

**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 *Revised Statement of Legal and Factual Bases for Settlement* updated to reflect the United States’ *Errata Notice – Concerning the United States’ Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation*, filed with the Court on April 13, 2012 (US Claims) and as further analyzed by the State’s Technical Assessment of the Settlement Agreement dated September 6, 2012.

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**STATE OF NEW MEXICO’S
REVISED STATEMENT
OF LEGAL AND FACTUAL BASES FOR SETTLEMENT**

The State of New Mexico *ex rel.* State Engineer (“State”) submits this *Revised Statement of Legal and Factual Bases for Settlement* (“Statement”) updated to reflect the United States’ *Errata Notice – Concerning the United States’ Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation*, filed with the Court on April 13,

2012 (US Claims) and as further analyzed by 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.

I. OVERVIEW

The Navajo Nation claims the largest federal reserved water right in the State of New Mexico. The United States Supreme Court has held that reservation Indian tribes have the right to sufficient water to provide for a permanent home land, 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).

As this Statement describes, 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 or authorization to use or develop. In addition, under the settlement, the Navajo Nation agrees to greatly limit priority calls and to accept restrictions on its uses in order to protect other water right owners.

To protect existing water right owners, the State negotiated a settlement that limits the Navajo Nation's water rights to the amount of their already existing water projects and uses and that requires use of water from federal projects, with a 1955 or 1956 priority, to satisfy the Navajo Nation's future use claims. As discussed in more detail below, the amount of water proposed to be adjudicated to the Navajo Nation is based only on existing and authorized irrigation projects and on existing or authorized municipal and domestic projects.

Under the settlement, the Navajo Nation foregoes quantification based on the practicably irrigable acreage ("PIA") standard as established in *Arizona v. California*, in exchange for funding and construction of the Navajo-Gallup Water Supply 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 rights to water rights with junior priority dates, by using water from storage in Navajo Reservoir and Lake Nighthorse and by not exercising 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 comparison of total depletions on the mainstem of the San Juan River based upon the State’s assessment of: (1) the Navajo Nation’s current water right; (2) amounts claimed by the United States on behalf of the Navajo Nation as stated in its filing with the Court on January 3, 2011, amended April 13, 2012 (“US Claims”); and (3) amounts proposed by the settlement.

Table 1. Navajo Nation Depletions (afy) for Mainstem Uses Included in the Proposed Decree¹

	Current Right	US Claims	Proposed Decree
Irrigation	315,511	468,556	299,250
Non-irrigation	13,820	102,272	26,506
Totals	329,331	570,828	325,756
¹ Uses from the San Juan and Animas rivers and from groundwater (excluding tributary irrigation and livestock uses).			

As described in the Technical Assessment, 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 proposed by the settlement is slightly less than the total quantity 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 sufficient water to meet future uses under the *Winters* Doctrine, there is a high probability, if litigated, the total litigation 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. BACKGROUND OF SETTLEMENT PROCESS

The settlement of the Navajo Nation's water rights is the second settlement of Indian reserved water rights the State of New Mexico has entered into in this adjudication. The first was with the Jicarilla Apache Tribe, culminating with federal legislation approving the settlement and the entry of a Partial Final Judgment and Decree. The success of the Jicarilla Apache settlement provided a precedent for pursuing settlement of the Navajo Nation's water rights.

Through a 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, formal discussions were initiated 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. By December 2003, the State and the Navajo Nation had drafted their initial settlement agreement. Aware of the basin-wide interest in the Navajo Nation's water rights claims, the parties released draft settlement documents for public review and comment on December 5, 2003. The State then held a public meeting in Farmington on December 15, 2003 to explain the initial proposed settlement documents and receive public comments. The Interstate Stream Commission ("ISC") held its regular meeting in Farmington on March 17, 2004, to hear public comments on the draft settlement proposal.

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 all issues raised by the public in their 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 ISC held its regular meeting in Farmington to receive public comments on the July 9, 2004 revised draft settlement documents.

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.

On December 7, 2006, the New Mexico Congressional delegation introduced federal legislation to authorize the settlement and construction of the Navajo-Gallup Water Supply Project (“NGWSP” or “Navajo-Gallup Project”). 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 NGWSP from Navajo Reservoir (“Settlement Contract”).

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.

III. LEGAL BASIS FOR SETTLEMENT

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).

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). 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 and to make the reservation a permanent homeland. 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 acre-feet per year (“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.¹

Recognizing the significant risk that under either of these standards the Navajo Nation could be adjudicated water rights beyond their currently authorized or existing amounts, with a senior priority, the State sought to quantify and recognize Navajo reserved rights based on existing uses and authorizations while simultaneously including protections for existing state-based water rights. Without settlement, the Navajo Nation would very likely be decreed a large water right with a senior priority with the potential to displace significant non-Navajo water rights. With settlement, the Navajo Nation will accept essentially the quantity that it currently has a right or authorization to use or develop. In addition, under the settlement, the Navajo Nation agrees to greatly limit priority calls and to accept restrictions on Navajo uses in order to protect other water rights.

Although the settlement is complex and includes many terms and conditions, the following are significant legal protections that the State negotiated in the Settlement.

¹ 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.

A. Settlement Avoids Litigation of Expansive Winters Doctrine Claims.

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 existing irrigation projects. To the extent that the settlement recognizes any PIA rights, those rights are for acreage already within an existing irrigation project. The largest irrigation right is for the Navajo Indian Irrigation Project (“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 irrigation projects are based on the acreage within their existing boundaries. 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, which is coming from a contract for federal project water with a 1955 priority date.

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.² 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

² 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.

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 the amount of water could be substantially greater than the amounts to be adjudicated by the Proposed Decree. The US Claims identify an additional 57,524 acres of irrigation, an additional 295,603 afy of irrigation diversion and an additional 169,306 afy of irrigation depletion. *See* Table 2, below. 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, including the Cambridge and Cudei areas, 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.

Thus, compared to the 12,165 acres included in the Proposed Decree for the Hogback and Fruitland projects, the Navajo Nation could claim an already existing Congressional authorization for a total of 26,000 acres under these projects. An additional 14,000 acres could more than double the daily diversion demand of these two projects from about 320 cubic feet per second (“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 in the San Juan River Basin, 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 San Juan-Chama Project.

In addition, the US Claims identified 102,272 afy of depletion for DCMI water demands, as compared to the 26,506 afy of depletion proposed by the settlement. *See* Table 3, below. In total, the US Claims assert a right to 245,072 afy of depletions more than would be recognized under the Proposed Decree. There is not enough water available within the apportionment made to the State of New Mexico by the Upper Colorado River Basin Compact to meet such a large additional demand without reducing the water available for other existing water rights in the San Juan River Basin.

By contrast, under the proposed settlement, the State negotiated protections to ensure the amounts of water to be decreed to the Navajo Nation are not likely to cause actual consumptive water uses in the basin in New Mexico in excess of the amount available to New Mexico under the Upper Colorado River Basin Compact, or to result in curtailment of other existing uses. Importantly, as explained in Section C, below, protective measures negotiated as part of the settlement that require the Navajo Nation to use some of its NIIP contract water to supply the Hogback and Fruitland projects during low-flow periods in the summer and fall substantially mitigate against the occurrence of priority calls in the basin.

B. The Navajo Nation Will subordinate Its Most Senior Priority Dates.

In litigation, the Navajo Nation would 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). Either date would very likely 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 reservation dates of extensions to the original reservation. However, the priority date for the reserved rights of the Mescalero Apache Tribe in the Pecos River adjudication was

determined by the New Mexico Court of Appeals to relate to the date of the Mescalero peace treaty and not to the later date the reservation was created. *See Lewis*, 116 N.M. 194. Under that holding, the Navajo Nation has direct authority for arguing that the priority date for its reserved right is as early as 1849.

The Proposed Decree would adjudicate a priority date of 1868 for the reserved rights and in addition would impose administrative conditions that severely limit the exercise of that priority date. First, the settlement subordinates the priority date for the Navajo Nation's reserved water rights uses under NIIP and NGWSP from 1868 to the Navajo Reservoir priority date of 1955. Under the settlement, the right to use water under NIIP (353,000 afy of diversion) and the Navajo-Gallup Project (22,650 afy of diversion), which together would amount to over 80 percent of the Navajo Nation's water rights in the San Juan River Basin, would be supplied from the Navajo Reservoir supply, rather than directly from the San Juan River. Only if the Navajo Reservoir water supply is "irretrievably lost" can the Navajo Nation assert the reserved priority date of 1868. In effect, as long as the Navajo Nation can receive water under its Bureau of Reclamation contract for water from Navajo Reservoir, the Nation is precluded from making any claims with a senior priority date to the direct flow of the San Juan River to supply either NIIP or Navajo-Gallup Project demand. The settlement further subordinates the priority date for the Navajo Nation's reserved water rights for the Animas-La Plata Project (ALP) from 1868 to the project priority date of 1956.

C. Water in Storage Will Limit Calls on Direct Flow.

A second important restriction would be imposed on potential priority calls for the Hogback and Fruitland projects. Both projects have direct-flow diversions and, under the settlement, have the right to irrigate a combined total of 12,165 acres with a priority date of 1868. Instead of subordinating this priority date by supplying water from a federal project with a

junior priority date, the Navajo Nation has agreed to supplement the amount of water for the projects with an “alternate water supply” before making a priority call. Under the alternate water supply provision of the settlement, the Navajo Nation agrees that it will first deliver up to 12,000 afy of NIIP contract water in storage in Navajo Reservoir to the Hogback and Fruitland projects before requesting priority calls against upstream junior appropriators. Only if this amount is exhausted in any year can a priority call be made in that year. Based on the hydrologic record, this provision would mean that instead of priority calls potentially occurring in one out of every two years, on average, the Navajo Nation would only need to request priority calls for Hogback and Fruitland in one out of every twenty years, on average.

D. Settlement Provides Protections for Animas-La Plata Project.

Furthermore, the Navajo Nation has also agreed to provide some protection to ALP water uses, which have a 1956 priority date, in the event that curtailment of New Mexico’s junior uses is required in any year for New Mexico to comply with the Upper Colorado River Basin Compact. Under the settlement, the Navajo Nation agrees to provide protection to New Mexico’s ALP contractors in an amount of up to 13,520 afy of depletion by foregoing uses of water to make water available to the ALP. As a result, ALP would only be shorted to the same extent that the Navajo-Gallup Project does not receive its full supply.

E. Navajo Nation Agrees not to Challenge Echo Ditch Decree.

Neither the United States nor the Navajo Nation was a party to the Echo Ditch Decree that adjudicated the 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 the

determination of water rights recognized in that decree, and are not bound by it. Under the settlement, the Navajo Nation and the United States as trustee for the Navajo Nation agree to not challenge 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.

In addition, the Navajo Nation has agreed to settle with the City of Farmington regarding the City's "trust" rights adjudicated under the Echo Ditch Decree and certain other of the City's water rights. The City of Farmington settlement, which was approved by the Farmington City Council on February 8, 2005, resolves the quantification of certain of the City's water rights as among the State of New Mexico, the City, and the Navajo Nation, and gives the City much greater certainty in the status of its water rights.

F. Settlement Limits NIIP Diversion.

Both the 1962 legislation authorizing NIIP, Public Law 87-483, and the State Engineer permit issued to the Secretary of the Interior allow a diversion right of 508,000 afy for NIIP from Navajo Reservoir. One dispute that the settlement resolves is whether the Navajo Nation is entitled to the full diversion. In litigation, the Navajo Nation could take the position that by conserving water by use of sprinkler rather than flood irrigation, the Navajo Nation can use the rest of the authorized diversion amount for other uses, up to the full 508,000 afy. The State would take the position that the NIIP diversion right is limited to the amount of water actually needed for irrigation use on the project, and further limited by a separate depletion limit. Again, in considering litigation of this dispute, the State would face a canon of construction that requires favoring the Nation.

Instead of this potential expansion of the diversion amount, the settlement would impose a practical reduction of 155,000 afy on the amount to be diverted for NIIP as compared to the diversion amount authorized in 1962. Although the settlement confirms the existing

authorizations, it also requires that if any portion of the NIIP right is used for purposes other than irrigation, then the Navajo Nation must apply to the State Engineer for a permit to allow the total diversion under the NIIP right to exceed an annual average of 353,000 afy, which would be subject to non-impairment of existing water rights. In addition, the settlement imposes a limit on NIIP's annual average depletion of 270,000 afy during any period of ten consecutive years.

G. Risk of Allottee Claims Protected by Settlement.

The settlement does not resolve the claims of the 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 is agreeing to use water under its water rights to supply or offset any future reserved rights that may be awarded to allottees. In effect, the Navajo Nation is agreeing to insure against and cover any large claims by individual Navajos not bound by the settlement.

H. Out-of-State Marketing of Navajo Water Restricted by Settlement.

Without the settlement, a significant concern of the State is that the Navajo Nation might seek at some point in the future to market its water downstream for uses in other states and that this resource would be lost to the State of New Mexico. In litigation, the State would rely on substantial legal impediments to interstate marketing that exist under current law. The law of the Colorado River does not provide for interstate marketing of water. Nonetheless, 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. 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).

Under the settlement, the Navajo Nation agrees that it will not market water out-of-state without the consent of the New Mexico Interstate Stream Commission. That requirement is in addition to the otherwise applicable legal requirements, including obtaining a State Engineer permit under Chapter 72, Article 12(B) of the Water Code and applicable provisions of the Colorado River and Upper Colorado River Basin compacts.

I. Supplemental Decree Places Depletion Limits on Tributary Water Uses.

The Proposed Supplemental Decree in two ways reduces the possibility that Navajo Nation tributary water uses in the future could significantly impact flows in the San Juan River and New Mexico’s ability to meet its obligations under the Upper Colorado River Basin Compact. First, the Proposed Supplemental Decree recognizes water rights for historic Navajo Nation water uses in New Mexico from ephemeral tributaries to the San Juan River, springs, stock wells or irrigation wells, but does not include water rights for any uses asserted by the US Claims for future water development. Second, in the event that the exercise of the Navajo Nation’s water rights under the Proposed Supplemental Decree (excluding livestock watering uses) results in actual depletions at the places of use exceeding an average of 8,355 afy, or results in depletions from the flow of the San Juan River exceeding an average of 1,819 afy, the Navajo Nation will have to offset the amount that is in excess of these depletion limits by forbearing use of surface water rights on the San Juan River, if the State Engineer determines that this replacement water is needed for the State of New Mexico to meet its interstate compact obligations or to protect existing water uses in New Mexico.

J. Additional Protections for Other Water Users.

In addition to the legal considerations described above, the settlement provides a number of other important protections to water rights holders in the San Juan River Basin. The Technical Assessment summarizes these additional protections.

IV. FACTUAL BASIS FOR SETTLEMENT

The factual basis for the settlement is summarized in the Technical Assessment, which describes the Navajo Nation's historic and existing water uses and existing water use authorizations, and compares them to the water rights proposed by the settlement and to those claimed by the United States on behalf of the Navajo Nation. The following summary discusses the factual bases for the amount of the water rights proposed to be adjudicated to the Navajo Nation by the Proposed Decree both for: (a) irrigation uses; and (b) domestic, commercial, municipal and industrial ("DCMI") uses.

A. Navajo Irrigation.

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 on the reservation 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 in order 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.

During the twentieth century, the federal government funded and developed three large-scale irrigation projects on the Navajo reservation which comprise the basis for the significant amount of water proposed to be adjudicated to the Navajo Nation as its water rights: (1) the Hogback-Cudei Project, (2) the Fruitland-Cambridge Project, and (3) NIIP.

1. The Hogback-Cudei Project.

Initial development of what became the Hogback-Cudei Project began in 1900 with construction of the Cudei ditch serving the south side of the San Juan River and in 1903 with commencement of construction of the Hogback Canal serving the north side of the river and the Shiprock area. The federal government continued to construct the Hogback Project and by 1960 several siphons and extensions of the Hogback Canal were completed or rehabilitated. In the 1960s, the canal was further extended by what is known as the Hogback Extension. In 2002, the Cudei Project diversion was removed from the San Juan River, and the Cudei Project canal system was connected to the Hogback Canal via a siphon constructed under the river.

The total number of acres subject to irrigation within the Hogback and Cudei projects was approximately 9,370 acres as of 1974; however, the projects are authorized to expand by an additional 11,000 to 14,000 acres. The Proposed Decree would recognize water rights on 8,830 acres based on BIA Land Use Permits issued to the Navajo Nation or its members.

2. Fruitland-Cambridge Irrigation Project.

The Fruitland-Cambridge Project is located on the Navajo Indian Reservation with a point of diversion for water from the San Juan River at Farmington for irrigation of lands located along the south side of the river valley in the vicinity of Fruitland between Farmington and the Hogback Project. Construction of the Fruitland Canal began in 1937 and replaced and

consolidated smaller irrigation ditches on Navajo lands. The smaller Cambridge Project takes water from the tail end of the Fruitland Canal.

By 1965, the total amount of lands subject to irrigation for this combined project approximated 3,550 acres. The Proposed Decree would recognize water rights on 3,335 acres based on BIA Land Use Permits issued to the Navajo Nation or to members of the Navajo Nation within the Fruitland-Cambridge Project.

3. Navajo Indian Irrigation Project.

The largest portion of the water rights in the Proposed Decree is for NIIP, which is authorized by federal law and by issuance of a State Engineer Permit for the project. The Colorado River Storage Project Act in 1956 authorized construction of Navajo Dam and Reservoir. The Bureau of Reclamation completed construction of the dam and initiated filling of the reservoir in December 1962. Congress authorized NIIP in 1962 by passage of the Act of June 13, 1962, Public Law 87-483, for an average annual diversion of 508,000 afy for the irrigation of up to 110,630 acres of land. The priority date of June 17, 1955 for NIIP is based on OSE File No. 2849, for the diversion and storage of surface water at Navajo Reservoir to provide NIIP with up to 630,000 afy for irrigation, power and domestic purposes.

NIIP was authorized and designed for flood irrigation at the time the project was authorized, but was later redesigned for sprinkler irrigation. The first water deliveries from Navajo Reservoir to NIIP were made in 1976. Of the total 110,630 acres, 79,760 acres have been developed for irrigation. Completion of NIIP, currently projected for 2030, will allow the remaining 30,870 acres to be developed for irrigation.

4. Comparison to Current Irrigation Rights and US Claims.

The Proposed Decree closely tracks existing and authorized irrigation of lands of the Navajo Nation, described above. The only irrigation rights recognized by the Proposed Decree

are for the three existing Navajo Nation irrigation projects: Hogback, Fruitland and NIIP. For each of the three projects, the following Table 2 provides a comparison of: (1) the amounts of water historically placed to use for irrigation; (2) the amount of water currently authorized for irrigation use; (3) the amounts of water claimed by the United States for irrigation use; and (4) the amounts of water in the Proposed Decree to be adjudicated for irrigation use.

Table 2. Water Right Elements for San Juan River Main Stem Irrigation Uses San Juan River Mainstem (Acres, Diversions in afy, and Depletions in afy)¹					
		Historic Use	Current Right	US Claims	Proposed Decree
Navajo Indian Irrigation Project	Acres	79,760	110,630	114,640	110,630
	Diversions	209,947	508,000	379,874	353,000 ² (508,000)
	Depletion	188,916	280,600	283,781	270,000
Fruitland-Cambridge Irrigation Project	Acres	3,120	3,335	3,711	3,335
	Diversions	42,447	42,447	42,876	18,180
	Depletion	8,694	9,293	10,072	7,970
Hogback-Cudei Irrigation Project	Acres	6,327	8,830	20,521	8,830
	Diversions	72,160	93,808	141,634	48,550
	Depletion	18,327	25,577	58,221	21,280
Individual Pump Irrigation	Acres	15	15	15	0
	Diversions	113	113	113	0
	Depletion	41	41	41	0
Additional lands based on PIA claims	Acres	0	0	41,432	0
	Diversions	0	0	150,827	0
	Depletion	0	0	116,442	0
TOTALS	Acres	89,222	122,810	180,319	122,795
	Diversions	324,667	644,368	715,333	419,730
	Depletion	215,978	315,511	468,556	299,250

¹For an explanation of and derivation of the figures stated in this Table, see Technical Assessment.

²The diversion for NIIP is effectively limited to a sprinkler irrigation amount of 353,000 afy, even though the original congressional authorization provided for a flood irrigation amount of 508,000 afy.

As shown in Table 2, the amounts of water claimed by the United States for irrigation are substantially greater than those to be adjudicated by the Proposed Decree. The US

Claims are based on the irrigation of an additional 57,524 acres along the mainstem of the San Juan River and substantially greater diversion and depletion amounts of water. The amount of water in the Proposed Decree for irrigation purposes is based upon the amount of acres that the Navajo Nation is already authorized to irrigate. While the amount proposed to be adjudicated exceeds historic use, historic use is not the basis for quantifying *Winters* Doctrine rights.

The Proposed Decree reflects a compromise among the settlement parties. Under the settlement, the Navajo Nation agrees to reduce its claims to an amount commensurate with its already existing rights and to provide protections to other water users. In exchange for giving up expansive claims that it could pursue under federal law, the Navajo Nation will receive substantial funding from the United States to bring wet water to outlying areas of the reservation under the Navajo-Gallup Project, bringing much needed domestic water to its people.

B. Navajo Domestic, Commercial, Municipal and Industrial Water Rights.

The most significant benefit to the Navajo Nation in the Proposed Decree is the recognition of an additional amount of water for domestic and municipal uses to be supplied by the Navajo-Gallup Project, with a diversion of 22,650 afy and a depletion of 20,780 afy. Although this may be a substantial quantity, it is still significantly less than the United States claimed and that the Navajo Nation could claim under federal law. The protection provided by the settlement is that this increase in the amount of water will not come from the supply available to all other existing water rights, the direct flow of the San Juan River system, but will be supplied either from water in storage in Navajo Reservoir or from junior direct flow.

Table 3 provides a comparison of the amounts of water for the Navajo Nation's DCMI uses if based on: (1) historic use of water; (2) current rights or authorizations to use water; (3) water right claims by the United States; and (4) the negotiated Proposed Decree.

Table 3.

Navajo Nation Domestic, Commercial, Municipal and Industrial Uses (DCMI) San Juan River Main Stem, Comparison (depletion in afy)¹				
	Historic Use	Current Right	US Claims	Proposed Decree
Navajo-Gallup Water Supply Project	0	0	36,575	20,780
Animas-La Plata Project	0	2,340		2,340
San Juan River DCMI uses	912	580		1,300
Ground water uses	1,534	1,670		2,000
Other Heavy Industrial and Commercial	3,545	9,230	65,697	86
TOTAL DEPLETIONS	5,991	13,820	102,272	26,506

¹For an explanation of and derivation of the figures stated in this Table, see Technical Assessment.

As shown in Table 3, the amount claimed by the United States for DCMI uses is substantially greater than that amount in the Proposed Decree. The Proposed Decree would adjudicate a greater DCMI water right than the amount of DCMI uses currently authorized only because the Proposed Decree includes 20,780 afy of depletion for the Navajo-Gallup Project. The 20,780 afy of depletion, however, is available only from water in Navajo Reservoir storage or from direct flow with a junior priority date available after supplying most other existing water rights. While this is a new authorization, even if the settlement fails the United States could still contract with the Navajo Nation for the same amount of water from storage in Navajo Reservoir, upon approval by Congress.

C. Comparison Based on Source of Supply.

One of the key benefits of the settlement is the Navajo Nation's agreement to subordinate its 1868 priority date for most of its reserved water rights by using water from storage instead of from direct flow. Table 4 categorizes the Navajo Nation's mainstem water rights, as stated in the Proposed Decree, and shows the source of supply for each category.

Table 4

Navajo Nation Settlement Proposed Decree San Juan River Mainstem by Source of Supply						
Category of Use	Water from US Projects with Reservoir Storage (afy)		Water from Direct Flow (afy)		Ground Water (afy)	
	Diversion	Depletion	Diversion	Depletion	Diversion	Depletion
Navajo Indian Irrigation Project (existing & future)	353,000 (508,000)	270,000	0	0	0	0
Navajo-Gallup Water Supply Project (new)	22,650	20,780	0	0	0	0
Animas-La Plata Project (future)	4,680	2,340	0	0	0	0
Fruitland- Cambridge Irrigation Project (existing)	0	0	18,180 (100 cfs)	7,970	0	0
Hogback-Cudei Irrigation Project (existing)	0	0	48,550 (221 cfs)	21,280	0	0
San Juan River municipal/industrial uses (existing & future)	0	0	2,600 (5 cfs)	1,300	0	0
Reserved ground water uses (existing & future)	0	0	0	0	2,000	2,000
TOTALS	380,330 (535,330)	293,120	69,330	30,550	2,000	2,000

Under the settlement, approximately 90 percent of the Navajo Nation’s mainstem depletion rights would be met from water in storage. Furthermore, under the settlement as described above, the river flow available to meet the diversion demands of the Hogback and Fruitland projects would be supplemented by release of available alternate water from storage before the Navajo Nation could make a priority call against other direct flow diverters.

D. Tributary Irrigation and Stock Use.

On April 2, 2012, the State, the United States and the Navajo Nation filed the revised Proposed Supplemental Decree describing the Navajo Nation's rights to existing and historic irrigation and livestock uses, including reservoir storage, from sources other than the San Juan River, including springs and ephemeral streams within the river basin. In support of the quantities proposed to be adjudicated by the Proposed Supplemental Decree, the State prepared a detailed analysis of the US Claims and other information regarding the Navajo Nation's existing and historic uses not encompassed by the mainstem rights described in the Proposed Decree. See "Quantification Analysis for the Proposed Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation" ("State's Quantification Analysis").

CONCLUSION

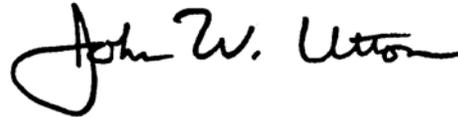
The State of New Mexico negotiated and agreed to the settlement because the State believes the terms of the proposed decrees and the Settlement Agreement are a fair and reasonable compromise and in the public interest. In particular, the settlement is favorable to non-Navajo water right holders because it contains important protections of 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 in the San Juan River Basin. Under the settlement, the United States and Navajo Nation have agreed to significantly reduce water right quantities and to subordinate the vast majority of Navajo 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 7th day of September 2012.

STATE OF NEW MEXICO



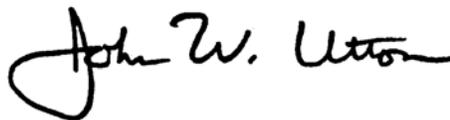
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CERTIFICATE OF SERVICE

I certify that on this 7th day of September 2012, at approximately 2:00 pm, an electronic copy of this Revised Statement of Legal and Factual Bases for Settlement was served by attaching an electronic copy to an email sent to: wrtavajointerse@nmcourts.gov.



John W. Utton