**S.2109: Overview of Provisions and Waivers**

Senate Bill 2109 is the proposed legislation that will resolve the Navajo Nation and the Hopi Tribe’s claims to the Little Colorado River. This legislation is currently before Congress and is sponsored by Arizona Senators John McCain and John Kyle. Throughout this handout, the proposed legislation is referred to as “S.2109.” S.2109 is based on the Navajo-Hopi Little Colorado Settlement Agreement created by Navajo leaders, Hopi leaders, and other non-Indian parties. Throughout this handout, the Navajo-Hopi Little Colorado Settlement Agreement will be called the “Settlement Agreement.” It is important to know that S.2109 and the Settlement Agreement are two different documents. The Settlement Agreement has many more specific provisions than S.2109. If S.2109 becomes law, it will incorporate all of the provisions in the Settlement Agreement and the Settlement Agreement will become law also.

This overview is a brief explanation of the major provisions and waivers in the Settlement Agreement and S.2109. This overview does not explain every provision of S.2109. It also does not explain every provision of the Settlement Agreement. However, it does provide a brief overview of the major provisions relating to (1) the water that the Navajo Nation will acquire and (2) the waivers that the Navajo Nation must agree to in order to get their water. After every provision there is a reference in italics that shows where to find that provision in the Settlement Agreement or S.2109.

Before analyzing the Little Colorado River settlement, this handout provides a short explanation of the law of Indian water rights. Under a legal principle known as the Winters Doctrine, Indian nations have implied water rights for their reservations. This is why the Navajo Nation has water rights claims to the Little Colorado River. However, Indian nations do not automatically receive their *Winters* rights. Instead, Indian Nations must either go to court to litigate for their rights or make a settlement with the state and other parties with claims to the river system. Litigation can be very time consuming. The Navajo Nation has been involved in the litigation of the Little Colorado River since 1994, and the lawsuit is not close to resolution. In order to resolve water rights more quickly and get funding for infrastructure, some tribes decide to settle their water rights claims. In a typical settlement, an Indian Nation agrees to take a smaller amount of water than they might get through litigation. In return, the Indian Nation receives money for infrastructure and a final resolution of their rights. The Navajo Nation has decided to settle its rights to the Little Colorado River and the current proposal is S.2109.

**Major Provisions in S.2109 and the Settlement Agreement**

**1) Surface Water Gained By the Settlement**

* According to the summary of the proposed settlement, the Navajo Nation gains rights to approximately 160,000 acre-feet of surface water. This amount does not appear to be specifically quantified or tallied in the settlement agreement.[[1]](#footnote-1)
* According to the summary of the proposed settlement, the Navajo Nation gains rights to 90,000 acre-feet in washes. This amount does not appear to be specifically quantified or tallied in the settlement agreement.
* The water promised by the Settlement cannot be lost by forfeiture or abandonment. *S.2109 Sec. 102(b)*
* The Navajo Nation cannot use its water rights for instream flows. *Settlement Agreement 4.53*
* The Navajo Nation gains rights to 6,411 acre-feet of water from the Central Arizona Project that will be used to supply water to eastern portions of the Navajo Nation through the Navajo-Gallup water supply project. *Settlement Agreement 9.1*

**2) Groundwater Gained by the Settlement**

* The Navajo Nation gains rights to unlimited domestic and municipal use of groundwater in the N-Aquifer. *Settlement Agreement 6.6.2.3*
* The Navajo Nation gains rights to 2,000 acre-feet/yr of groundwater for industrial use from the confined portion of the N-Aquifer. *Settlement Agreement 6.6.2.4*
  + The confined portion of the N-Aquifer is where the aquifer has the most pressure. This is why springs come up from the ground. Pumping from the confined portion affects whether the springs will continue to flow.
* If either the Hopi Tribe or the Navajo Nation wants to pump more than 2,000 acre-feet, it must get permission from the other tribe. *Settlement Agreement 6.6.2.3*
* According to the summary of the proposed settlement, the Navajo Nation gains rights to unlimited pumping for industrial use from the un-confined portions of the N-Aquifer. The same language does not appear in the proposed settlement agreement.
* The LCR Settlement limits pumping in certain protected areas. *Exhibit 6.2.2.7*

**3) Infrastructure Projects gained by the Settlement**

* One major claimed benefit of the LCR Settlement are the groundwater projects that will bring infrastructure to communities that currently lack running water.
* According to the summary of the proposed settlement, the Leupp-Dilkon Regional Groundwater Project will provide 4,776 acre-feet of C-Aquifer water to Leupp, Bird Springs, Tolani Lake, Teesto, Dilkon, Indian Wells, L Greesewood, and White Cone. This amount does not appear to be specifically quantified or tallied in the settlement agreement.
* The Gandao Regional Groundwater Project will provide 5,600 acre-feet to Ganado, Kinlichee, Jeddito, Cornfields, Steamboat, Klagetoh, and Wide Ruins. This amount does not appear to be specifically quantified or tallied in the settlement agreement.
* The LCR Settlement authorized the appropriation of $199 million dollars for these projects. *S.2109 Sec. 104(a)(2)(A)(i)*
* The proposed Settlement also includes an operation, maintenance, and replacement fund of $23 million to support the continued existence of the projects. *S.2109 Sec. 104(b)(2)*
* The LCR Settlement Act does not appropriate this money. However, the Settlement is not effective until the groundwater projects are fully funded. *S.2109 Sec. 108(a)(4)*

**4) Waivers and Conditions**

* **A) Waiver of Future Water Rights Claims to the Little Colorado River**
  + The Navajo Nation waives all past, present and future claims to the Little Colorado River. This waiver applies to claims based on the Winters Doctrine or claims based on aboriginal use. This waiver means that the Navajo Nation cannot sue the state of Arizona, the federal government, or any other person or corporation for water rights to the Little Colorado River. *S. 2109. Sec. 105 (a)(1)(A)(i), (ii).* 
    - The Navajo Nation can still bring claims in the Upper Colorado River Basin, including claims for the Navajo Nation’s land in Utah. *S. 2109. Sec. 105 (a)(1)(C)(i)(I).*
    - The Navajo Nation can also still bring claims on the Lower Colorado River. *S. 2109. Sec. 105 (a)(1)(C)(i)(I).*
  + The Navajo Nation waives the right to sue the United States for past, present, and future failure to protect, acquire, or develop water rights for the Navajo Nation and its members. *S. 2109. Sec. 105 (a)(2)(A)(vii).*
* **B) Waivers Related to CAP Water**
  + In exchange for the 6,411 acre-feet of CAP water, the Navajo Nation agrees for that water to be given a priority date that is the same as non-Indian users. This means that if the Colorado River has to be curtailed, CAP water will be reduced before many other users. Therefore, the 6,411 acre-feet of CAP water in the LCR Settlement is vulnerable if the Colorado River experiences extreme drought. *S.2109 Sec. 202(c)(1)(B)(iv)(I)*
  + CAP water can only be marketed in Arizona. *S.2109 Sec. 202(c)(1)(B)(vi).*
  + All other water can only be used on the Navajo Nation. *Settlement Agreement 4.15*
* **C) Waivers Related to Water Quality**
  + The Navajo Nation permanently waives the right to sue the state of Arizona, the federal government, and any other person or corporation, including Peabody Coal, for past, present, and future injuries to their water rights or water quality caused by increased salinity or increased naturally occurring constituents. This prevents any action by the Navajo Nation or tribal members from suing for damage to either surface water or groundwater that is caused by excessive drawdown. *S. 2109. Sec. 105 (a)(1)(A)(iii)-(v).*
    - The Navajo Nation can sue for damage to water quality that is not caused by (1) increased salinity and (2) increased naturally occurring constituents. Keep in mind that the reported damage to water quality has occurred because of increased salinity or because of high concentrations of things that are already naturally in the water. This could mean that the retained ability to sue may not be as meaningful as it might seem on paper.
  + The Settlement does not limit Peabody’s ability to pump groundwater from the N-Aquifer as long as the pumping occurs within Peabody’s leaseholds. *Settlement Agreement 6.2.2.4*
* **D) Other Waivers**
  + The Navajo Nation waivers the right to sue the United States for damages to hunting, fishing, gathering, or cultural rights due to loss of water or water rights. *S. 2109. Sec. 105 (a)(2)(A)(xi).*
  + The Navajo Nation agrees that the LCR Settlement will not be classified as a “major federal action.” This means that the Navajo Nation cannot bring a claim based on the National Environmental Policy Act or the National Historic Preservation Act. *S. 2109. Sec. 110 (a).*
  + The Navajo Nation cannot protest a well that is withdrawing “subflow,” which is water that would replenish surface water flows such as washes. *Settlement Agreement 7.4*

**5) Provisions Relating to the Navajo Generating Station**

* The Navajo Nation will renew the leases related to the Navajo Generating Station through 2044. This includes all rights of way, land leases, and easements across the Navajo Nation. *S. 2109. Sec. 201 (a)(2)(B),(C)*
* The Navajo Nation will renew Peabody’s coal lease on Black Mesa for enough coal to continue the operation of the Navajo Generating Station through 2044. *S. 2109. Sec. 201 (a)(2)(D)*
* Peabody will enter into a contract to supply the Navajo Generating Station with coal through 2044. *S. 2109. Sec. 201 (a)(2)(F)*
* The Office of Surface Mining renew the permit for the Kayenta mine and that the renewal is uncontested. *S. 2109. Sec. 201 (a)(2)(E)*
* If the Navajo Nation refuses any of these conditions, then the Navajo Nation will not receive its CAP water. *S. 2109. Sec. 201 (a)(1)*
  + The CAP water promised in this Settlement will go to the eastern parts of the Navajo Nation that currently lack infrastructure. They are the communities that would benefit from the Navajo-Gallup pipeline authorized in 2009. This means that if the Navajo Nation refuses the provisions related to the Navajo Generating Station and Peabody, the eastern Navajo communities, including Window Rock, won’t get their water.

1. This could be due to one of two reasons: absence of the language altogether or the fact that the agreements reviewed were possibly incomplete and missing exhibits. The same is true for all other references to the summary. [↑](#footnote-ref-1)