

# Frequently-asked Questions Regarding the Proposed Little Colorado River Water Settlement

May 1, 2012

## 1. General Questions

### **1) What is the proposed Little Colorado River water right settlement?**

The water right settlement is a proposed agreement to settle tribal claims to water from the Little Colorado River and related groundwater. Under the agreement the Hopi Tribe would agree to waive its water rights claims to the Little Colorado River, and would agree not to pursue damages claims for injuries to its water rights or water quality, up until the time the settlement becomes effective. In return, the agreement would confirm the Hopi Tribe's Winters rights to groundwater underlying the Hopi Reservation and to on-reservation washes. The Hopi Tribe would receive funding for infrastructure to supply clean, reliable water to the Hopi villages. The proposed settlement also includes provisions to protect the Hopi Tribe's springs. Next, the proposed water settlement agreement confirms the Hopi Tribe's right to drill replacement Wells for its existing wells on new Hopi lands in the Homolovi District. The Hopi Tribe also could drill new wells on all other lands within the Homolovi District to serve most future development needs. Finally, the proposed agreement would reserve a quantity of water from the mainstem Colorado River to help address the Hopi Tribe's Winters rights claims to the Lower Colorado River.

### **2) What are "Winters rights" claims to water?**

In a case called Winters v. United States, the U.S. Supreme Court ruled that the federal government and an Indian tribe that agrees to live on a reservation have reserved from the public domain -- and from State ownership or control -- sufficient water rights for the intended purposes of that reservation. Indian tribes also reserved "time immemorial" water rights based on continued use and occupancy of a tribe's ancestral home land, which includes all the Hopi villages. These rights often are referred to as "Winters rights."

### **3) Is the Hopi Tribe obligated to support the proposed Little Colorado River water right settlement?**

No. On February 17, 2012, Senator Kyl wrote to Chairman Shingoitewa and requested that a representative of the tribe correspond with Senator Kyl and Senator McCain

indicating that the representative would present the draft settlement to the Hopi Tribal Council for prompt consideration. On March 1, 2012, the Hopi Tribe's representative complied with this request, but the letter explicitly reserves for the Hopi Tribe the right to conduct an independent evaluation of the proposed settlement. In no way is the Hopi Tribe committed to support the settlement or prevented from making an independent decision on the proposed settlement.

***4) Is the Hopi Tribe obligated to support S. 2109 if the Tribe agrees to support the settlement agreement?***

No. Senator Kyl introduced S. 2109, the federal implementing legislation for the water rights settlement on February 14, 2012, before negotiators completed their work on the settlement agreement. There are a few provisions in S. 2109 that are not included in the settlement agreement. The Hopi Tribe will continue to work to modify certain portions of the implementing legislation even if the Tribe decides to support the settlement agreement.

**2. Hopi Water Rights Claim and Settlement Goals**

***5) How much water is the Hopi Tribe claiming from the Little Colorado River Basin?***

The Hopi Tribe is claiming enough water to meet its present and future needs, including enough water to maintain the Hopi Reservation as a permanent homeland for the Hopi people.

***6) What are the Hopi Tribe's goals and objectives for the settlement negotiations?***

The Hopi Tribe's goal for the settlement negotiations is to secure an adequate, reliable water supply for present and future generations. The Tribe's objectives are as follows:

- 1) Protect Hopi water supplies, including culturally-important springs;
- 2) Provide water supply infrastructure for Hopi villages;
- 3) Provide water for new lands in the Homolovi District, which were acquired by the Hopi Tribe under the 1996 Navajo-Hopi Land Dispute Settlement Act; and
- 4) Preserve the Hopi Tribe's claims to the mainstem Colorado River as a backup water supply to meet the Hopi Tribe's future needs.

***7) Does the proposed settlement provide a specific quantity of water for the Hopi Tribe?***

No. The proposed settlement agreement confirms the Hopi Tribe's right to use underground water within the Hopi Reservation and all of the surface water that reaches the Hopi Reservation without establishing a specific overall water use limitation,

but also includes reciprocal protections between the Hopi Tribe and the Navajo Nation to protect N-aquifer and surface water uses on both reservations. The protections include:

- The proposed settlement includes an N-Aquifer Management Plan, which is intended to protect existing wells and other water sources developed by one tribe from interference caused by new wells drilled by the other tribe. The N-aquifer Management Plan can be modified by the two Tribes, but only if both Tribes agree on the changes. If they can't agree on changes, then either Tribe can invoke dispute resolution procedures that can end up with the LCR Adjudication Court resolving the disagreement based on the general purposes and goals of the N-Aquifer Management Plan and the facts presented. Also, both tribes are limited to 2,000 acre-feet of water of N-aquifer groundwater each year for industrial uses unless the other tribe agrees to an exception.
- The proposed settlement limits new surface water impoundments on the Navajo Reservation upstream of the Hopi Reservation, and new surface water impoundments on the Hopi Reservation upstream of the Navajo Reservation. These provisions are designed to protect both tribes from significant new uses of surface runoff by upstream water users.

The proposed settlement also would confirm existing surface and underground water rights for new Hopi lands outside of the Hopi Reservation, including lands that are acquired in the future under the 1996 Navajo-Hopi Land Dispute Settlement Act. The Hopi Tribe would be able to pump groundwater on these lands, including establishing new wells on most of the new lands with no pumping restrictions, but would not be able to initiate new surface water diversions on them. The proposed settlement would restrict groundwater pumping on certain Hopi lands near the southwest part of the Navajo Reservation.

Finally, the proposed settlement would reserve 2,500 acre-feet of water from the mainstem Colorado River for a future settlement of the Hopi Tribe's claims to the Lower Colorado River, but would not allocate water to the Hopi Tribe until after the tribe agreed to a Lower Colorado River settlement.

### **3. Waivers**

#### ***8) Does the proposed settlement require the Hopi Tribe to waive its Winters rights claims?***

The proposed settlement would require the Tribe to waive its claims to surface water from the Little Colorado River, but only in exchange for the complete benefits called for in the settlement. The proposed settlement agreement would confirm the Hopi Tribe's Winters rights to on-reservation surface water and to its groundwater supplies. The

settlement agreement also would reserve the tribe's claim to water from the mainstem Colorado River.

**9) Does the proposed settlement require the Hopi Tribe to waive its water rights to the mainstem Colorado River?**

No. The Hopi Tribe specifically reserves its claim to water rights from the Lower Colorado River. Furthermore, the definitions in the settlement agreement for water rights claims that are subject to the waivers do not include either the Lower Colorado River or the Upper Colorado River. Also, the settlement agreement reserves 2,500 acre-feet of Colorado River water annually for a future settlement of the Hopi Tribe's Lower Colorado River Winters rights claims. The proposed settlement does not explicitly address the Hopi Tribe's water rights claim for the Upper Colorado River.

**10) Does the proposed settlement prevent the Hopi Tribe from protecting water quality on the Hopi Reservation?**

No. The proposed settlement agreement would require the Hopi Tribe to waive damages claims for injury to water rights or to water quality up to the enforceability date. The tribe is not required to waive claims for injuries that occur after the enforceability date except to the extent such claims are based on aboriginal occupancy of the land. The settlement agreement explicitly reserves the authority of the Hopi Tribe to seek enforcement of federal environmental laws, including specifically the Clean Water Act and the Safe Drinking Water Act.

**11) Does the proposed settlement require the Hopi Tribe to execute waivers before funding is secured for the Hopi Groundwater Project?**

No. The Hopi Tribe would not be required to execute waivers for its Little Colorado River claims until after Congress approves all funding to implement the proposed settlement and the U.S. Secretary of the Interior is ready to start construction of the tribal groundwater projects.

#### **4. Future Water Supply**

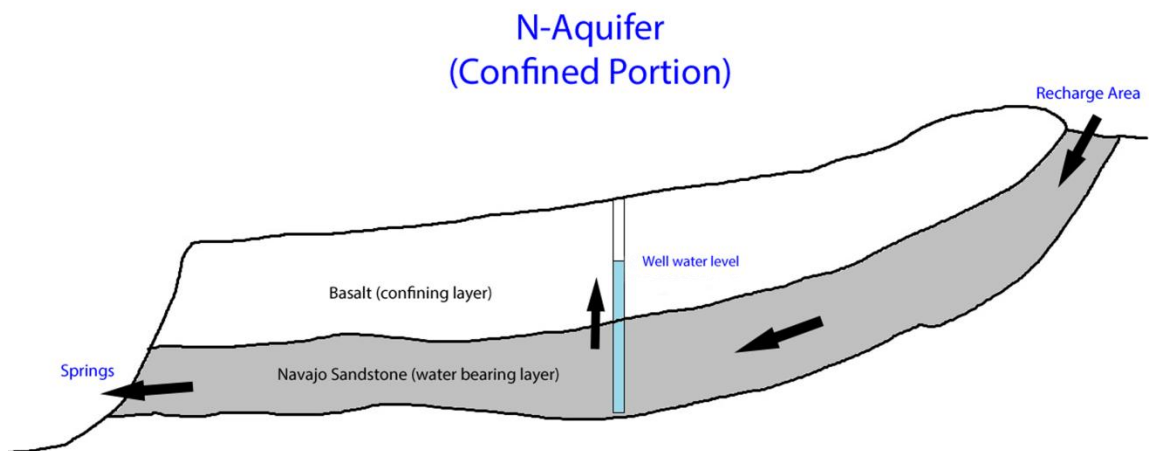
**12) What is an "aquifer"?**

An **aquifer** is an underground layer of permeable rock (such as sandstone or porous limestone), sediment (usually sand or gravel), or soil that yields water. The pore spaces in aquifers are filled with water and are interconnected, so that water flows through them. The largest and most productive aquifer beneath the Hopi Villages is the Navajo Sandstone Aquifer, referred to as the N-aquifer. Beneath the new lands (Homolovi

District), the main aquifer is the Coconino Sandstone Aquifer, referred to as the C-aquifer.

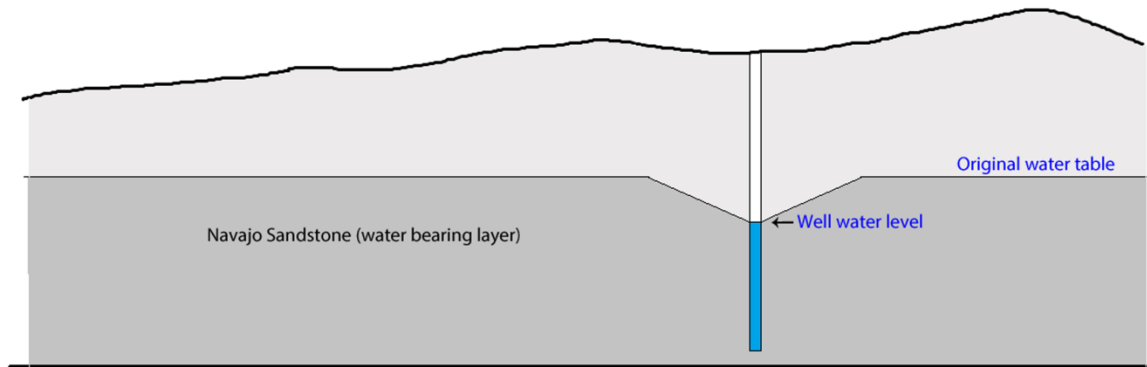
**13) What is the difference between a “confined” aquifer and an “unconfined” aquifer?**

A **confined aquifer** is an aquifer that is below a confining layer, often made up of basalt or clay. The confining layer often consists of shale or clay, which is nearly impermeable to water. Recharge in to a confined aquifer is limited to specific areas where the confining layer is fractured or non-existent. The groundwater that exists in the aquifer below the confining layer is under pressure from the weight of the confining layer and, if the aquifer is penetrated by a well, the water level in the well will rise above the top of the aquifer due to the pressure. The N-aquifer beneath much of the Hopi Reservation, such as beneath the villages and the Peabody Lease area, is a confined aquifer.



An **unconfined aquifer** is one that is open to receive water from the surface, and whose water table surface is free to fluctuate up and down, depending on the recharge and discharge rates. There is no overlying confining layer above an unconfined aquifer. The water table in an unconfined aquifer represents the top of the zone of saturation, below which all of the pores and open spaces in between grains of sand and gravel are entirely filled with water. Recharge is not limited to a specific area but can occur anywhere across the entire surface area by infiltrating rain water. This type of aquifer occurs in the Navajo Sandstone in the Tuba City and Moenkopi areas, and in the Coconino Sandstone beneath the new lands.

## N Aquifer (Unconfined Portion)



The drawdown caused by pumping a well occurs differently in confined and unconfined aquifers. The “drawdown” is the lowering of water levels in an aquifer caused by pumping. For a given pumping rate, in confined aquifers the drawdown occurs more rapidly and extends to greater distances from the pumping well than that it does in unconfined aquifers.

### **14) Does the proposed settlement place restrictions on the Hopi Tribe’s use of its on-reservation groundwater supplies?**

Yes. The proposed settlement agreement prevents both tribes from exporting water from the N-aquifer outside of their respective reservations. The settlement agreement also limits industrial uses of water from the confined portion of the N-aquifer to 2,000 acre-feet annually for each tribe. This limit does not include the water currently used by Peabody Western Coal Company for mining.

### **15) Does the proposed settlement protect Hopi springs?**

Yes. The proposed settlement includes the following measures to protect springs on Hopi lands:

- N-aquifer Management Plan would include specific measures to protect culturally-significant springs;
- 1.5-mile buffer would prevent new well drilling around springs near the Hopi Reservation boundary, unless the Hopi Tribe consents to a well;
- 2.3-mile buffer would prevent new well drilling around Pasture Canyon springs, unless the Hopi Tribe consents to a new well; and
- Congress would appropriate \$10.4 million to relocate existing Tuba City wells to prevent the wells from interfering with spring flows in Pasture Canyon.

**16) Does the proposed settlement provide funding for water supply infrastructure for the Hopi Tribe?**

Yes. The proposed settlement would provide approximately \$113.5 million to construct the Hopi Groundwater Project. The project would include construction of the “Hopi Lateral Pipeline,” which is a large-diameter water transmission line between Moenkopi and Keams Canyon, new wells near Howell Mesa, and water system improvements at Hopi villages. Funding for the Hopi Groundwater Project is subject to approval by Congress after the settlement is ratified by the tribes and the settlement legislation is approved by Congress. The Hopi Tribe would not need to waive its Winters rights claims to the Little Colorado River or other claims until all of the funds are approved by Congress and the Interior Secretary has approved project construction.

**17) Will the Hopi Tribe’s future water supply be limited by the capacity of the Hopi Groundwater Project?**

No. The capacity of the Hopi Lateral Pipeline would not limit the amount of water the Hopi Tribe could use from the N-aquifer. Also, the pipeline would be designed so that its capacity could be expanded if and when a pipeline is constructed from the mainstem Colorado River to Tuba City and Moenkopi.

**18) How will the Hopi Tribe manage the Hopi Lateral Pipeline and village water system improvements?**

The Hopi Tribal Council has not yet made any decisions about how to manage the Hopi Groundwater Project. The Hopi Tribe probably would need to establish a tribal water utility authority or commission to manage the Hopi Lateral Pipeline. Even so, each village probably would continue to manage its own water system.

**19) How will the Hopi Tribe pay for operations, maintenance and replacement for the Hopi Groundwater Project?**

The proposed settlement includes \$5 million for initial operations and maintenance costs for the Hopi Groundwater Project. The proposed settlement also allows the Tribe to use interest from the project account and construction savings from the project for operations and maintenance. The Tribe could augment this amount with customer service charges or other sources of revenue.

**20) Does the proposed settlement provide water supplies for the new lands (Homolovi District lands)?**

Yes. The Hopi Tribe received funding under the 1996 Navajo-Hopi Land Dispute Settlement Act to buy land to compensate the Hopi Tribe for leasing Hopi Partitioned

Land to Navajo families under terms of the 1996 land dispute settlement. The lands are referred to in the 1996 settlement as “new lands,” and are located south of the Navajo Reservation in an area sometimes referred to by the Hopi Tribe as the “Homolovi District.” The proposed water settlement agreement allows the Hopi Tribe to drill replacement Wells for its existing wells on Hopi “new lands” in the Homolovi District. This provision allows the Hopi Tribe to develop a new water supply within a two-mile-wide strip in the Homolovi District where wells otherwise could not be drilled under previous versions of the settlement proposal. The Hopi Tribe could drill new wells on all other lands within the Homolovi District to serve most future development needs.

## **5. Affected Parties and Interests**

### ***21) Are the Navajo Nation’s water rights affected by the proposed settlement?***

Yes. The proposed settlement also would include settlement of the Navajo Nation’s claims to the Little Colorado River. The Navajo Nation’s future water use from the N-aquifer also would be limited by the N-Aquifer Management Plan. Development of new Navajo Nation surface water storage on washes upstream of the Hopi Reservation would also be substantially limited. The Navajo Nation also must approve the settlement agreement.

### ***22) Are there any water uses that are not affected by the proposed settlement?***

Yes. Water use from existing wells (Hopi and Navajo) would not be affected by the proposed agreement. Second, water use by Peabody Coal Company would not be affected. Finally, water use from exempt wells (i.e., those wells producing 35 gallons per minute or less) would not be affected.

### ***23) Why did the Central Arizona Water Conservation District participate in the settlement negotiations?***

The Central Arizona Water Conservation District (CAWCD) does not have water rights claims to the Little Colorado River or related groundwater, but the CAWCD will be affected by the settlement. First, the CAWCD manages the water from the Central Arizona Project (CAP) to supply water for all of its tribal and non-tribal customers. The settlement agreement allocates CAP water to the Navajo Nation under the terms of the previous settlement of its claims to the San Juan River. The proposed settlement agreement also reserves CAP water for use to satisfy future Hopi and Navajo claims to the Lower Colorado River.



**24) Does the proposed settlement require the Hopi Tribe to support the Navajo Generating Station (NGS)?**

No. There is no requirement that the Hopi Tribe expand its existing Peabody lease or issue a new lease to Peabody. It is possible that Peabody would secure its coal supply from its existing coal leases or a new lease on Navajo Reservation land. In any case, the Hopi Little Colorado River water settlement and the Little Colorado River-aspects of the Navajo water settlement are not dependent on the extension of the NGS lease and the other NGS conditions.

**25) Does the proposed settlement obligate the Hopi Tribe to continue Peabody's coal mining operation?**

No. The settlement proposal does not obligate the Hopi Tribe to lease coal for Peabody's mining operation nor does it require the Hopi Tribe to provide any water for the coal mining operation.

**26) Does the proposed settlement require the Navajo Nation to support the Navajo Generating Station (NGS)?**

No, but the proposed implementing legislation does. In fact, the proposed legislation would establish a number of conditions that support extension of NGS operations until 2044, all of which must occur if the Navajo Nation is to obtain the right to water delivered from the San Juan River for use in the Window Rock area of Arizona. The conditions include, for instance, the renewal of the NGS project lease by the Navajo Nation, federal extension of certain rights of way needed for NGS operations, and extension of the Bureau of Reclamation water contract for NGS. One condition is that the Secretary find that Peabody has leased sufficient coal – either from the Navajo Tribe or from a combination of the Navajo and Hopi Tribes – in sufficient quantity and quality for NGS to operate through 2044, but the Hopi settlement and the LCR portion of the Navajo settlement don't depend on such a lease.

**27) What is the relationship between the proposed Little Colorado River water rights settlement and the Arizona Water Settlement Act of 2004?**

The 2004 Arizona Water Settlement Act provided a framework for future Indian water settlements. Specifically, the Act reserved a specific quantity of water from the Central Arizona Project (CAP) to help address future settlements for all Arizona tribes. The proposed Little Colorado River water settlement reserves a portion of that CAP water to satisfy future Lower Colorado River water settlements for the Hopi Tribe and the Navajo Nation. Title II of the proposed Little Colorado River Water Rights Settlement Act also

provides for delivery from the San Juan River of CAP water reserved for the Navajo Nation under the 2004 settlement legislation.

**28) What is the relationship between the proposed Little Colorado River water rights settlement and the Boulder Canyon Project?**

The proposed water settlement is not related to the Boulder Canyon Project.

**6. What's Next?**

**29) What is the process for approval of the proposed water settlement?**

The Hopi Tribal Council will continue to discuss the pros and cons of the settlement with Hopi tribal members. The Tribal Council soon will consider a resolution regarding the settlement. Congress also must pass legislation to ratify and implement the settlement. Finally, the President of the United States must approve the legislation.

**30) What happens to the Little Colorado adjudication if the Hopi Tribe approves the proposed settlement?**

Under the terms of the settlement agreement the parties would seek a stay of the Little Colorado adjudication proceedings within 30 days after the "execution date," which is a date upon which both tribes and most of the non-Indian parties have signed the agreement.

**31) What happens if the Hopi Tribe does not approve the proposed settlement?**

There are several consequences if the Hopi Tribal Council does not approve the settlement agreement. First, it is important to recognize the distinction between Winters rights, which would be confirmed in the settlement, and claims, which must be confirmed by a court. The proposed settlement would confirm the Hopi Tribe's Winters rights claims to on-reservation resources, including groundwater, but without the settlement the Tribe would be forced to assert and defend its water rights claims in the Little Colorado River adjudication. Second, the Tribe would need to find another funding source for a Hopi water system. Finally, there would be no agreed-upon protection program for the N-aquifer. Ultimately, the Tribe may seek to curtail Navajo water use from the N-aquifer to protect its groundwater supplies, but it could be many years of litigation before such an effort was successful, and even then it may be difficult to prevent continuing harm from then-existing wells.