

**Response from Grassroots, Diné Water Rights Coalition to the Navajo Nation  
Department of Justice, President Buu Nygren, and the Navajo Nation Council**

A. Introduction and Background

The Diné Water Rights Coalition does not support the Settlement as written and presented by the Navajo Nation Department of Justice and the Water Rights Commission. The Settlement does not:

- give Navajo quantified rights to the LCR.
- provide enough provisions to protect the unallocated flows on the Little Colorado River (LCR).
- give Navajo 1<sup>st</sup> priority, instead it gives 4<sup>th</sup> priority on Lower Basin through the Central Arizona Project water (CAP)
- claim a maximum of 50,000 AFY (Acre Feet per Year). Instead, Navajo claims only 44,700 AFY on the Upper Basin.
- ensure that the settlement will not waive past, present, and future claims for Injury to Water quality arising from time immemorial and, thereafter, forever.
- effectively use an in-house study to fulfill the requirements argued by Navajo, in the recent case before the U.S. Supreme Court (2023).

The Navajo Nation has stated that it is currently in negotiations to settle all of the Nation's water rights claims in the State of Arizona, including with respect to Tótichíí Koooh (Red Water Wash – the Little Colorado River) and Bits'íís Nineeží (River of Long Life Span – the Colorado River). The Navajo Nation DOJ writes in their summary “These Rivers are protectors for the Navajo people born from Dibé Ntsaa, our northern mountain, and are two of the four sacred rivers that set the boundaries for Dinétah (Navajoland)” and “The Nation is seeking to ensure that these rivers will continue to protect our people and sustain life on our lands – forever”

According to Diné creation story, Diné was entrusted with instruction of the proper use, management of water by Teiholtsoodii, a Water Being sometimes referred to as Water Otter. After a series of events Teiholtsoodii, the Water Being, gave the Diné instructions on how to steward and manage water. The people established a spiritual relationship with the water and learned to have reverence for water.

Again, according to Diné creation stories, Salt Woman led her people using a crystal along what is now the San Juan and then the Upper Basin. She then guided them down the Lower Basin and using the crystal guided them into the confluence where she brought her people to shore. The people were able to ascend the canyon at the Salt Trail. She remained behind and became part of the Salt Trail.

Since Navajo creation, water has served as a fundamental element to Navajo life. The four elements that must be protected to ensure sustainable life are water, earth, air and sunlight (energy & technology). From our spiritual obligations to our agriculture responsibilities and to maintain our daily lives as Diné, water is integral to our existence on Dinétah. Our clanship system is deeply connected to the water. There are over 40 clan names that link matrilineal lines directly to specific water places across the Southwest and over half of our towns and communities on Navajo are named after water.

Arizona's water is spread over three distinct eras, the 19<sup>th</sup> century for rights and laws, the 20<sup>th</sup> century for infrastructure building (the era of "reclaim the desert"), and the 21<sup>st</sup> century of demand and scarcity. Any future Northeastern (NE) Arizona Indian Water Rights Settlement Agreement should address what we will be facing in the 21<sup>st</sup> century -- where humanity in the desert Southwest keeps screaming, "More, more water!", in the pursuit of endless growth and Nature responds with less and less. In the 19<sup>th</sup> century, we had our instructions and guidance to steward and manage the water, while most of the rest of Arizona was dividing up the water and using laws and rights that they created and or brought with them. The legal concepts, such as *prior appropriation, limited to "reasonable and beneficial use"*, and *rights* are tied to the overlaying surface land, were brought to our lands. In the 20<sup>th</sup> century, Arizona and the Federal Government built its big water projects (i.e. Hoover Dam and Glen Canyon Dam) while Navajo had only small local projects in Arizona —nothing compared to the other two. What we learned in the 20<sup>th</sup> century was our trust relationship with the Federal Government means little. In the 21<sup>st</sup> century nothing has changed, Western States continue to battle Navajo water claims and the Federal Government argued that the U.S. has no enforceable responsibility to protect Navajo's claims this past summer. The loss of acquiring our full share has meant Navajo will be precluded from future development of the reservation and otherwise prevent the beneficial development of the reservation intended by Congress. Arizona has always used the strategy that; "*When an economy has grown up premised upon the use of Indian waters, the Indians are confronted with the virtual impossibility of having awarded to them the waters of which they had been illegally deprived.*" Today we have to prepare water needs projections based on reservation population growth and are caught in a trap —at a time when an existential threat called climate change is staring us in the face.

To ensure a permanent homeland for our people and the Navajo way of life, the Navajo Nation must advocate for the Nation's water rights in the State of Arizona in the following ways:

## B. Navajo Water Sources

1. The Upper Basin Colorado River Water: According to the Settlement the Navajo Nations is currently claiming 44,700 AFY of Arizona's Upper Basin allocation. Navajo should be claiming 50,000 AFY. In addition, all water permits issued to other users during the time the NGS agreements were in effect, should be given to Navajo in this settlement.
2. Little Colorado River Mainstem Water: As written in the current Settlement, Navajo is claiming all the Little Colorado River mainstem that reaches the Navajo Nation (Navajo is using "historic flows are estimated to be 122,000 AFY"). Our first point is that Navajo needs to assert 1<sup>st</sup> priority rights on the LCR Mainstem Water. Secondly Navajo should seek actual quantified rights on the LCR Mainstem. "Unallocated flows" means if anything is left, that is NOT a Water Right. To ensure that LCR water reaches Navajo and meets EPA water quality standards, Navajo Nation should ask for the following protection measures:
  - i) Cap all future wells along the alluvial of the Little Colorado River on upstream users.
  - ii) Require/ensure that the water that reaches Navajo meets Federal EPA Water Quality Standards, as there are sources of contamination upstream, i.e., Coal-fired Powerplants, agricultural/livestock run off, and sediments upstream.

Next, NNDWR should use Arizona Department of Water Resources (ADWR) 1994 estimates of the median annual flow of the LCR at the reservation border at 162,900 AFY and the median undeleted flow at 222,450 AFY as referenced in the document, instead NNDWR uses its own released *Water Resource Development Strategy for the Navajo Nation, 2011*, as a strategy guide.

Because the LCR is characterized by NNDWR as an "erratic flow" regime (affected by extreme values), the median annual flow rates provide a better representation of the central tendency. Flow rate numbers from the last 3 decades (~1994 to present) are distorted by coal facilities in the LCR basin. Apache County, where the Springerville and Coronado powerplants are located accounted for 68% of groundwater withdrawals in 2005. That figure was 28% in Navajo County, where the Cholla Power Plant is located. There likely is a lag of about 10 years for the LCR flows to fully respond to the massive groundwater withdrawals by the 3 coal facilities. The peak withdrawals by the coal facilities occurred in 2001-5 at 36,100 AFY, by 2007 the LCR became intermittent at Holbrook. The ADWR 1994 estimates might be at the edge of what Navajo should use as flow rate numbers for claims.

3. Little Colorado River Tributary Water: We defer comments until the full Settlement document is made available.
4. 4<sup>th</sup> Priority Lower Basin Colorado River Water: Navajo needs to claim and assert 1st Priority rights to water in the Lower Basin. In 2010 and 2012, Navajo Water Settlements, Navajo was offered approximately 31,000 AFY by Arizona. The language in the previous Settlements agreed to reserve the 31,000 AFY, when a LCR Settlement is achieved. What happened to this reserved amount? Currently, Navajo is claiming 3,600 AFY. What is 3,600 AFY based on? Will Navajo assert a greater amount?
5. Coconino Aquifer: Monitoring measures need to be established on any new wells, such as Flagstaff's Red Gap Ranch for salinity. The 1,000 AFY is of dubious value to Navajo because the Red Gap Ranch is mostly within Navajo's C-aquifer protection zones. Why is Navajo accepting 1,000 AFY, if the idea of protecting zones is to limit C-aquifer withdrawals? Again, Navajos in-house study should include an analysis of Flagstaff's and Hopi Hart Ranch (which is mentioned in the current Settlement) maximum allowed withdrawals over the decades from the C-Aquifer and its effects on Navajo wells east of the Twin Arrows Casino. Since Navajo's wells are close to the gradient in water quality (mg/l, dissolved solids), there is a possibility that excessive Red Gap Ranch withdrawals will affect (intrusion of fair/poor water into by reversal of groundwater flow), the good water quality and therefore the water delivered to Dilcon and the future SW Navajo Regional Project (increased AFY from current).  
  
\*Blue Springs is Navajo Coconino Aquifer discharge – Navajo Water. It must be included in the Water Budget. Navajo should be compensated for its use downstream.
6. Navajo Aquifer: Navajo is claiming "all that underlies Navajo", yet the language limits Navajo to 8,400 AFY). Clarify if 2000 AFY for industrial use, is part of the 8,400 AFY or in addition to the 8,400 AFY? Our position is that no provisions should be made for industrial use. In addition, Navajo needs to advocate to put the confined portion of the N-aquifer under EPA Aquifer Protection Program.
7. Shared Washes: We need to measure rainfall and stream flow from the top of Dzitijjin (Black Mesa) to know how much water is discharged in the LCR. Funding needs to be included for Projects to be built that direct water flows to replenish aquifers instead of draining into the Little Colorado River unchecked.

### C. Off-Reservation Surface Water

1. Restrict Federal Agencies livestock permits - Prohibit United States Forest Service (USFS) & National Park Service (NPS) from restricting flows off Federal lands onto Navajo Nation lands or restrict enlarging earthen dams.
2. Avoid and manage wildland fires that could leave bare ground near tribal lands thus affecting the quality of run-off water onto tribal lands. Create buffer zones on Federal lands adjacent to tribal lands to preserve forage that will retain water quality run-off vs versus run-off of contaminated water from bare grounds from hot wildfires.
3. Protect underground flows from volcanic fields that flow year-round to springs along the Little Colorado River. These flows provide water to feral horses and wildlife, and their locations are imprinted into the memory of wildlife/animals during drought years. Restrict activities that could inadvertently damage or stop these flows through questionable management decisions.
4. Direct water flows to replenish aquifers instead of drainage into the Little Colorado River.

#### D. Off-Reservation Groundwater

1. Although the US, as trustee, refused to assess Navajo's needs and develop a plan to meet them, Navajo should perform a study, in-house and plan to fulfill the requirements argued by Navajo before the Supreme Court of the United States (SCOTUS) 2023. There are plenty of questions, uncertainties, and imbalances about water resources for Navajo in the future, below are just 4 examples of further investigations:

a) The United States Bureau of Reclamation (USBOR)'s 2016, *The North Central Arizona Water Supply Feasibility Study* (which includes Flagstaff, Williams, South Grand Canyon, Hopi and western Navajo), together with earlier studies concluded that by 2050 the region's unmet municipal water demand of more than 28.1k acre-foot per year (AFY) in the region by the year 2050 for area communities and cities. The results of further analyses indicate that if water conservation reduces demand by 20 percent, there would still be an unmet water demand of more than 22,000 AFY by the year 2050. The study team projections are based on the projected population growth and estimated water demands for the year 2050. How is Navajo going to address these conclusions by USBOR?

In addition, in 2018, Arizona Department of Water Resources' *Arizona's Next Century: A Strategic Vision for Water Supply Sustainability*, The Water Resource Development Commission found that Arizona has grown from a population of 2.7 million, with an economy of approximately \$30 billion in 1980 to nearly 6.6 million

people with an economy of \$260 billion by 2009. Estimates for population growth in Arizona were developed for 2035, 2060, and 2110. The population estimates for these years are 10.5, 13.3, and 18.3 million people, respectively. Annual water demand is expected to grow from current levels of 6.9 MAF to between 8.2 and 8.6 MAF in 2035, between 8.6 and 9.1 MAF in 2060, and between 9.9 and 10.5 million acre-feet in 2110. Where do Navajo fit in this projected growth? Hence, only our own study can determine accurate Navajo growth projections.

b) The US Census has not shown an appreciable increase in the Navajo population in 3 decades. An in-house study should be conducted to reveal the relationship between evaluation of infrastructure development, economic development, demographics, and the challenges for Navajo. The revelations in the study should help Navajo argue their water claims. In the ADWR's *Preliminary Navajo Reservation Hydrographic Survey Report (HRS) March 2019*, Navajo is claiming a future population "on reservation", inside the Arizona portion of the LCR watershed, a projection for 2110 of 250,548 (an increase of 335%) for DCMI, while for the state (as a whole) is 240%. An in-house study would explain, and support select methods to project future demand, instead of relying on US consultants.

c) *Accelerating Global warming* has now entered mainstream climate science. Prior climate science that contributed and/or attributed to the UN's IPCC reports was considered mainstream. The global warming rate, which was 0.18°C per decade from 1970-2010, has now increased by 50-100 percent, i.e., to 0.27 to 0.36°C per decade. Projections are now 2.0°C above pre-industrial (1880-1920 baseline) and will be reached in the late 2030s (~15 years). Navajo should use the most recent scientific assessments given and new temperatures and time regimes.

#### E. Infrastructure, Projects, and Estimated Funding

1. Are the proposed water projects planning for climate change and drought, such as gray water systems, recycling and treating water to conserve potable water sources?

#### F. Navajo Renewable Energy Project

1. We have no comments at this time

#### G. Navajo Funds

1. We have no comments at this time

#### H. Rights-of-Way

1. We have no specific comments on Rights-of-way

## I. Waivers & Retentions

1. As a sovereign nation we do not agree to waivers

## J. C-Aquifer Agreement

1. We need a side agreement with Hopi for Clear Creek and Aja Ranches on C-aquifer limits.

## K. Red Gap Ranch Agreement

1. We have no comments at this time

## L. Other Grassroots Issues and overarching concerns from the Diné Water Rights Coalition

1. What is Navajo doing to challenge the colonial system in which we are being forced to settle Navajo Water Rights.
2. The Navajo Nation Council has ratified the United Nation declaration on the rights of Indigenous Peoples, so the Navajo People have the right to use FPIC to ensure their rights are upheld. The Navajo People have inherent individual sovereignty from time immemorial and do not waive this right not now, not ever.
3. Waivers of Water Quality, Priority Rights and other waivers were not included in the current Settlement; therefore, we defer comments until the full document is available.
4. The 2012 Settlement gave away the “sub-flow” (alluvial aquifer), which stated that Navajo and Hopi may not “*object to dispute, or challenge ... the withdrawal and use of underground water from a well even if it is determined that the well is capturing or will capture the sub-flow of any surface water source ...*” This is unacceptable. Will the 2024 Settlement have similar language?
5. The 2012 Settlement defines De Minimis Use (Section 3.1.33) as less than 1 AFY per family; and Domestic Use (Section 3.1.37) as enough for less than 2 acres of garden or orchard. Every Diné family should have De Minimis/Domestic use of 2 AFY for all homestead purposes,
6. The Salt River Project has committed to helping the Navajo Nation obtain rights to the upper basin river. How is the Navajo Nation making sure SRP follows through with its commitment?
7. Coal-fired Power Plants (Cholla, Coronado, and Springerville) in the LCR Basin, as these facilities are retired (2025, 2032, and 2032(U4?) respectively), the water supplies used to support them will potentially become available for alternative uses. Since these facilities are listed as using groundwater for operations it is limited to a “reasonable and beneficial use.”

Just because the water is withdrawn from a well does not necessarily mean it is legally groundwater. Depending on their location, wells may be deemed to be pumping a river's subsurface flow that under Arizona law is considered surface water, even though it is underground. This distinction is important because the right to use water from wells pumping subflow may be subject to senior surface water rights. Not all Coal-fired Power Plants along the LCR, make well withdrawals from the C-aquifer, the Coronado plant also uses the Bidahochi Aquifer (springs along Pueblo Colorado Wash and Wide Ruin Wash on Navajo rely on the Bidahochi Aquifer) and is a sub-flow coming from the LCR. The Cholla plant's well farm is at a location where the top of the C-Aquifer is near the surface and is taken from the LCR. By withdrawing most of Cholla's water from the south side of the LCR, the wells intercept most of the natural seeps and discharges from the C-Aquifer into the LCR and consequently devastate the ecology of the LCR downstream. It is well known that APS purchased land for water rights for a radius of 16.5 miles surrounding the plant including all but two wells of the Joseph City Irrigation Company and had a "critical groundwater area" declared in the northern portion of Navajo County. By this action, APS precluded future groundwater exploitation for irrigation which might compete for water with Cholla. The Joseph city region is the only declared critical groundwater area of the LCR Basin. Navajo must insist that Arizona change the status of the Joseph City Irrigation Non-Expansion Area to an Active Management Area (AMA) and also put AMAs around wells farms for Coronado and Springerville after decommissioning. By changing the status of Cholla's water, Navajo would limit C-Aquifer withdrawals and restore some of the flow in the LCR after 2025. Navajo also needs side-agreements on Clear Creek and Aja Ranches limits.

8. The Settlement should include the restoration and construction of riparian areas for birds and other species
9. Shallow aquifers have been destroyed and deep aquifers impacted (drawn down and depressurized) by coal mining on Black Mesa. This Settlement should include a Federal Government obligation to continue monitoring the aquifers on Black Mesa until full recovery. The "Navajo Projects" section of the Settlement should include funds for a monitoring project.
10. Water Rights should be settled according to Navajo interpretation of permanent homeland. Navajo needs to be explicit about what "permanent homeland" means. The treaty agreement of permanent homeland means sufficient water for our homeland. Provisions should include the continuous flow of the river for other



lifeforms including wildlife and wetland habitat. Furthermore, permanent homeland means the Navajo water must meet USEPA standards for quality, which has not been considered. First in time, first in right, and the law of river etc., should not apply to Navajo.

11. In the recent US Supreme Court decision, they declared that Federal Government has no treaty obligation to help NN to access water rights. Is Navajo asking Congress, to clarify the Federal Governments treaty trust obligation to the Navajo Nation and the process in accessing water and appropriating funds for water projects.
12. How is the Navajo Nation explicitly protecting all of Navajos cultural uses of Water?
13. In discussing the history of Hopi Partitioned Lands (HPL)/Navajo Partitioned Lands (NPL) and Navajos resisting and those who signed accommodation agreements to remain on what is now HPL lands; Who is accounting for water used by Navajos on HPL lands. We have water needs for our homes, livestock, and farming, but are we included in any of the water claims?
14. What happens if all the projects are not funded? Can Congress change the settlement and approve an amended settlement without Navajo? Do we maintain our right to refuse changes?
15. The Navajo People have the right to free, prior, and informed consent, (FPIC). The details and specifics of the Settlement Agreement are still not known to the Navajo people, yet the NNDOJ is planning to drop the Settlement to the Council soon, at which time they will give the public only 5 days to read, and comment. This is not enough time to adequately review and comment on the full document's details and agreements and respond. If the Navajo Nation will not honor Free, Prior and Informed Consent, then we demand a referendum vote by the people to determine the validity of the Settlement Agreement.

#### Sources:

1. Water Resource Development Strategy for the Navajo Nation, 2011;  
[http://frontiernet.net/~nndwr\\_wmb/PDF/Reports/DWRReports/DWR2011%20Water%20Resource%20Development%20Strategy%20for%20the%20Navajo%20Nation.pdf](http://frontiernet.net/~nndwr_wmb/PDF/Reports/DWRReports/DWR2011%20Water%20Resource%20Development%20Strategy%20for%20the%20Navajo%20Nation.pdf)
2. Navajo-Hopi Little Colorado River Water Rights Settlement Agreement (NHLCRWRS); <https://www.hopi-nsn.gov/wp-content/uploads/2013/05/NHLCRS-Settlement-Agreement-03-08-12.pdf>
3. The North Central Arizona Water Supply Feasibility Study, USBOR 2016;
4. <https://www.usbr.gov/lc//phoenix/programs/NCAWSFS/NCAWSFSIR2016.pdf>

5. Arizona Department of Water Resources' Arizona's Next Century: A Strategic Vision for Water Supply Sustainability; <https://azmemory.azlibrary.gov/nodes/view/89714>
6. ADWR's Preliminary Navajo Reservation HSR March 2019; <https://infoshare.azwater.gov/docushare/dsweb/View/Collection-19546>
7. ["Navajo-Hopi Little Colorado River Water Rights Settlement Act,"](#)