

December 5, 2003, Discussion Draft – Navajo Nation Water Rights Settlement

Disclaimer. It is expressly understood that the governing bodies or authorities of the proposed signatories have not approved this draft settlement agreement, including the draft partial final decree, draft settlement act, draft settlement contract and draft executive summary. The New Mexico Interstate Stream Commission staff prepared the draft depletion schedule. These draft documents are provided for discussion purposes only.

SAN JUAN RIVER BASIN IN NEW MEXICO
NAVAJO NATION WATER RIGHTS SETTLEMENT
EXECUTIVE SUMMARY

Representatives of the Navajo Nation and the State of New Mexico have drafted legislation to authorize the Bureau of Reclamation to construct and operate the Navajo-Gallup Water Supply Project and to effectuate a proposed Settlement Agreement to resolve the claims of the Navajo Nation to the use of waters of the San Juan River Basin in New Mexico in a manner that would inure to the benefit of the Navajo Nation and the State of New Mexico. The proposed Settlement Agreement is intended to provide water rights and associated water development projects, including the Navajo-Gallup Water Supply Project, for the benefit of the Navajo Nation in exchange for a release of claims to water that potentially might otherwise displace existing non-Navajo water uses in the Basin in New Mexico. The proposed Settlement Agreement includes three appendix documents:

- (1) a proposed Partial Final Decree for entry in the San Juan River Adjudication setting forth the rights of the Navajo Nation to use and administer waters of the San Juan River Basin in New Mexico;
- (2) a proposed Settlement Act for Congress to authorize the Bureau of Reclamation to construct and operate the Navajo-Gallup Water Supply Project, to fund the Bureau of Reclamation to complete and rehabilitate Navajo water projects in the San Juan River

Basin in New Mexico, and to approve the Settlement Agreement and other authorizations to secure to the Navajo Nation a water supply to meet the needs of the Nation and its members; and

- (3) a proposed Settlement Contract to provide for deliveries to the Navajo Nation under Bureau of Reclamation water projects, namely the Navajo Indian Irrigation Project, the Navajo-Gallup Water Supply Project, and the Animas-La Plata Project.

The governing bodies or authorities of the Navajo Nation, the State of New Mexico and the United States have not approved the proposed Settlement Agreement and will be reviewing it during the next couple of months. Also, the New Mexico Congressional delegation will be reviewing the Settlement Agreement. The proposed Settlement Agreement and appendix documents are available at the Office of the State Engineer website (www.ose.state.nm.us) for public review, and public meetings to discuss the proposed Settlement Agreement are scheduled to be held on December 15 in Farmington and January 5 in Shiprock beginning at 6:00 pm. The Navajo Nation Department of Water Resources and the New Mexico Interstate Stream Commission will take comments on the documents through January 15, 2004. The provisions of the proposed Settlement Agreement are subject to continuing negotiations.

The following tabulation is a summary of the reserved rights that the Navajo Nation would have under the proposed Settlement Agreement.

	<u>Diversion</u>			
	<u>Amount</u>	<u>Rate</u>	<u>Depletion</u>	
	<u>(af/yr)</u>	<u>(cfs)</u>	<u>(af/yr)</u>	<u>Priority</u>
Irrigation Projects:				
- Navajo Indian Irrigation Project	508,000	1,200	267,000	Subordinated ¹
- Fruitland-Cambridge Irrigation Project	15,940	100	7,970	1868
- Hogback-Cudei Irrigation Project	42,200	225	21,100	1868
- San Juan River supplemental irrigation ²	14,500	55	0	2004
- Tributary irrigation projects, including storage	Determine by Hydrosurvey ³			1868

Municipal, Industrial, Commercial and Domestic Uses:

- Navajo-Gallup Water Supply Project ⁴	22,650	48	20,780	Subordinated ¹
- Animas-La Plata Project	4,680	13	2,340	Subordinated ¹
- San Juan River municipal diversions	2,000	3	1,000	1868
- San Juan River supplemental M&I diversions ²	14,500	40	0	2004
- Tributary groundwater diversions	2,000	N/A	2,000	1868
- Tributary recreation and livestock uses	Determine by Hydrosurvey ³			1868

Notes:

¹ The 1868 reserved priority for the Navajo Indian Irrigation Project, the Navajo-Gallup Water Supply Project and the Animas-La Plata Project uses would be subordinated to the rights of the Secretary of the Interior for the Navajo Reservoir Supply and the Animas-La Plata Project, respectively. Pursuant to the subordination of these reserved rights and consistent with the Act of June 13, 1962, the Navajo Indian Irrigation Project and the Navajo-Gallup Water Supply Project will be treated as equal in priority to and will share in shortages in the Navajo Reservoir Supply with the San Juan-Chama Project, the Hammond Irrigation Project, Jicarilla Apache Nation uses under its water rights settlement contract, and other small contracts. The Navajo Nation's uses under the Animas-La Plata Project will share in shortages in the water supply for that project with the San Juan Water Commission and other project contractors.

² Supplemental diversions would be permitted to the extent necessary for the Navajo Nation to fully develop the depletions on the Fruitland-Cambridge and Hogback-Cudei irrigation projects and the depletions associated with the specified municipal and industrial uses from the San Juan River, when sufficient flow is available from the San Juan River for diversion without impairment to other water uses in New Mexico.

³ Water rights for historic and existing irrigation, recreation and livestock uses on Navajo lands in areas of New Mexico that are tributary to the San Juan River and outside the San Juan River valley would be determined by a hydrographic survey of these uses to be prepared jointly by the United States and the State of New Mexico. It is anticipated that the total amount of water rights for these tributary uses will not exceed approximately 10,000 acre-feet of depletion at the places of use.

⁴ The diversion and depletion amounts for the Navajo-Gallup Water Supply Project tabulated above include only those for Navajo Nation uses in New Mexico. In addition, the Project would divert from the San Juan River 6,410 acre-feet for use by the Navajo Nation in Arizona, 1,200 acre-feet for use by the Jicarilla Apache Nation under its water rights settlement contract, and 7,500 acre-feet for use by the City of Gallup. The City of Gallup's share of the Project diversion would be sourced by a subcontract with the Jicarilla Apache Nation under the Jicarilla Apache Nation's settlement contract with the United States. The diversion of water by the Project for Navajo Nation uses in Arizona would not be included in the Settlement Contract and would not occur until an accounting of the use of the water within the apportionments of Colorado River Basin water made to the State of Arizona through compact, statute or court decree has been resolved and Congress has approved a water delivery contract between the Navajo Nation and the United States for such diversion. Also, the Bureau of Reclamation would have to comply with the National Environmental Policy Act, the Endangered Species Act and other applicable laws in implementing the Project. If to

comply with the Endangered Species Act it is deemed necessary to arrange for some amount of use in the San Juan River Basin to be forborne for some period of time to allow full use under the Project to be made, the Project contractors would not be prohibited from making such arrangements as may be appropriate.

In addition, the Navajo Nation would retain a small amount of rights it has acquired under state law, rights to further diversions of groundwater that is non-tributary to the San Juan River, and additional rights to *de minimus* indoor residential domestic uses that are not served by public water supply systems. In addition, the Navajo Nation would have 869 acre-feet of storage capacity space in Ridges Basin Reservoir allocated by contract for its exclusive use under the Animas-La Plata Project. In all instances, the rights of the Navajo Nation to divert and use water from the San Juan River Basin in New Mexico would be limited to the amounts of water necessary for current beneficial uses.

Individual members of the Navajo Nation that have been allotted land by the United States are not bound by the Settlement Agreement and may have additional claims to historic and existing agriculture, stock and domestic uses in the San Juan River Basin. The aggregate amount of the historic and existing uses is included in estimated current depletions in the Basin. However, any reserved rights that may be adjudicated to such members for additional future uses would be serviced by, or offset by corresponding reductions in use under, the rights of the Navajo Nation in order to keep the water demands in the Basin from exceeding New Mexico's apportionment under the Upper Colorado River Basin Compact.

For Congress to approve the Settlement Contract, the Secretary of the Interior will need to make a determination that sufficient water is reasonably likely to be available to New Mexico for the Navajo Nation's uses in New Mexico under the Navajo-Gallup Water Supply Project and for existing and authorized Navajo and non-Navajo uses from the San Juan River Basin in New Mexico under the apportionment made by the Upper Colorado River Basin Compact. The New Mexico Interstate Stream Commission has drafted for the Secretary's consideration a revised schedule of anticipated depletions in

the San Juan River Basin in New Mexico that indicates that sufficient water would be available through the year 2060 to service the Settlement Contract. The anticipated depletions are based on reasonable assumptions of use within the water rights for Navajo and non-Navajo uses in the Basin. Pursuant to the proposed subordination of reserved rights for Navajo Nation uses under the Navajo Indian Irrigation Project, the Navajo-Gallup Water Supply Project and the Animas-La Plata Project, the Navajo Nation would share in shortages in the Navajo Reservoir Supply and the Animas-La Plata Project water supply. Shortages in supplies for the three projects would be shared pro-rata among the San Juan-Chama Project, the Navajo Nation and other contractors of the Navajo Reservoir Supply, and among the Navajo Nation and other Animas-La Plata Project contractors, respectively. Shortages include decreases in water availability caused by implementation of the Endangered Species Act. Senior direct flow water rights in the San Juan River Basin, including irrigation rights for Navajo and non-Navajo ditches on the San Juan River and its tributaries, would retain their rights in a priority administration of the river system and not share shortages.

Under the Settlement Agreement, the Navajo Nation would administer its rights on Navajo lands subject to non-impairment of non-Navajo water rights. Transfers of water uses by the Navajo Nation to locations off Navajo lands would require approval of the State Engineer. Navajo Nation uses of water under rights acquired pursuant to state law or the Secretary of the Interior's rights for the Navajo Reservoir Supply and the Animas-La Plata Project must comply with the rights adjudicated in the Partial Final Decree or be approved by the State Engineer. The Navajo Nation would be responsible for measuring and reporting water uses under its rights.

The Settlement Act would authorize appropriations for the construction or rehabilitation of the following water development projects and purposes to benefit the Navajo Nation, and would require that associated project construction and funding milestones be achieved by specified completion dates.

	<u>Service Acres</u>	<u>Federal Funds</u>	<u>Completion Date</u>
Irrigation Projects:			
- Navajo Indian Irrigation Project	110,630	\$277.4 million ¹	Dec. 2015
- Fruitland-Cambridge Irrigation Project	3,335	\$ 5.7 million	Dec. 2010
- Hogback-Cudei Irrigation Project	8,830	\$ 12.0 million	Dec. 2015
Municipal, Industrial, Commercial and Domestic Uses: ²			
- Navajo-Gallup Water Supply Project	N/A	\$463.4 million ³	Dec. 2016
- Navajo Nation Municipal Pipeline ⁴	N/A	\$ 5.0 million	Dec. 2009
- Conjunctive use groundwater wells ⁵	N/A	\$ 77.6 million	Dec. 2016
Other Purposes:			
- Joint Hydrographic Survey	N/A	\$ 5.0 million	Sep. 2008
- Navajo Nation Water Development Trust Fund	N/A	\$ 25.0 million ⁶	Dec. 2016

Notes:

¹ The authorization for federal appropriations of \$277.4 million to complete construction of the Navajo Indian Irrigation Project is in addition to the currently authorized cost ceiling for the Project and includes funding to complete refurbishment of existing on-farm facilities on the Project. The construction costs for the Project would be non-reimbursable. The United States would continue to pay the operation and maintenance costs for the Navajo Indian Irrigation Project as it does currently.

² The Navajo Nation would pay the operation and maintenance costs of the Navajo-Gallup Water Supply Project and the Animas-La Plata Project that are allocable to the Navajo Nation. The City of Gallup and the Jicarilla Apache Nation would pay the operation and maintenance costs of the Navajo-Gallup Water Supply Project allocable to them. The total population within the service area of the Navajo-Gallup Water Supply Project, the Navajo Nation Municipal Pipeline and the conjunctive use groundwater wells is projected to be about 250,000 people by the year 2040, of which over 80 percent will be members of the Navajo Nation. The City of Gallup's population is anticipated to grow from approximately 20,000 today to almost 50,000 by 2040.

³ The City of Gallup and the Jicarilla Apache Nation would be required to repay the construction costs of the Navajo-Gallup Water Supply Project that are allocable to each, estimated to be \$85.1 million and \$15.2 million, respectively, based on their ability to pay. The remainder of the federal funding for the Project, which includes \$363.1 million for construction costs allocable to the Navajo Nation, would be non-reimbursable. Funds expended by the City of Gallup and the State of New Mexico prior to authorization of the Project for enhancement and expansion of the regional water supply distribution system in and around Gallup, currently anticipated to be as much as \$5 million, would be credited towards Gallup's repayment requirement. Use of Gallup's water supply infrastructure to assist in delivering water to surrounding Navajo communities minimizes the amount and cost of works needed to serve water to these communities.

⁴ The funding for the Navajo Nation Municipal Pipeline is additional funding needed to extend capacity of the Pipeline from the City of Farmington's water treatment plant to the Nation's water meter. Ownership, maintenance and operation of the Navajo Nation Municipal Pipeline would be transferred to the Navajo Nation upon completion of Pipeline construction.

⁵ The groundwater wells to be developed would provide conjunctive groundwater uses within the service area of the Navajo-Gallup Water Supply Project to help meet water needs of Navajo communities in the San Juan, Little Colorado and Rio Grande basins and minimize the demand for water from the San Juan River.

⁶ The federal funding for the Navajo Nation Water Resources Development Trust Fund would be deposited over the course of ten years following the date of passage of the Settlement Act into law and would be matched by equal contributions from the State of New Mexico. The Trust Fund would be used to investigate, construct, maintain and operate water facilities, and to implement water conservation measures and improvements, for the Navajo Nation to make use of its water rights under the Settlement Agreement.

Not all of the water project costs tabulated above are a result of the proposed Settlement Agreement. Without settlement, the United States would continue to construct the Navajo Indian Irrigation Project, now approximately 70 percent complete, to service 110,630 acres in accordance with the authorization for the Project provided by the Act of June 13, 1962, and would continue to pay the operation and maintenance costs in accordance with the existing water delivery contract for the Project between the Navajo Nation and the United States. Also, the Department of the Interior, pursuant to the trust responsibility of the United States to the Navajo Nation, would rehabilitate the Fruitland-Cambridge Irrigation Project and Hogback-Cudei Irrigation Project facilities. The additional cost for the Navajo Nation Municipal Pipeline, which was authorized by the Colorado Ute Settlement Act Amendments of 2000, is due to an apparent oversight in the Bureau of Reclamation's planning for the full capacity of the Pipeline between the Navajo Nation water meter and the City of Farmington water treatment plant. Thus, the federal cost of settlement amounts to \$470.7 million, which is the sum of: (1) the Navajo Nation's share of the construction cost of the Navajo-Gallup Water Supply Project plus associated conjunctive management groundwater wells; (2) the federal contributions to the Navajo Nation Water Development Trust Fund; and (3) the cost of the Joint Hydrographic Survey. Of this

amount, \$37.2 million for construction of wells outside the San Juan River Basin in New Mexico, but within the Navajo-Gallup Water Supply Project service area, would result in less demand for water from the San Juan River and may contribute to settlement of Navajo Nation claims in other basins.

The Upper Colorado River Basin Compact apportionment to New Mexico is at least 669,000 acre-feet of consumptive use annually. Of that amount, about 58,000 acre-feet is New Mexico's share of reservoir evaporation from Colorado River Storage Project reservoirs (Flaming Gorge Reservoir, Curecanti Unit reservoirs and Lake Powell) that regulate flow for the Upper Basin's delivery at Lee Ferry under the Colorado River Compact. Authorization and completion of water projects as proposed in the Settlement Act would allow the State of New Mexico to fully utilize the minimum apportionment available for uses within New Mexico, after deduction of New Mexico's share of the Colorado River Storage Project reservoir evaporation. Under the Settlement Agreement, approximately 60 percent of the minimum apportionment to New Mexico would benefit the Navajo Nation. Because of large potential Indian claims to water, the State of New Mexico was apportioned 11.25% of the water available to the Upper Basin, after Arizona's use, to provide for Indian and non-Indian uses in New Mexico even though the flows contributed by runoff originating in New Mexico amount to only a few percent of the total flow of the Upper Basin.

Because the Upper Colorado River Basin Compact apportions consumptive uses, depletions are the primary consideration for water planning and water administration in the San Juan River Basin under the Compact. Nevertheless, it is expected that approximately 730,000 acre-feet of water would be diverted in New Mexico annually by 2040 from the flows of the San Juan River and its tributaries, including from return flows. That amount of diversion includes about 320,000 acre-feet per year for the Navajo Indian Irrigation Project so long as the sprinkler irrigation systems on the Project are operating. An additional 108,000 acre-feet per year would be diverted from tributaries to the San Juan

River in Colorado for uses in New Mexico under the San Juan-Chama Project. In comparison, the average annual inflow into Navajo Reservoir, after San Juan-Chama Project diversions, is approximately 900,000 acre-feet per year, and the flow entering New Mexico in the Animas River is projected to be approximately 600,000 acre-feet per year after anticipated future Animas-La Plata Project uses in Colorado.

It is anticipated that the continuing negotiations could result in execution of a Settlement Agreement in February 2004 and introduction of a Settlement Act to Congress by March 1, 2004. Execution of the Settlement Agreement and the Settlement Contract by the United States Secretary of the Interior would be expected to occur upon passage of the Settlement Act into law. Also after passage of the Act, a Joint Hydrographic Survey would be conducted by the United States and the State of New Mexico to identify rights of the Navajo Nation to historic and existing irrigation, recreation and livestock uses on Navajo lands in areas tributary to the San Juan River and rights acquired by the Nation under state law. After completion of a Joint Hydrographic Survey report, the Partial Final Decree would be completed and a joint motion would be submitted to the court in the San Juan River Adjudication requesting that the Partial Final Decree be made final and binding on all claimants in the Adjudication. The proposed Settlement Agreement would require that: (1) the Settlement Act be enacted into law by October 31, 2006; (2) the Joint Hydrographic Survey report be completed by September 30, 2008; (3) the Partial Final Decree be entered by the Court in the San Juan River Adjudication by December 31, 2010; and (4) the project construction and funding milestones be achieved by the specified completion dates.

For more information regarding the proposed Settlement Agreement, contact the Navajo Nation Department of Water Resources at 928-729-4004 or the New Mexico Interstate Stream Commission at 505-827-6160. Please provide written comments on the proposed Settlement Agreement to the following

addresses no later than January 15, 2004, to ensure their consideration prior to execution of a Settlement Agreement:

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Public discussion of the Settlement Act and the Settlement Contract will continue throughout the negotiation and legislative processes. Also, public review of the Navajo-Gallup Water Supply Project will continue through the Bureau of Reclamation's process of developing an Environmental Impact Statement for the Project. The Partial Final Decree would be heard by the Court in the San Juan River Adjudication.