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L A W Y E R S

January 15, 2004

**BHP Navajo Coal Company's Comments on the Draft
Navajo Nation-State of New Mexico-United States
Settlement Agreement and Related Documents**

Modrall, Sperling, Roehl, Harris, & Sisk, P.A. submits these comments on behalf of BHP Navajo Coal Company ("BHP"). BHP is the owner of New Mexico State Engineer Permit No. 2838 ("Permit 2838"). BHP and its affiliate own and operate coal mines in the San Juan Basin, New Mexico and utilize the surface and groundwater of the San Juan Basin pursuant to Permit 2838 for purposes of their operations. BHP also supplies Permit 2838 water to the Four Corners Power Plant and San Juan Generating Station.¹

BHP supports the efforts of the settling parties in the steps they have taken toward resolving the long-standing and complex Navajo Nation water rights claims to the San Juan River in New Mexico. BHP recognizes that resolution of these matters can benefit all water users in the basin by providing greater certainty and potential flexibility with regard to water use.

BHP appreciates the opportunity to provide input on the December 5, 2003 Discussion Draft Settlement Agreement, Partial Final Judgment and Decree, Settlement Legislation, Contract between the United States and Navajo Nation, and related materials. These comments are submitted as a cooperative matter, without prejudice to any position BHP may take in the San Juan River Stream Adjudication or other judicial, administrative or legislative proceedings. As the settling parties consider these comments, BHP stands ready to discuss or explain them further, as appropriate. BHP's comments are as follows:

A. GENERAL COMMENTS.

1. More Predictable Water Rights Administration. The proposed settlement represents a significant effort by the Navajo Nation ("Nation") and the State of New Mexico to settle the Nation's claim in the San Juan Basin while taking into account limitations on water supply and protection of existing uses. Generally, with the exception of the comments provided herein, the settlement represents a positive step toward more predictable water rights administration in the Basin.

¹ Arizona Public Service Company, Operating Agent and part Owner of the Four Corners Power Plant, and Public Service Company of New Mexico, as Operator of the San Juan Generating Station, support these comments.

2. Ability of the Nation to Market Water to Municipal and Industrial Users. Settlement of the Navajo Nation's claim will create the opportunity for the Nation to become a participant in the San Juan Basin water market. This, of course, would provide revenue opportunities for the Nation. In turn, access to Navajo water would provide alternative sources of supply in times of drought to other water users. However, the draft settlement may not provide as clearly as possible for the ability for the Nation to market water it receives under the settlement for a full range of uses, including municipal or industrial uses on or off the Navajo Reservation. At this stage, it would seem beneficial to the Nation to obtain maximum flexibility in how it might use its decreed rights. This would serve to increase the potential value of its water rights. The opportunity is here now to provide flexibility in terms of the potential for marketing water for different places and purposes of use in the event the Nation does not then have other uses for its water. Providing flexibility now still leaves the Nation's decision whether to utilize that flexibility for later discussion within the Nation.

Examples of the potential ambiguity or lack of clarity concerning the Nation's ability to use or market its water flexibly are as follows:

(a) Paragraph 2(a) of the Partial Final Judgment and Decree of the Water Rights of the Navajo Nation ("Decree") provides that uses of Navajo Indian Irrigation Project ("NIIP") water is for irrigation of NIIP "and for other purposes authorized by section 203 of the San Juan River Basin in the Settlement Act. Section 203 of the Settlement Act, however, does not appear to provide that water may be used for municipal and industrial uses not directly associated with NIIP.

(b) Section 202 of the Settlement Act specifically lists the purposes of the Act. It does not appear to include expanding the purposes of uses currently allowed under the NIIP Act.

(c) As noted, Section 203 of the Settlement Act amends the NIIP Act but does not appear to provide clear amendment with regard to allowing NIIP water to be utilized for municipal and industrial uses.

(d) Section 302 of the Settlement Act provides that the Nation may use the "water supply under its water rights outside the boundaries of its lands consistent with state and federal law and not inconsistent with the terms of the Settlement Agreement between the Navajo Nation, the State of New Mexico and the United States and the terms of the Settlement Contract between the Nation and the United States." While this expands usage of NIIP and other water to allow use of the water for certain other purposes, it may create ambiguity by specifying that the water can be used only "outside the boundaries of its lands." This may unintentionally exclude water uses for operations on Reservation lands leased to non-members or on Reservation lands subject to federally-granted rights-of-way. Moreover, because the other settlement documents do not make absolutely clear that NIIP and other water can be sourced for municipal and industrial uses outside Reservation lands and for purposes unrelated to NIIP, this may be an issue warranting clarification. (Finally, this is listed as a "finding" in the legislation and is arguably not a substantive provision amending NIIP. See comment 2(c), above.)

(e) On a related point, the fourth sentence of Paragraph 15 of the Decree provides that the Nation can change a place of use, (but not the purpose of use), to a location that is not Navajo land (presumably tribal trust or tribal fee lands), in accordance with state law. Again, this would appear to permit the transfer of NIIP water, for example, for use off-Reservation as long as state law obligations concerning such a transfer were met. This provision is positive, but BHP questions why transfers to other users, such as lessees of tribal trust lands or holders of federally-granted rights-of-way, are not addressed. BHP would recommend that the provision (and related provisions elsewhere in the Settlement documents) be broadened to permit changes in both place and purpose of use, and to permit transfers to other users on Navajo lands, such as lessees of the Nation or holders of federally-granted rights-of-way.

(f) The recitals of the proposed Settlement Contract provide that the Nation "may exercise the right to market such water subject to the provisions of this contract and the agreement between the Navajo Nation and the State of New Mexico" However, the contract itself may not provide marketing authority if the legislation and Decree do not provide the authority with sufficient clarity. See also Settlement Contract, Paragraphs 4(g), 11(a).

These various provisions should be clarified and amplified to ensure that broad subcontracting authority of the Nation's settlement water is clearly provided for, and that subcontract water may be used for municipal and industrial purposes both on and off the Reservation. We understand this to be the intent of the parties, and simply recommend that this intent be clarified.

3. Amount of Water Received Under the Settlement. Overall, while BHP has questions concerning priority dates as discussed below, the amount of water the Nation is receiving under the settlement appears reasonable given its historic claims. However, there are numerous ambiguities which are cause for concern regarding how the Decree could be implemented or interpreted. These include:

(a) NIIP receives a 508,000 afy diversionary right and a 267,000 afy depletion right. These two numbers do not appear to have a logical relationship unless one views them in context of the depletion schedule but the depletion schedule is not referenced nor made an explicit part of the Settlement documents.

(b) Diversionary rights are based on ten year averages. This may be problematic dependent on how the right is administered, particularly if there is no diversion rate administration as noted in comment 3(g) below.

(c) Depletions explicitly allowed under the settlement differ from what is calculated in the depletion schedule based on the apparent premise that in any given year a certain amount, of agricultural land will be fallowed. However, there is no explicit fallowing requirement. This may create confusion if water is used for purposes other than agricultural purposes and should be clarified.

(d) The basis for the amounts allocated to the Fruitland and Hogback irrigation projects need to be articulated and verified.

(e) 2,000 afy of tributary groundwater is decreed but the locations of these underground diversions are unclear.

(f) "Extra" diversions allotted to Navajo-Gallup and ALP water. How will it be determined and by whom that there is in fact any "extra" water in the river to divert? Since these "extra" diversions will be taken upstream of BHP's Permit 2838 diversion points and any water returned will be returned below Permit 2838 diversion points, BHP requests greater clarity as to how this will operate.

(g) Paragraph 4(c) of the Decree specifies that the maximum diversion flow rates for the Nation's decreed rights will only be adhered to if "the Court adjudicates and requires enforcement of annual diversion limits for all irrigation uses in the San Juan River" However, there may be a significant lag time between approval of the Decree for the Nation, and adjudication and enforcement of diversion limits for other irrigation uses. The diversion limits for the Nation need to be administered and enforced in the interim.

(h) Section 106(e) of the Settlement Act indicates that the settlement is not intended to determine the Nation's groundwater rights. However, the Nation receives the right to divert 2,000 afy of tributary groundwater, and the Settlement Act provides for "conjunctive use wells." What more groundwater will the Nation claim and when? Moreover, the right to claim additional groundwater seems inconsistent with the language of the proposed Decree that it decrees "[a]ll rights of the Navajo Nation."

(i) As we understand the settlement documents, all the Nation's rights (and some allotted lands rights) are adjudicated, except for certain historic and existing uses. See Decree, Paragraphs 2(b), (c), (d), and (g), 6. However, there are other places in the documents providing that water rights to allotted lands are not adjudicated. See Decree, Paragraph 10. Consequently, there appear to be inconsistencies in the documents concerning the scope of the settlement. To provide non-settling parties an opportunity to fully evaluate the settlement, it would be helpful to delineate the lands as to which those historic and existing uses are yet to be determined. At this point, for example, it is not clear what tribal and allotted rights or uses are yet to be determined through the hydrographic survey process.

4. Jurisdiction/Enforcement Issues.

(a) The bulk of the Nation's water rights will be allocated and administered pursuant to the "Contract" with the Department of the Interior. However, it is expressly provided in the Decree that the Court which has jurisdiction over the Decree (the Eleventh Judicial District), does not have jurisdiction over implementation of the Settlement Contract. See Decree, Paragraph 4(a). This may be problematic as administration of the Decree and implementation of the Settlement Contract are not severable for all purposes. This concern is exacerbated by the fact that Paragraph 13 of the Decree is comprehensive concerning the

retained jurisdiction of the Court, which seems inconsistent with the reference language of Paragraph 4(a). Administration of the Decree may necessarily include interpretation of the Settlement Contract. BHP submits that for decree administration purposes the Decree Court should retain jurisdiction over the Contract.

(b) Other than McCarran Act jurisdiction which is explicitly referenced in Paragraph 13 of the Decree, there are no explicit consents to suit by the Nation in the Settlement Act or other documents for purposes of enforcement of the Act, or the Contract. This may be problematic because of the implementation of the Nation's rights pursuant to the federal Contract. See comment 4(a) above.

B. SETTLEMENT AGREEMENT.

1. Definition of Navajo Lands.

(a) The definition of the term "Navajo Lands" in Paragraph 2.7 is very broad, and from a policy standpoint, the definition of "Navajo Lands" may give rise to unintended consequences of implications. It would be helpful to an understanding of the proposed settlement to have good maps depicting geographically how the settlement operates.

(b) Further, the definition of "Navajo Lands" includes allotted lands and decreed reserved rights are defined for those (unidentified) allotted lands, and yet elsewhere in the Settlement documents, as we have noted, there is an effort to preserve the claims of allottees as separate claims - to be adjudicated or resolved independently. As a result, BHP is concerned about the potential for duplicative claims to water for allotted lands - some asserted in the context of this settlement, and some asserted independently by allottees. Once again, the use of detailed maps to depict the lands to which various rights attach might be helpful to clarify the settlement.

(c) On an interrelated point, generally, under the settlement, water rights associated with trust lands, including lands added to the reservation after the original reservation was established by Treaty, will receive an 1868 priority date. BHP presumes that an 1868 priority date for Navajo Lands may be reasonable in the overall context of a settlement that includes subordination of certain claims, but the selection of the earliest possible priority date for most all of the Nation's water rights would seem a generous concession. Absent some explanation, 1880 or 1908 priority dates would seem appropriate for some of the Nation's rights, depending on the location of the lands to which the rights are appurtenant. Of course, parts of the Navajo Reservation in New Mexico were added to the original Treaty Reservation by Executive Order in 1880 and shortly thereafter. And, as to certain allotted lands in the "checkerboard area", those lands were added to the Reservation only temporarily for purposes of facilitating allotments in 1908, as described further in the next paragraph.

(d) Paragraph 3.4 of the Settlement Agreement addresses the determination of historic and existing uses on tribal trust and allotted lands in the

preparation of the hydrographic survey. As BHP reads the settlement documents, those rights will be given an 1868 priority date, even though some or all of those lands may be in the 1880 Executive Order addition to the Reservation and others, may lie within the "checkerboard" area to the east of the Reservation boundary proper. In the absence of some other explanation, the appropriate priority date for allotments in the area described in Executive Order No. 709, as amended by Executive Order No. 744, should be 1908 at the earliest, when President Roosevelt signed Order No. 709. And, for allotments outside the former Executive Order addition, their priority date should be the date of allotment, barring some earlier claim or interest. In any event, BHP would be interested in knowing the justification for the 1868 date, whether preliminary determinations have been made concerning the size of the historic and existing uses, and what other Walton claims may be as to these lands. Presumably, the claims would be relatively modest since the basic purpose of the temporary Executive Order No. 709 addition to the Reservation was to facilitate allotments for Navajo sheep ranchers before the area (and its water sources for grazing purposes) was taken over by non-Navajo sheep ranchers. The predominant use for the area was understood to be sheep ranching.

(e) Paragraph 3.4 raises two or three other questions: (a) What does the following language mean: "Allottees whose lands are within the exterior boundaries of lands held in trust for the benefit of the Navajo Nation . . ." mean? In other words, what "exterior boundaries" are referred to here? Are the settling parties talking about allotments throughout the "checkerboard" in the San Juan River Basin? Are there allotments that are not covered by that limitation?

(f) Further, the last sentence of Paragraph 3.4 concerning Navajo administration, regulation or enforcement of rights appears over-inclusive. BHP presumes the intent is that the Navajo Nation "enforces" the provisions concerning the fulfillment of new allottee claims, not the entirety of Paragraph 3.4. If the last sentence relates to the entire provision, it would mean that the Nation enforces the provision that the allottees can make water rights claims. Of course, the Decree Court has jurisdiction over such matters. In any event, the language is unclear, and it may give rise to concerns about the geographic scope of tribal administrative or regulatory authority.

2. Schedule for Settlement Approval. Paragraph 4.0 of the Settlement Agreement does not describe what happens if Settlement Legislation is not adopted on the schedule provided or is adopted in too different a form. Nor does the provision discuss what the parties will do if the milestones concerning construction and funding are not met. Some of those milestones are very far down the road. Further, this and other Settlement documents address "nullification", "revocation" and other consequences of failures to meet certain obligations. These provisions should be considered carefully. It would appear that there is a risk that the entire settlement could be unraveled completely well into the future, even if there has been substantial compliance with the materials terms of the settlement. It also presents some risks to all water users on the San Juan River by retaining some uncertainty in the event the Settlement collapses for some reason.

3. **Nullification.** In the Settlement documents there is language to the effect that the agreement cannot be "nullified" under certain circumstances. The last sentence in Paragraph 8.5 is an example. Does this mean that in all other circumstances, the agreement can be "nullified"? The parties should provide greater clarity concerning what circumstances justify seeking nullification (or revocation, in other places in the documents).

C. **PARTIAL FINAL JUDGMENT AND DECREE.**

1. **Subordination Language.** The Decree provides that 535,330 afy of the Nation's decreed right will be subordinated to the rights of the Nation to receive that water pursuant to a contract with the Secretary of the Interior with a priority date of June, 1955. The subordination language is arguably ambiguous. While this provision tracks in significant respects, the language of the Jicarilla Apache Nation Decree, this proposed settlement involves significantly larger volumes of water, with greater risks arising from any lack of clarity. Given the long term over which the proposed settlement will govern administration of a large portion of the San Juan River, the parties should strive to provide clarity for future generations of water users and administrators. Ambiguities arguably exist as follows:

(a) **Subordination.** Paragraph 4(b) is confusing in that it is intended to subordinate the rights in perpetuity but could be read to be a subordination on a per annum basis.

(b) **Partial "Irretrievable Loss".** The language of Paragraph 4(b) of the Decree provides that the subordination continues unless "all or part of the Navajo Nation's rights to divert water under the Settlement Contract are irretrievably lost." It appears that even an "irretrievable loss" of one acre-foot per annum under the Contract would allow "unsubordination" of the entire 535,330 afy. This would seem an absurd result, but appears to be the plain meaning of the language.

(c) **"Irretrievable Loss" Definition.** Paragraph 4(b) of the Decree lists specific examples of what is not an irretrievable loss. This may create the inference that those things not listed can constitute an irretrievable loss. BHP assumes that such an inference is not the parties' intent.

2. **Administration.**

(a) **Records of water use.** Paragraph 14 of the Decree provides that the Nation "within six years from the date of entry of this decree . . . prepare and maintain . . . records of the acreages of all Navajo lands in the San Juan River Basin in New Mexico irrigated each year. . . ." The lag time of six years from the date of entry of the decree to have accountability with regard to water use appears unacceptable. The period between now and the entry of the Decree would provide ample opportunity to develop and implement a tracking and record keeping system.

(b) **Nation authority to administer rights.** The Settlement provides the Nation with a significant amount of jurisdictional authority regarding administration of its water rights. The Decree, in particular Paragraph 15, does not

resolve how the Nation will determine whether third party rights are impaired by changes in the Nation's water rights or how a third party can protect its rights in the face of any changes by the Nation. Overall, Paragraph 15 of the Decree is very difficult to understand. BHP believes it raises the following potential problem areas:

1. With respect to unsubordinated rights, the Nation may regulate use and transfer of those rights so long as changes do not impair non-Navajo water rights. Paragraph 15 does not specify the forum that will make the non-impairment determination. BHP would recommend that any determinations regarding such impairment be subject to State review and oversight.

2. The second sentence of the provision, as written, is overbroad, giving the Nation "jurisdiction to administer and regulate the use of water pursuant to water rights acquired under state law...." We assume the intent is that the state law-based rights held by the Nation are to be within the Nation's jurisdiction, and not all state law-based rights. This should be clarified. If limited, the sentence as a whole would appear reasonable.

3. Allotted Lands Water Rights. Paragraph 2(b) would appear to define certain water rights for allottees who are "members of the Navajo Nation" and not other water rights for allottees. This makes it difficult for the uninitiated to determine which allottees get these rights and which allottees are left to fend for themselves or pursue new claims. Again, there would seem also to be the risk of "double dipping" or duplicative decreed rights. Other subparagraphs in Paragraph 2 of the Decree raise the same questions and concerns. These points need to be clarified.

4. Priority Dates. Paragraph 2(b) (and others) also grants an 1868 priority date for fee lands. In the event the subordination principle disappears (i.e., where "rights to divert water under the Settlement Contract are irretrievably lost"), fee lands should not have an 1868 priority date. Moreover, as discussed above, BHP questions whether an 1868 priority date should apply to lands associated with the 1880 Executive Order addition. There may be some justification for using an 1868 priority date across the board, but the parties have not provided it.

5. Reservation Boundaries. In Paragraph 6 there is a reference to "lands allotted to individual members that are a part of the Navajo Indian Reservation lands, as described in this decree and in the Joint Hydrographic Survey Report" We cannot find a description of "Navajo Indian Reservation lands" elsewhere. As noted above, there seems to be an array of descriptions used in the various documents of lands in which the Nation and/or its members have some interest. BHP understands that most, if not all, allotted lands in the San Juan River basin lie outside the Navajo Reservation. While not perhaps directly material to BHP, the references raise public policy considerations and could be taken as

expressions of congressional intent that the Nation could use to extend its jurisdictional reach in other contexts.

6. Boundaries (Continued). In Paragraph 10, there is another reference to allotted lands "outside the exterior boundaries of lands held in trust for the benefit of the Navajo Nation" Again, we are not sure what this means. Allotted lands and tribal trust lands, by definition, are mutually exclusive.

7. Recordkeeping on Tribal and Allotted Lands. In Paragraph 14, relating to keeping records of water use, there is a reference to "Navajo lands." Does that reference include allotted lands or just tribal trust and tribal fee lands?

8. Revocation. Paragraph 18 describes certain rights the Nation has to revoke the Settlement Decree. The right to revoke expires in 2020. As noted above, it seems extreme to permit the Nation to have a right to revoke the settlement if the last payment provided by the agreement is not made, but that appears to be the idea. One would think the better approach that far down the road, would be to give the Nation a right to sue for money damages or for specific performance or similar relief to accomplish the purposes of the Settlement Agreement, rather than potentially allow the Settlement to be unwound.

9. Revocation vs. Nullification. A related point: the documents refer to "nullification" and "revocation" - are they the same or different? The use of these terms is not clear.

D. SETTLEMENT ACT.

1. Section 103(c). The Settlement Act authorizes the Secretary of the Interior to "acquire lands, easements or other property or property rights as necessary to construct, operate and maintain the [Navajo-Gallup] Project facilities." We interpret the Secretary's authority to "acquire . . . property rights" to mean that the Secretary does not have the authority to condemn land or water rights for purposes of the Project. If our understanding is incorrect, BHP would like to discuss this issue with the parties.

2. Section 106. Section 106 authorizes construction of "conjunctive use wells" to allow up to 1,670 acre-feet per annum to be diverted for municipal and domestic use for the Navajo-Gallup Project. Apparently the need for, and specifics of these wells, are described in the March 2001 technical memorandum referenced below in BHP's comment 11(a). We need to understand more fully the location, purpose and function of these wells in order to fully evaluate the settlement.

3. Section 202(a)(7). Section 202(a)(7) uses the term "Navajo Reservation" - which is not defined. What is the relationship between this term and the term "Navajo lands" used elsewhere in the Settlement documents? These terms and other references to lands (both tribal and allotted) and/or geographic areas or boundaries should be clarified to eliminate uncertainty concerning the scope of the settlement. BHP is prepared to assist the parties in clarifying these

terms, but at this juncture, the company is not certain of the intent of the settling parties and cannot provide useful recommendations at this point.

4. **Section 302(a)(b).** The term "outside the boundaries of its lands" should be clarified to ensure that water can be subcontracted on Reservation Navajo Nation lessees and federal rights-of-way holders for municipal and industrial purposes.

E. SETTLEMENT CONTRACT.

1. **Employment Preferences.** Paragraph 11(e) requires the Navajo Nation to include equal opportunity language in subcontracts. The language provides that subcontractors "will not discriminate...because of race, color, religion, sex or national origin." This language (which is incorporated into the Settlement Act) would appear to foreclose a subcontractor operating on or near the Reservation from providing an Indian preference for employees according to a publicly announced policy. Later in Paragraph 11(e), the Contract provides: "Nothing in this section shall be read as prohibiting the Nation from requiring that subcontractors give preferential employment to members of the Navajo Nation." At first blush, this would suggest that subcontractors may be required by the Nation to provide a tribal preference. And, the Navajo Nation may very well interpret the provision in that fashion. However, federal law likely would still prohibit a tribal preference, at least under current EEOC interpretation and Ninth Circuit authority. And, State law also might prevent application of a preference off the Reservation. The result of all this will be potential confusion, and potential conflict. Again, similar language is in the Jicarilla Contract; nonetheless, if there is a potential flaw, it ought not be compounded.

2. **Enforcement.** As noted, there are no express enforcement provisions in the Contract (or the Act). Presumably, the settling parties would want to provide for reciprocal enforcement of the Contract by each party to the Contract, and any subcontracts. Perhaps the most efficient place to include consent to suit or waiver of immunity and forum selection matters would be in the Settlement Legislation.

F. OTHER POINTS.

1. **Referenced Documents to Request.** Section 103(a) of the Settlement Act refers to a "March 2001 technical memorandum" for the Navajo-Gallup Project and an April 2002 appraisal report. BHP requests copies of these documents. The depletion schedule references a February 19, 2002 letter to Rick Gold from the New Mexico State Engineer. BHP also requests a copy of this letter.

2. **State of New Mexico Schedule of Anticipated Upper Basin Depletions.** This table needs to be corrected regarding its volume references; each reference should be to 39,000 afy, for all years. In addition, the table needs to be corrected regarding its reference to BHP's "lease to PNM." BHP has a contractual relationship to supply water to Four Corners Power Plant in certain amounts and under certain conditions, and to the San Juan Generating Station in

certain amounts under certain conditions. The 39,000 acre-feet per annum is the total consumptive use under Permit 2838, not a lease right of PNM.

3. Comprehensive Review of Definitions and Terms. As noted in prior comments, these complex Settlement documents use a variety of terms and definitions. Based on our review to date, it does not appear that the terms and definitions are always utilized consistently. In some cases, the definitions and terms, including land descriptions or boundaries, are vague or difficult to understand. BHP urges the parties to undertake a comprehensive review of the Settlement documents to ensure clarity and consistency. Such a review will serve the settling parties and other water rights holders well, long into the future.

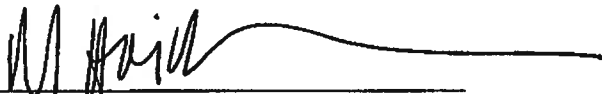
4. Reservation of Right to Comment Further. BHP reserves the right to provide further comments on the Settlement documents, including without limitation, during legislative consideration of any Settlement Legislation that may be introduced, and during the process to be defined by the Decree court for formal consideration of the Partial Final Judgment and Decree.

G. CONCLUSION.

Once again, BHP congratulates the settling parties in their efforts toward a full and final resolution of the Navajo Nation's water rights claims on the San Juan River in New Mexico. Thank you for your consideration and attention to these comments. Please raise any questions you may have.

Respectfully submitted,

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