

BFJY-38-05

RESOLUTION OF THE
BUDGET AND FINANCE COMMITTEE
OF THE 20TH NAVAJO NATION COUNCIL -- Third Year

AN ACTION


Relating to Budget and Finance and Natural Resources; Navajo Nation Water Rights Claim Fund; Approving the Comprehensive Fund Management Plan for the Water Rights Claim Fund.

BE IT ENACTED:

1. The Navajo Nation hereby approves the Comprehensive Fund Management Plan for the Water Rights Claim Fund, attached hereto and incorporated herein as Exhibit "A".
2. All Navajo Nation commissions, divisions, departments, and offices which are responsible for the implementation of the Comprehensive Fund Management Plan for the Water Rights Claim Fund, including but not limited to the Navajo Nation Water Rights Commission, the Office of the Controller, the Office of Management and Budget, and the Office of the Attorney General, are hereby authorized to do all things necessary to effectuate and carry out the intent of this resolution.

CERTIFICATION

I hereby certify that the foregoing resolution was duly considered by the Budget and Finance Committee of the Navajo Nation Council at a duly called meeting held at Window Rock, Navajo Nation (Arizona), at which a quorum was present and that the same was passed by a vote of 3 in favor and 2 opposed, this 5th day of July, 2005.


Bennie Shelly, Chairperson
Budget and Finance Committee

Motion: Ernest Hubbell
Second: Lorenzo Bedonie

Legislation No. 0166-05

1
2 COMPREHENSIVE FUND MANAGEMENT PLAN
3 FOR THE WATER RIGHTS CLAIM FUND
4 ESTABLISHED BY CMY-47-02
5

6 INTRODUCTION:

7 The Navajo Nation Council established the Water Rights Claim Fund pursuant to
8 Resolution CMY-47-02. The purpose of that fund is to address the financial support for the
9 pursuit of water rights claims on behalf of the Navajo Nation and to support financially the
10 creation of the Navajo Nation Water Rights Commission's activities in furtherance of the
11 Nation's water rights claims. This *Fund Management Plan* further implements the intent of the
12 Navajo Nation Council Resolutions CAP-39-02 and CMY-47-02. This plan shall be deemed to
13 replace the expenditure plan previously adopted by Budget and Finance Committee of the
14 Navajo Nation Council Resolution No. BFN-189-03.

15
16 I. Funding of the Water Rights Claim Funds:

17 The Water Rights Claim Fund was established by the Navajo Nation pursuant to
18 Resolution CMY-47-02 on May 20, 2002. That resolution and the enabling legislation attached
19 thereto provide:

- 20 a. That the Navajo Nation Council shall appropriate no less than \$2,000,000.00 each
21 year during the annual operating budget appropriation into the Water Rights
22 Claim Fund; and
23 b. Funds appropriated into the Water Rights Claim Fund shall not lapse on an annual
24 basis pursuant to 12 N.N.C. § 820 (N) but shall be a continuing appropriation,
25 available until expended.

26 During the Fiscal Year 2003 annual operating budget appropriation process,
27 \$2,100,000.00 was appropriated and in the Fiscal Year 2004, \$2,000,000.00 was appropriated
28 into the Water Rights Claim Fund.

1 II. Water Rights Claims Fund Operations

2 As provided for in Resolution CMY-47-02, and the Plan of Operation for the Navajo
3 Nation Water Rights Commission (as amended by Government Service Committee Resolution
4 GSCAP-07-04), the Water Rights Commission has approved by Resolution No. NNWRC-006-
5 04 the expenditure of funds from the Water Rights Claim Fund in the amount of \$2,000,000.00.
6 All funds to date have been allocated to the operation of the Commission or the pursuit of water
7 rights claims by the Department of Water Management Branch, Department of Water Resources,
8 Division of Natural Resources and the Department of Justice. The prior allocation of funds from
9 the Water Rights Claim Fund was made pursuant to the procedures set forth in Budget and
10 Finance Committee Resolution No. BFN-189-03.

11 II

12 III. Use of the Water Rights Claim Funds

13 The principal reason for the establishment of the Water Rights Claim Fund is to
14 provide assured annual funding for the protection of the Nation's water rights in the State of
15 Arizona, New Mexico and Utah, including but not limited to the diligent pursuit and protection
16 of the Nation's rights in the Little Colorado River, the Colorado River Main Stem, the San Juan
17 River in Utah and the San Juan River in New Mexico.

18 The Navajo Nation Water Rights Commission shall establish the policies and priorities
19 for the expenditure of the Fund as follows:

- 20 a. the development and filing of claims in any jurisdiction, the pursuit and resolution
21 of such claims through adjudication or settlement, including the development of
22 any legislation before any state, tribal, local legislative body or the Congress of
23 the United States to implement a settlement of an adjudication and to take any
24 action necessary to perfect a Navajo Nation Water Right; and
25 b. the establishment and operation of any support program or departments that the
26 Water Rights Commission deems necessary to pursue and protect the water rights
27 of the Navajo Nation; and
28 c. any and all actions deemed necessary by the Water Rights Commission to further
29 the purposes stated herein.
30 d. Attached as Exhibit "A" and incorporated by reference is the Navajo Nation

1 Water Rights Commission's Prioritized Long-Term Strategy Plan for the pursuit
2 of the Nation's water rights.

3
4 IV. Water Rights Claim Fund Expenditure Plan Confidential

5 Since the annual budget expenditure plans of the Water Rights Claim Fund have a direct
6 correlation to the legal rights and claims made by the Navajo Nation, any and all detailed
7 information contained in budgets or expenditure reports of the Water Rights Claim Fund shall be
8 deemed to be confidential and the subject of attorney-client privilege. Said detailed budget or
9 expenditure information shall not be released, posted or made public in any fashion by any
10 Navajo Nation elected official, employee or contractor or other person without the prior written
11 consent of the Attorney General of the Navajo Nation pursuant to 2 N.N.C. § 1964 (G). The
12 total lump sum amount of the annual appropriation made by the Navajo Nation Council, without
13 any reference to how that amount or any portion thereof is allocated, may be released by the
14 Controller of the Navajo Nation pursuant to a written request.

15
16 V. Expenditures from the Water Rights Claim Fund

17 The Water Rights Claim Fund was established by the Navajo Nation Council to achieve a
18 highly specialized and unique purpose as set forth in CMY-47-02 and its attachments. Likewise
19 the Navajo Nation Council created the Navajo Nation Water Rights Commission pursuant to
20 CAP-39-02 and directed that a Plan of Operation be developed for that Commission.
21 Resolutions CAP-39-02 and CMY-47-02 must be read together to develop and fully implement
22 the intentions of the Navajo Nation Council. To that end the principal responsibility for the
23 management and expenditure of the Water Rights Claim Fund resides in the Navajo Nation
24 Water Rights Commission. To ensure that the Water Rights Claim Fund is treated in a manner
25 consistent with Resolution CMY-47-02 and to ensure that the Water Rights Commission's
26 specific delegated authority to allocate funds from the Water Rights Claim Fund is preserved.
27 The budgets submitted to the Standing Committees of the Navajo Nation Council and the entire
28 Navajo Nation Council shall be viewed as and treated as a comprehensive Water Rights Claim
29 Funds budget.

1 a. Annual Appropriations.

2 The Navajo Nation Council has committed to appropriate no less than
3 \$2,000,000.00 annually into the Water Rights Claim Fund pursuant to Resolution
4 CMY-47-02. In support of this requirement, prior to the appropriation the Navajo
5 Nation Water Rights Commission shall submit anticipated budgets indicating the
6 anticipated allocations for the upcoming fiscal year. The level of detail for each
7 of the program amounts anticipated to be allocated by the Commission shall be
8 the complete set of budget forms contained in the annual Budget Instructions and
9 Policies Manual (BIPM) approved by the Budget and Finance Committee of the
10 Navajo Nation or its equivalent. Said anticipated detailed budget documents shall
11 be presented to the Resources Committee of the Navajo Nation Council in
12 Executive Session and the Budget and Finance Committee of the Navajo Nation
13 Council in Executive Session, and to no other Committees, in order to support the
14 annual appropriation by the Navajo Nation Council of not less than
15 \$2,000,000.00. These anticipated detailed budgets shall not be included in any
16 budget development process other than the process outlined in this
17 Comprehensive Fund Management Plan and in any related policies and
18 procedures developed by the Navajo Nation Water Rights Commission. Budgets
19 developed for purposes of seeking and receiving an allocation from the Water
20 Rights Claim Fund shall not be processed, released, or included in any other
21 budget development process. In light of the unique power to allocate provided by
22 the Council, the Committees are limited to a review of the anticipated budgets; the
23 Committees do not have the authority to approve, disapprove, or take any action
24 on the anticipated detailed budgets. The confidential nature of these budgets will
25 be maintained as set forth in Section IV of this Plan.

26 The submission of budget forms, as set forth above, accomplishes several
27 important issues while harmonizing several distinct statutory mandates. This
28 approach will ensure compliance with the Appropriations Act, 12 NNC § 800 et
29 seq., while preserving as confidential the nature of the Water Rights Claim Fund
30 allocations. Simultaneously this approach preserves the Navajo Nation Council's

1 statutory mandate that the Water Rights Commission allocate these funds, as
2 provided for in Resolutions CAP-39-02 and CMY-47-02.

3 b. Allocation of Expenditures by the Water Rights Commission.

4 Following the appropriation of funds by the Navajo Nation Council, but before
5 the beginning of the Fiscal Year for which funds are appropriated, all programs
6 seeking an allocation from the Water Rights Claim Fund shall complete budgets
7 utilizing the complete set of budget forms and associated instructions as contained
8 in the annual BIPM or its equivalent. These budgets will be submitted to the
9 Office of Management and Budget for review to ensure consistency with
10 Performance Budgeting, Financial Management Information System Budgeting,
11 Chart of Accounts and Account Level of Detail, Navajo Nation Personnel
12 Expenses, and Navajo Nation Operating Expenses. The Water Rights
13 Commission by passage of resolution(s) shall approve the budget. All programs
14 seeking an allocation from the Water Rights Claim Fund will follow only this
15 Comprehensive Fund Management Plan and any related policies and procedures
16 developed by the Navajo Nation Water Rights Commission. Budgets developed
17 for purposes of seeking and receiving an allocation from the Water Rights Claim
18 Fund shall not be processed, released, or included in any other budget
19 development process. Those budgets approved by the Water Rights Commission
20 shall be forwarded to the Office of Management Budget and the Office of the
21 Controller for use in the Fiscal Year in which funds were appropriated for the
22 Water Rights Claim Fund. The Office of Management and Budget and Office of
23 the Controller shall maintain the confidential nature of these budgets as set forth
24 in Section IV of this Plan.

25 c. Continuing Use of Previously Allocated Funds.

26 At the close of any Fiscal Year, those funds previously allocated by the Water
27 Rights Commission shall continue to be available for use consistent with the
28 original allocation, without further justification.
29
30

1 d. Transfer of Funds

2 To the extent that any recipient of such an allocation wants to transfer funds
3 within a program's budget, the program proposing to transfer funds will require
4 the approval of the program's Division Director, or equivalent, and the OMB
5 Executive Director's approval as to form. In addition, for transfers in excess of
6 \$1,000, the program must provide the Water Rights Commission a detailed
7 budget along with a narrative report that supports said transfer and a Navajo
8 Nation Water Rights Commission resolution in support of the transfer. Upon
9 passage of such a resolution, such transfer of funds may occur by adjusting the
10 current year budget based on the resolution approved by the Commission.

11 e. Reallocation of Funds.

12 To the extent that any recipient of such an allocation wants to reallocate funds
13 from one program budget to another, the Water Rights Commission must receive
14 a detailed budget along with a narrative report that supports said reallocation and
15 a resolution in the form specified by the Commission from the program seeking
16 the allocation. The program from which funds will be reallocated will also need
17 to express its support of the reallocation. Upon passage of such a resolution, such
18 reallocation of funds may occur by adjusting the current year budget based on the
19 resolution approved by the Commission (adding the re-allocated funds to the
20 current year budgets).

21 f. Investment of Funds.

22 As provided for in the legislation establishing the Water Rights Claim Fund, a
23 portion of the funds appropriated by the Navajo Nation Council may be invested
24 for any purpose consistent with the purposes for which the Water Rights Claim
25 fund was established. Said investments shall be managed by the Controller of the
26 Navajo Nation and shall be invested in a manner consistent with the Navajo
27 Nation Investment Policies. At any point in time when the Controller determines
28 that the amount of funds available in the fund exceeds the amount budgeted for
29 the then current fiscal year, the Controller may invest the amount that exceeds
30 current needs in short term investments managed by the Office of the Controller.

1 The Office of the Controller will review the cash availability in the fund to keep
2 sufficient funds available to cover anticipated expenses.

3 g. Audit of the Water Rights Claims Fund.

4 The Water Rights Claim Fund shall be audited as a part of the annual audit, of the
5 Navajo Nation as required by the enabling legislation. Following the acceptance
6 of the Navajo Nation's Annual Audit report by the Navajo Nation Council based
7 upon the recommendation of the Budget and Finance Committee of the Navajo
8 Nation Council, but prior to December 31 of each year, the Controller shall meet
9 with the Water Rights Commission and review that portion of the Navajo Nation
10 Audit that pertains to the Water Rights Claims Fund.

11
12 VI. Prioritization of Fund Allocations and Expenditures

13 In order to ensure that the Water Rights Claim Fund is focused upon priority needs of the
14 Navajo Nation, the Navajo Nation Water Rights Commission shall periodically, at least once
15 every two years, not later than May 31 of any two year period, re-evaluate priorities for the
16 allocation and expenditure of the Water Rights Claim Fund. The priorities established by the
17 Water Rights Commission shall be relied upon by all programs and offices of the Navajo Nation
18 that may seek an allocation of funds from the Water Rights Claim Fund.

19
20 VII. Reporting on the Water Rights Claim Fund Activities.

21 The Water Rights Commission, through its Chairperson or designee, shall report at least
22 semi-annually to the Resources Committee of the Navajo Nation Council, the Budget and
23 Finance Committee of the Navajo Nation Council, and the President of the Navajo Nation. The
24 focus of the report shall be substantive in nature and principally relate to the Nation's
25 accomplishments in the pursuit of the Nation's water rights claims. The focus of the report to the
26 Budget and Finance Committee shall be on the budget, expenditures, and performance of the
27 Water Rights Claim Fund and how the budget relates to the expenditures. Since these reports
28 may be sensitive in nature and relate to on-going litigation, each committee should consider
29 conducting these meetings in an Executive Session. At any time, by written agreement between
30

1 either of the Standing Committees and the Water Rights Commission, these reports may be made
2 by means of a written document.

3
4 VII. Amendments

5 This Plan may be amended based upon recommendations of the Navajo Nation Water
6 Rights Commission and upon approval of the proposed amendments by the Resources
7 Committee of the Navajo Nation Council and the Budget and Finance Committee of the Navajo
8 Nation Council.



NAVAJO NATION WATER RIGHTS COMMISSION

RAY GILMORE
CHAIRMAN

**NAVAJO NATION
WATER RIGHTS COMMISSION**

**PRIORITIZED LONG-TERM
STRATEGY DOCUMENT**

**Revised
September 9, 2004**

OVERVIEW

Navajo Nation Water Rights Commission. On April 24, 2002 the Navajo Nation Council adopted the enabling legislation for the Navajo Nation Water Rights Commission (Commission) (CAP-39-02).

Navajo Nation Water Rights Claim Fund. On May 17, 2002 the Navajo Nation Council resolved that water rights claims must be placed as a top priority of the Navajo government and the Council established the Navajo Nation Water Rights Claim Fund (Fund) (CMY-47-02). The Navajo Nation Council resolved to appropriate no less than \$2,000,000 per year for the Fund to protect the Nation's water rights in the States of Arizona, Utah and New Mexico and to diligently pursue the Navajo Nation's water rights in the Little Colorado River, Colorado River Main Stem, San Juan River in Utah and San Juan River in New Mexico. This Fund will be expended pursuant to a Fund Expenditure Plan (Expenditure Plan). The Commission has been directed by the Council to establish the priorities for the expenditure of the Fund, and to promulgate the procedures for the use of money from the Fund (BFAP-33-02 and RCAP-43-02).

THE NAVAJO NATION'S WATER RIGHTS

Nature of the Navajo Nation's Water Rights. The Nation possesses extensive water rights which are largely unquantified. The Navajo Nation claims historic, appropriative and reserved rights to the use of all the water necessary for the Navajo Reservation to be the permanent homeland for the Navajo people. Such rights to water have been judicially recognized by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564, 567 (1908) and more recently by the Arizona Supreme Court in *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P. 3d 68, 76 (2001). These rights are not lost through non-use and cannot be abandoned.

Measure of the Right (PIA). The United States Supreme Court recognized that water so reserved "was intended to satisfy the future as well as the present needs of the Indian Reservations . . ." *Arizona V. California*, 373 U.S. 546, 600 (1963). Stated another way, the water was reserved "to make the Reservations livable . . ." In order to quantify the water rights of the five Indian tribes below Lake Mead, the Supreme Court adopted the Practicably Irrigable Acreage (PIA) standard. The water rights for these tribes were quantified based on the water necessary to irrigate the "practicably irrigable acreage" on the five reservations. Under this test, it is necessary to develop technical studies to present a claim, including:

- History - Was the reservation created to develop agriculture?
- Hydrology - Is water available?
- Soil Classification - Are soils arable?
- Engineering - Can the water systems be developed?
- On-Farm Design - Can the farm systems be developed?
- Agronomy - Can the crops be grown?
- Market Studies - Is there a market for the crops?
- Economics - Is the proposed project economically defensible?

Water Rights for Non-Agricultural Uses. A more difficult issue is the extent to which water has been reserved for the benefit of tribes for non-agricultural uses. The Arizona Supreme Court recently held that PIA is not the exclusive quantification measure for determining water rights on Indian lands, and the quantity of water reserved must satisfy both present and future needs of the reservation as a livable homeland. *In Re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P. 3d 68, 76 (Ariz. 2001).

General Stream Adjudications. Water rights are quantified through lawsuits known as general stream adjudications. The Navajo Nation is located almost entirely within the Colorado River Basin. There is no single general stream adjudication for the entire Colorado River. Instead, general stream adjudications exist for various sub-basins within the Colorado River system, on a state-by-state basis. State courts have jurisdiction to adjudicate Indian water claims by virtue of the McCarran Amendment which allows the United States to be sued in state court for the purpose of quantifying federal and tribal water rights in a general stream adjudication. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). The Navajo Nation is currently a party in five general stream adjudications. Because of the vast size of the Navajo Nation, its water rights cannot be quantified in a single adjudication.

Water Rights Litigation and Negotiation Strategies. The litigation of the Navajo Nation's water rights may take decades and cost many millions of dollars. In the following sections the key components of each general stream adjudication by basin are listed in general order of priority. Circumstance beyond the control of the Navajo Nation may force the Navajo Nation to modify these priorities. In conjunction with its litigation strategy, the Navajo Nation has been engaged in negotiations with the States of Arizona, New Mexico and Utah. The effort to reach a negotiated settlement, and the resources to engage in these negotiations, will need to be balanced with the demands of court ordered litigation schedules.

1. LITTLE COLORADO RIVER (Arizona)

A. Background.

The Little Colorado River is one of the largest tributaries of the Colorado River in the Lower Colorado River Basin. The median gaged flow of the Little Colorado River is approximately 165,000 acre feet per year as measured at Grand Falls. There are significant groundwater aquifers in the basin, including the Coconino (C-aquifer), Dakota (D-aquifer), and Navajo (N-aquifer).

The Little Colorado River Basin encompasses an area of 26,964 square miles in northeast Arizona and northwest New Mexico. The Arizona lands, 21,667 square miles, are subject to this adjudication. Indian lands from five Indian tribes (Navajo, Hopi, San Juan Southern Paiute, Zuni, and White Mountain Apache) make up over half of the land in the basin. In the state general stream adjudication there are approximately 3,100 claimants who have filed 10,927 Statements of Claimants.

The major claimants include non-Indian communities (Show Low, Snowflake, Springerville, St Johns, Holbrook, Winslow, and Flagstaff), large industrial users (Arizona Public Service, Phelps Dodge Corporation, Salt River Project, and Tucson Power & Electric), irrigation companies (St Johns, Pinetop and Woodland Irrigation Companies), and the federal claimants (including five units of the National Park Service).

B. Recommendations

- Make the Little Colorado River General Stream Adjudication the Navajo Nation's highest priority in litigation.
- Hire the necessary experts.
- Pursue the Colorado River "mainstream" case to put pressure on the State of Arizona for the Little Colorado River settlement.

2. LOWER BASIN COLORADO RIVER (Arizona)

A. Background.

In 1952 the State of Arizona invoked the Supreme Court's jurisdiction to determine its rights to use water from the Colorado River. In *Arizona v. California* no claims were filed on behalf of the Navajo Nation for the mainstream of Colorado River or for any mainstream Colorado River uses above Lee Ferry. In 2002, the Navajo Nation filed a law suit against the Department of the Interior alleging that the Secretary breached her trust responsibility to the Navajo Nation by managing the Colorado River without regard to the unquantified water rights of the Navajo Nation. The Nation also alleged that the Secretary breached her trust responsibility by failing to secure water from the Colorado River necessary to support a permanent homeland for the Navajo people. This lawsuit is not a general stream adjudication and does not seek a particular quantity of water from the Colorado River. Instead, the lawsuit seeks to recognize the existence of the Navajo Nation's right to use water from the Colorado River and to force the Secretary of the Interior to take steps to quantify and protect such claims. Experts for the Navajo Nation have conducted technical studies to support a potential Navajo claim. The Nation is currently attempting to enter into settlement negotiations with the United States and the State of Arizona.

B. Recommendations

- Finalize the NRCE municipal and industrial water development analyses.
- Hire other experts as needed, including historians.
- Retain lobbyists to deal with the political repercussions.

3. SAN JUAN RIVER (New Mexico)

A. Background.

The San Juan River is one of the largest tributaries of the Colorado River in the Upper Colorado River Basin. The median flow of the San Juan River at Bluff, Utah is more than 1.5 million acre-feet per year. The basin is vast, and Navajo lands are substantial. Thus, the technical studies to support any litigation will be extremely expensive. The general stream adjudication may involve many thousands of claimants.

B. Other Activities.

The Navajo Nation is actively engaged in settlement related activities that will require the full support of the Commission including:

1. San Juan River Recovery Implementation Program.
2. Construction of the Anima-La Plata Project.
3. Agreement with the Public Service Company of New Mexico (subcontract with the Jicarilla Apache Nation, support for the Shiprock Irrigation Projects, and assistance with construction of the PNM fish bypass).

C. Recommendations.

An opportunity exists to resolve issues with Arizona as part of the pending water rights settlement for Gila River. The proposed San Juan River settlement documents have been drafted, including: Settlement Legislation, Settlement Agreement, Partial Final Decree, and Contract for Water Delivery.

- The Navajo Nation should quickly move to finalize the settlement agreement with the State of New Mexico once the final issues are resolved, and pursue opportunities to resolve compact issues with Arizona water rights negotiations.
- Retain lobbyists to deal lobby Congress for the approval of the Settlement Legislation.

4. SAN JUAN RIVER (UTAH)

A. Background.

The Navajo Nation possesses substantial, but unquantified, water rights to the San Juan River in Utah. The Navajo Nation Council only recently appropriated funds to retain experts to pursue the Navajo claim. The federal government has never allocated funding for this purpose. The Navajo Nation owns all of the lands on both sides of the San Juan River in Utah, downstream to Bluff. Therefore, there should be no conflict with any other party concerning the use of the San Juan River through this stretch. Downstream of Bluff, the Navajo Nation owns all of the lands south of the San Juan River in Utah.

The Utah portion of the Navajo Nation, like many other parts of the Navajo Nation, lack developed water infrastructure. This is especially true with respect to drinking water supplies, such as Navajo Mountain. The drinking water problem at Navajo Mountain is not a result of the lack of a quantified water right, but the lack of an adequate supply of potable water.

The gage flow of the San Juan River at Bluff is approximately 1.5 million acre-feet per year. The State of Utah does not have a specific apportionment to the San Juan River. Article XIV of the Upper Colorado River Basin Compact apportions the San Juan River between the states of Colorado and New Mexico. Even with full development of New Mexico's apportionment, full development of the Animas-La Plata Project, and additional water development in Colorado, there should be ample water in the San Juan River available for appropriation by the Navajo Nation.

The State of Utah is entitled to 23 percent of the water available to the Upper Colorado River states under the Upper Colorado River Basin Compact. The State of Utah calculates this right as a depletion right of approximately 1.37 million acre-feet per year. Currently, Utah has developed almost one million acre-feet per year of its apportionment. Although Utah has no apportionment to the San Juan River, all of the water it depletes from the San Juan River must be charged against Utah's Colorado River apportionment. The State of Utah has developed a state water plan. According to this plan, the State of Utah believes that the total water supply for the Southeast Colorado River that can be developed, including the San Juan River, is 136,000 acre-feet per year.

B. Recommendations.

- Water development should be aggressively pursued and the Navajo Nation Utah state water right should be used as soon as possible.
- The Navajo Nation should continue to aggressively negotiate with Utah pursuant to the Memorandum of Understanding executed by the Navajo Nation and the State of Utah.

5. UPPER BASIN COLORADO RIVER (Arizona)

A. Background.

The Upper Colorado River Basin Compact of 1948 allocated 50,000 acre-feet per year to the Upper Basin within Arizona. This compact limitation is problematic in part because of several Navajo agreements including:

- **CJY-95-66:** "[A]ffirm the right of the Navajo Tribe to said 50,000 acre-feet of water from the Upper Colorado River Basin pursuant to the aforementioned Upper River Basin Compact."
- **CD-108-68:** "[T]he Navajo Tribe of Indians agrees that they will not make demands upon the 50,000 acre-feet of water per year allocated to the State of Arizona, pursuant to the Upper Colorado River Basin Compact, in excess of 50,000 acre-feet of water per year, of which 34,100 acre-feet of water per year shall be used by the coal-fuel power plant to be located on the Navajo Reservation near Page, Arizona"

"It shall be understood that the Navajo Tribe's promise to limit its claim to 50,000 acre-feet of water per year shall only be for the term of the lifetime of the proposed power plant, or for 50 years, whichever shall occur first"

- **CJN-50-69:** "[T]he Tribe agrees that of the 50,000 acre-feet of water per year allocated to the State of Arizona, pursuant to Article III(a) of the Upper Colorado River Basin Compact, 34,100 acre-feet shall be used for a coal-fired power plant to be located on the Navajo Reservation for the life time of the proposed power plant or for 50 years, whichever shall occur first, and an estimated 3,000 acre-feet per year that may be used

for the Glen Canyon Unit of the Colorado River Storage Project along with its associated community and recreation developments in Arizona."

- **Application and Grant of Rights-of-Way and Easements Navajo Project:** "[T]he Secretary consents to the Agreement by the Tribe that during the term of the § 323 Grant or the operating life of the Navajo Generating Station, whichever is the shorter, of the 50,000 acre-feet of water per year allocated to the State of Arizona, pursuant to Article III(a)(1) of Compact (63 Stat. 31), 34,100 acre-feet of water per year shall at all times be available for consumptive use by Grantees in the operation of the Navajo Generating Station and all other purposes related to such operation including coal transportation and ash disposal. Secretary further consents to the Agreement by the Tribe that the use of Water on Reservation Lands within the Upper Basin of Arizona . . . shall not reduce or diminish the availability of said 34,100 acre-feet to the Grantees." In December 10, 1969, the Solicitor issued an opinion regarding the Upper Colorado River Basin Compact – Restriction on the Use of Upper Basin Water in Arizona that reemphasizes this limit:

"The Upper Colorado River Basin Compact is binding on the Secretary of the Interior, the Indians, and all others, and it flatly precludes total use of Upper Basin water in Arizona in excess of 50,000 acre-feet a year.

B. Recommendations.

- NRCE should finalize the appraisal level report for the Navajo Nation's non-agricultural claim.
- The Navajo Nation should develop a comprehensive water budget for Arizona.
- Once NRCE reports are finalized, the Navajo Nation should commence negotiations with Arizona.

6. ADMINISTRATIVE HEARINGS (New Mexico)

A. Administrative Hearings.

The Navajo Nation Department of Justice has filed protests with respect to various permits to appropriate water in the San Juan Basin.

- **San Juan Water Commission (ALP Permit 2883).** SJWC filed an application with the Office of the State Engineer for additional ALP water. Formal protest filed by Navajo Nation.
- **City of Albuquerque (Application 4830).** Navajo Nation objected to Albuquerque's application to appropriate water from the San Juan-Chama Project. The Navajo objections were recently resolved.

- **City of Bloomfield (No. 04711 into 2800).** The proposed application by City of Bloomfield is to change the place or use, point of diversion and purpose of use. The Navajo Nation objected. Motions for summary judgment are to be filed in January 2003.
- **Bloomfield Irrigation District (Application No. No. 01675).** The application is to increase the maximum diversion rate for Citizens Ditch. The Navajo Department of Justice filed a protest on behalf of Navajo Nation on December 3, 2002.
- **Mustang Energy/Peabody Natural Resources Company (Application No. SJ-118 into SJ-120).** Mustang/Peabody proposed change of place and point of diversion and purpose of use to provide water to develop a new power plant near Grants, New Mexico. Application withdrawn and case dismissed November 18, 2002.
- **City of Farmington (Application pending).** Proposed application to change the point of diversion, place of use, and purpose of use. Farmington believes that the Echo Ditch Decree authorizes this use.

B. Recommendations.

- Hire an attorney to focus on these administrative issues.

7. ZUNI RIVER (New Mexico)

A. Background.

In 1982 the Zuni Tribe brought action to determine the tribe's water rights to the surface and groundwaters of the Zuni River, the Rio Nutria, the Rio Pescado. (*Zuni Tribe v. City of Gallup, et al.*, Civil No. 82-1135M (D. New Mexico)). In 1984 the general stream adjudication of Zuni River Basin filed. (*City of Gallup v. United States*, CV-84-164 (11th Judicial District, McKinley County)).

In 1985 the Federal action was dismissed in deference to state court adjudication. In 1990 the State action was dismissed with prejudice for lack of progress. In 2001 the United States filed a federal action to adjudicate claims in the Zuni Basin. In July 2002 the Navajo Nation's motion to intervene was granted. (*Zuni River General Stream Adjudication (United States v. State of New Mexico, et al.* CIV 01 0072, U.S. District Court, New Mexico.).

B. Recommendations.

- Develop a settlement proposal that gives Navajo the right to use whatever surface water is available on Navajo lands

- Investigate the potential for additional surface water development and develop a claim to such water.
- Develop a settlement proposal that protects the groundwater supply at Navajo, and to augment this supply if necessary.

8. RIO SAN JOSE (New Mexico)

A. Background.

The Navajo lands in the Rio San Jose Basin are minimal. In most instances, there are no water users upstream to block any use of water on these lands. In other words, Navajo should be able to control its own water destiny. However, since there are no reliable supplies of surface water proximate to most of the Navajo lands, with the exception of Bluewater Lake, the only surface water rights that Navajo is likely to obtain are for the water that arises on Navajo land. The challenge for the Navajo Nation is to keep this water on Navajo land and not have this water subject to call by downstream water users, such as the Pueblos. The other challenge is to ensure that Navajo has sufficient access to groundwater resources in order to provide a dependable potable water supply.

B. Recommendation.

The Expenditure Plan needs to address the following recommendations:

- Develop a settlement proposal that gives Navajo the right to use whatever surface water is available on Navajo lands.
- Investigate the potential for additional surface water development and develop a claim to such water.
- Develop a settlement proposal that protects the groundwater supply at Navajo, and to augment this supply if necessary.