San Juan Water Commission
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MEMBERS:
City of Aztec
City of Bloomfield
City of Farmington
San Juan County
S.J. County Rural Water Users Assoc.

January 13, 2004

Mr. John Whipple
Interstate Stream Commission
P.O. Box 25102
Santa Fe, NM 87504-5102

Dr. John Leeper
Navajo Nation Dept. of Water Resources
P.O. Drawer 678
Fort Defiance, AZ 86504

Re: Comments of San Juan Water Commission

Dear Messrs. Whipple and Leeper:

Pursuant to the public notice seeking comments on the "Proposed Water Rights Settlement Agreement between the State of New Mexico and the Navajo Nation for the San Juan River Basin in New Mexico" ("Settlement"), the staff of the San Juan Water Commission ("SJWC") offers the following.

First, SJWC commends the Office of the State Engineer/Interstate Stream Commission ("OSE"), the Navajo Nation ("Nation") and the federal team's efforts to develop a final settlement of the Nation's *Winters* reserved water rights claims. Without a doubt, such a settlement is an intimidating challenge and will take a number of years, as reflected by the time required to finalize the settlements with the Colorado Ute Tribes and the Jicarilla Apache Nation. At this time, SJWC is not taking a position either supporting or opposing the Settlement. Rather, SJWC staff are simply asking the first of many questions we anticipate asking during the process of completing this enormous challenge. The questions raised below reflect only an effort to understand the proposed Settlement. As the Settlement process proceeds and the settlement documents are revised, SJWC will provide more detailed comments.

1. Executive Summary

a. The Nation and its boundaries in New Mexico are a product of treaty and executive order from 1868 through 1917. As we understand the 1908 *Winters* decision and its progeny, federal reservations, including Indian reservations, include a reservation of water from the date of the order or treaty establishing the reservation. Should the 1868 priority date proposed for the various water projects/uses identified on

pages 2-3 be modified to be consistent with the dates of relevant boundary changes to the reservation?

b. Note 1 on page 3 indicates that the 1868 priority date for the Navajo Indian Irrigation Project ("NIIP), the Navajo-Gallup Water Supply Project (the "Navajo Pipeline"), and the Animas-La Plata Project ("ALP") uses will be subordinated to the Secretary of Interior's permits for the Navajo Reservoir Supply and the ALP (*i.e.*, will receive the same priority date as those projects). How can the Navajo Pipeline priority date be the same as the state law priority date for pre-existing projects served by the Navajo Reservoir supply? The Secretary of Interior's permits do not currently include the Navajo Pipeline project.

c. The Executive Summary (at 2-3) lists 29,000 acre-feet of "supplemental" water rights with no depletions that have a priority date of 2004. What is the purpose and/or necessity of these supplemental diversions? Would such diversions encourage or constitute wasteful uses of the State's scarce water resources?

d. The paragraph beginning at the bottom of page 4 appears to limit anticipated depletions through 2060 to existing and authorized Navajo and non-Navajo uses. What consideration was given to future non-Navajo uses?

e. With regard to the last paragraph on page 5, please explain the types of situations in which the Nation and the OSE anticipate transfers of water off of the Reservation. For example, do the parties anticipate the transfer or use of surface water rights to preserve groundwater supplies currently used on the Reservation?

2. Settlement Agreement

a. Paragraph 5.1 on page 7 of the Settlement Agreement indicates that the Secretary of the Interior must determine that

> sufficient water is reasonably likely to be available to New Mexico under the apportionment made by the Upper Colorado River Basin Compact (63 Stat. 31) for the Navajo Nation's uses in New Mexico under the [Navajo Pipeline] and for existing and authorized Navajo and non-Navajo uses from the San Juan River Basin in New Mexico.

However, this language does not refer to a determination of water availability from any particular source. Can the Secretary make this determination without considering the interstate compact with Colorado and the potential that Colorado uses may leave the Animas River dry?

b. Regarding paragraph 8.2 on page 12, which addresses additional allocations, it is SJWC's understanding that the purpose of the Settlement is to resolve the Nation's entire *Winters* claim to the waters of the San Juan River Basin in New Mexico. *Winters* rights provide the water necessary to fulfill the purposes of the reservation. Thus, inherent in this Settlement is the recognition that the water provided meets all of the current and future water needs of the Nation. Is it therefore appropriate to provide that the Nation is entitled to one-half of any future allocation to the State of New Mexico made under the Upper Colorado River Basin Compact?

3. Depletion Schedule

a. The Depletion Schedule and associated table provide only for existing and authorized uses. Why are there no references to future non-Navajo depletions through 2060?

b. The first full paragraph on page 2 indicates that, in preparing the depletion schedule, the State assumed that, "on average, about 5 percent of the acreage within large irrigation projects such as [NIIP] and the Hogback-Cudei Irrigation Project will be fallow." Is it reasonable to assume that only 5 percent of the acreage of such large projects will be fallow?

c. The first full paragraph on page 2 also refers to non-Indian "historic irrigation use." What does this mean, *i.e.*, when was the historic use? Further, this paragraph indicates that the depletion schedule does not reflect the transfer of water rights from irrigation to municipal and industrial uses from 1965 forward. Does this exclusion conflict with the requirement that the depletion schedule reflect authorized uses, including the transfer of authorized irrigation uses based on the 1948 Echo Ditch Decree to municipal and industrial uses?

d. With regard to the discussion on page 2 concerning the subordination of the Navajo Pipeline priority date, please see the question raised in paragraph 1(b) above. In addition, please identify the priority date of the combined permits for Navajo Reservoir.

e. The last paragraph on page 3 indicates that the depletion schedule does not reflect "salvage by use," but the term "salvage by use" is nowhere defined. In his December 7, 2003, letter to the Secretary of the Interior, the Nation's president, Joe Shirley, Jr., stated that he wants to "manage" and "retrieve" all NIIP tailwater. Does the term "salvage by use" in the depletion schedule relate to this request and thus indicate an intent to permit the Nation to deplete more than 267,000 acre-feet of water?

f. Note 11 on the table accompanying the Depletion Schedule states that the Schedule is for planning purposes only. Please explain the legal effect of this table in

the pending adjudication and its impact on non-Indian water rights owners. Once the table becomes a part of a finalized settlement, will it be considered finalized?

4. Partial Final Judgment and Decree

a. Paragraph no. 2 on pages 2-5 indicates that the diversion point for the Nation's "reserved" water rights will include Navajo Reservoir. However, Navajo Reservoir is located upstream of the Nation's boundaries. Should the appropriate diversion point for the Nation's reserved *Winters* rights be within the boundaries of the reservation?

b. The proposed Decree identifies (at 3, ¶ 2(b)) two points of diversion for the Navajo Pipeline—Navajo Dam and the San Juan River. Is the San Juan River diversion at Kirkland? How much water will be diverted at each location?

c. Paragraph no. 2(g) on page 5 refers to a diversion of 2,000 acre-feet of tributary groundwater for municipal, industrial, commercial and domestic purposes, but it does not identify the amount of depletion. However, the Executive Summary indicates that this diversion will have a 100 percent depletion. Should the depletion be only 30 percent of the diversion if it is tributary to the San Juan River, which is typical of other municipal and industrial uses?

d. Paragraph no. 3 on pages 5-6 provides for a diversion of 29,000 acre-feet with a priority date of 2004 for supplemental use for (i) the Navajo Pipeline, (ii) the Navajo Nation Municipal Pipeline, (iii) ALP, (iv) other municipal, industrial, commercial and domestic purposes, (v) the Hogback-Cudei Irrigation Project, and (vi) the Fruitland-Cambridge Irrigation Project. This large diversion has no corresponding depletion. Please see the question raised in paragraph 1(c) above.

Finally, SJWC has a question relating to the settlement as a whole. It appears that the settlement provides water rights to fulfill the purposes of the Reservation in terms of encouraging and expecting a significant Navajo migration back to the Reservation. However, if such migration does not occur, and the Nation's population projections prove to be inaccurate, how will the Nation assure the water needs of Nation members living in areas adjacent to the Reservation?

Thank you for the opportunity to comment on the proposed settlement of the Nation's water rights. We look forward to your response to our comments/questions. We concur with the representation of the Nation's counsel, Stanley Pollack, that the proposed settlement does not represent a final agreement. SJWC will be following these settlement proceedings closely in order to protect the interests of its members, will formulate additional questions as this matter progresses, and will provide those

questions and additional information to our congressional delegation and the court, as appropriate.

Very truly yours,

L. Randy Kirkpatrick
Executive Director

cc: San Juan Water Commission