo Dam up to 225 cubic-feet-per-second (cfs) as measured at the San Juan River at Archuleta gauging station if inflow to the reservoir is determined to be less than 225 cfs. The direct-flow water users may divert and use water made available pursuant to this subparagraph without a contract for water from Navajo Reservoir. Making water available to direct-flow users pursuant to this subparagraph shall not impair the ability of the Secretary, in the current year, to deliver water to Navajo Reservoir water supply contractors or to provide flows to satisfy any obligation under federal law.

During low flows, this provides direct-flow diverters a benefit of storage even though they do not hold storage rights. See Whipple Affidavit at para. 62 and **Exhibit 6**, Responses to Public Comments, Appendix D.

***4. Animas-La Plata Project: Shortage Sharing Protection.***

The settlement also provides a specific protection for ALP water supply, which constitutes a substantial portion of the water available to the cities of Farmington, Aztec and Bloomfield and other domestic water providers in the San Juan River Basin. Because ALP has a junior priority of 1956, it faces risk of curtailment in the event that it becomes necessary for the State in any year to curtail uses to comply with the Upper Colorado River Basin Compact. Paragraph 9.3 of the Settlement Agreement addresses this possible curtailment by requiring sharing of shortages between ALP and the Navajo Nation's uses from the Navajo Reservoir supply. The Navajo Nation agrees to forbear exercising up to 13,520 afy of its water rights to make water available for ALP uses in New Mexico. Paragraph 9.3.5(2) provides that the water forborne by the Navajo Nation shall:

be for the exclusive purpose to provide for depletions from the San Juan River stream system to be made by the Navajo Nation and non-Navajo Nation municipal and domestic water uses in New Mexico under the Animas-La Plata Project that are allocated by section 302 of the Colorado Ute Settlement Act Amendments of 2000 (114 Stat. 2763A-258);

As a result, ALP would only be shorted to the same extent that the Navajo Nation does not receive its full supply from the Navajo-Gallup Project.

***5. San Juan-Chama Project: Shortage Sharing Protection.***

The Settlement Act clarifies the method for sharing shortages between the water available to Navajo Reservoir contractors and the San Juan-Chama Project ("SJCP"). When Congress authorized NIIP and SJCP in 1962, the legislation required a reduction in the water allocated to SJCP during years when there are shortages in the Navajo Reservoir water supply, based on a water allocation formula set forth in section 11(a) of Public Law 87-483 (76 Stat. 96). Section 10402(b) of the Settlement Act amends the

1962 Act to clarify that the water allocation formula shall be based upon a normal annual diversion requirement for the SJCP of 135,000 afy. Because the actual annual diversion by SJCP averages only about 105,200 afy, a normal annual diversion requirement of 135,000 afy gives SJCP a substantial buffer against actual cuts in its supply. *See Whipple Affidavit* at paras. 65 & 66. The Settlement Act further protects SJCP by establishing normal diversion requirements for NIIP and the Navajo-Gallup Project based on actual demand, thereby providing administrative certainty. Finally, the Settlement Act protects existing Reclamation contractors by making subservient any subsequent contracts for Navajo Reservoir supply.

#### ***6. Limits on Tributary Water Uses***

Under the *Winters Doctrine*, the Navajo Nation could also claim water for future uses on its lands away from the San Juan River, generally to the south. These tributary uses are comprised of smaller irrigation and stock uses supplied from groundwater and ephemeral tributaries, many along the Chuska Mountains. Under the Settlement Agreement, the Navajo Nation agrees to waive any claims to additional water rights for future uses in the tributary areas. Instead, Paragraph 4.2.1 of the Settlement Agreement provides that the basis for quantification of the Navajo Nation's rights under the Supplemental Partial Final Decree shall be its historic and existing water uses.

In addition to agreeing to quantify these rights based on historic and existing uses, the Navajo Nation and the United States agree to specific depletion limits. Paragraph 5 of the Proposed Supplemental Decree sets a total at-site depletion limit of 8,355 afy for all uses in the decree (excluding stock water consumption). Paragraph 5 further sets a total limit on depletion of flow of the San Juan River of 1,819 afy resulting from the use of rights described by the Proposed Supplemental Decree. If the river

depletions exceed this amount, the Navajo Nation is required to offset the excess amount by forbearing use of its surface water rights.

Furthermore, the Proposed Supplemental Decree limits the transferability of these rights. Paragraph 12(a) provides that stock rights may not be transferred to other purposes of use or other sources of supply, in effect making them in-situ uses. Construction and use of stock ponds in new locations will have to be offset using other Navajo Nation water rights. With respect to irrigation rights, Paragraph 12(b) includes substantial limitations on the transferability of existing points of diversion from the current local source of supply, precluding rights from being moved to the San Juan River.

#### ***7. Administration of Water Rights***

The Navajo settlement does not simply resolve the adjudication of Navajo Nation's water rights claims. It takes the next step and resolves potential disputes regarding the administration of those water rights. Without settlement, this Court's adjudication decree would be limited to the elements of the Navajo Nation's water rights. The Settlement Agreement and Proposed Decrees include detailed administrative provisions that will help avoid post-decree disputes over authority, methodology and jurisdiction by confirming administrative responsibility in the State Engineer and review authority in this Court. *See* Settlement Agreement, Paragraphs 9.1, 9.3.1 & 9.5, Proposed Decree, Paragraphs 14, 15 & 17, and Supplemental Decree Paragraphs 8, 9 & 11.

Paragraph 9.3.1 of the Settlement Agreement provides that the State Engineer has authority to administer all water rights in priority as necessary to comply with interstate compact obligations and other applicable law:

Subject to the provisions of the Partial Final Decree and the Supplemental Partial Final Decree, the Navajo Nation and the United States, acting in its capacity as trustee for the Navajo

Nation, agree that the State of New Mexico may administer in priority water rights in the San Juan River Basin in New Mexico, including rights of the Navajo Nation, as may be necessary for New Mexico to comply with its obligations under interstate compacts and other applicable law.

Paragraph 9.5 of the Settlement Agreement further provides:

Administration of Water Rights. Subject to the provisions of the Partial Final Decree, the Supplemental Partial Final Decree and this Agreement, the Navajo Nation and the United States, acting in its capacity as trustee for the Navajo Nation, agree that the New Mexico State Engineer has authority under state law to administer water rights within, and to supervise the apportionment, diversion and use of the waters of, the San Juan River Basin in New Mexico, including by appointment of watermasters, according to the orders and decrees of the Court in the Stream Adjudication and the licenses and permits issued by the State Engineer in the Basin.

Both of the Proposed Decrees make clear that the Adjudication Court will retain jurisdiction to enforce and interpret the decrees and that the State Engineer will have authority to administer water rights. Paragraph 14 of the Proposed Decree provides:

This Court retains jurisdiction to interpret and enforce this Decree. Subject to the provisions of this Decree, the State Engineer has authority under state law to administer water rights within, and to supervise the apportionment, diversion and use of the waters of, the San Juan River Basin in New Mexico, including by appointment of watermasters, according to the orders and decrees of the Court in this adjudication suit and the licenses and permits issued by the State Engineer in the Basin.

A similar provision is contained in Paragraph 8 of the Proposed Supplemental Decree.

Under Paragraph 17 of the Proposed Decree and Paragraph 11 of the Proposed Supplemental Decree, any Navajo water rights transfer involving a change in the point of diversion on the San Juan River, the Animas River or to a location off of Navajo lands will require a permit from the State Engineer. Changes that are just limited to uses on Navajo lands fall under the administrative authority of the Navajo Nation, subject to non-

impairment of non-Navajo Nation water rights and to the provisions of the decrees and the Settlement Agreement. In the event of an administrative dispute, Paragraph 17 of the Proposed Decree provides that this Court will retain jurisdiction to hear such disputes, even over disputes regarding proposed changes of use on Navajo Nation lands. *See* Paragraphs 17(b) & (c).

The settlement also confirms the State Engineer's authority to monitor Navajo Nation water uses for compliance with the Proposed Decree and Proposed Supplemental Decree. Paragraph 15 of the Proposed Decree and Paragraph 9 of the Proposed Supplemental Decree provide for metering of uses of water by the Navajo Nation. Paragraph 16 of the Proposed Decree and Paragraph 10 of the Proposed Supplemental Decree require that records of uses of water by the Navajo Nation be maintained and provided to the State Engineer. Paragraph 17(h) confirms the State Engineer's authority to determine actual uses and any needs for curtailments of use, including in response to priority calls made for the Hogback and Fruitland Projects.

#### ***8. In-State Leasing of Water***

By authorizing the Navajo Nation to lease water within the State of New Mexico, the settlement provides an additional source of supply to other New Mexico water users. The Settlement Act authorizes two types of leasing: (1) allowing subcontracts under the Navajo Nation's Reclamation contract for NIIP, the Navajo-Gallup Project and ALP, which will require approval from the United States, under section 10701(c); and (2) direct leasing of non-contract water rights, which does not require a subcontract, under section 10701(d).

For the first category, section 10701(c) authorizes:

#### **(A) SUBCONTRACTS BETWEEN NATION**

AND THIRD PARTIES.—The Nation may enter into subcontracts for the delivery of Project water under the Contract to third parties for any beneficial use in the State of New Mexico (on or off land held by the United States in trust for the Nation or a member of the Nation or land held in fee by the Nation).

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(F) COMPLIANCE WITH OTHER LAW.—A subcontract described in subparagraph (A) shall comply with the Agreement, the Partial Final Decree described in paragraph 3.0 of the Agreement, and any other applicable law.

Section 10701(d) sets forth a parallel authorization for water leasing by the Navajo Nation of rights not subject to its Reclamation contract:

WATER LEASES NOT REQUIRING SUB CONTRACTS.—

(1) AUTHORITY OF NATION.—

(A) IN GENERAL.—The Nation may lease, contract, or otherwise transfer to another party or to another purpose or place of use in the State of New Mexico (on or off land that is held by the United States in trust for the Nation or a member of the Nation or held in fee by the Nation) a water right that—

(i) is decreed to the Nation under the Agreement; and

(ii) is not subject to the Contract.

(B) COMPLIANCE WITH OTHER LAW.

—In carrying out an action under this subsection, the Nation shall comply with the Agreement, the Partial Final Decree described in paragraph 3.0 of the Agreement, the Supplemental Partial Final Decree described in paragraph 4.0 of the Agreement, and any other applicable law.

Paragraph 17(f) of the Proposed Decree specifically incorporates sections 10701(c) and (d) of the Settlement Act and allows the Navajo Nation to lease its reserved rights and to subcontract water to others within New Mexico, subject to non-impairment of other water

rights and to State Engineer permit approval if the subcontract or lease involves a change in the point of diversion or a change to non-Navajo lands.

Without the settlement, a significant concern of the State is that the Navajo Nation might seek to market its water downstream for uses in other states and that this resource would be lost to the State of New Mexico. Although the law of the Colorado River does not provide for interstate marketing of water from New Mexico to other states, this area of law is in long-term flux. The U.S. Supreme Court in *Sporhase v. Nebraska*, 458 U.S. 941 (1982), and the New Mexico federal district court's decision in *El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), have made clear that water is an article of commerce. Accordingly, existing state law sets forth a process for an in-state water right holder to apply to the State Engineer for a permit to use water outside of the state under Chapter 72, Article 12(B) NMSA 1978. In addition, Article XIX of the Upper Colorado River Basin Compact provides: "Nothing in this compact shall be construed as: (a) affecting the obligations of the United States of America to Indian tribes." 63 Stat. 31 (1949).

Even without settlement, it would be difficult for the Navajo Nation to market water out of state. The provisions of the Colorado River Compact, the Upper Colorado River Basin Compact and other federal law already restrict the marketing or transfer of water between the State of New Mexico and the other Colorado River Basin states. Chapter 72, Article 12(B) also prohibits out-of-state transfers if the proposed use will result in impairment to existing New Mexico water rights, is contrary to the conservation of water within the State, or is detrimental to the public welfare of the citizens of New Mexico.



The Navajo settlement goes a long way towards resolving a potential fight. Under the settlement, the Navajo Nation may lease water within the State of New Mexico under the administrative authority of the State Engineer. In addition, the Navajo Nation explicitly waives its right to market its water out of the state unless the State of New Mexico consents to the proposed use. Paragraph 17(g) of the Proposed Decree provides in pertinent part:

The Navajo Nation's water rights adjudicated herein shall not be leased, contracted, exchanged, forborne or otherwise transferred for use directly or indirectly outside the boundaries of the State of New Mexico without the consent of the State of New Mexico, acting through the New Mexico Interstate Stream Commission, and unless in compliance with applicable law.... Except as provided in this paragraph, nothing in this Decree shall be construed to establish, address, prejudice, or prevent any party from litigating, whether or to what extent any law or compact does or does not permit, govern, or apply to the lease, contract, exchange, forbearance or transfer of the Navajo Nation's water rights for use directly or indirectly in an area outside the State of New Mexico.

The requirement of the State's consent, as a matter of contractual agreement, is in addition to the otherwise applicable legal or regulatory requirements. No other New Mexico water user has made such an agreement. Thus, under the settlement, Congress has only authorized Navajo leasing of water within New Mexico, and the Navajo Nation has waived its right to seek out-of-state marketing in the future in the absence of State consent.

#### ***9. Navajo Nation Agreements Respecting Water Rights of Others***

In addition to agreements governing the quantification, use and administration of its own water rights, the Navajo Nation makes a number of agreements regarding other parties' claimed water rights that provide greater security in the recognition and use of those rights.

Neither the United States nor the Navajo Nation was a party to the Echo Ditch Decree that adjudicated state law-based surface water rights in the San Juan River Basin in 1948. The McCarran Amendment, which provides for the waiver of federal and tribal sovereign immunity from suit in a general stream adjudication, was not enacted by Congress until 1952. *See* 43 U.S.C. sec. 666(a). Because they were not parties to that adjudication, the United States and the Navajo Nation did not have the opportunity to assert their claims or object to water rights of others recognized in that decree, and are not bound by it. Under Paragraph 9.6.1 of the Settlement Agreement, the Navajo Nation and the United States as trustee for the Navajo Nation agree to not challenge in the adjudication the elements of water rights recognized in the Echo Ditch Decree except on the basis of forfeiture, abandonment or illegal use since entry of the Decree in 1948.

Similarly, under Paragraph 9.6.2 of the Settlement Agreement, the Navajo Nation and the United States agree not to challenge the quantities and diversion rates of post-Echo Ditch Decree irrigation rights (developed after 1948) as provided in State Engineer permits or licenses or if based on a methodology consistent with the method used to determine irrigation uses by the Echo Ditch Decree. In particular they agree not to challenge quantifications of water rights within the Hammond Irrigation Project based on a total water right acreage of up to 3,900 acres.

The Navajo Nation also agrees to not challenge major water rights of the City of Farmington, including the City's trust rights described in the Echo Ditch Decree, under a separate agreement among the State, the City and the Navajo Nation, approved by the Farmington City Council on February 8, 2005. Under the Farmington Agreement, the City agreed to support the Settlement Agreement, including entry of the Proposed Decree. The Navajo Nation agreed to not challenge the adjudication of the City's water

rights as described by the Farmington Agreement so long as the Settlement Agreement has not been terminated and the City has fulfilled its commitment to support the Settlement Agreement and entry of the Proposed Decree.

The Navajo settlement will also protect thousands of acres of non-Indian irrigated lands from being acquired and retired from agricultural use by the federal government to satisfy Paragraph 4(i) of the Jicarilla Apache Nation Settlement Contract, approved by Congress in 1992. Under that contract, the United States agreed to buy out private water rights totaling 11,000 afy of depletion from the San Juan River stream system by 2040 to reconcile total commitments of depletion from the system in New Mexico with the State's allocation of Upper Colorado River Basin water. *See* Technical Assessment at 32. If the buy-out provision were implemented, the United States could seek to acquire currently unused decreed irrigation rights or to acquire and retire up to approximately one-third of the remaining irrigated non-Indian farmland in the San Juan River and Animas River valleys. With the Settlement Agreement and the 2007 Hydrologic Determination, the United States likely will no longer be required to implement the buy-out.

Finally, the Navajo settlement addresses the potential risk posed by claims of approximately 25,000 individual Navajos who have been allotted lands in the San Juan River Basin by the United States in what is commonly called the checkerboard area, east of the Navajo reservation. The United States, not the Navajo Nation, represents the allottees in the adjudication. Nonetheless, the settlement reduces the risk of sizeable allottee claims affecting existing water users in the basin. Under the settlement, the Navajo Nation agrees to use its adjudicated water rights to supply water for any reserved water rights for future uses that may be awarded to allottees. *See* Settlement Agreement,

Paragraph 12.3; Proposed Decree, Paragraph 11; Proposed Supplemental Decree, Paragraph 6. As a result, the Navajo Nation will insure against and cover any large water right claims by individual Navajos not bound by the settlement.

***10. Funding to Improve Non-Navajo Ditches***

Finally, the United States and the State have pledged to provide up to \$21 million for the rehabilitation of non-Navajo irrigation works. See Settlement Act at §§ 10608(c)(1) and 10609(d); Settlement Agreement, Paragraph 10.1. Improvement in ditch efficiencies should reduce diversion demand and potential priority administration among ditches in times of low flows.

**C. There is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial.**

The State believes that absent settlement, it is reasonably likely that the Navajo Nation and the United States as its trustee would secure water rights in excess, perhaps greatly in excess, of the quantities in the Proposed Decrees. Except for water for the Navajo-Gallup Project, the Proposed Decrees recognize historic and existing uses, or uses that were authorized many years ago. Even with the new water for the Navajo-Gallup Project, the total quantity under the settlement is less than the quantity of the Navajo Nation's current water rights, which do not include additional future use rights the Navajo Nation could claim under federal law.

***1. Under Federal Law the Navajo Nation Could Claim Greater Quantities of Water than Provided in the Proposed Decrees.***

The Navajo Nation's claims to the waters of the San Juan River Basin illustrate a direct conflict between federal and state law over the adjudication of water rights. Generally, the federal government accords deference to state water law. The Prior Appropriation Doctrine, which recognizes water rights based on the amount of water

placed to actual beneficial use and the date the beneficial use was initiated, has been adopted by almost every western state in one form or another.

A significant exception to federal deference to state water law is the *Winters* Doctrine, which provides that at the time the United States established an Indian reservation, it also reserved sufficient water to provide for the reservation as a permanent homeland. In the *Winters* case and its progeny, the U.S. Supreme Court decided that federal law controls the determination of the water rights on Indian reservations. See *Winters v. U.S.*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963). See also Beck, *Waters and Water Rights*, § 37.01(c) (the reserved rights doctrine is an exception to deference the federal government usually accords state water law). As the New Mexico Court of Appeals recently observed regarding the Commissioner of Public Land's claims in this case: "Overall, the doctrine of federal reserved water rights represents a limited exception to the general rule that individual states govern water rights within their respective borders." *Comm'r of Pub. Lands*, 145 N.M. at 440, 200 P.3d at 93.

Under *Winters*, neither the priority date nor the amount of reserved rights is based on the historic actual beneficial use of water. Instead, the priority date is based on the date the federal government established an Indian reservation, even though only some or even no water has ever been placed to beneficial use. See *Arizona v. California*, 373 U.S. 546, 600 (1963) (The 1868 reservation date for tribes along the Colorado River also established the priority date, even though most of the rights recognized had yet to be used); *Comm'r of Pub. Lands*, 145 N.M. at 441, 200 P.3d at 94 (priority not determined by appropriation to beneficial use and quantity not determined by amount put to beneficial use). See also Beck, *Waters and Water Rights*, § 37.02(b).

The New Mexico state courts have already applied the federal law of the *Winters* Doctrine to the adjudication of the water rights of an Indian tribe on a reservation in New Mexico. In adjudicating reserved rights to the Mescalero Apache Tribe, the New Mexico Court of Appeals recognized a priority date of 1852 for the tribe's *Winters* rights based on the date of the tribe's peace treaty with the United States, even though the reservation boundaries were not established until 1873. *See New Mexico v. Lewis*, 861 P.2d 235, 238 (Ct. App. 1993).

Under the *Winters* Doctrine, the amount of the reserved right is quantified based on the amount of water needed to fulfill the purposes of the reservation. Most Indian reservations were established for the purpose of turning nomadic Indian tribes into farmers. In 1963, the U.S. Supreme Court first adopted the "practicably irrigable acreage" or PIA standard for quantifying federal Indian reserved water rights. Under the PIA standard, the amount of water is quantified by determining the number of acres that can be practicably or feasibly irrigated on the reservation, assisted by the extensive resources of the United States. *See Arizona v. California*, 373 U.S. 546 (1963). Based on the PIA standard, the Court in that case recognized over a million afy of water as the amount of water for the reserved rights of the five tribes along the Lower Colorado River.

More recently, the Arizona Supreme Court adopted a multi-factor approach to quantify reserved water rights in the case of *In re General Adjudication of Gila River System*, 35 P.3d 68 (Ariz. 2001). In that case, the Arizona Supreme Court retreated from the PIA standard as too narrow and not necessarily meeting the purpose of a reservation of creating a permanent homeland; instead, the court adopted a balancing test that takes the specific facts of each tribe into account. However, even under this more flexible

standard, recent Indian water rights settlements in Arizona have recognized quantities far in excess of a tribe's historic beneficial use.<sup>1</sup>

Under either standard, determining the amount of water the Navajo Nation could obtain through litigation is difficult. Some have argued that by enactment of the 1962 legislation authorizing the NIIP, the Navajo Nation waived some or all of its *Winters* claims. However, the Navajo Nation did not sign any prior settlement agreement waiving claims and the Act itself does not recite any waiver.<sup>2</sup> In evaluating these positions, the State has to keep in mind the U.S. Supreme Court's canon of construction of interpreting an ambiguity in favor of the affected tribe. See *Choate v. Trapp*, 224 U.S. 665 (1912). In the *Winters* case the Court put it this way: "Ambiguities occurring will be resolved from the standpoint of the Indians." 207 U.S. at 577. The New Mexico Court of Appeals also employed the canon of liberal construction in favor of Indian tribes in finding an earlier priority date for the Mescalero Apache Tribe. *Lewis*, 861 P.2d 235, 241.

If the Navajo Nation were to prevail on a PIA claim, the acreage and amount of water could be substantially greater than the amounts to be adjudicated by the Proposed Decree. In 2004, the Navajo Nation prepared a preliminary report seeking to quantify its PIA claims (NRCE Report). Although the Navajo Nation did not make the full NRCE Report available to the State for review during the negotiation process, the Navajo Nation did show state negotiators portions of the report, including a PIA map showing an

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<sup>1</sup> For example, the Gila River Indian Community settlement approved by Congress in 2004 and decreed in the Arizona adjudication recognized more than 600,000 acre-feet of water for a tribe whose reservation is less than 400,000 acres, has a tribal membership of less than 20,000 and which has historically irrigated 20,000 acres.

<sup>2</sup> A 1980 law review article by Charles DuMars and Helen Ingram, *Congressional Quantification of Indian Reserved Water Rights: A Definitive Solution or a Mirage?*, *Natural Resources Journal*, Vol. 20 at 17 (1980), presents arguments on both sides of the debate, providing a compelling case for settlement of the issues.

additional 37,000 acres of gravity-irrigated lands on the Navajo Reservation. Table 11-1 of the recently released NRCE Report shows a total claim for historic and future uses, both for irrigation and other uses, of 772,142 acre-feet of diversion and 534,859 acre-feet of depletion. *See* Tables 3 & 4, below. The more recent US Claims identify 57,524 acres of new PIA irrigation, with a claimed irrigation diversion of 295,603 afy and depletion of 169,306 afy. In addition, the US Claims identified 102,272 afy of depletion for DCMI water demands. *See* Table 4, below.

The State did not at the time of the negotiations and does not now accept these large amounts of additional future use claims.<sup>3</sup> Nonetheless, without settlement, the State believes that it is likely that some substantial amount of PIA acreage would be recognized, beyond the acreage that would be recognized by the Proposed Decrees. For example, Section 11(c) of Public Law 87-483 allows for inflows to Navajo Reservoir to be bypassed through Navajo Dam as necessary to meet downstream senior water rights for the Hogback and Fruitland Projects for the acreage then existing plus an expansion of the projects by an additional 11,000 acres. The Congressional record for Public Law 87-483 refers to a total combined acreage for the Hogback and Fruitland Projects of 26,000 acres. *See* 85th Congress, 2d Session, Senate, Report No. 2198, August 5, 1958. This amount is more than double the combined acreage of 12,165 for the two projects stated in the Proposed Decree. This additional acreage could more than double the daily diversion demand of these two projects from about 320 cfs under the Proposed Decree, to about 650 cfs. Such a large demand with an early priority date could, if fully utilized, result in possible priority calls against junior water rights, including the cities and power plants,

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<sup>3</sup> Moreover, the State did not conduct its own PIA analysis because the Proposed Decrees do not recognize any PIA acreage and only recognizes acreage within the already existing or authorized irrigation projects of NIIP and Hogback and Fruitland.



for a significant portion of the summer and fall each year. The supply available for storage in Navajo Reservoir each spring to meet diversion demands under Navajo Reservoir water supply contracts would also be reduced. Pursuant to Public Law 87-483, a shortage in any year to the Navajo Reservoir water supply contracts would trigger an allocation of shortages between the water delivery demands under the contracts and the normal diversion requirement of the SJCP.

***2. Settlement is Based on Historic, Existing and Authorized Uses.***

The core of the settlement is recognition of the Navajo Nation's historic and existing irrigation projects. Adjudication of irrigation water rights for Navajo farming is consistent with the purpose of the reservation as set forth in the 1868 treaty between the Navajo tribe and the United States of America. The treaty sought to establish an agrarian way of life and explicitly encouraged members of the tribe to take up farming by allocating 160 acres of land and tools to each Navajo member or family to cultivate the land. *See Treaty Between the United States of America, and the Navajo Tribe of Indians, June 1, 1868, Articles V and VII.* As early as the 1880s and continuing to the early part of the 1900s, the federal Division of Indian Irrigation, located in Albuquerque, encouraged irrigation on the reservation by constructing ditches and preparing engineering plans for small irrigation projects. *See Leah Glaser, Bureau of Reclamation, Navajo Indian Irrigation Project (1998) at 8-9.*

All of the irrigation rights proposed to be adjudicated are based on long-standing existing irrigation projects. Outside of these existing projects, the Proposed Decrees recognize no federal reserved water rights for future irrigation purposes. The largest irrigation right is for NIIP, which has the existing legal right to irrigate 110,630 acres. *See Act of Congress on June 13, 1962, Public Law 87-483 authorizing NIIP; State Engineer*

File No. 2849. The project is more than two-thirds completed, and construction of irrigation facilities continues with the addition of up to a few thousand acres of irrigation every year. The proposed water rights for the Hogback and Fruitland irrigation projects are based on the acreage within their existing boundaries. Navajo irrigation on these two projects has been going on for a century. The State's Technical Assessment, at 5-11, provides a detailed summary of the historic and existing uses of water by NIIP and the Hogback and Fruitland Projects.

Similarly, the Proposed Decree would recognize historic, existing and previously authorized DCMI uses. *See* Technical Assessment, at 13-21. For example, water for the Navajo Nation under the ALP was authorized by the Colorado Ute Settlement Act Amendments of 2000 and by State Engineer File No. 2883. The only increased amount of water not based on an existing right or use of water is the 20,780 afy of depletion for municipal and domestic uses under the Navajo-Gallup Project. The quantity of water for the Navajo-Gallup Project, however, falls within the already existing authorized quantities under State Engineer File No. 2849 for storage and supply from Navajo Reservoir and could be granted by the United States to the Navajo Nation by federal contract, even if there were no settlement. Furthermore, the Navajo Nation has effectively made water available for the 20,780 afy for the Navajo-Gallup Project by agreeing to reductions and restrictions on the Navajo Nation's current water rights as discussed in the next section. Even with the addition of 20,780 afy, the total amount of water proposed by the settlement is equivalent to or less than the Navajo Nation's current right without settlement, even without considering potential additional future use claims that the Navajo Nation could assert.

**3. *The Proposed Water Rights, Including for the Navajo-Gallup Project, Fit within the Current and Already Existing Navajo Right.***

Although water for the Navajo-Gallup Project is a new authorization, all of the Navajo Nation's water rights in the Proposed Decrees, including for the Navajo-Gallup Project, fit within the Navajo Nation's current water rights, as described in the Technical Assessment at 5-21. The following table summarizes current rights compared to the settlement water rights in the Proposed Decree:

	<u>Current Right</u>	<u>Proposed Decree</u>
Annual Diversion (afy)	663,148	451,746
Annual Depletion (afy)	329,331	325,756

Even with the addition of 22,650 afy of diversion and 20,780 afy of depletion for the Navajo-Gallup Project, the total settlement quantities are equivalent to or less than the Navajo Nation's current right. The Navajo Nation's water rights described by the Proposed Supplemental Decree are for historic tributary irrigation, reservoir evaporation and scattered livestock uses, and do not include rights for any additional future uses.

The Proposed Decrees place tight restrictions on both the diversion and depletion of existing Navajo water rights. The two biggest restrictions involve depletions and diversions by NIIP. Paragraph 3(a) of the Proposed Agreement sets a maximum NIIP depletion of 270,000 afy, whereas neither the State Engineer File No. 2849 nor the Act of June 13, 1962 (Public Law 87-483) place a depletion limit on the project. Without the agreed depletion limit, the State believes actual depletions by NIIP at full build-out could range from about 280,600 afy to as much as 299,000 afy, because of incidental percolation losses to ground water below project lands (10,600 afy) and incidental transit losses of irrigation drainage and operational waste discharges to the Chaco River sub-basin (up to 18,900 afy) that may not all return to the San Juan River. *See* Technical

Assessment at 23-24. Without the agreed depletion limit, these incidental depletions would be in addition to at-site project depletions of up to 270,000 afy. The Proposed Decree provides that all incidental losses from the project that do not return to the San Juan River, including losses to ground water and losses from drainage and waste discharges to the Chaco River sub-basin, must be included within the total depletion limit. Paragraph 3(a) achieves this by accounting for depletions based on diversions minus return flows to the San Juan River.

The second key restriction effectively reduces potential NIIP diversions from 508,000 afy to 353,000 afy. The Act of June 13, 1962, the Navajo Nation's existing Reclamation contract and State Engineer File No. 2849 all allowed for the higher NIIP diversion quantity based on a flood-irrigation project. Although the Proposed Decree incorporates the original statutory diversion amount of 508,000 afy, other provisions of the decree restrict NIIP diversions to contemporary conditions. Because of the change of the project's design to sprinkler irrigation, the settlement reduces the total diversion. Consequently, so long as NIIP employs sprinkler irrigation, the decree will limit diversions to quantities necessary for that method of irrigation. Based on the 1999 NIIP Biological Assessment, the amount of diversion required for the project as currently designed for sprinkler irrigation is between 337,500 afy and 372,000 afy. *See Whipple Affidavit at para. 30.* Paragraph 5(e)(4) of the Proposed Decree sets a practical limit on NIIP diversions of 353,000 afy. The Navajo Nation may not exceed that limit if any portion of the NIIP right is used for purposes other than irrigation, including for current livestock uses at NIIP feedlots and current aquaculture uses at NIIP ponds, unless the Navajo Nation obtains a permit from the State Engineer upon a showing of non-impairment of other water rights in New Mexico.

Furthermore, the Proposed Decree places important restrictions on depletions and diversions by the Fruitland and Hogback Projects. The Navajo Nation and the United States agree to quantify depletions for these two projects consistent with the methodology for calculating consumptive irrigation requirements ("CIR") for non-Navajo ditches contained in the 1938 Echo Ditch Decree. This approach results in conservatively low depletion amounts of up to 15 percent less than those calculated using modern CIR methods such as the modified Blaney-Criddle method. *See Whipple Affidavit at para. 31.* Paragraphs 3(e) and 3(f) of the Proposed Decree recognize a total maximum depletion of 29,250 afy for these two projects. Using modern CIR methodology, this figure would be more than 4,000 afy higher. Because the State Engineer may determine the amount of the Navajo Nation's actual irrigation depletions using a more modern methodology (*see Proposed Decree, Paragraph 16*), the Navajo Nation will have to carefully manage project acres, requiring fallowing and perhaps lower-water-use crops, to comply with the maximum annual depletion amounts. In effect, the Proposed Decree will recognize a total of 12,165 irrigable acres under the Hogback and Fruitland Projects but the annual depletion limits for the projects may result in a practical reduction in the amount of project acres that could be irrigated in any one year for crop production by up to 15 percent. Without agreement to this reduction in the settlement, the depletion right for these projects would almost certainly be based on the more generous modern methods of estimating irrigation consumptive uses.

The Proposed Decree also limits the diversion amount and rate of the Hogback and Fruitland Projects. Consistent with Echo Ditch Decree standards of 1 cfs per 40 acres used for non-Indian ditches, Paragraph 3(e) of the Proposed Decree sets a maximum diversion rate for the Hogback Project at 221 cfs. Paragraphs 3(f) allows an

initial maximum diversion rate for the Fruitland Project of 100 cfs, based on its currently fully-utilized canal capacity, but under Paragraph 5(h) rehabilitation of the canal will cause the rate to be reduced to as little as 83.4 cfs, again based on 1 cfs per 40 acres. Also, the Proposed Decree recognizes farm delivery requirements ("FDR") and project diversion requirements ("PDR") for the Hogback and Fruitland Projects in conformance with Echo Ditch Decree standards, again based on conservatively low CIRs. The Proposed Decree provides that the Navajo Nation's rights to divert water for the Hogback and Fruitland Projects are subject to supplying a FDR of 3.3 acre-feet per acre. *See* Proposed Decree, paragraph 5(g). In total, the Proposed Decree limits the diversions of the two projects to 66,730 afy, if PDRs are enforced for non-Navajo irrigation ditches in the San Juan River Basin. Without the Navajo Nation and United States' agreements to these diversion limits, the State's analysis shows that the current diversion right of the two projects is 135,255 afy, almost 70,000 afy greater. *See* Technical Assessment at 5-8.

With respect to the smaller tributary irrigation projects, the Proposed Supplemental Decree includes water rights for acres claimed by the Navajo Nation and the United States to have been historically irrigated from ephemeral tributaries at one time or another. However, the diversion and depletion amounts for the specific tributary irrigation uses were computed based on the maximum number of acres irrigated in any one year, which are only a portion of all the acreage historically irrigated. *See* Quantification Analysis. Further, the water rights for the tributary irrigation uses included in the Proposed Supplemental Decree are based on CIRs consistent with those for non-Navajo ditches contained in the 1938 Echo Ditch Decree, while the Navajo Nation and the United States could claim water amounts using modern methods such as the modified Blaney-Criddle method.

The Proposed Supplemental Decree includes water rights for specific irrigation use depletions totaling 11,828 afy and up to 12,713 afy of depletion by reservoir evaporation in the tributary areas. Thus, the total historic depletion for irrigation and reservoir evaporation uses in the tributary areas at the sites of use might total to about 24,541 afy assuming a full water supply. However, as shown in Table 4, below, the Proposed Supplemental Decree at Paragraph 5(a) recognizes a total depletion limit for these uses plus industrial ground water uses combined of 8,355 afy on average during any period of ten consecutive years. This compares to a potential average annual depletion of about 9,327 afy under the current water rights for tributary irrigation and reservoir evaporation uses, assuming historic average use of the available water supply and modern methods of calculating CIRs such as the modified Blaney-Criddle method (15 percent higher depletion and diversion demand for the tributary irrigation uses than were given in the Quantification Analysis). Also as discussed in section II(B)(6), the Navajo Nation and United States agree to limits on the use and transfer of these rights that currently do not apply.

Finally, the Navajo Nation currently has water rights for 11,850 afy diversion and 9,230 afy depletion for heavy industrial purposes, but the Proposed Decrees include only 86 afy for them because the Navajo Nation is agreeing to cancel State Engineer permits and licenses and to supply industrial uses from other rights described in the Proposed Decree. *See* Settlement Agreement, Paragraph 4.3.1.

#### ***4. Comparison of Water Rights Claims, Current Rights and Proposed Rights.***

Table 3 compares water right diversion amounts of: (1) the US Claims, (2) the NRCE Report, (3) the Current Right without settlement (not including any additional future use *Winters* rights), and (4) the Proposed Decrees.

<b>Table 3. Comparison of Diversions by Type (AFY)</b>				
	<b>US Claims</b>	<b>NRCE Report</b>	<b>Current Right</b>	<b>Proposed Decree</b>
NIIP	379,874	371,717	508,000	353,000 <sup>1</sup>
Hogback & Fruitland	184,519	96,852	136,255	66,730
Other mainstem irrig.	150,940	131,316	113	0
Municipal & domestic	36,575	82,396	6,930	31,930
Heavy industrial uses	105,761	71,247	11,850	86
Recreation/commercial	0	10,092	0	0
<b>Subtotal</b>	<b>857,669</b>	<b>763,620</b>	<b>663,148</b>	<b>451,746</b>
Tributary stock water	1,173	3,000	517	517
Tributary irrigation	78,766	5,522	33,489 <sup>2</sup>	28,466
<b>Total Diversions</b>	<b>937,608</b>	<b>772,142</b>	<b>697,154</b>	<b>480,729</b>

Note: For an explanation of and derivation of the figures stated in this Table, see Technical Assessment and Quantification Analysis.

<sup>1</sup> The Proposed Decree recognizes the statutory diversion amount for the NIIP of 508,000 afy, but effectively limits NIIP diversions to 353,000 afy under existing project conditions.

<sup>2</sup> The amount of the current right includes 15 percent greater irrigation diversion demand than that incorporated into the Proposed Supplemental Decree to reflect modern methods for calculating CIRs.

The total diversion under the settlement is a little more than half the amount claimed by the United States. Perhaps more striking, the settlement amounts are more than 200,000 afy less than the existing Navajo water right.

Table 4 compares water right depletion amounts for the same for categories.



<b>Table 4. Comparison of Depletions by Type (AFY)</b>				
	<b>US Claims</b>	<b>NRCE Report</b>	<b>Current Right</b>	<b>Proposed Decree</b>
NIIP	283,781	269,937	280,600 <sup>1</sup>	270,000
Hogback & Fruitland	68,293	40,472	34,870	29,250
Other mainstem irrig.	116,483	104,608	41	0
Municipal & domestic	36,575	51,085	4,590	26,420
Heavy industrial uses	65,697	51,700	9,230	86
Recreation/commercial	0	9,915	0	0
<b>Subtotal</b>	<b>570,829</b>	<b>527,717</b>	<b>329,331</b>	<b>325,756</b>
Tributary stock water	733	3,000	517	517
Tributary irrigation	23,695	5,522	9,327 <sup>2</sup>	8,269 <sup>2</sup>
Tributary reservoir evap.	variable	3,000	Included	Included
<b>Total Depletions</b>	<b>595,257</b>	<b>534,859</b>	<b>339,175</b>	<b>334,542</b>

Note: For an explanation of and derivation of the figures stated in this Table, see Technical Assessment and Quantification Analysis.

<sup>1</sup> Excludes incidental depletions associated with about 18,900 afy of anticipated NIIP discharges or subsurface drainage into ephemeral tributaries to the Chaco River under full project development.

<sup>2</sup> Includes limit on actual average annual depletions for all tributary irrigation uses and reservoir evaporation combined based on historic use (see Proposed Supplemental Decree, Paragraph 5(a)). The amount of the current right also includes 15 percent greater irrigation depletion than that incorporated into the Proposed Supplemental Decree to reflect modern methods for calculating CIRs. The amount for the Proposed Decree is based on a limit of 8,355 afy for all tributary irrigation uses, reservoir evaporation and industrial uses combined, reduced by 86 afy to avoid double-counting the heavy industrial use.

The proposed depletion quantity is 200,000 to 260,000 afy less than the claimed amounts.

Again, even though new water for the Navajo-Gallup Project is included in the settlement, total settlement depletions are equivalent to or slightly less than the total current right.

It is difficult to know the quantity of water rights that the Navajo Nation could secure at trial without actually litigating the claims. Nonetheless, the water rights stated

in the Proposed Decrees are substantially less than the amounts claimed by the US Claims or the NRCE Report. More significant to the State, the settlement water rights are less than the already-existing rights of the Navajo Nation. Absent settlement, the State believes the Navajo Nation could secure at trial the amount of its current right at a minimum. On top of that, the Court could decree additional future uses under the *Winters* Doctrine. But no matter how much additional *Winters* rights the Court might recognize, the settlement rights are less than the minimum that would be secured at trial.

**D. The Settlement Agreement is consistent with public policy and applicable law.**

The Navajo settlement quantifies the water rights of the Navajo Nation in conformance with federal and state law. Through the long-standing line of *Winters* cases, the United States Supreme Court has held that reservation Indian tribes like the Navajo Nation have the right to sufficient water to provide for a permanent homeland. To that end, the settlement recognizes water rights needed for existing Navajo uses and irrigation projects and to meet the important domestic purposes of the Navajo-Gallup Project.

Congress approved and the Secretary of the Interior signed the Settlement Agreement. Congress also required compliance with all applicable federal laws in implementing the settlement, including: (1) interstate compacts; (2) federal water project authorizations; and (3) federal environmental laws, including the Endangered Species Act and the National Environmental Policy Act.

The settlement respects state law and interests by harmonizing adjudication and administration of the large federal claims for the Navajo Nation with existing state interests and obligations. New Mexico's two water management agencies, the Office of the State Engineer and the Interstate Stream Commission, approved the Settlement

Agreement and the New Mexico Governor and Attorney General signed the Settlement Agreement.

The settlement acquiesces to the State of New Mexico's obligations and water use constraints under the Upper Colorado River Basin Compact. In particular, the Navajo Nation agrees to accept quantities that fit within the amount of consumptive use available for development within the state's apportionment. As shown in the 2007 Hydrologic Determination, the settlement successfully integrates the Navajo Nation's claims within New Mexico's apportionment without displacing other existing or authorized water uses.

The settlement resolves the conflict between state-law standards of beneficial use and federal reserved right principles. Instead of asserting a senior federal reserved right, most of the Navajo water rights will be supplied from junior water in storage. The settlement confirms that operation of Navajo Reservoir, NIIP, the Navajo-Gallup Project and the New Mexico portion of the ALP are subject to New Mexico state law, including the priority dates of State Engineer permits. NIIP and the Navajo-Gallup Project will remain subject to sharing of shortages in the Navajo Reservoir water supply with Navajo Reservoir supply contractors and the SJCP, consistent with the Act of June 13, 1962 (Public Law 87-483, Section 11(a)).

Also, the settlement resolves potential disputes over authority and administration of water rights. The United States and the Navajo Nation agree that the State Engineer is the water master with the authority to: (a) administer the distribution and diversions of water in the basin in accordance with decreed water rights and the licenses and permits; (b) determine the validity and extent of any priority calls on the system to meet current beneficial use demands; and (c) curtail uses as may be necessary for the State to comply with the Upper Colorado River Basin Compact. In particular, the Navajo Nation agrees

that the State Engineer may administer its water rights in priority, and with conditions or restrictions on use, as described by the Settlement Agreement and the Proposed Decrees. This Court retains jurisdiction to review decisions of the State Engineer regarding water rights administration.

The settlement carries out the State of New Mexico's policy of seeking settlement of Indian water rights claims in order to recognize tribal water rights while simultaneously protecting rights of other water users. In commencing negotiations, both the State and the Navajo Nation cited the importance of attempting to settle the Navajo claims:

Determination of the Navajo Nation's water rights in the San Juan River Stream System is important for both the Navajo Nation and the State of New Mexico in order to develop and protect water resources within the San Juan River Stream System in New Mexico; and

Because the determination of water rights through a general stream system will be costly, lengthy, and contentious, discussions should commence to determine if a negotiated resolution is possible in lieu of litigation.

See **Exhibit 4** to Whipple Affidavit, *Memorandum of Agreement* between the State of New Mexico and the Navajo Nation executed by Governor Gary Johnson and President Albert Hale on July 23, 1997 at paras. 6 & 7. In 2001, the parties re-affirmed their support for seeking settlement and emphasized that any agreement should: "Recognize the political reality that there is non-Indian dependence on water in the San Juan Basin and that a settlement will require non-Indian support; [and] Provide stability for Indians and non-Indians within the San Juan Basin. See **Exhibit 4** to Whipple Affidavit, *Memorandum of Agreement* between the State of New Mexico and the Navajo Nation executed by Governor Gary Johnson and President Kelsey Begaye on October 31, 2001 at paras. 10(d) & (e).

In 2005, the Legislature enacted the Indian Water Rights Settlement Fund Act creating a fund “in the state treasury to facilitate the implementation of the state's portion of Indian water rights settlements.” *See* NMSA 1978, § 72-1-12 (2005). To date the New Mexico Legislature has appropriated more than \$40 million of the \$50 million necessary to fund the State’s cost share of the Navajo-Gallup Project. This State contribution together with federal appropriations will fund a \$1 billion project. During its ten to twelve years of construction, the project will bring jobs to and stimulate the economy of northwestern New Mexico. Once completed, the Navajo-Gallup Project will provide much-needed domestic and municipal supply and will aid economic development for much of the Navajo Nation, the Jicarilla Apache Reservation and the City of Gallup.

#### **CONCLUSION**

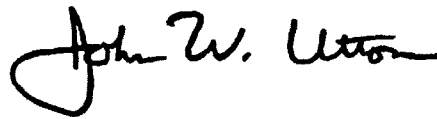
The State of New Mexico negotiated and agreed to the settlement because the State believes the terms of the Proposed Decrees and the Settlement Agreement are a fair and reasonable compromise and in the public interest. In particular, the settlement is favorable to non-Navajo water right holders because it contains important protections to non-Navajo water uses. Without settlement, federal law governing Indian reservations would allow the United States and the Navajo Nation to claim large quantities of water with the earliest priority dates. Under the settlement, the United States and Navajo Nation have agreed to significantly reduce water right quantities and to subordinate the vast majority of the Nation’s water uses to junior priority dates. The Navajo Nation is willing to make this concession in exchange for federal authorization, funding and construction of the Navajo-Gallup Project, which will provide domestic and municipal water supply to the reservation.

Respectfully submitted, this 15th day of April 2013.

STATE OF NEW MEXICO



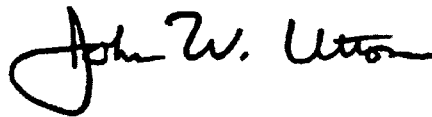
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CERTIFICATE OF SERVICE

I certify that on this 15th day of April 2013, at approximately 3:00 pm, an electronic copy of this Memorandum Brief in Support of Joint Settlement Motion was served by attaching an electronic copy to an email sent to: [wnavajointerse@nmcourts.gov](mailto:wnavajointerse@nmcourts.gov).



\_\_\_\_\_  
John W. Utton

**STATE OF NEW MEXICO  
SAN JUAN COUNTY  
THE ELEVENTH JUDICIAL DISTRICT COURT**

**STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,**  
**Plaintiff,**

**vs.**

**THE UNITED STATES OF AMERICA, *et al.*,**  
**Defendants,**

**THE JICARILLA APACHE TRIBE AND THE  
NAVAJO NATION,**

**Defendant-Intervenors.**

**CV-75-184  
HON. JAMES J. WECHSLER  
Presiding Judge**

**SAN JUAN RIVER  
GENERAL STREAM  
ADJUDICATION**

**Claims of the Navajo Nation  
Case No. AB-07-1**

**AFFIDAVIT OF JOHN J. WHIPPLE**

I, John J. Whipple, being first duly sworn hereby declare as follows:

**Education and Experience**

1. I obtained a BS degree in Civil Engineering from the University of California, Davis, in June 1981, and an MS degree in Civil Engineering (Water Resources Engineering option) from the University of California, Davis, in June 1983.

2. From June 1982 to September 1983, I was employed by the United States ("U.S.") Geological Survey to perform ground water modeling.

3. From October 1983 to May 1985, I was employed by Systech Engineering, Inc., to perform hydrologic and water quality modeling.

4. From June 1985 to December 2010, I was employed in various capacities by the State of the New Mexico ("State"). My duties generally included work on behalf of the State regarding its responsibilities and interests related to: interstate compact administration; water

use analysis and accounting; Indian water rights claims and settlements in the San Juan Basin; federal authorization and operation of United States Bureau of Reclamation ("USBR") projects; and federal environmental approvals under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"). In carrying out these duties, I regularly performed technical tasks in the areas of hydrology, water use accounting, water resources management and planning, and water rights analysis and administration.

5. I began my employment with the State in June 1985 as a water resources specialist with the New Mexico Interstate Stream Commission ("ISC"). I was responsible for analyzing hydrologic and climatologic data, accounting consumptive uses of water, reviewing reservoir and river operations, modeling of river systems and ground water resources, and other technical tasks. I also provided expert testimony in *Texas v. New Mexico* regarding the hydrology and salinity of the Pecos River.

6. From about 1997 and continuing until December 2010, I served as the Basin Manager for the Colorado/San Juan Basin, with responsibilities to help protect the State's interests in the San Juan River Basin, the Little Colorado River Basin and the Gila River Basin in New Mexico (collectively, in the Colorado River system). In that capacity, I took part in a wide-range of water related activities on behalf of the State, including administration of interstate compacts, resolution of issues relating to river and reservoir operations on the Colorado River system, the San Juan River Basin Recovery Implementation Program (SJRBRIP), and the Navajo Nation water rights settlement. I also was a fact witness in *San Juan Water Commission v. John R. D'Antonio, Jr., New Mexico State Engineer*, No. CV-2008-1699, District Court of San Juan County.



7. Since my retirement from the State at the end of 2010, I have worked under contract as a water resources consultant for both the ISC and the New Mexico Office of the State Engineer ("OSE"), primarily regarding Colorado River issues and implementation of the Navajo Nation settlement.

8. The following is a list of the more substantive responsibilities I assumed relating to the San Juan River and the Colorado River during my tenure as an employee with the ISC and as a contractor to the OSE and the ISC since retirement from the State (see **Exhibit No. 1**, Resume of John J. Whipple):

a. I was the State's lead technical negotiator for the Navajo Nation water rights settlement in the San Juan River Basin, including for settlement implementation after the settlement was approved by Congress and signed into law by the President in March 2009.

b. I was the State's member of the Upper Colorado River Commission's ("UCRC") Engineering Advisory Committee from the early 2000s through 2010. The UCRC is a body created to administer the Upper Colorado River Basin Compact ("Upper Basin Compact").

c. I facilitated the development of the USBR's 2007 Hydrologic Determination with the USBR and the Upper Division States, and the preparation of related UCRC resolutions regarding the availability of water from Navajo Reservoir for use in New Mexico under the Navajo-Gallup Water Supply Project ("Navajo-Gallup Project").

d. I was the State's technical negotiator for an agreement in 2005 regarding the City of Farmington's water rights from the Animas River in New Mexico.

e. I was a primary drafter and facilitator of the initial agreement among major water users on the San Juan River in New Mexico regarding San Juan River operations and administration in New Mexico for 2003, and also facilitated subsequent similar agreements covering 2004, 2005, 2006, 2007-2008 and 2009-2012.

f. I was the State's representative from about 1997 through 2010 on the San Juan River Basin Recovery Implementation Program ("SJRIP") Coordination Committee. During the same period, I was the State's representative on several other committees related to the SJRIP that were active for portions of the period: the SJRIP Hydrology Committee, Hydrologic Baseline sub-committee and Navajo Dam Operations Committee; and the Ad Hoc San Juan River Basin Modeling Team and Ad Hoc Funding Committee that addressed specific issues related to the SJRIP. Governor Bruce King in 1992 signed a Cooperative Agreement committing the State to participate in the SJRIP, a multi-state and multi-agency program with goals to: (a) conserve populations of endangered fish species in the San Juan River Basin consistent with the recovery goals established under the ESA; and (b) proceed with water development in the basin in compliance with federal and state laws, interstate compacts, Supreme Court decrees and federal trust responsibilities to Indian tribes.

g. I was a member of the Navajo-Gallup Water Supply Project Steering Committee ("Steering Committee") from the early 1990s through 2010 to help plan a water supply project for communities in Northwestern New Mexico.

h. I represented the ISC in its role of cooperating agency in the development of environmental impact statements for Navajo Reservoir operations and the Navajo-Gallup Project.

- i. I provided consultation to the OSE regarding water rights and active water resources management in the San Juan River Basin.
  - j. I was responsible for monitoring daily flow administration under the La Plata River Compact through 2010.
  - k. I prepared studies of water supplies and consumptive uses and losses in the San Juan River Basin for uses in New Mexico, including for San Juan-Chama Project ("SJCP") exports to the Rio Grande Basin, for water planning, hydrologic modeling and water rights settlement purposes.
  - l. I represented the State in the Seven Colorado River Basin States' Technical Work Group to address Colorado River system river and reservoir operations concerns from the early 2000s through 2010.
  - m. I was the State's representative on the Steering Team, Project Team and Water Supply Assessment sub-team for the USBR's Colorado River Basin Study ("Study") through 2010. As a contractor to the ISC, I reviewed draft Study reports during 2011 and 2012.
  - n. I was a member of the Glen Canyon Adaptive Management Program's (GCAMP) Technical Work Group for several years through 2010. The Secretary of the Interior ("Secretary") formed the GCAMP, a multi-state, multi-agency and multi-stakeholder program to advise the Secretary on Lake Powell operations to protect biological, recreational and cultural resources through Glen, Marble and Grand Canyons.
9. For more than a decade, the ISC and the New Mexico State Engineer ("State Engineer") have devoted considerable time and resources to negotiate and implement the Navajo Nation water rights settlement. During that time, I have served as the State's primary technical

staff member and then consultant in negotiating and implementing the settlement. I participated in initial settlement discussions beginning in 1996 and then actively participated in negotiations from 2001 through 2004, culminating in the State and the Navajo Nation signing the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement on April 19, 2005 ("2005 Settlement Agreement"). Because Congressional authorization was required for the U.S. to sign the agreement, I was also involved in settlement issues during the subsequent legislative process. In 2009, Congress authorized settlement when it enacted the Northwestern New Mexico Rural Water Projects Act (Public Law 111-11, Title X, Subtitle B) ("Settlement Act"). I then participated in additional meetings from 2009 through 2010 in order to make revisions to the 2005 Settlement Agreement to make it consistent with the Settlement Act. The conformed settlement agreement was signed in December 2010 ("Settlement Agreement"). The Settlement Agreement calls for the Court in the San Juan River Adjudication ("Adjudication") to enter two proposed settlement decrees ("Proposed Decrees"): (1) a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, which was attached to the Settlement Agreement as Appendix 1 ("Proposed Decree"); and (2) a Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, the form of which was attached to the Settlement Agreement as Appendix 2. During 2011 and the first few months of 2012, I actively participated in the negotiation of the revised Appendix 2 dated April 2, 2012 ("Proposed Supplemental Decree").

10. The State has identified me as both a fact witness and an expert witness in the Navajo *inter se* proceeding in the Adjudication. In those capacities I have prepared two reports filed last year with the Court:

*Technical Assessment of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement, September 6, 2012* (“*Technical Assessment*”); and

*Quantification Analysis for the Proposed Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, April 2, 2012* (“*Quantification Analysis*”).

11. The State asked me to prepare this affidavit in support of its motion and brief in support of entry of the Proposed Decrees.

**Origins of the Settlement Process**

**The Navajo-Gallup Water Supply Project**

12. Beginning in the mid 1990s, the Interstate Stream Engineer, William Miller, tasked me with representing the ISC on the Steering Committee to assist in planning the Navajo-Gallup Project. Ms. Patricia Lundstrom, Director of the Northwest New Mexico Council of Governments, chaired the Steering Committee. Also participating in meetings of the Steering Committee were staff of the USBR’s Western Colorado Area Office, Navajo Nation Department of Water Resources (“NNDWR”), the Navajo Tribal Utility Authority, the City of Gallup, the U.S. Indian Health Service and the U.S. Bureau of Indian Affairs (“BIA”).

13. I discussed with the Upper Colorado River Commissioner for New Mexico, Mr. Philip Mutz, concerns regarding possible impacts on the State’s ability to comply with the terms of the Upper Basin Compact and on non-Navajo water uses in the basin if the Navajo Nation were able to both move forward now with the Navajo-Gallup Project and then come back later with large water rights claims for additional new water development in the future. The Upper Colorado River Commissioner represents the State on the UCRC. We then had discussions about this matter with State Engineer Thomas Turney. The State Engineer determined that State

support for the Navajo-Gallup Project would be provided only in the context of a settlement of the Navajo Nation's water rights claims in the basin.

*Exploring the Possibility of Settlement of the Navajo Nation's Water Rights*

14. The State and the Navajo Nation initiated discussions to explore possible settlement of the Navajo Nation's water rights claims in the San Juan River Basin in New Mexico in late 1996. Navajo Nation President Albert Hale's September 9, 1996, letter to New Mexico Governor Gary Johnson, citing a "Government-to-Government Policy Agreement" executed in July 1996 between the Governor, the New Mexico Attorney General and the presidents and governors of the Indian reservations and pueblos in New Mexico, expressed a willingness of the Navajo Nation to meet with the State to discuss the possibility of a negotiated resolution of the Navajo Nation's claims. Several exploratory meetings were held between representatives of the State and the Navajo Nation between September 1996 and July 1997. Representatives of the State included State Engineer Turney, Mr. Mutz, myself and counsel for the ISC and the OSE; and representatives for the Navajo Nation included Mr. Stanley Pollack, Dr. John Leeper and other Navajo Nation staff and tribal leaders. To the best of my recollection, I attended most, if not all, of these exploratory meetings.

15. Based on information available in the mid 1990s, including the USBR's 1988 Hydrologic Determination prepared in support of the Jicarilla Apache Nation's Settlement Contract that was approved by the Jicarilla Apache Tribe Water Rights Settlement Act of 1992, Mr. Mutz and I believed that sufficient water might be available for development by the State under the Upper Basin Compact to support a settlement that would include historic and existing Navajo Nation water uses, the Navajo Nation's previously authorized uses under the NIIP and its planned uses under the authorized ALP, the proposed Navajo-Gallup Project, and perhaps a very

small amount of additional uses. We informed the State Engineer and the Navajo Nation of this settlement negotiation limitation early in the process.

*The Navajo Nation's Existing or Previously Authorized Water Project Uses: the Hogback and Fruitland Projects, Navajo Indian Irrigation Project and Animas-La Plata Project*

16. The Hogback and Fruitland Projects are existing Navajo irrigation projects in the San Juan River valley below Farmington, New Mexico. Construction of the Hogback Canal began in 1903, and about 767 acres were irrigated under the canal in 1908. Several siphons and extensions of the canal were completed by 1960. The canal was connected also to the Cudei area in 2002. Irrigation in the Cudei area began in as early as 1900. Based on BIA records, the maximum amount of acres irrigated within the existing Hogback Project boundary, including the Cudei area, in any one year historically was about 6,327 acres in 1966.

17. Construction of the Fruitland Canal began in 1937 to replace, consolidate and expand the service area of smaller irrigation ditches on Navajo lands from Farmington to the Cambridge area. Irrigation within portions of the Fruitland Project area was apparently occurring by about 1900. Based on BIA records, the maximum amount of acres irrigated within the existing Fruitland Project boundary, including the Cambridge area, in any one year historically was about 3,120 acres in 1965.

18. By 1993, the BIA had issued Land Use Permits for farming to the Navajo Nation or to individual members of the Nation for irrigation uses on the Navajo Indian Reservation from the San Juan River for a total of 8,829 acres under the Hogback-Cudei ("Hogback") Project and a total of 3,335 acres under the Fruitland-Cambridge ("Fruitland") Project as identified by the 1993 BIA Crop Utilization Survey. Either the BIA or the Navajo Nation could rehabilitate or expand irrigation facilities on the Hogback and Fruitland Projects.

19. The Navajo Nation's diversion from Navajo Reservoir of up to 508,000 afy for irrigation of 110,630 acres on the Navajo Indian Irrigation Project ("NIIP") was authorized by Act of Congress on June 13, 1962 (Public Law 87-483). Irrigation on the NIIP began in 1976, and has increased over time as project construction advances. Based on BIA records, the maximum amount of acres irrigated on the NIIP in any one year through 2010 was 64,787 acres. The maximum diversion amount for the NIIP in any one year through 2010 was 209,947 acre-feet per year ("afy").

20. The Animas-La Plata Project ("ALP") was originally authorized in 1968 by the Colorado River Basin Projects Act. The Colorado Ute Settlement Act Amendments of 2000 authorized for construction a downsized version of the ALP. The Navajo Nation's authorized uses from the Animas River under the downsized ALP amount to a depletion of 2,340 afy, which is less than the amount of Navajo Nation water use under the project previously planned prior to downsizing of the project. Lake Nighthorse, the ALP storage reservoir, was filled in 2011.

*Settlement Discussions and Negotiations*

21. Governor Johnson and President Hale in July 1997 signed the "Memorandum of Agreement between the State of New Mexico and the Navajo Nation to Commence Discussions to Determine the Water Rights of the Navajo Nation in the San Juan River Stream System through Negotiation" (See **Exhibit No. 2**). Subsequent meetings were held to discuss the feasibility of entering into formal water rights settlement negotiations. I actively participated in these initial settlement discussions on behalf of the State, as did Mr. Mutz and counsel for the OSE. The participants for the State and the Navajo Nation in these initial settlement discussions were largely the same as those in the exploratory meetings. These initial settlement discussions were facilitated by Ms. Lucy Moore.



22. During 2001, State Engineer Turney met with a number of water user groups in the San Juan River Basin to outline the major components of a possible water rights settlement for the Navajo Nation. I attended some of these meetings to assist in answering questions. For example, on August 21, 2001, I attended a meeting at which State Engineer Turney made a presentation to the San Juan Water Commission ("SJWC") in which he indicated that settlement would include support for completion of the NIIP and the Navajo-Gallup Project, in addition to rehabilitation of the Fruitland and Hogback irrigation projects (see **Exhibit No. 3**, "Comments of Thomas C. Turney before San Juan Water Commission, Farmington, NM, August 21, 2001"). Also in attendance at some of these meetings were Robert Genualdi of the OSE staff in Aztec and counsel for the OSE.

23. In October 2001, Governor Johnson and President Kelsey Begaye signed the "Memorandum of Agreement between the State of New Mexico and the Navajo Nation to Advance Discussions to Quantify the Water Rights of the Navajo Nation in the San Juan River Stream System through Negotiation" (see **Exhibit No. 4**). The agreement included a commitment to cooperate to ensure to the extent possible that development of the proposed Navajo-Gallup Project is consistent with a settlement of the Navajo Nation's water rights claims in the basin.

24. Beginning in 2002 and continuing through 2004, representatives of the State, the Navajo Nation and the U.S. engaged in very active settlement negotiations, including regular in-person and telephonic meetings and considerable document drafting and revising. Mr. John Utton, contract attorney to the OSE, and I attended these meetings and actively participated in the negotiations on behalf of the State, with input from Mr. Mutz who also attended some of these meetings. The principal negotiators for the Navajo Nation were Mr. Pollack, counsel for

the Nation, and Dr. Leeper, head of the NNDWR, with participation also from other NNDWR staff (notably, Mr. Jason John), and other Navajo Nation Department of Justice staff (notably, Ms. Bidtah Becker), and several members of the Navajo Nation Water Rights Commission. Representatives of the U.S. Department of the Interior (including Mr. Michael Schoessler of the Solicitor's Office) participated in some, but not all, of the negotiation sessions.

25. The UCRC on June 19, 2003, resolved that: (1) the States of Colorado, New Mexico, Utah and Wyoming support and consent to the diversion of water from the Upper Basin for use in the Lower Basin in New Mexico via the Navajo-Gallup Project; and (2) the UCRC supports such Congressional action as may be necessary to authorize the project. Mr. Mutz and I worked with the UCRC members and their legal and technical advisers in securing this resolution.

**Provisions Restricting the Navajo Nation's Existing or Authorized Water Uses Negotiated in the Settlement**

26. One of the key objectives of the State's negotiators in settling the claims of the Navajo Nation was to protect existing uses of non-Navajo water users in the San Juan River Basin to the extent possible. In the Technical Assessment, I described in detail the protections to non-Navajo water users incorporated into the Settlement Agreement and the Proposed Decrees, which are primarily restrictions added to the Navajo Nation's uses of water under projects that were authorized many years ago.

27. Although the use of water for the Navajo-Gallup Project is a new authorization, all of the Navajo Nation's water rights in the Proposed Decree and Proposed Supplemental Decree, including for its uses under the Navajo-Gallup Project, fit within the Navajo Nation's current rights to use water. In effect, the Proposed Decrees limit the total quantity of the Navajo

Nation's water rights to the approximate amount or less of the Navajo Nation's existing or current rights as I described in the Technical Assessment, pages 5-21.

Restrictions to the NIIP

28. One of the important restrictions on the quantity of water use by the Navajo Nation that was added in the settlement is a maximum depletion by the NIIP of 270,000 afy (see Proposed Decree, Paragraph 3(a)). The authorizing legislation for the NIIP, the Act of June 13, 1962 (Public Law 87-483) limits diversions, but not consumptive uses or depletions, for the project. Defining the depletion rights for the NIIP was important for fully describing the depletions rights of the Navajo Nation and understanding how the settlement fits within the consumptive use apportionment made to the State by the Upper Basin Compact. Because the yield available for development by the Upper Basin under the Colorado River Compact is generally expressed in terms of consumptive use measured at Lee Ferry, the Proposed Decree provides that the depletions under the water rights for the NIIP will be determined as depletions of the flow of the San Juan River, which are based on diversions minus return flows to the San Juan River.

29. Under the settlement, the Navajo Nation will have to manage the NIIP so as to not exceed a maximum depletion of flow of the San Juan River of 270,000 afy, on average, during any period of ten consecutive years, including incidental depletions of river flow resulting from deep percolation losses of applied irrigation water to ground water beneath NIIP lands and channel losses between the NIIP boundary and the San Juan River on irrigation drainage returns or operational waste discharges to the Chaco River drainage. The settlement imposes a limit on total NIIP depletions that currently does not exist without settlement.

30. During the negotiation process, the Navajo Nation's representatives made clear that a settlement would need to recognize an annual diversion amount of 508,000 afy for irrigation on the NIIP as authorized by the Act of June 13, 1962 (Public Law 87-483). The Proposed Decree therefore recognizes the statutory average annual diversion amount of 508,000 afy for the NIIP pursuant to the Act of June 13, 1962 and the existing contract with the Secretary for water from Navajo Reservoir to supply the NIIP. However, based on the 1999 Biological Assessment for the NIIP, the amount of diversion required for irrigation on the project as currently designed for sprinkler irrigation is anticipated to average between 337,500 afy and 372,000 afy, depending on the implementation and effectiveness of planned water management and water conservation measures. Regardless of the statutory diversion amount, the Navajo Nation may not divert more water for the NIIP than is needed to meet actual water demands on the project in any year. Further, the Proposed Decree also provides that if any portion of the NIIP right is used for a purpose other than irrigation, such as for current livestock uses at NIIP feedlots and current aquaculture uses at NIIP ponds, then the Navajo Nation will have to file application with the State Engineer to increase the total average annual diversion by all uses under the water rights for the NIIP above 353,000 afy, and approval of such application will be subject to non-impairment of other water rights in New Mexico (see Proposed Decree, Paragraph 5(e)(4)). Thus, the annual diversion amount that the Navajo Nation can actually make under the NIIP right is effectively reduced from the statutory diversion amount.

*Restrictions to the Hogback and Fruitland Projects*

31. Under their existing authorizations, the Navajo Nation could increase their irrigation depletions on the Hogback and Fruitland projects relative to historic uses or to amounts previously assumed in State planning studies. With settlement, a maximum annual depletion

