

July 9, 2004, Revised Draft – Navajo Nation Water Rights Settlement

Disclaimer. It is expressly understood that the governing bodies or authorities of the proposed signatories have not approved the revised draft settlement agreement, including the revised draft partial final decree, revised draft settlement act and revised draft settlement contract. New Mexico Interstate Stream Commission staff also prepared the revised draft executive summary of the proposed settlement and the draft responses to public comments received on the December 5, 2003, discussion draft of the settlement.

SAN JUAN RIVER BASIN IN NEW MEXICO

NAVAJO NATION WATER RIGHTS SETTLEMENT AGREEMENT

***NOTE:** The following settlement concepts and any other written or oral communications are covered by Rule 408 of the New Mexico and Federal Rules of Evidence.*

This Agreement is entered into as of the dates executed below, by and among the State of New Mexico, the United States of America, acting through the Secretary of the Interior, and the Navajo Nation.

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 right 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 2;

2.2 "Agreement" or "Settlement Agreement" means this Agreement and the three 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 3;
- 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 United States and the Navajo Nation;
- 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 8 and 9 of the Partial Final Decree, respectively, and to provide the information required to administer subparagraph 3.4 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; and

2.17 “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 paragraphs 1 through 7 and 10 through 22 of the Partial Final Decree. Furthermore, the Parties agree to the form of paragraphs 8 and 9 of the Partial Final Decree and to the procedure described in subparagraph 3.2 of this Agreement for determining the quantification of the Navajo Nation’s rights under the respective paragraphs.

3.2 Joint Hydrographic Survey Report.

3.2.1 The basis for quantification of the Navajo Nation’s rights under paragraphs 8 and 9 of the 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 3.2.2. 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 8 and 9 of the Partial Final Decree and the data and information required to administer subparagraph 3.4 of this Agreement.

3.2.2 The quantification of water rights for irrigation uses identified under paragraphs 8 and 9 of the Partial Final Decree shall be based on annual per acre consumptive irrigation and diversion requirements and on maximum per acre diversion rates determined consistent with the approach or methodology adopted by the Court in the San Juan River Adjudication for other irrigation uses.

3.2.3 The United States and the State of New Mexico shall act in good faith to complete the Report as described in subparagraphs 3.2.1 and 3.2.2 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.

3.2.4 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.

3.3 Completion and Entry of the Partial Final Decree.

3.3.1 Once the Report described in subparagraph 3.2 is complete, the Parties shall complete paragraphs 8 and 9 of the Partial Final Decree based on the contents of the Report.

3.3.2 Once paragraphs 8 and 9 of the 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 Partial Final Decree pursuant to expedited *inter se* procedures to be adopted by the Court.

3.3.3 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.

3.4 Relation of the Partial Final Decree to Allottees.

3.4.1 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 for historic and existing uses as may be documented by the Joint Hydrographic Survey Report prepared pursuant to subparagraph 3.2.

3.4.2 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, such additional water rights shall be fulfilled or serviced by water rights adjudicated to the Navajo Nation by the 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.

4.0 **SETTLEMENT ACT**

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

4.2 Conditions. The Settlement Act must be enacted into law in substantially the form of Appendix 2 by October 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 in subsection 309(a) of the Settlement Act must be fulfilled in the manner provided therein.

5.0 **SETTLEMENT CONTRACT**

5.1 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.

5.2 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 3 upon passage of the Act into law.

5.3 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).

6.0 TRUST FUND

6.1 Deposits by the State of New Mexico. The State of New Mexico must deposit into the Navajo Nation Water Resources Development Trust Fund authorized by section 307 of the Settlement Act \$3 million per year in each of the first five fiscal years which commence following the date of passage of the Settlement Act into law and \$2 million per year in each of the five fiscal years next following the first five fiscal years referred to herein.

6.2 Deposits by the United States. The United States must deposit into the Navajo Nation Water Resources Development Trust Fund authorized by section 307 of

the Settlement Act \$3 million per year in each of the first five fiscal years which commence following the date of passage of the Settlement Act into law and \$2 million per year in each of the five fiscal years next following the first five fiscal years referred to herein.

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 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 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.

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 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 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:

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 Minimum Direct Flow Determination. The Navajo Nation and the United States agree to the use of a minimum daily direct flow determination of 225 cubic-feet-per-second for the San Juan River at the Archuleta gaging station below Navajo Dam in the administration of water rights on the San Juan River during the irrigation season whenever total storage in Navajo Reservoir will 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 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 for supplying 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 15,000 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 15,000 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 for supplying Navajo Nation uses on 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 transfer of irrigation rights described in the respective subparagraphs to non-irrigation uses.

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 for supplying 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:

- (1) the Court in the San Juan River Adjudication making determinations of irrigation water rights for other parties to the Adjudication in accordance with subparagraphs 9.6.1 through 9.6.3; except, that new appropriations under state law approved pursuant to application filed with the New Mexico State Engineer by owners or operators of irrigation ditches or projects for additional carriage water, if needed in consideration of current ditch conditions and hydraulics to provide sufficient head to make deliveries to water rights owners served by a ditch or project, that do not impair the rights of the Navajo Nation or impact the diversions by the Navajo Nation described in paragraph 4 of the Partial Final Decree shall not affect said provisions; and

(2) the Secretary of the Interior and the State Engineer and the Court following 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; provided, that the minimum direct flow determination provisions of subparagraph 9.1 of this Agreement shall be observed, and that 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 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 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 for those rights that may be permanently retired by the State of New Mexico, or for those permits 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 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 for those rights that may be permanently retired by the State of New Mexico, or for those permits 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, or retired, or for permits 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. 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 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 and this Agreement.

9.6 San Juan River Adjudication.

9.6.1 For irrigation rights previously adjudicated by the Echo Ditch Decree, the Navajo Nation, and the United States as trustee for the Navajo Nation, agree that:

(1) determinations of the irrigation water right amounts for parties in the San Juan River Adjudication shall be based on the annual per acre consumptive irrigation requirements, farm delivery requirements (duties) and irrigation diversion requirements determined in the report of Hydrographic Survey approved by the Echo Ditch Decree;

(2) determinations of ditch diversion rates for irrigation uses shall be based on the maximum per acre instantaneous ditch diversion rates incorporated into the Echo Ditch Decree for irrigation;

- (3) determinations of the diversion amount and rate for irrigation uses on a ditch or project in the aggregate shall be based on the total water rights acreage served by the ditch or project to be determined by the Court in the San Juan River Adjudication; and
- (4) the annual irrigation right amounts for diversions from the La Plata River, which were not adjudicated by the Echo Ditch Decree, shall be determined consistent with part (1) of subparagraph 9.6.2.

9.6.2 For irrigation rights not previously adjudicated by the Echo Ditch Decree, excluding federal reserved rights and uses made under contract with the Secretary of the Interior pursuant to section 11 of the Act of June 13, 1962, the Navajo Nation, and the United States as trustee for the Navajo Nation, agree that:

- (1) determinations of irrigation water right amounts for parties in the San Juan River Adjudication shall be based on an approach or methodology that results in annual per acre consumptive irrigation requirements, farm delivery requirements (duties) and irrigation diversion requirements consistent with those determined in the report of Hydrographic Survey approved by the Echo Ditch Decree;
- (2) determinations of ditch diversion rates for irrigation uses shall be based on the maximum per acre instantaneous ditch diversion rates incorporated into the Echo Ditch Decree for irrigation from the San Juan River; and

- (3) determinations of the diversion amount and rate for irrigation uses on a ditch or project in the aggregate shall be based on the total water rights acreage served by the ditch or project to be determined by the Court in the San Juan River Adjudication.

9.6.3 For the Bureau of Reclamation's Hammond Irrigation Project, the Navajo Nation, and the United States as trustee for the Navajo Nation, agree that determinations of water rights for the Project in the San Juan River Adjudication shall be based on:

- (1) a total water rights acreage of no more than 3,933 acres;
- (2) an approach or methodology that results in annual per acre consumptive irrigation requirements and farm delivery requirements (duties) consistent with those determined for irrigation uses in the report of Hydrographic Survey approved by the Echo Ditch Decree;
- (3) consumptive use for existing stock, domestic, industrial, municipal and miscellaneous uses on the Project;
- (4) a total amount of diversion for the Project in any one year of 26,724.4 acre-feet, which includes diversions under New Mexico State Engineer File Nos. 2475 and 2593(1) that have been acquired by the Hammond Conservancy District and under New Mexico State Engineer File No. 2848 held by the Secretary of the Interior for the Project; and
- (5) a total diversion rate for the Project of 90 cfs.

The diversion amount and the diversion rate for the Project described in (4) and (5) above, respectively, include water to operate a hydraulic pump as part of the Project's existing canal system.

9.6.4 The Navajo Nation agrees to the adjudicated priority dates for all water rights adjudicated by the Echo Ditch Decree.

9.6.5 The Navajo Nation may object in the San Juan River Adjudication to proposed determinations of water rights that are in excess of the amounts and rates described in subparagraphs 9.6.1 through 9.6.3.

9.6.6 Except as provided in subparagraph 9.6, the Navajo Nation retains the right to object in the San Juan River Adjudication to proposed determinations of water rights, including water rights acreages, for reasons such as forfeiture or abandonment for non-use, unauthorized use since entry of the Echo Ditch Decree or since acquisition of a permit or license not included in the Echo Ditch Decree, and proposed priority dates that may conflict with law.

9.6.7 The State of New Mexico agrees to make available to the State Engineer sufficient funds and resources to complete the San Juan River Adjudication no later than December 31, 2016, subject to the New Mexico State Legislature each year appropriating funds for this purpose.

9.7 Navajo Reservoir Water Supply Contracts. The Navajo Nation does 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 does 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 shall 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

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 to the use of water adjudicated to the Navajo Nation 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.

- 10.2 Eligibility Criteria. The State of New Mexico, acting through the Interstate Stream Commission, will adopt specific criteria, including eligibility and cost-sharing requirements, for receiving applications for funding and determining which ditch improvement and water conservation projects will be funded.
- 10.3 Additional Contributions. Nothing herein prohibits the United States from providing cost-share funding for ditch improvement and water conservation projects in the San Juan River Basin, nor prohibits the State of New Mexico from making additional allocations of funds for ditch improvement and water conservation projects in the Basin.
- 10.4 Lack of Appropriations. This Agreement shall continue in full force and effect independently of the status of appropriations and funding for ditch improvement and water conservation projects pursuant to paragraph 10.0.

11.0 EFFECTIVENESS

- 11.1 Effective Date. This Agreement shall become effective upon the date of signature by the Secretary of the Interior.
- 11.2 Term. This Agreement shall be perpetual unless:
- 11.2.1 terminated pursuant to the conditions described by subsection 309(b) of the Settlement Act for revoking the settlement or by paragraph 22 of the Partial Final Decree for revoking the decree;
- 11.2.2 the Court in the San Juan River Adjudication does not approve this Agreement, excluding the Appendices hereto, in conjunction with the Partial Final Decree pursuant to subparagraph 3.3; or
- 11.2.3 terminated by the mutual consent of the Parties.

12.0 ENFORCEMENT

12.1 Court Enforcement. The Court in the San Juan River Adjudication shall have jurisdiction pursuant to 43 U.S.C. Section 666 over the terms and conditions of this Agreement. The Parties may agree that another court may have jurisdiction over certain disputes regarding Navajo Nation rights to divert and use ground water in the State of Arizona referenced by subparagraph 9.12.3 or performance of the Navajo Nation under subparagraph 9.13.2 of this Agreement.

12.2 Interstate Compacts. Nothing in this Agreement shall be construed to confer or bestow upon the Court in the San Juan River Adjudication jurisdiction over the interpretation of, or determinations under, the provisions of the Mexican Water Treaty, the Colorado River Compact, the Upper Colorado River Basin Compact, the La Plata River Compact or the Animas-La Plata Project Compact.

13.0 OTHER PROVISIONS

13.1 Entire Agreement. This Agreement, including its Appendices, constitutes the entire understanding among the Parties. This Agreement has been negotiated in good faith for the purposes of advancing the settlement of legal disputes, including pending litigation, and all of the Parties to this Agreement agree that no information exchanged or offered, or compromises made, in the course of negotiating this Agreement may be used as either evidence or argument by any Party to this Agreement in any legal or administrative proceeding other than a proceeding for the approval of this Agreement.

13.2 Construction and Effect. This Agreement is to be construed fairly and reasonably in its entirety. The paragraph and subparagraph titles used in this Agreement are

for convenience only and shall not be considered in the construction of this Agreement. Each of the Parties has been fully represented in connection with the preparation of this Agreement, and as such, this Agreement shall be neutrally interpreted and shall not be construed in favor of any Party or against any Party.

13.3 No Precedent. Nothing in this Agreement is intended to:

13.3.1 establish any precedent or standard for the quantification of Federal reserved rights, aboriginal claims, or any other Indian claims to water in any other judicial or administrative proceeding, including the Navajo Nation's water rights or claims in basins other than the San Juan River Basin in New Mexico;

13.3.2 establish any precedent concerning the applicability of interstate compacts to the quantification of Federal Indian reserved rights or rights pursuant to aboriginal claims to water, or to the administration or use of water under such rights; or

13.3.3 quantify or otherwise affect the water rights, claims or entitlements to water of any Indian tribe, band or community other than those of the Navajo Nation in, to and from the San Juan River Basin in New Mexico; except, for the rights of the Navajo Nation to the use of water in other river basins in New Mexico to the extent provided in subparagraph 9.13.2.

13.4 Authority. By signing this Agreement each person represents that he or she has the authority to execute it.

- 13.5 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall be considered an original and all of which, taken together, shall constitute one agreement.
- 13.6 Amendments. No modification of this Agreement shall be effective unless it is in writing, signed by all Parties; provided, that appendices to this Agreement may be amended in accordance with their terms or applicable law.
- 13.7 Appropriations Contingency. The expenditure or advance of any money or the performance of any obligation by the United States, in any of its capacities, or by the State of New Mexico under this Agreement is contingent upon their respective appropriation of funds therefor. No liability shall accrue to the United States, in any of its capacities, or to the State of New Mexico in the event funds are not appropriated.
- 13.8 Waiver Limitation. No waiver of any breach of any of the terms or conditions of this Agreement shall be construed as a waiver of any subsequent breach of the same or other terms or conditions of this Agreement.
- 13.9 Diversions in Other Basins Referenced in the Settlement Act. This Agreement shall continue in full force and effect regardless of, and is not conditioned upon, the Navajo Nation's ability or right to divert and use ground water in the Little Colorado River Basin and Rio Grande Basin from wells constructed or rehabilitated pursuant to subsection 107(b) of the Settlement Act.

In witness whereof, the parties hereto have duly executed this Agreement.

THE STATE OF NEW MEXICO

By: _____ Date: _____
Governor

Attorney General Date: _____

THE NAVAJO NATION

By: _____ Date: _____
President

Attorney General Date: _____

THE UNITED STATES OF AMERICA

By: _____ Date: _____
Secretary of the Interior