

## **Agreement in Principle**

Navajo Nation, Hopi Tribe and State Parties

March 28, 2008

**I. PURPOSE:** To resolve, fully and finally, any and all claims that the Navajo Nation and the Hopi Tribe may have to the Lower Colorado River, and to surface water and ground water in the Little Colorado River Basin subject to adjudication by the Little Colorado River Adjudication court. The commitment of the undersigned attorneys to seek the approval of their respective clients to this tentative agreement shall remain in effect through the end of the Hundredth and Tenth (110<sup>th</sup>) Congress of the United States of America.

**II. WATER BUDGET AND C-AQUIFER MANAGEMENT AND REGULATION:**  
Each tribe will be provided with water in the following amounts and priorities from the following sources:

### **Little Colorado River Water and Ground Water**

#### **Applicable Major Provisions from the 1999 Draft Little Colorado River Adjudication Water Settlement**

- 1) Preliminary matters (general provisions and definitions).  
Non-tribal off-reservation uses of surface water and underground water (e.g., grandfathering of existing uses, restrictions on large new uses of surface water).
- 2) Tribal water uses including:
  - a) Navajo and Hopi rights to the flow of on-reservation washes;
  - b) Navajo and Hopi rights to water under their reservations, subject to the provisions of the Settlement addressing the management and regulation of C-aquifer supplies;
  - c) Navajo right to the flow of the Little Colorado River, Clear Creek, Chevelon Creek, and Jacks Canyon with a priority date as of the settlement. The Navajo Nation and the Hopi Tribe shall not object to the existing quantification of decreed and certificated rights within the Three Canyon Area.
  - d) Navajo rights to the flow of the mainstem Little Colorado on the reservation for historical uses with priorities from 1900 through 1934, subordinated to existing off-reservation water uses; and
  - e) Hopi rights to water sources on their ranches (sections III.B.4 and 5).

- 3) Adjudication and administration (e.g., claims and objections, court jurisdiction).
- 4) Effective date provisions.

### Colorado River Water

Navajo Nation		Hopi Tribe	
Amount	Priority	Amount	Priority
From the water supplies available under the AWSA 11,000 AFY	8,500 AFY CAP NIA firmed to CAP M&I under AWSA <sup>1</sup>  2,500 AFY CAP NIA firmed to CAP M&I <sup>2</sup>	From the water supplies available under the AWSA 1,000 AFY	CAP NIA
From 4 <sup>th</sup> Priority C.R. water supplies held by ADWR 2,000 AFY	4 <sup>th</sup> Priority C.R. Water firmed to CAP M&I <sup>3</sup>	From 4 <sup>th</sup> Priority C.R. water supplies held by ADWR 1,500 AFY	4 <sup>th</sup> Priority C.R. Water, 650 AFY firmed to CAP M&I <sup>4</sup>
From the water supplies available under the AWSA 18,000 AFY	CAP NIA		
<b>Total: 31,000 AFY</b>		<b>Total: 2,500 AFY</b>	

The tribes or the United States on their behalf may at their expense provide for firming above and beyond that provided for in this Agreement in Principle.

### Limitations on Use / Leasing / Accounting

No Colorado River water referred to above may be used directly or indirectly outside of the State of Arizona. Subject to further agreement of the parties, Colorado River water made available to or owned by the tribes may be leased by the tribes for use off of the

<sup>1</sup> The State of Arizona will firm the 8,500 AFY for the Navajo settlement as if the Navajos were a CAP M&I subcontractor. The Federal Government will assume the obligation to firm CAP NIA water for a settlement with the White Mountain Apache Tribe.

<sup>2</sup> The AWBA will purchase a senior right to Lower Colorado River water sufficient to firm this 2,500 AFY, using monies from the four-cent tax levied by CAWCD. The State will firm the 2,500 AFY for 100 years. CAWCD will have the use of the acquired water when not needed to firm the 2,500 AFY for the Navajo Nation.

<sup>3</sup> This 2,000 AFY will be firmed in the same manner as for on-River communities under State law, with the State reimbursing the revolving fund for the first 100 years.

<sup>4</sup> This 650 AFY will be firmed in the same manner as for on-River communities under State law, with the State reimbursing the revolving fund for the first 100 years.

tribal reservations. All Colorado River water consumptively used by the tribes (or their lessees) shall be accounted for as if such use had occurred in the Lower Colorado River Basin, regardless of the point of diversion or place of use.

### **C-Aquifer Management and Regulation**

#### **Objective**

Protect good quality C-aquifer ground water for existing and future water uses on the Navajo Reservation, while not unduly restricting C-aquifer ground water use off of the Reservation.

#### **Concepts**

- 1) Establish a C-aquifer Protection Area covering the southwest corner of the Reservation and adjacent areas.
- 2) The Protection Area would be a rectangle centered on the proposed "Triangle" well field south of Leupp. [See *Figure 5 of the 11/21/07 Bill Greenslade memo for the location of the Triangle.*]
- 3) Protection Area A would extend 18 miles north of the southern boundary of the Navajo Reservation and 18 miles south from the southern boundary of the Navajo Reservation, extending from the Coconino County line on the east to the Forest Service Boundary on the west excluding the U 6 Ranch and the southwest corner state trust land parcel (immediately to the west of the Flying M Ranch). Protection Area A contains three zones, starting from the southern boundary of the Navajo Reservation extending south: Zone 1, 0 to 6 miles, Zone 2, 6 to 12 miles, Zone 3, 12 to 18 miles. The following protections apply within each zone.
  - a. Zone 1, 0 to 6 miles:
    - i. Any new non-de minimis wells (greater than 35 gpm) would be prohibited within 2 miles of the southern boundary of the Navajo Reservation within Zone 1.
    - ii. The non-Navajo parties may pump 17,500 AFY within Zone 1, which includes 2,000 AFY pumping by the Hopi Tribe.
  - b. Zone 2, 6 to 12 miles: the non-Navajo parties may pump 17,500 AFY

within Zone 2, which includes 2,000 AFY pumping by the Hopi Tribe.

- c. Zone 3: the non-Navajo parties may pump 15,000 AFY within Zone 3, which includes 2,000 AFY pumping by the Hopi Tribe.
- 4) Protection Area B shall be established east of the Coconino County line along the southern boundary of the Navajo Reservation to the Arizona-New Mexico state line. Protection Area B contains two zones, starting from the southern boundary of the Navajo Reservation extending south: Zone 1, 0 to 2 miles and Zone 2, 2 to 6 miles. The following protections apply within each zone within Protection Area B.
    - i. Zone 1, 0 to 2 miles: Any new non-de minimis wells (greater than 35 gpm) would be prohibited within 2 miles of the southern boundary of the Navajo Reservation within Zone 1.
    - ii. Zone 2, 2 to 6 miles: No pumping from new wells with a capacity greater than 500 gpm for a single use will be permitted within Zone 2, except for the development and operation of mineral estate property within Zone 1 or Zone 2 of Protection Area B, provided that the mineral estate owner commits to refrain from pumping on its mineral estate that is not being developed and operated, absent consent by the Navajo Nation.
  - 5) Protection Area C would extend west from the western boundary of the Navajo Reservation to the Forest Service boundary and from the southwestern corner of the Navajo Reservation north along the western boundary of the Navajo Reservation to the Colorado River. Protection Area C contains two zones, starting from the western boundary of the Navajo Reservation extending west: Zone 1, 0 to 2 miles and Zone 2, 2 to the Forest Service boundary. The following protections apply within each zone within Protection Area C.
    - i. Zone 1, 0 to 2 miles: Any new non-de minimis wells (greater than 35 gpm) would be prohibited within 2 miles of the southern boundary of the Navajo Reservation within Zone 1.
    - ii. Zone 2, 2 miles to the Forest Service boundary: No pumping from new wells with a capacity greater than 500 gpm for a single use will be permitted within Zone 2.
  - 6) Forest Service lands would be excluded from Protection Area C. The Navajo

Nation will make efforts to work out agreements with the Forest Service with similar management and regulation conditions as contained within this Settlement.

- 7) All existing wells within the Protection Areas would be exempt from regulation.
- 8) The amount of future pumping of C-aquifer water supplies within Protection Area A (over and above those referred to in paragraph 7), would not exceed 110,000 acre-feet per year of which, 60,000 acre-feet per year could be pumped on the Navajo Reservation within Protection Area A and 50,000 acre-feet per year could be pumped on off-Reservation lands within Protection Area A.
- 9) Off-Reservation uses by the Navajo Nation within the Protection Area would count against the 60,000 acre-feet per year allocated to the Navajo Nation in paragraph 8.
- 10) Future pumping of C-aquifer water supplies within the off-Reservation portion of Protection Area A would be allocated among the State Parties located within Protection Area A in accordance with paragraph 3 of this Section.
- 11) Future non-de minimis wells would be allowed in Protection Area A as long as the cumulative ground water pumping from such wells does not exceed the limitations in paragraph 8.
- 12) For all Protection Areas, regulation of new non-de minimis wells would be by ADWR for off-Reservation lands and by the Navajo Nation for on-Reservation lands.
- 13) Major pumpers in and near the Protection Areas may elect to collaborate on NEPA and ESA compliance but such collaboration would not be a condition of settlement.
- 14) Off-Reservation pumping will only be regulated under: 1) state law, including the new state law Protection Area provisions specified above, and 2) the settlement agreement(s) among the parties, which will be enforced in the Little Colorado River Adjudication Court.
- 15) On-Reservation pumping will only be regulated under the settlement agreement(s) among the parties, including the Navajo Reservation provisions above, which will be enforced in the Little Colorado River Adjudication Court.

- 16) On off-Reservation lands outside the Protection Areas, the Navajo Nation may not object to pumping from new or existing wells. The Navajo Nation may not object to pumping from wells within the Protection Areas that is in accordance with paragraphs 1 through 15.
- 17) Notwithstanding paragraphs 12 and 14, if the Hopi fee lands are taken into trust by the United States for the Hopi Tribe, administration of pumping on those lands will be by the Hopi Tribe, subject to the jurisdiction of the Little Colorado River Adjudication Court.

### **III. INFRASTRUCTURE:**

#### **1) Western Navajo Pipeline (federal cost $\approx$ \$450 M)**

Federal authorization of approximately \$450 M for the construction cost of a pipeline and related facilities diverting from Lake Powell to serve M&I demands on the Navajo and Hopi reservations. If constructed, the pipeline would serve communities in the western portion of the Navajo Reservation including Lechee, Bitter Springs, Cedar Ridge, Bodaway/The Gap, Tuba City, and Cameron. The Hopi Lateral would connect to the project at Moenkopi to serve Kykotsmovi and other communities. Any additional pipeline capacity or pipeline extension from Cameron to a turn out located off-Reservation at or near Grey Mountain would be constructed at the expense of the party to be benefited by the increased capacity or extension. A feasibility study will be performed for the purpose of identifying the most feasible alternative for delivering Indian and non-Indian water supplies. Any non-Indian entities wanting to participate in the construction of the pipeline shall bear an appropriate share of the costs of the feasibility study or other in-kind contributions as may be agreed upon by the parties participating in the feasibility study. The State Land Department may seek to participate in the construction and use of a portion of the pipeline in the event adequate financing or other contributions can be arranged. The settlement legislation shall provide that the Hopi tribe may transport the water it has acquired from the Cibola Irrigation District through the pipeline to the Hopi Reservation.

#### **2) Ganado Project (federal cost $\approx$ \$60 M)**

Federal authorization of approximately \$60 M for the construction cost of an on-Reservation well field and distribution system diverting from the C-aquifer to serve water demands in the Ganado, Steamboat, Kinlichee, Cornfields, Klagetoh,

and Wide Ruins chapters. Subsequent expansion by NTUA could serve the Lupton and New Lands areas.

**3) Leupp-Dilkon Project** (federal cost  $\approx$  \$90 M)

Federal authorization of approximately \$90 M for the construction cost of an on-Reservation well field and distribution system diverting from the C-aquifer to serve water demands in Leupp, Birdsprings, Dilkon, and neighboring communities. The production wells drilled as part of the Black Mesa Project could be used as part of the project, as well as some of the existing NTUA distribution systems.

- 4) The projects listed above are separate from and in addition to the Northwestern New Mexico Rural Water Projects Act, which would serve Gallup, Window Rock, and other Navajo communities.
- 5) Except as between themselves, neither tribe shall assess any fee, tax or other charge, including right-of-way fees, against any Indian or non-Indian participant for the use of land for the infrastructure contemplated by this settlement or for the delivery of water through such infrastructure. Provided, however, that each participant in the pipeline shall pay an appropriate share of the OM&R costs of the pipeline, as determined by the Bureau of Reclamation.
- 6) The construction and operation of the pipeline shall not be subject to Public Law 93-638. The Bureau of Reclamation shall operate and maintain the pipeline on behalf of all pipeline participants.

**IV. POWER:**

- 1) Power for pumping CAP water through the pipeline may be supplied from the CAP share of the output of the Navajo Generating Station (“NGS”) to the extent that the needs for pumping energy are less than or equal to the amount of energy that would have been needed to deliver such CAP water through the CAP aqueduct system.
- 2) Any additional amounts of energy needed for delivery of water through the pipeline for the benefit of the tribes will be purchased by the tribes or by the United States on their behalf.

**V. OPERATION AND MAINTENANCE COSTS:**

- 1) The CAP fixed OM&R costs associated with the delivery of CAP water through the pipeline will be paid each year to CAWCD. To the extent that CAP water is delivered through the pipeline for the benefit of the tribes, these costs will be paid by the Secretary of the Interior pursuant to 43 U.S.C. § 1543(f)(2)(A), as amended, as long as funds are available in the Lower Colorado River Basin Development Fund, and, thereafter, by the tribes or by the United States on their behalf.<sup>5</sup> To the extent that CAP water is delivered through the pipeline for the benefit of non-Indian participants in the pipeline, such participants shall pay an appropriate share of CAP fixed OM&R costs.<sup>6</sup>
- 2) The fixed OM&R costs associated with the pipeline itself shall be paid by the tribes or by the United States on their behalf. Any non-Indian participants in the pipeline shall pay an appropriate share of the fixed OM&R costs of the pipeline.
- 3) To the extent that NGS power is used to deliver CAP water through the Western Navajo Pipeline, the pumping energy charges will be the same for the Navajos and Hopis (and any non-Indian participants receiving CAP water) as for other CAP water users. Any additional amounts of energy needed for delivery of water through the pipeline for the benefit of the tribes will be purchased by the tribes or by the United States on their behalf. Any additional amounts of energy needed for delivery of water through the pipeline for the benefit of non-Indian participants will be purchased by such non-Indian participants.

## **VI. WAIVERS:**

- 1) In consideration for the foregoing, each tribe shall deliver comprehensive waivers of any and all claims to the waters of the Lower Colorado River, and all claims to surface water and groundwater within the Little Colorado River Basin, which are subject to adjudication in the Little Colorado River Adjudication. These waivers shall include waivers of any and all claims that the tribes may have against other users of these sources of water.

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<sup>5</sup> While this focuses on CAP water delivered through a Western Navajo Pipeline, the same conditions would apply to delivery of CAP water to Window Rock.

<sup>6</sup> Non-Indian participants would also be required to pay a CAP water service capital charge, an in-lieu tax charge and a charge to retire 9(d) debt for any CAP NIA water.



- 2) The Navajo Nation will confirm and extend the right to use water from Arizona's entitlement to the Upper Colorado River to meet the water requirements of NGS for as long as NGS continues in operation.<sup>7</sup>
- 3) The tribes will provide appropriate waivers of claims against the United States and one another.
- 4) The Navajo Nation shall dismiss with prejudice *The Navajo Nation v. United States Department of the Interior*, No. CV-03-0507-PCT-PGR, pending in the United States District Court for the District of Arizona.

## VII. OTHER SETTLEMENT PROVISIONS

- 1) Provide for State implementing legislation, if needed.
- 2) Develop and approve additional abstracts for Hopi ranch uses, if any.
- 3) The Tribes would work with the State Land Department to develop a land consolidation program within the Little Colorado River Basin.
- 4) Congressional authorization to transfer up to [ ] AFY of CAP NIA or other Colorado River water supplies that may be acquired by and delivered through the Western Navajo Pipeline, including 8,500 AFY of water for Flagstaff.
- 5) The agreement in principle between the Navajo Nation and the Hopi Tribe, as to washes and "N aquifer" management is set forth in the attached appendix "A".

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<sup>7</sup> CAWCD believes that other agreements with the Navajo Nation related to the operation of NGS should be similarly extended, particularly inasmuch as NGS will be used, at least in part, to provide power for the delivery of the CAP water through the Western Navajo Pipeline.

## Appendix "A"

### AGREEMENT IN PRINCIPLE BETWEEN THE HOPI TRIBE AND THE NAVAJO NATION AS PART OF A COMPREHENSIVE PLAN TO SETTLE WATER RIGHTS IN THE LOWER COLORADO AND LITTLE COLORADO RIVER BASIN

March 28, 2008

#### I. Washes

The Parties have agreed to a plan for the management of washes common to both Tribes. Components of the Wash Management Plan include:

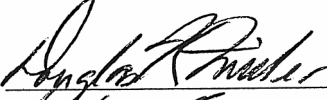
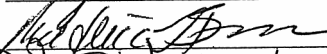
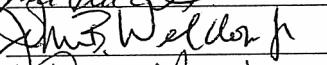
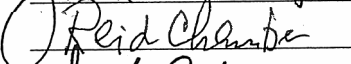

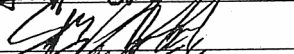
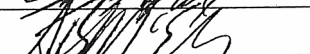
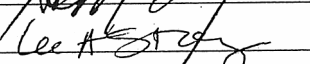
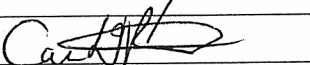
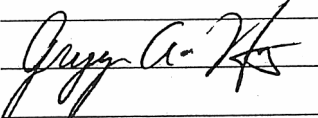
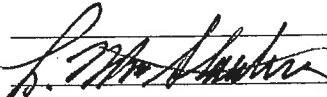
- grandfathering of historic uses
- grandfathering of existing permanent Peabody impoundments
- studying the feasibility and implementation of a proposed Moenkopi Alluvial Project
- constructing the Moenkopi Alluvial Project with Navajo ability to opt-in
- rehabilitating the Kerley Diversion Dam Project
- Locating new Navajo NTUA wells away from Pasture Canyon, the cost of which will be part of the settlement

#### II. N-Aquifer Management

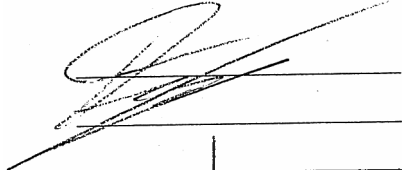
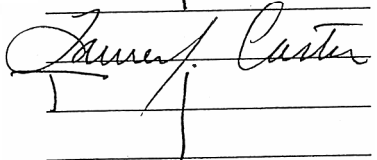
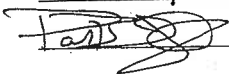
The Parties agree to finalize a plan for management of the N-Aquifer. Components of the N-Aquifer Management Plan include

- prohibiting either tribe from exporting N-aquifer water off either reservation from either the confined or unconfined portion within the LCR basin
- exempting certain wells
- grandfathering existing pumping, including Peabody wells
- allowing development of non-exempt wells subject to
  - well development codes
  - notice and opportunity to object
  - no impairment
- industrial pumping limits
- spring protection
- information sharing

The undersigned attorneys hereby agree to use good faith efforts to review the Agreement in Principle with their respective clients and seek their clients' approval of the same:

Attorney	Name (print)	Representing
	DOUGLAS K. MILLER	CAWCD
	FREDERIC BEESON	SRP
	JOHN B. WELDON, JR	SRP
	Reid Chamber	Hopi
	Scott County	Hopi
	STANLEY POLLACK	NAVAJO NATION
	Scott McElroy	Navajo Nation
	Lee A. Storey	City of Flagstaff
	Carlos Ronstadt	CAWCD
	Gregg A. Houtz	A.DAR
	L. William Staudenmaier	APS

The undersigned attorneys hereby agree to use good faith efforts to review the Agreement in Principle with their respective clients and seek their clients' approval of the same:

Attorney	Name (print)	Representing
	David A. Brown Michael B. Whiting	Brown + Brown
		Winslow
		Show Low
		Holbrook
		Snowflake
		Taylor
		Eagar
		Springerville
		Bar T Bar Ranch
		Crater Ranch
		Flying M Ranch
		A Ztec Land & Cattle
		Brown Rancher
		Dobson Rancher
		Lyman Irr. Co.
		Pioneer Irr. Co.
		Show Low - Pinetop -
		Woodland Irr. Co.
		Silver Creek Irr. Dist.
		Lakeside Irr. Dist.
		Forest Lakes Water Imp. Dist.
		Navopache Hosp. Dist.
	Laurent Pastor	Abitibi Consolidated Sales Corp.
		Arizona Water Co.
		Santa Fe Pacific Railroad Co.
	Patrick B. Sigl	Arizona State Law Dept.