

SAN JUAN RIVER BASIN IN NEW MEXICO

NAVAJO NATION WATER RIGHTS SETTLEMENT

AGREEMENT

April 19, 2005

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NAVAJO NATION WATER RIGHTS SETTLEMENT AGREEMENT

This Agreement is entered into as of the dates executed below, by and among the State of New Mexico, the Navajo Nation and the United States of America, acting through the Secretary of the Interior. The provisions of this Agreement, including its Appendices, and any other written or oral communications related thereto are covered by Rule 408 of the New Mexico Rules of Evidence.

1.0 RECITALS

- 1.1 Proceedings to determine the nature and extent of the rights to water of the Navajo Nation in the San Juan River Basin in New Mexico are pending in the San Juan River Adjudication.
- 1.2 Recognizing that final resolution of the proceedings in the San Juan River Adjudication may take many years, entail great expense, prolong uncertainty concerning the availability of water supplies, and seriously impair the long-term economic well-being of all water users in the San Juan River Basin in New Mexico, the Parties to this Agreement desire to arrive at a settlement regarding the water rights of the Navajo Nation and to seek entry of a partial final decree of

those rights in the San Juan River Adjudication, setting forth the Navajo Nation's rights to use and administer waters of the San Juan River Basin in New Mexico.

- 1.3 In fulfillment of its trust responsibility to Indian tribes and to promote tribal sovereignty and economic self-sufficiency, it is the policy of the United States to settle water rights claims of Indian tribes without lengthy and costly litigation.
- 1.4 Recognizing the commitments made by the United States to the Navajo Nation inherent in the treaties of 1849 and 1868, including the commitment to create a permanent homeland for the Navajo people, this settlement will secure to the Navajo Nation a perpetual water supply from the San Juan River Basin of New Mexico.

NOW, THEREFORE, in consideration of mutual and dependent covenants and conditions contained herein that each Party acknowledges inures to its respective benefit, the State of New Mexico, the Navajo Nation and the United States agree as follows:

2.0 DEFINITIONS

As used in this Agreement, the term:

- 2.1 "Act" or "Settlement Act" means the proposed San Juan River Basin in New Mexico Water Projects and Settlement Act, a copy of which is attached at Appendix 3;
- 2.2 "Agreement" or "Settlement Agreement" means this Agreement and the four Appendices hereto, which are incorporated herein by this reference;
- 2.3 "Allottees" means individual members of the Navajo Nation for whom the United States holds in trust title to lands allotted by public land orders or otherwise;

- 2.4 “Animas-La Plata Project” means the project of the same name authorized by the Colorado Ute Settlement Act Amendments of 2000 (114 Stat. 2763A-258; Public Law 106-554, Appendix D, Title III) and related facilities, including Ridges Basin Dam and Reservoir and the Navajo Nation Municipal Pipeline.
- 2.5 “Contract” or “Settlement Contract” means the proposed contract between the United States and the Navajo Nation setting forth certain commitments, rights, and obligations of the United States and the Navajo Nation, a copy of which is attached at Appendix 4;
- 2.6 “Echo Ditch Decree” means the decree entered April 8, 1948, by the First Judicial District Court of New Mexico within and for San Juan County in the matter of *The Echo Ditch Company, et al., v. The McDermott Ditch Company, et al.*, Cause No. 01690.
- 2.7 “Navajo Dam and Reservoir” means Navajo Dam and the reservoir created by the impoundment of the San Juan River at Navajo Dam as authorized by the Act of Congress of April 11, 1956, the Colorado River Storage Project Act (70 Stat. 105; Public Law 84-485), as amended;
- 2.8 “Navajo-Gallup Water Supply Project” means the project substantially described in the March 2001 technical memorandum for the project prepared by the Navajo Nation Department of Water Resources and the April 2002 appraisal report for the Project prepared by the United States Bureau of Reclamation, as conditioned, modified and limited by the Settlement Act;

- 2.9 “Navajo Indian Irrigation Project” means the project of the same name authorized by section 2 of the Act of June 13, 1962 (76 Stat. 96; Public Law 87-483), as amended by the Act of September 25, 1970 (84 Stat. 867; Public Law 91-416);
- 2.10 “Navajo Lands” means lands set aside as reservation lands for the Navajo People, whether by treaty, statute, executive order or public land order. Also included in this definition are lands that are held in trust for the Navajo Nation by the United States, held in trust for members of the Navajo Nation by the United States, or held in fee ownership by the Navajo Nation;
- 2.11 “Navajo Nation” means a body politic and federally-recognized Indian nation as provided for in section 101(2) of the Federally Recognized Indian Tribe List of 1994 (Public Law 103-454, 25 U.S.C. 497a(2)), also known variously as the “Navajo Tribe,” the “Navajo Tribe of Arizona, New Mexico & Utah,” and the “Navajo Tribe of Indians” and other similar names, and includes all bands of Navajo Indians and chapters of the Navajo Nation;
- 2.12 “Partial Final Decree” means a final and binding judgment and decree entered by the Court 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, the form of which is attached as Appendix 1;
- 2.13 “Parties” means the State of New Mexico, the Navajo Nation and the United States;
- 2.14 “Report” means the Joint Hydrographic Survey Report prepared by the United States and the State of New Mexico to determine certain reserved rights of the Navajo Nation and the Navajo Nation’s rights acquired under state law, as called

for by paragraphs 3 and 4 of the Supplemental Partial Final Decree, respectively, and to provide the information required to administer subparagraph 4.4 of this Agreement;

2.15 “San Juan River Adjudication” means the general stream adjudication of the San Juan River Basin in New Mexico being determined in *New Mexico v. United States*, No. 75-184, District Court of San Juan County;

2.16 “San Juan River Basin in New Mexico” means all areas located within the physical drainage of the San Juan River and its tributaries within the State of New Mexico;

2.17 “Supplemental Partial Final Decree” means a final and binding judgment and decree entered by the Court in the San Juan River Adjudication to supplement the Partial Final Decree by quantifying certain reserved rights of the Navajo Nation for historic and existing uses within the San Juan River Basin in New Mexico from tributaries to the San Juan River and ground water, and rights of the Navajo Nation to the use of water in the San Juan River Basin in New Mexico acquired pursuant to the laws of the State of New Mexico, the form of which is attached as Appendix 2; and

2.18 “Upper Basin States” means the States of Arizona, Colorado, New Mexico, Utah and Wyoming.

3.0 PARTIAL FINAL DECREE

3.1 Terms and Conditions of the Partial Final Decree. The Parties have negotiated and agree to the terms and conditions contained in the Partial Final Decree.

3.2 Entry of the Partial Final Decree.

3.2.1 Once this Agreement is executed by the United States, the Parties shall file a joint motion with the Court in the San Juan River Adjudication for entry of the Partial Final Decree pursuant to expedited *inter se* procedures to be adopted by the Court; provided, that the Settlement Contract described in paragraph 6.0 must be executed by the Navajo Nation and the United States prior to entry of the Partial Final Decree.

3.2.2 To satisfy this Agreement, the Court in the San Juan River Adjudication must enter the Partial Final Decree in substantially the form of Appendix 1.

3.3 Relation of the Partial Final Decree to Allottees. Allottees, or the United States as trustee for Allottees, are not bound by the Partial Final Decree from making claims to water rights in the San Juan River Basin in New Mexico. Allottees, or the United States as trustee for Allottees, may make claims to, and may be adjudicated, individual water rights in the Basin. Notwithstanding the forgoing, this Agreement shall not diminish the Navajo Nation's authority to administer the use of water on lands held in trust by the United States for Allottees.

4.0 SUPPLEMENTAL PARTIAL FINAL DECREE

4.1 Terms and Conditions of the Supplemental Partial Final Decree. The Parties have negotiated and agree to the terms and conditions contained in paragraphs 1, 2 and 5 through 12 of the Supplemental Partial Final Decree. Furthermore, the Parties agree to the form of paragraphs 3 and 4 of the Supplemental Partial Final Decree and to the procedure described in subparagraphs 4.2 and 4.3.1 of this Agreement

for determining the quantification of the Navajo Nation's rights under the respective paragraphs.

4.2 Joint Hydrographic Survey Report.

4.2.1 Except as otherwise provided in subparagraph 4.3.1 of this Agreement, the basis for quantification of the Navajo Nation's rights under paragraphs 3 and 4 of the Supplemental Partial Final Decree shall be a Joint Hydrographic Survey Report describing historic and existing water uses on Navajo Lands, including on lands of Allottees, prepared in accordance with New Mexico State Engineer hydrographic survey standards and subparagraph 4.2.2. The Report shall be prepared cooperatively and jointly under the supervision of the United States and the State of New Mexico, and shall document the data and information called for by paragraphs 3 and 4 of the Supplemental Partial Final Decree and the data and information required to administer subparagraph 4.4 of this Agreement.

4.2.2 The quantification of water rights for irrigation uses identified under paragraphs 3 and 4 of the Supplemental Partial Final Decree shall be determined consistent with the approach or methodology adopted by the Court in the San Juan River Adjudication for determining rights for other irrigation uses in the San Juan River Basin.

4.2.3 The United States and the State of New Mexico shall act in good faith to complete the Report as described in subparagraphs 4.2.1 and 4.2.2 in a timely manner. If the State of New Mexico and the United States are

unable to agree on the method of preparation, contents or other aspects of the Report, the Parties agree to resolve the matter by submitting the dispute(s) to the Court in the San Juan River Adjudication or, by mutual agreement, to an alternative dispute resolution process.

4.2.4 The funds reasonably necessary to complete the Report shall be appropriated to the Bureau of Indian Affairs pursuant to subsection 308(b) of the Settlement Act.

4.3 Completion and Entry of the Supplemental Partial Final Decree.

4.3.1 Once the Report described in subparagraph 4.2 is complete, the Parties shall complete paragraphs 3 and 4 of the Supplemental Partial Final Decree based on the contents of the Report; except, that the permits and licenses for the diversion and use of water pursuant to New Mexico State Engineer File Nos. 758, 2472, 2807 and 2875 shall be cancelled, and no water rights shall be adjudicated for said permits and licenses.

4.3.2 Once paragraphs 3 and 4 of the Supplemental Partial Final Decree are complete, the Parties shall file a joint motion with the Court in the San Juan River Adjudication for entry of the Supplemental Partial Final Decree pursuant to expedited *inter se* procedures to be adopted by the Court.

4.3.3 To satisfy this Agreement, the Court in the San Juan River Adjudication must enter the Supplemental Partial Final Decree in substantially the form of Appendix 2.

4.4 Relation of the Supplemental Partial Final Decree to Allottees.

4.4.1 Allottees, or the United States as trustee for Allottees, are not bound by the Supplemental Partial Final Decree from making claims to water rights in the San Juan River Basin in New Mexico. Allottees, or the United States as trustee for Allottees, may make claims to, and may be adjudicated, individual water rights in the Basin for historic and existing uses as may be documented by the Joint Hydrographic Survey Report prepared pursuant to subparagraph 4.2.

4.4.2 To the extent that water rights are adjudicated for Allottees, or for the United States as trustee for Allottees, for uses in the San Juan River Basin in New Mexico that are in addition to the historic and existing uses identified for allotted lands by the Report and in addition to the rights provided for and adjudicated to the Navajo Nation by the Partial Final Decree and the Supplemental Partial Final Decree, such additional water rights shall be fulfilled or serviced by water rights adjudicated to the Navajo Nation by the Partial Final Decree or the Supplemental Partial Final Decree, or shall be offset by a corresponding and equivalent reduction of use of water rights adjudicated to the Navajo Nation by the Partial Final Decree or the Supplemental Partial Final Decree.

5.0 SETTLEMENT ACT

5.1 Proposed Legislation. Federal legislation is necessary to provide the authorizations, approvals, terms, restrictions, procedures and appropriations to carry out this Agreement.

5.2 Conditions. The Settlement Act must be enacted into law in substantially the form of Appendix 3 by December 31, 2006. This date shall be extended if reasonably necessary to provide Congress additional time to consider and act upon the Settlement Act. In addition, the milestones described in subsection 309(a) of the Settlement Act must be fulfilled in the manner provided therein.

6.0 SETTLEMENT CONTRACT

6.1 Determination of Water Availability. Pursuant to the Act of June 13, 1962 (Public Law 87-483, 76 Stat. 100), approval of the Settlement Contract is subject to the Secretary of the Interior submitting a determination to the United States Congress declaring 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-Gallup Water Supply Project and for existing and authorized Navajo and non-Navajo uses from the San Juan River Basin in New Mexico. The State of New Mexico, acting through the New Mexico Interstate Stream Commission, has prepared a schedule of anticipated depletions from the Upper Basin under its apportionment that reflects the Settlement Agreement, and will submit the depletion schedule to the United States Bureau of Reclamation for its and the Secretary's consideration in this matter.

6.2 Contract between the United States and the Navajo Nation. In order to implement provisions of this Agreement and the Settlement Act, once enacted, the Navajo Nation and the United States must enter into the Settlement Contract in substantially the form of Appendix 4 no later than December 31, 2007. This date

shall be extended if reasonably necessary to provide the Secretary and the Navajo Nation additional time to consider and execute the Settlement Contract.

- 6.3 Ridges Basin Reservoir Storage Capacity Allocation. At the time of execution of the Settlement Contract, the Secretary of the Interior shall insert into the Settlement Contract at subsection 4(i) the numerical figure indicating the amount of storage capacity in Ridges Basin Reservoir allocated to the Navajo Nation for its use pursuant to the Animas-La Plata Project authorizations of the Colorado Ute Settlement Act Amendments of 2000 (114 Stat. 2763A-258).

7.0 SETTLEMENT OF CLAIMS

- 7.1 Claims by the Navajo Nation and the United States. In consideration of the benefits accruing under this water rights settlement, the Navajo Nation, on behalf of itself and its members, and the United States, acting in its capacity as Trustee for the Navajo Nation but not as Trustee for or on behalf of Allottees, agree that this settlement constitutes a full and final settlement of:

7.1.1 all claims for water rights in, or for waters of, the San Juan River Basin in New Mexico that the Navajo Nation, or the United States on behalf of the Navajo Nation, may have asserted or could assert in the San Juan River Adjudication or in any other court proceeding; and

7.1.2 all claims for damages, losses or injuries to water rights or claims of interference, diversion or taking of water for lands within the San Juan River Basin in New Mexico that accrued at any time up to and including the date of entry of the Supplemental Partial Final Decree that the Navajo

Nation, or the United States on behalf of the Navajo Nation, may have asserted or could assert.

7.2 Claims by the Navajo Nation against the United States. In consideration of the benefits accruing under this water rights settlement, the Navajo Nation, on behalf of itself and its members, agrees that this settlement constitutes a full and final settlement of:

7.2.1 all causes of action against the United States, its agencies, or employees, arising out of claims for water rights in, or for waters of, the San Juan River Basin in New Mexico that the United States may have asserted or could assert in the San Juan River Adjudication or in any other court proceeding;

7.2.2 all claims for damages, losses or injuries to water rights or claims of interference, diversion or taking of water for lands within the San Juan River Basin in New Mexico that accrued against the United States, its agencies, agents or employees at any time up to and including the date of entry of the Supplemental Partial Final Decree that the Navajo Nation may have asserted or could assert; and

7.2.3 all claims arising out of or resulting from the negotiation or the adoption of this Agreement, appendices to this Agreement, or any specific terms and provisions thereof, against the United States, its agencies, agents or employees.

7.3 Effectiveness of Settlement of Claims.

7.3.1 Nothing herein acknowledges the existence or validity of any claims that are being settled pursuant to this Agreement.

7.3.2 The settlement of claims herein shall become effective upon entry of the Partial Final Decree with respect to the rights adjudicated to the Navajo Nation therein, and shall become fully effective upon entry of the Supplemental Partial Final Decree.

7.4 Reservation of Rights and Retention of Claims. Notwithstanding the settlement of claims described in subparagraphs 7.1 and 7.2, the Navajo Nation shall retain:

7.4.1 all claims for water rights or injuries to water rights arising out of activities occurring outside the San Juan River Basin in New Mexico, subject to subparagraphs 8.0, 9.3, 9.12, 9.13 and 13.9 of this Agreement;

7.4.2 all claims for enforcement of this Agreement, including its appendices, through such legal and equitable remedies as may be available in any court of competent jurisdiction;

7.4.3 all rights to use and protect water rights acquired pursuant to state law, to the extent not inconsistent with the Partial Final Decree, the Supplemental Partial Final Decree and this Agreement; and

7.4.4 all rights not settled, waived or released pursuant to this Agreement.

7.5 No Effect on Claims of Allottees. Nothing in this Agreement shall affect the rights or claims of Allottees, or the United States as trustee for or on behalf of

Allottees, for water rights or damages related to lands allotted by the United States to Allottees by public land orders or otherwise.

8.0 ADDITIONAL ALLOCATIONS

8.1 Animas-La Plata Project. If it is determined that an allocation to New Mexico water users can be made without impairment to existing water rights in New Mexico from the water supply associated with New Mexico State Engineer File No. 2883 that is in addition to the Animas-La Plata Project water allocations to users in New Mexico made by section 302 of the Colorado Ute Settlement Act Amendments of 2000 (114 Stat. 2763A-258):

8.1.1 the Navajo Nation shall receive for its use an additional share of water to be supplied under File No. 2883 that is equal to 50 percent of the additional allocation that can be made; and

8.1.2 the remainder of the additional allocation shall be reserved for uses of water by member entities of the San Juan Water Commission, subject to approval of the State of New Mexico, acting through the Interstate Stream Commission.

8.2 Additional Uses under Upper Basin Apportionment. If the yield available to the Upper Basin States under the apportionment of water to the Upper Basin by Article III of the Colorado River Compact is determined to be greater than 6.0 million acre-feet of water annually at Lee Ferry:

8.2.1 the New Mexico Interstate Stream Commission will determine the additional allocation of water available for use within the State of New Mexico's Upper Colorado River Basin Compact apportionment;

8.2.2 the additional allocation, if any, shall be shared as follows:

- (1) the Navajo Nation shall receive for its use an additional share of water that is equal to 50 percent of the additional allocation; and
- (2) the remainder of the additional allocation shall be reserved for uses of water by entities other than the Navajo Nation, and the State of New Mexico, acting through the Interstate Stream Commission, shall determine the shares for the non-Navajo entities; and

8.2.3 the additional allocation, if any, shall be supplied by the Secretary of the Interior under New Mexico State Engineer File Nos. 2849, 2883, 2917 and 3215, subject to non-impairment of existing water rights in New Mexico and to the provisions of subparagraph 8.1.

9.0 WATER ADMINISTRATION

9.1 Administration of Navajo Reservoir Releases. 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, excluding storage in any top water bank that may be established in Navajo Reservoir pursuant to section 405 of the Settlement Act, the Navajo Nation and the United States 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 reservoir storage threshold may be adjusted from time to time to maintain within the storage threshold a consistent amount of active storage that reflects sedimentation of the

reservoir determined by sediment surveys or any change in the minimum reservoir operating level for the Navajo Indian Irrigation Project diversion.

9.2 Alternate Water Source for San Juan River Uses.

9.2.1 When the direct flow of the San Juan River is insufficient to supply current beneficial uses under direct-flow water rights in New Mexico, the Navajo Nation agrees to make water available from the Settlement Contract to supply its uses under the reserved rights for Shiprock municipal uses and the Hogback-Cudei and Fruitland-Cambridge irrigation projects described in subparagraphs 3(d), 3(e) and 3(f), respectively, of the Partial Final Decree; provided, that:

- (1) the maximum amount of water to be made available from the Settlement Contract for this purpose during any one year is 12,000 acre-feet; and
- (2) the maximum amount described in (1) above is to be reduced in any year in which the Secretary of the Interior determines and allocates a shortage in the Navajo Reservoir water supply pursuant to subsection 11(a) of the Act of June 13, 1962 (76 Stat. 96) and section 403 of the Settlement Act, such reduction to be a function of the percentage shortage in water supply to the diversion demand for the Navajo Indian Irrigation Project; whereby, the maximum amount shall decline linearly in proportionate parts from 12,000 acre-feet at no shortage to 0 acre-feet at 20 percent shortage.

The Navajo Nation at its sole discretion may increase the maximum amounts described in (1) and (2) above in any given year.

9.2.2 The amount of water made available from the Settlement Contract to supply Navajo Nation uses from the San Juan River pursuant to subparagraph 9.2.1 shall be determined as the releases from Navajo Dam made for this purpose, and shall be accounted against the Nation's rights to divert water under the Navajo Indian Irrigation Project described in subparagraph 3(a) of the Partial Final Decree. The depletions of the releases from Navajo Dam made for this purpose shall be accounted against the Nation's rights to deplete water under the Navajo Indian Irrigation Project described in subparagraph 3(a) of the Partial Final Decree. Depletions of releases for purposes of accounting under this subparagraph include consumptive uses, incidental depletions and incremental river carriage losses.

9.2.3 The State of New Mexico and the United States agree that the water to be supplied under the Settlement Contract to the Navajo Nation for use on the Navajo Indian Irrigation Project may be delivered pursuant to subparagraph 9.2.1 to service the Nation's reserved rights under subparagraphs 3(d), 3(e) and 3(f) of the Partial Final Decree as alternate points of delivery and use. No further action of the Parties will be necessary to approve a water rights transfer for this purpose, and the Navajo Nation shall not be required to transfer in advance rights for a specific amount of irrigated acreage or water use. The Navajo Nation also

shall not be required to fallow irrigated acreage on the Navajo Indian Irrigation Project to effectuate the alternate delivery described in subparagraph 9.2.1.

9.2.4 Providing the alternate water supply under subparagraph 9.2.1 shall service, but shall not increase, the rights described in subparagraphs 3(d), 3(e) and 3(f) of the Partial Final Decree, and shall not be affected by any transfers to non-irrigation uses of the irrigation rights described in subparagraphs 3(e) or 3(f) of the Partial Final Decree.

9.2.5 When the direct flow of the San Juan River is insufficient to supply current beneficial uses under direct-flow water rights in New Mexico and the amount of water to be made available, if any, from the Settlement Contract pursuant to subparagraph 9.2.1 to supply Navajo Nation uses under the reserved rights described in subparagraphs 3(d), 3(e) and 3(f) of the Partial Final Decree is exhausted, the Navajo Nation may request a priority administration of water uses in the San Juan River Basin as necessary to fully or partially meet the current beneficial uses of the Nation under such rights.

9.2.6 The provisions of subparagraph 9.2 are conditioned upon enforcement of the provisions of section 11 of the Act of June 13, 1962, that no water user has an entitlement to water released from Navajo Reservoir storage into the San Juan River that is in excess of the direct flow determined to be available at Navajo Dam except under contract with the Secretary; except, that:

- (1) direct-flow water users may divert and use water released from reservoir storage and made available to them pursuant to the provisions of subparagraph 9.1 of this Agreement; and
- (2) water released for delivery from a top water bank in the reservoir established pursuant to section 405 of the Settlement Act is available only to the owners or assigns of the banked water.

9.3 Administration for Compact Compliance.

9.3.1 The Navajo Nation and the United States 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.

9.3.2 If it is determined that the consumptive use of water in New Mexico from the San Juan River Basin exceeds the State of New Mexico's Upper Colorado River Basin Compact Article III(a) apportionment taking into account salvage of river losses by use and other relevant factors, the Navajo Nation agrees, subject to subparagraphs 9.3.4 and 9.3.5, to not exercise a portion of its depletion rights adjudicated to the Nation by the Partial Final Decree and the Supplemental Partial Final Decree in an amount, as measured on the San Juan River, not to exceed in any year the lesser of:

- (1) the amount of over-allocation;

- (2) a quantity equal to: (i) 67% of the sum of 13,520 acre-feet per year plus the New Mexico share of Ridges Basin Reservoir evaporation; plus (ii) an additional one acre-foot for each acre-foot of depletion for those water rights adjudicated as abandoned or forfeited by the Court in the San Juan River Adjudication or otherwise terminated by operation of law, or for those rights that may be permanently retired by the State of New Mexico, or for those permits or licenses cancelled by the New Mexico State Engineer, after the effective date of this Agreement; and
- (3) the sum of 13,520 acre-feet per year, plus the New Mexico share of Ridges Basin Reservoir evaporation, minus the same percentage shortage that is allocated, if any, to the Navajo Nation's water uses in New Mexico under the Navajo-Gallup Water Supply Project as a result of such over-allocation.

9.3.3 In the event that the Upper Colorado River Commission determines pursuant to Article IV of the Upper Colorado River Basin Compact that the State of New Mexico must curtail its consumptive uses of water for some period of time to allow the Upper Basin to comply with Article III of the Colorado River Compact, the Navajo Nation agrees, subject to subparagraphs 9.3.4 and 9.3.5, to not exercise for said period of time a portion of its depletion rights adjudicated to the Nation by the Partial Final Decree and the Supplemental Partial Final Decree in an amount, as measured on the San Juan River, not to exceed in any year the lesser of:

- (1) the amount of curtailment required of the State of New Mexico;
- (2) a quantity equal to: (i) 67% of the sum of 13,520 acre-feet per year plus the New Mexico share of Ridges Basin Reservoir evaporation; plus (ii) an additional one acre-foot for each acre-foot of depletion for those water rights adjudicated as abandoned or forfeited by the Court in the San Juan River Adjudication or otherwise terminated by operation of law, or for those rights that may be permanently retired by the State of New Mexico, or for those permits or licenses cancelled by the New Mexico State Engineer, after the effective date of this Agreement; and
- (3) the sum of 13,520 acre-feet per year, plus the New Mexico share of Ridges Basin Reservoir evaporation, minus the same percentage shortage that is allocated, if any, to the Navajo Nation's water uses in New Mexico under the Navajo-Gallup Water Supply Project as a result of such curtailment.

9.3.4 For the purpose of determining the quantity referenced in subparagraphs 9.3.2(2) and 9.3.3(2), depletion amounts for rights abandoned, forfeited, terminated or retired, or for permits or licenses cancelled, shall be as quantified by decree, permit or license, or if not so quantified shall be based on the consumptive use for municipal, industrial or commercial uses or on annual consumptive irrigation requirements that are consistent with those provided in the report of Hydrographic Survey approved by the Echo Ditch Decree for irrigation uses, as appropriate. Depletions

associated with permits or licenses pursuant to New Mexico State Engineer File Nos. 758, 2472, 2807 and 2875, all cancelled in accordance with subparagraph 4.3.1, shall not be accounted towards the quantity referenced in subparagraphs 9.3.2(2) and 9.3.3(2). Nothing in subparagraphs 9.3.2, 9.3.3 or 9.3.4 shall affect the adjudication of water rights in the San Juan River Adjudication.

9.3.5 Any reduction in depletion by the Navajo Nation under subparagraphs 9.3.2 or 9.3.3 shall be:

- (1) in addition to any reductions otherwise required of Navajo Nation water uses pursuant to this Agreement or as a result of water rights administration in New Mexico;
- (2) 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);
- (3) limited by the extent to which forbearance of the use of the Navajo Nation's depletion rights is necessary to permit the current beneficial use needs of the municipal and domestic uses described in (2) above to be served; and
- (4) further limited so as not to result in a greater percentage water supply being made available for depletion during any year by the

municipal and domestic uses described in (2) above than is available for depletion during the same year by the Navajo Nation's water uses in New Mexico under the Navajo-Gallup Water Supply Project pursuant to the Settlement Contract and to section 11 of the Act of June 13, 1962, and section 403 of the Settlement Act.

9.4 Cooperative Water Sharing Agreements. Nothing in this Agreement prohibits the Navajo Nation from participating with water users in cooperative agreements for the sharing of water supplies in the San Juan River Basin.

9.5 Watermaster. To facilitate the administration of diversions from the San Juan River, the Navajo Nation and the United States agree that the New Mexico State Engineer shall serve as watermaster for the purpose of administering water rights and the diversion of water within the San Juan River stream system in New Mexico, subject to the provisions of the Partial Final Decree, the Supplemental Partial Final Decree and this Agreement.

9.6 San Juan River Adjudication.

9.6.1 The Navajo Nation, and the United States as trustee for the Navajo Nation, agree to not challenge in the San Juan River Adjudication rights previously adjudicated by the Echo Ditch Decree so long as:

- (1) quantifications of irrigation water rights in the Adjudication are based on the consumptive irrigation requirements per acre described by the report of hydrographic survey approved by the

Echo Ditch Decree, and on the amounts of water allotted per acre by the decree;

- (2) quantifications of maximum ditch diversion rates for irrigation uses under ditches in the Adjudication are based on the diversion rates per acre approved by the Echo Ditch Decree; and
- (3) priority dates for irrigation and non-irrigation rights in the Adjudication are based on the priority dates adjudicated by the Echo Ditch Decree.

The Navajo Nation may challenge in the San Juan River Adjudication quantifications of both irrigation water right acreages and non-irrigation water rights for reasons of forfeiture or abandonment for non-use or unauthorized use since entry of the Echo Ditch Decree. If as a result of the Adjudication the Court finds that the amount of water right acreage served by a ditch is significantly less than the acreage adjudicated in the Echo Ditch Decree, and if as a consequence a ditch claims a need for reason of hydraulics for additional carriage water over and above the maximum ditch diversion rate for irrigation uses on the ditch quantified per (2) above in order to allow the ditch to make deliveries of water to irrigators in accordance with the rights described in (1) above, the Navajo Nation may challenge the amount of additional carriage water claimed but agrees not to challenge irrigation water rights on the ditch quantified in accordance with (1) above. Further, the Navajo Nation may challenge in the Adjudication quantifications of annual diversion requirements for

irrigation uses under ditches to the extent that the requirements would exceed the annual diversion requirements per acre described by the report of hydrographic survey approved by the Echo Ditch Decree.

9.6.2 For irrigation rights not previously adjudicated by the Echo Ditch Decree, the Navajo Nation, and the United States as trustee for the Navajo Nation, agree to not challenge in the San Juan River Adjudication quantifications of water rights or maximum ditch diversion rates for irrigation uses under ditches so long as:

- (1) quantifications of water rights in the Adjudication are based on the consumptive irrigation requirements and farm delivery requirements, or farm duties, stated or indicated, if any, in permits or licenses, or if not so stated or indicated in permits or licenses, based on a methodology that results in consumptive irrigation requirements and farm duties consistent with those described by the report of hydrographic survey approved by the Echo Ditch Decree; and
- (2) quantifications of maximum ditch diversion rates for irrigation uses under ditches in the Adjudication are based on the diversion rates stated or indicated, if any, in permits or licenses, or if not so stated or indicated in permits or licenses, based on a methodology that results in maximum diversion rates per acre consistent with those approved by the Echo Ditch Decree.

The Navajo Nation may challenge in the San Juan River Adjudication quantifications of both irrigation water right acreages and non-irrigation water rights for reasons of forfeiture or abandonment for non-use or unauthorized use since issuance of a permit or license not included in the Echo Ditch Decree, and may challenge priority dates that may conflict with law; provided, that the Navajo Nation, and the United States as trustee for the Navajo Nation, agree to not challenge in the Adjudication quantifications of water rights under the Bureau of Reclamation's Hammond Irrigation Project based on a total water right acreage for the Project of up to 3,900 acres. Further, the Navajo Nation may challenge in the Adjudication quantifications of annual diversion requirements for irrigation uses under ditches to the extent that the quantifications would exceed the annual amounts of diversion or the diversion requirements per acre described in permits or licenses, if any, or if not, the annual diversion requirements per acre described by the report of hydrographic survey approved by the Echo Ditch Decree.

- 9.7 Navajo Reservoir Water Supply Contracts. The Navajo Nation, and the United States as trustee for the Navajo Nation, do not object to the contracts and subcontracts with other entities that have been approved as of the date of this Agreement by the Secretary of the Interior pursuant to section 11 of the Act of June 13, 1962 (76 Stat. 96), and do not object to the permits approved as of the date of this Agreement by the State Engineer for the diversion and use by the

contractors or subcontractors, respectively, of the water delivered under said contracts and subcontracts.

9.8 Notice of Applications. The New Mexico State Engineer shall provide notices to the Navajo Nation Department of Water Resources of applications filed for new appropriations, or to change the point of diversion or the place or purpose of use of water, in the San Juan River Basin in New Mexico, said notices to be provided when the State Engineer provides the applicant with the notice to be published; except, that the State of New Mexico shall not be required to provide the Navajo Nation with notices of applications to appropriate ground water for stock, domestic, mineral or construction purposes of use filed pursuant to Section 72-12-1.1, 1.2, or 1.3, NMSA 1978 (2003).

9.9 Transfers of Water Rights. The New Mexico State Engineer will consider evidence of historic use or non-use in determining whether approval of an application filed under state law to change the purpose or place of use of an irrigation water right in the San Juan River Basin would be consistent with the provisions of section 72-5-23, NMSA 1978, as it may be amended.

9.10 Hydrologic Models. Hydrologic models shall be developed cooperatively by the United States, acting through its water management and research agencies, and the State of New Mexico, acting through the Office of the State Engineer and the Interstate Stream Commission, and in consultation with the Navajo Nation Department of Water Resources, to the extent that models are needed to:

9.10.1 administer or manage the surface waters of the San Juan River Basin, and manage federal and other water projects, for the conservation of water for uses in New Mexico consistent with applicable laws;

9.10.2 determine return flow and depletion amounts for the Navajo Indian Irrigation Project, the Fruitland-Cambridge and Hogback-Cudei irrigation projects, and other Navajo Nation water uses for the accounting and administration of the rights adjudicated to the Nation by the Partial Final Decree and the Supplemental Partial Final Decree; and

9.10.3 determine the hydrologic effects of diversions and uses of ground water in the San Juan River Basin in New Mexico on San Juan River flows and on ground water resources, including impacts on other wells, as necessary to effectively administer the provisions set forth in paragraph 7 of the Partial Final Decree.

9.11 Ground Water Consultations. The State of New Mexico, acting through the State Engineer, shall cooperate and consult with the Navajo Nation, as it would with other applicants, in the preparation of any proposed Navajo Nation application to appropriate ground water in accordance with state law and pursuant to subparagraph 7(b)(2) of the Partial Final Decree, including the development of any replacement water plan required pursuant to subparagraph 7(c) of the Partial Final Decree and issues of impairment to existing rights related to a proposed application.

9.12 Uses in Other States.

9.12.1 The San Juan River and its tributaries shall be administered consistent with the provisions of the Upper Colorado River Basin Compact (63 Stat. 31).

9.12.2 The United States under contract to the Navajo Nation may provide water for diversion in New Mexico for uses in the State of Arizona under the Navajo-Gallup Water Supply Project consistent with and limited to the authorizations provided by sections 104 and 404 of the Settlement Act, and pursuant to paragraph 6 of the Partial Final Decree. This Agreement shall continue in full force and effect independently of the status of the ability to divert water to the State of Arizona under this subparagraph.

9.12.3 The Navajo Nation may divert ground water from the San Juan River Basin in New Mexico for use in the San Juan River Basin in Arizona, or may use ground water diverted from the San Juan River Basin in Arizona in the San Juan River Basin in New Mexico, subject to, and consistent with, the provisions of subparagraph 7(g) of the Partial Final Decree. This Agreement shall continue in full force and effect independently of the status of the ability to divert or use ground water within the State of Arizona under this subparagraph.

9.13 Fulfillment of Rights in Other Basins with Water from San Juan River Basin.

9.13.1 To the extent that, and only so long as, water is diverted from the San Juan River Basin and delivered to supply a portion of the Navajo Nation uses in the Little Colorado River Basin in New Mexico or the Rio Grande Basin

in New Mexico, such deliveries shall be the water supply to fulfill or service the water requirements of any rights adjudicated to the Navajo Nation for such uses in either or both of the latter two basins.

9.13.2 Navajo Nation water rights in the Little Colorado River Basin and the Rio Grande Basin shall not be:

- (1) exercised, transferred, leased or otherwise used to the extent that, and only so long as, the rights are being supplied by the delivery of water diverted from the San Juan River Basin; or
- (2) subject to forfeiture, abandonment or irretrievable loss to the Navajo Nation for reason of being supplied water from the San Juan River Basin in lieu of using water diverted from the Little Colorado River or Rio Grande basins.

9.13.3 This Agreement shall not alter or affect the quantification of claims or rights of the Navajo Nation to the diversion and use of water outside the San Juan River Basin in New Mexico.

10.0 STATE FUNDING FOR DITCH IMPROVEMENTS

10.1 Amount of Funds. The State of New Mexico agrees to make available for deposit into the State's Water Project Fund the amount of \$1 million in each of the first ten fiscal years which commence following the date of passage of the Settlement Act into law for the express purpose of providing cost-share funding for ditch improvement and water conservation projects in the San Juan River Basin in New Mexico, subject to the New Mexico State Legislature in each of the ten years appropriating funds for this purpose and to subparagraph 10.4.

