

TITLE 21: WATER CODE

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Water Code

CHAPTER 1: GENERAL PROVISIONS

§ 1 PURPOSE.

Consistent with its assertion of sovereign authority and control over its land and resources, and to provide for the health, safety, and welfare of its members, the Jicarilla Apache Nation adopts this Water Code, recognizing that water is essential to life and the future well-being of the Nation. Through comprehensive regulation of its water resource, the Nation can effect a just and equitable system for the distribution of water to ensure its availability for future generations.

§ 2 NATURE OF RIGHT TO USE WATER.

The waters of the Jicarilla Apache Nation shall always remain the property of the Nation. A grant of a right to use the waters of the Nation shall not imply ownership and such right to use shall be held subject to the paramount rights and interests of the Jicarilla Apache Nation.

§ 3 DECLARATION OF RIGHTS.

(A) *Rio Chama Basin.* The Nation is the owner of and asserts sovereign control over water rights for that portion of the Nation east of the Continental Divide and within the Rio Chama Basin as follows:

(1) *Historic and existing reserved rights.*

Quantity: 65.06 afy diversion or 40.29 afy depletion, whichever is less, and a net evaporation from stock ponds and lakes of 1,786.84 afy.

Source: Lakes, stock ponds, stock wells and springs, and tributaries of the Rio Chama.

Priority: September 21, 1880

(2) *San Juan-Chama Transmountain Diversion.*

Quantity: 6,500 afy depletion

Source: Willow Creek or Heron Reservoir

Priority: September 21, 1880 reserved right subordinated to a contract with the Secretary of the Interior with a project priority date

(3) *State acquired historic reserved rights.*

(a) *El Poso Ranch.*

Source: Stock ponds and stock wells and springs on the Ranch

Priority: Varies by use from March 18, 1907 to January 14, 1982

(b) *Theis Ranch.*

Source: Horse Lake and stock ponds, stock wells and springs on the Ranch

Priority: Varies by use from March 18, 1907 to June 27, 1985

(c) *Quantity for El Poso Ranch and Theis Ranch combined:* 1,492.93 afy diversion or 1,095.01 afy depletion, whichever is less, and a net evaporation from stock ponds and lakes of 759.94 afy.

(4) *Groundwater.* The Nation may withdraw groundwater within the Rio Chama Basin, which withdrawal does not deplete the surface flows of the Rio Chama Stream System.

(B) *San Juan River Basin.* The Nation is the owner of and asserts sovereign control over water rights for that portion of the Nation west of the Continental Divide and within the San Juan River Basin as follows.

(1) *Future use reserved rights.*

Quantity: 33,500 afy diversion
25,500 afy depletion

Source: Navajo River and Navajo Reservoir

Priority: September 21, 1880 reserved right subordinated to a contract with the Secretary of Interior with a project priority date

(2) *Historic and existing reserved rights.*

Quantity: 5,095.61 afy diversion or 2,208.69 afy depletion, whichever is less

Source: Navajo and San Juan River Stream System

Priority: September 21, 1880

(3) *Groundwater*. The Nation may withdraw groundwater within the San Juan Basin which withdrawal does not deplete the surface flows of the San Juan River System.

§ 4 NATURE OF OWNERSHIP.

(A) The Congress of the United States has reserved in perpetuity to the Nation by law (P. L. 102-441) 40,000 acre-feet per year of water from the Colorado River Stream System. The Nation is the holder of equitable title to these rights, legal title to which vests in the United States in trust for the Nation.

(B) By entry of judgment in the 11th Judicial District Court, New Mexico, there is reserved to the Nation _____ acre-feet per year in the San Juan Basin.

(C) By entry of judgment in the United States District Court for the District of New Mexico, there is reserved to the Nation _____ acre-feet per year in the Rio Chama Basin.

§ 5 APPLICATION OF THE CODE.

Upon adoption of this Code, the provisions hereof shall govern the right to impound, divert, withdraw, use, or affect the use of the waters of the Jicarilla Apache Nation. All rights to use such water shall be subject to the applicable provisions of this Code and any use not authorized in accordance with this Code shall be deemed unlawful.

§ 6 JURISDICTION.

Any person lawfully exercising the right to use the waters of the Jicarilla Apache Nation as provided herein shall be deemed to have submitted to the jurisdiction of the Jicarilla Apache Nation and the provisions of this Code. Any disclaimer by such person to the Nation's jurisdiction shall result in the loss of the right to use such water.

§ 7 DEFINITIONS.

As used in this Code, the following definitions shall apply:

(A) **CONTRACT BETWEEN THE UNITED STATES AND JICARILLA APACHE NATION DATED DECEMBER 8, 1992.** That contract signed by the Department of the Interior setting forth the terms and conditions by which the Nation can use the Navajo Reservoir and the San Juan-Chama Diversion Project as storage and delivery systems for the Nation's future use reserved rights.

(B) **EMINENT DOMAIN.** The power of the Jicarilla Apache Nation to take assignments for public use.

(C) **FUTURE USE RESERVED RIGHTS.** Those rights reserved for the future use of the Jicarilla Apache Nation by P.L. 102-441, the Jicarilla Apache Tribe Water Rights Settlement Act.

(D) **HISTORIC AND EXISTING RESERVED RIGHTS.** Those rights historically and presently used by the Jicarilla Apache Nation within the Jicarilla Apache Nation as quantified by the partial final decrees entered in New Mexico v. United States, No. 75-184, District Court of San Juan County, New Mexico and New Mexico v. Aragon, CIV No. 7941-SC (D.N.M.).

(E) **JICARILLA APACHE NATION.** All lands within the territory defined by J.A.N.C. § 1-1-5.

(F) **NAVAJO RESERVOIR.** The reservoir created by the impoundment of the San Juan River at the Navajo Dam as authorized by the Act of Congress of April 11, 1956, 70 Stat. 105, as amended.

(G) **NAVAJO RIVER.** The river of that name which flows across the Jicarilla Apache Nation in New Mexico, and all tributaries thereto.

(H) **PUBLIC LAW 102-441.** That Act of Congress entitled the Jicarilla Apache Tribe Water Rights Settlement Act signed into law October 23, 1992.

(I) **SAN JUAN-CHAMA PROJECT.** The project authorized by Section 8 of the Act of June 13, 1962, 76 Stat. 96, and the Act of April 11, 1956, 70 Stat. 105, as amended.

(J) **SECRETARY.** The Secretary of the Department of the Interior of the United States.

(K) **STATE ACQUIRED RESERVED RIGHTS.** Those water rights appurtenant to acquired lands permitted pursuant to state law and transferred to the United States in trust for the Jicarilla Apache Nation.

(L) **SURPLUS WATER.** Any water which has neither been appropriated for beneficial use by issuance of a water use permit nor leased for use within or outside the Jicarilla Apache Nation.

(M) **LEGISLATIVE COUNCIL or COUNCIL.** The duly elected Legislative Council of the Jicarilla Apache Nation.

(N) ***COURT OF THE NATION.*** The Court of the Jicarilla Apache Nation.

(O) ***WATER ADMINISTRATOR.*** The Water Administrator of the Jicarilla Apache Nation.

(P) ***WATER COMMISSION.*** The Water Commission of the Jicarilla Apache Nation as created by this Code.

(Q) ***WATER USE PERMIT.*** The authority to use water granted by the Nation through the Water Commission which grant is a conditional right to use water and does not confer legal ownership of the water to the permittee.

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CHAPTER 2: MISCELLANEOUS PROVISIONS

§ 1 SEVERABILITY.

Should any provision of this Code be deemed unlawful or inconsistent with the Jicarilla Apache Constitution, laws and ordinances of the Jicarilla Apache Nation, or the laws of the United States of America, the remaining provisions of the Code shall remain in full force and effect.

§ 2 RULES OF CONSTRUCTION.

When applying and enforcing the provisions of this Code, the Water Commission shall be guided by and apply the following rules of construction:

(A) The Jicarilla Apache Nation is the permanent homeland of the members of the Jicarilla Apache Nation. All actions taken, consistent with the provisions of this Code, shall consider the effect of the existing or proposed use of the water resource on the Nation as a whole. The interest of individuals shall not supersede the beneficial interest of the Nation.

(B) The waters of the Jicarilla Apache Nation should be put to the highest and best use, consistent with the common good of and greatest return to the Nation.

(C) In considering whether to grant a proposed use or curtail an existing use, the Commission shall consider the adverse effects against the benefits to the Nation and to the affected parties, and shall study and consider alternatives to the proposed use, when appropriate, to minimize the adverse effects and to protect the Nation's water resources.

§ 3 PROCEDURES FOR REVIEW OF CODE.

(A) The Water Administrator and Water Commission shall, in the performance of their duties, note deficiencies or omissions in this Code and recommend amendments thereto or the addition of new Sections to the Council as may be necessary for the efficient application of the Code.

(B) No less than annually, the Water Administrator and Water Commission shall undertake a comprehensive review of the provisions of this Code and shall recommend amendments thereto as deemed appropriate.

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CHAPTER 3: WATER COMMISSION

§ 1 CREATION.

(A) *Membership.* The Water Commission shall consist of seven (7) voting members appointed by the President of the Nation with confirmation of the Council. The Commission may appoint non-voting ex-officio members to assist in the business of the Commission.

(B) *Terms.* The initial Water Commission shall be appointed for a period of two (2) years for four (4) members and one (1) year for three (3) members. Thereafter, each member appointed will serve a term of two (2) successive years. There shall be no limit on the number of successive terms a member may serve.

(C) *Qualifications.* Commissioners shall be enrolled members of the Jicarilla Apache Nation and shall have sufficient education and experience to enable them to understand the issues inherent in the administration of water resource and to make sound judgments.

§ 2 DISQUALIFICATION OF MEMBERS.

Any Commissioner may disqualify himself or may be disqualified by a majority vote of the Commission whenever such Commissioner cannot, because of a conflict of interest, deliberate or decide a matter impartially.

§ 3 QUORUM.

A simple majority of the Commission shall constitute a quorum for conducting the business of the Commission. A vote of the majority of the Commissioners present at the meeting or hearing at which a quorum is present shall constitute an official act of the Commission.

§ 4 RESIGNATION.

Any Commissioner may resign by submitting written notice of resignation to the Nation's President. Such Commissioner shall be replaced in the manner established for the appointment of Commissioners for the remainder of the unexpired term of the resigning Commissioner.

§ 5 REMOVAL.

(A) *Failure to Attend Meetings.* A Commissioner may be removed by majority vote of the Commission for failure to attend three (3) consecutive meetings or four (4) meetings in any single calendar year of which the Commissioner was duly notified in accordance with regulations adopted by the Commission.

(B) *Malfeasance or Misfeasance.* A Commissioner may be removed by majority vote of the Commission for conviction of a crime which reflects upon the Commissioner's honesty or ability to fulfill the fiduciary obligation to the Nation. A Commissioner may likewise be removed for engaging in transactions with persons doing business with the Commission unless the Commissioner's interest is fully disclosed and the remaining Commissioners who have no interest authorize the proposed transaction.

§ 6 GENERAL POWERS OF THE WATER COMMISSION.

(A) In administering this Code, and consistent with the provisions herein, the Water Commission may:

- (1) Accept for filing and review all applications to use water;
- (2) Duly note the protests which may be lodged against an application and provide a forum for hearing such protest;
- (3) Issue or deny the issuance of permits for use;
- (4) Resolve disputes and conflicts over the use of the Nation's water resources;
- (5) Promulgate, adopt, modify, or amend all regulations deemed necessary to implement and carry out the purposes of this Code;
- (6) Gather data as to the quality and quantity of the Nation's water resources and engage in comprehensive water resource planning for the conservation and preservation of that resource;
- (7) Curtail, when necessary, the use of water;
- (8) Allocate the available water supply among users in an equitable manner;
- (9) Engage in negotiations and discussions and respond to inquiries regarding use of the Nation's water resources outside the Nation; and

(10) Issue appropriate orders.

(B) In administering this Code, the Water Commission must:

(1) Comply with all directives of the Council; and

(2) Fulfill all accounting and reporting requirements contained in the agreement dated December 8, 1992 between the Nation and the United States.

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CHAPTER 4: WATER REGULATIONS

§ 1 AUTHORITY OF WATER COMMISSION TO PROMULGATE.

The Water Commission shall adopt such rules, regulations, procedures and forms as may be necessary to implement and perform the duties required by the provisions of this Code.

(A) In the performance of its duties hereunder, the Water Commission shall be subject to the oversight of the Council.

(B) All rules, regulations, procedures, and forms adopted by the Commission shall, within thirty (30) calendar days of their adoption, be published in the Jicarilla Chieftain, or other publication of general, local distribution, and shall be posted at the Nation's administration building. Such notice shall contain information necessary to assure adequate notice of the enactment and legal effect of the regulations.

§ 2 SCOPE AND EFFECT OF REGULATIONS.

This Code, and regulations adopted by the Water Commission, shall regulate and govern the impoundment, diversion, withdrawal, use, or actions affecting the use of water within the jurisdiction of the Jicarilla Apache Nation. All other uses of water shall be deemed unlawful.

§ 3 ENFORCEMENT PROCEDURES.

The Water Commission shall adopt regulations and procedures to ensure compliance with the Code, regulations, and conditions of all permits or other grants of rights to use water as well as established policies and guidelines.

§ 4 FEES AND PENALTIES.

(A) The Water Commission shall establish a schedule of reasonable fees to be paid in conjunction with applications to appropriate or change the place or purpose of use of water.

(B) The sale of water for short-term commercial or industrial use shall be regulated by the Water Commission which shall set a price therefor. The Commission shall make an annual determination of the market value of such water and shall adjust the price thereof accordingly.

(C) The costs associated with hearings as required by this Code and the accompanying regulations shall be borne by the applicant, purchaser and/or, in the proper case, the protestant(s). Regulations for the assessment of such costs shall be adopted by the Commission.

§ 5 GROUNDWATER.

(A) *Generally.* When deemed prudent by the Water Commission, based upon the recommendation of the Water Administrator, other departments of the Nation, or any person, regulations shall be adopted for the administration of the development and use of groundwater supplies to prevent impairment of existing uses and to promote water conservation.

(B) *Scope.* Any activity for the production of oil and gas which affects groundwater resources shall be subject to review and regulation of the Water Commission consistent with the scope of authority delegated to other regulatory or administrative agencies of the Nation and with the action of the Council.

(C) *Water Well Construction.* The method and design of water well construction shall be governed by procedures adopted by the Water Commission. Completion of all water production wells shall be in strict compliance therewith.

(D) *Licensing Procedures and Regulation of the Activities of Water Well Drillers.* It shall be unlawful for any person to drill a well for the development of a groundwater supply without a valid license for the drilling of such wells issued by the Water Commission consistent with this Code and the rules and regulations promulgated in accordance therewith.

§ 6 SURFACE WATER.

(A) Upon the adoption of this Code, all persons desiring to appropriate surface water for beneficial use or take any action affecting the surface waters of the Jicarilla Apache Nation shall file an application for permit as required by Title 21, Chapter 7. The provisions of this Code and regulations shall govern the appropriation and use of the surface water of the Jicarilla Apache Nation.

(B) Surface water of the Jicarilla Apache Nation may be applied to any beneficial use as determined by the Water Commission. There shall be no priority preference of the beneficial use of water unless so established by the Water Commission. The Water Commission and Water Administrator shall take appropriate actions to:

- (1) Ensure adequate water supplies;
- (2) Conserve water;
- (3) Protect water from pollution whether from point or nonpoint sources;
- (4) Control interference between competing water users to avoid impairment;
- (5) Protect and maintain riparian habitat for plant and animal life;
- (6) Preserve and enhance recreational use of the Nation's water supply whether as a primary or secondary beneficial use;
- (7) Ensure the safety of dams and other water storage structures, including municipal water storage facilities;
- (8) Regulate the construction of facilities in or adjacent to streams and other waterways to protect water quality and the rights of existing water users.

§ 7 PUBLIC AND COMMUNITY WATER SYSTEMS.

Public and community water supplies and delivery systems shall be regulated by the Water Commission to ensure a long-term, reliable water supply for domestic, municipal, and industrial use.

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CHAPTER 5: WATER ADMINISTRATOR

The Water Administrator shall administer the Jicarilla Office of Water Resources and shall ensure compliance with the provisions of this Code and the conditions of all permits, orders, regulations, and other actions taken and policies and guidelines established by the Water Commission.

§ 1 ESTABLISHMENT OF OFFICE OF WATER ADMINISTRATOR.

There is hereby established the Office of Water Administrator, responsible directly to the Water Commission, with full authority to administer the provisions of this Code and all regulations adopted by the Commission.

The Water Administrator shall be a technically qualified, registered, professional engineer or hydrologist possessing at least a master's degree in a water-related discipline or a bachelor's degree and not less than three (3) years experience in water resource management, water rights administration, or water development or engineering. The Water Administrator shall be appointed by the President, upon recommendation of the Water Commission, and confirmed by the Council. The salary of the Water Administrator shall be set by the Council.

§ 2 DUTIES.

The Water Administrator shall have the following duties and authority.

(A) *Employment of Staff.* The Water Administrator may employ staff for the proper conduct of his duties consistent with the budget approved by the Council. The employment of such staff shall be in compliance with the personnel manual of the Jicarilla Apache Nation.

(B) *Enforcement of Water Code and Regulations.* The Water Administrator shall ensure strict compliance with this Code and the regulations and with the requirements of all permits and orders issued by the Water Commission. In performance of his duties the Water Administrator may:

(1) Enter upon Nation lands, whether or not such lands are assigned or leased, to inspect diversion facilities, wells, impoundments, and other activities affecting water quality, quantity or flow, to install metering devices or measure flows, and to compel testimony and data by subpoena, if necessary, to enforce this Code;

(2) Exercise emergency powers to modify or curtail any diversion, withdrawal, or impoundment of surface or groundwater which adversely affects water quality or quantity; and

(3) On behalf of the Jicarilla Apache Nation *ex relatione*, take any action authorized by this Code or the laws of the Jicarilla Apache Nation to protect the water resources of the Nation.

(C) *Administration of the Water Code.* In administering this Code, the Water Administrator must:

(1) Make employment decisions regarding administrative and technical staff in compliance with the personnel manual and policies of the Nation;

(2) Prepare and submit an annual budget;

(3) Administer the Nation's water resources consistent with this Code and ensure compliance with the terms and conditions of all permits, orders, regulations, policies, guidelines and other actions of the Water Commission; and

(4) Comply with all accounting and reporting requirements of the contract between the Jicarilla Apache Nation and the United States dated December 8, 1992, establishing standard procedures for such compliance.

(D) *Administration of Advice and Counsel to the Water Commission.* The Water Administrator shall provide advice to the Water Commission on the following matters:

(1) Proposals to market water for use by entities other than the Nation, including advice on the term and pricing provisions of such proposals;

(2) Water resource planning and development, including economic analyses for development of the highest and best use of the Nation's water resources;

(3) Amendments to this Code and Commission regulations and procedures;

(4) Purchase of additional water, including advice on the economics of such purchases; and

(5) Participation in administrative or legal actions, the determination of which may affect the Nation's water resources.

(E) *Collection of Information and Data.* The Water Administrator shall be the primary source for all data and information regarding the Nation's water resources. In discharging this responsibility the Water Administrator shall:

(1) Collect, organize, and catalog existing information and studies, from whatever source, relating to water resources within the Nation and develop a computer database of such information;

(2) Develop or cause to be developed any additional data or studies regarding the Nation's water resources necessary to attain the objectives of this Code;

(3) Obtain all data from other sources necessary to determine the effects on the Nation's water resources of water diversion and withdrawal outside the Nation;

(4) Conduct on-going research regarding the Nation's water resources to confirm reliability and quality of supply and perform long-range planning for the Nation's water requirements; and

(5) Compile water marketing data for marketing potential and pricing factors.

(F) *Service as Intergovernmental Liaison.* The Water Administrator shall act as the Jicarilla Apache Nation's liaison in communicating with other governments and quasi-governmental entities on water matters. The Water Administrator shall attend such meetings and avail himself of information from water-related organizations as is necessary to inform the Nation on issues of importance to the Nation's water resources.

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CHAPTER 6: GUIDELINES FOR ADMINISTRATION

§ 1 POLICY.

In administering this Code, the Water Commission and the Water Administrator shall consider the following Policy.

(A) Water is a life-giving resource and its use should benefit the greatest possible number of members of the Nation.

(B) The welfare of the Nation is the most important consideration when authorizing the use of the water resource and no decision should be made which would compromise the Nation's welfare.

(C) The authorization of the use of water outside the Nation's boundaries should be allowed only under conditions which will ensure the greatest possible return to the Nation and for terms which will not impair the Nation's ability to put the water to beneficial use on the Nation within a reasonable time.

(D) Any proposed action which will impair an existing water right or result in a significant hardship for an existing user, or impair other economic, cultural, religious, historic, aesthetic, or environmental values, shall be permitted only after careful consideration of the nature and extent of such impairment or hardship.

(E) Although any use of water results in its degradation to some extent, the Water Commission and the Water Administrator shall weigh the benefits to the Nation against the adverse effect on the resource when considering a proposed water use or other water-related action, and shall consider alternatives which will protect the quality of the resource and be in the interest of water conservation.

§ 2 PRIORITY OF USE.

The Nation's water resource shall at all times be utilized for maximum benefits. When insufficient water is available to supply all beneficial uses, the following shall determine the priority of uses:

(A) Domestic;

(B) Stock-watering/agriculture;

(C) Fish and wildlife conservation;

- (D) Commercial/industrial;
- (E) Recreation; and
- (F) Instream flow – aesthetics/environment.

§ 3 POLICY GUIDELINES.

(A) The Nation's water resources may be appropriated for any use deemed beneficial by the Nation in compliance with this Code and any regulations thereunder. Any use deemed not beneficial shall be considered a waste of water and is prohibited by this Code.

(B) Storage of water may be authorized by the Water Commission whenever such storage or use of water by an upstream owner or owners would not deprive downstream users or appropriators of their reasonable water needs. Storage of water for purposes other than the public welfare or the common good shall be authorized only to the extent that such storage does not interfere with the use of water by others, priority of right notwithstanding.

(C) Water appropriated and applied to beneficial use may be transferred by the permitted water user in compliance with this Code and the regulations.

(D) The rivers, lakes, and ponds of the Nation are to be retained as nearly as possible in their natural condition, prohibiting the obstruction of flows and maintaining water levels necessary to preserve traditional and religious, recreational, fish and wildlife uses, and maintain aesthetic and environmental values to the greatest extent possible.

(E) The Water Commission and Water Administrator shall:

- (1) Plan for the efficient and economic use of the Nation's water resources;
- (2) Maintain five (5) and ten (10) year water plans to avoid conflict among water uses;
- (3) Penalize misuse; and
- (4) Enforce the provisions of this Code and the regulations.

CHAPTER 7: PERMITTING PROCEDURES

§ 1 EXISTING USES TO BE PROTECTED.

The Water Commission shall complete an inventory of water uses existing on the date of the adoption of this Code. Each existing use of water shall be identified with the information required in J.A.N.C. §§ 21-7-3 or 21-7-4, whichever is applicable. Such existing water uses which comply with the requirements of this Code and regulations shall be protected against all subsequent applicants except as otherwise provided herein.

§ 2 EMINENT DOMAIN.

The Nation may exercise the right of eminent domain to take and acquire permitted water uses and rights-of-way for the construction of water impoundments and conveyance systems when the exercise of such right is in the interest of protecting the health, safety, and welfare of the Nation.

§ 3 APPLICATION TO APPROPRIATE GROUNDWATER.

Any member of the Nation desiring to appropriate the groundwater of the Nation for beneficial use must file an application with the Water Commission in the form prescribed, stating:

- (A) The location within the Nation from which the water will be appropriated;
 - (B) The beneficial use to which the water will be applied;
 - (C) The location of the well;
 - (D) The name of the assignee of the land upon which the well will be located;
 - (E) The amount of water applied for;
 - (F) The proposed place of use of the water;
 - (G) If the use is for irrigation, the description of the land to be irrigated and the assignee of the land;
- and

(H) If the applicant is not the assignee of the land or the lessee of the oil and gas rights under the land, the application shall be accompanied by a statement of the assignee that the applicant is granted access to the assignment for purposes of drilling and operating the well. This subsection shall not apply to the Nation or to an application to appropriate groundwater for the Nation's benefit.

Water wells limited to the use of three (3) acre-feet per annum or less for domestic and garden uses shall not be subject to the provisions of this Section.

§ 4 APPLICATION TO APPROPRIATE SURFACE WATER.

Any member of the Nation intending to acquire the right to beneficially use any surface waters of the Nation shall, before beginning any construction for such purpose, make application to the Water Commission in the form prescribed, stating:

- (A) The quantity of water desired;
- (B) The purpose and location of use;
- (C) The point of diversion of such water from its source; and
- (D) The period or periods of annual use of such water.

Stock tanks constructed so that the dam does not exceed ten (10) feet in height from the natural level of the drainage on the downstream side of the impoundment and which does not impound more than ten (10) acre-feet of water shall not be subject to the provisions of this Section.

§ 5 PUBLIC NOTICE OF APPLICATION.

Upon the filing of an application in compliance with this Chapter, and appropriate regulations, the Water Commission shall instruct the applicant to publish notice thereof in the newspaper of the Nation, or if no such newspaper exists, then to post notice in a place and for the period of time as instructed by the Water Commission. Such notice shall contain the information required by J.A.N.C. §§ 21-7-3 or 21-7-4, whichever is applicable, and the information required by J.A.N.C. § 21-7-6. Proof of such publication or posting shall be made to the Water Commission before further proceedings may be held on the application.

§ 6 PROTESTS.

The published or posted notice required by J.A.N.C. § 21-7-5 shall state that any person whose interests are or may be affected by the proposed water appropriation or use may, within thirty (30) calendar days from the date of publication or posting, formally protest the issuance of the permit by filing a written objection with the Water Commission. Such objection shall be made on forms made available by the Water Commission and shall contain a statement as to the interests of the objector and a short and plain statement of the reason(s) why the application should be denied or issued in a form other than that applied for. The Nation, including its departments and agencies, shall have standing to file objections.

§ 7 RESPONSES TO PROTESTS BY APPLICANT.

Any applicant whose application is subject of a protest may file a written response. Such written response shall not preclude applicant from requesting a hearing on the application as hereinafter provided.

§ 8 INVESTIGATION AND REVIEW BY THE WATER ADMINISTRATOR.

Upon the filing of any application for the appropriation of water, the application shall be forwarded to the Water Administrator who shall:

(A) Make a reasonable factual investigation, including a technical review of the hydrology of the system affected by the proposed action;

(B) Provide notice to other water right users in the same hydrological system who may be affected by the granting of the permit; and

(C) Make a non-binding recommendation to the Water Commission as to whether to grant or deny the permit applied for.

§ 9 HEARING ON PROTESTS BY WATER COMMISSION.

The applicant or any protestant may request and shall be granted a hearing as a matter of right. Absent a request for hearing, the Water Commission may schedule a hearing whenever it determines that a hearing is necessary to make a decision on the application. Notice of and procedural requirements for such hearing shall be as set forth in J.A.N.C. §§ 21-12-1 and 21-12-2.

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CHAPTER 8: ISSUANCE OF PERMITS

§ 1 FORM.

Water use permits shall be issued in a form approved by the Water Commission. The form shall, at a minimum, include the following information:

- (A) Name and address of the permitted water user;
- (B) A description of the source or point of diversion from which the water will be withdrawn and put to beneficial use;
- (C) The quantity of water authorized to be diverted or impounded;
- (D) The purpose or purposes for which water will be used;
- (E) The quantity of diverted water which may be depleted;
- (F) The priority date of the permit which shall be the date of first use for all rights established prior to the effective date of this Code and the date of filing of the application to appropriate surface water or groundwater for any permit issued subsequent to the effective date of this Code; and
- (G) Any other conditions regarding the use of the permitted water right deemed appropriate by the Water Commission.

§ 2 RIGHT TO USE.

Beneficial use shall be the sole determinant of the right to use water and the quantity which may be used under any permit.

§ 3 FAILURE TO USE.

Failure to use permitted water may result in loss by forfeiture or abandonment of the permitted water use or the unused portion thereof as the terms forfeiture and abandonment are described in Title 21,

Chapter 11. Any forfeited or abandoned permitted water use shall revert to the Jicarilla Apache Nation and the permittee shall retain no right(s) thereto. Failure to use permitted water may be excused for any one or more of the following reasons upon good cause shown to the Water Commission:

(A) Unavailability of water due to drought or other circumstances beyond the control of the permittee;

(B) By operation of law; or

(C) Any other showing that the non-use of the permitted use was beyond the control of the permittee.

§ 4 REPORTING REQUIREMENTS.

The Water Commission, as a condition for the issuance of the continuing right to hold a water use permit, may impose upon the permittee the requirement to meter, measure, or otherwise record the water diverted or impounded pursuant to the permit and may require the periodic reporting of this information to the Water Administrator. The Water Administrator shall have the right to periodically inspect the metering or measuring devices and may require the performance of tests to ensure their accuracy.

§ 5 MODIFICATION OF PERMITS.

Permits for the use of water may be modified by the Water Commission to serve any purpose deemed necessary to protect the public health and welfare or upon request of the permittee.

(A) Any permit to use water may be modified by the Water Commission upon an application to modify permit filed in the same manner as provided in J.A.N.C. §§ 21-7-3 or 21-7-4 for the filing of applications to appropriate water.

(B) Notice of application to modify shall be given in the manner set forth in J.A.N.C. § 21-7-5 and any applicant or protestant may request a hearing on the proposed modification as provided in Title 21, Chapter 12. An application to modify permit may include, among other modification requests, the right to change the place and/or purpose of use of a water right or to enlarge the place of use of such right.

(C) Upon the filing of an application to modify permit, the Water Administrator shall investigate the application to determine whether the modification will result in the beneficial use of water, whether water is available to fulfill the purposes of the proposed modified use, and whether the modification, if granted, will not impair existing uses of water. The results of the investigation and a recommendation shall be forwarded to the Water Commission.

(D) Upon consideration of all information provided by the Water Administrator, and if applicable, after hearing all evidence of the applicant and any protestants, the Water Commission may grant or deny the application, may grant the application with conditions deemed necessary, or may request additional information from the Water Administrator prior to making a final decision.

Water Code

CHAPTER 9: DETERMINATION OF AVAILABILITY AND BENEFICIAL USE

§ 1 WATER ADMINISTRATOR REVIEW.

(A) *Availability of Water.* Upon the filing of any application to appropriate water an investigation shall be initiated by the Water Administrator to determine whether water is available for appropriation. The information recovered in the course of such investigation shall be incorporated into the Water Inventory whether such data is new information or an amendment of existing data.

(B) *Determination of Beneficial Use.* The Water Administrator shall determine whether there is a need for the quantity of water applied for and if the proposed use is a beneficial use in accordance with this Code and the laws of the Jicarilla Apache Nation.

(C) *Impairment of Existing Uses.* A review of all existing uses of water from the source and tributaries thereto for which a new application is made shall be conducted to determine whether the granting of the application will result in the impairment of an existing permitted water use.

§ 2 WATER ADMINISTRATOR'S REPORT.

(A) *Preparation of Report.* Within forty-five (45) calendar days of receipt of an application for a permit to appropriate water, the Water Administrator shall issue a report determining the availability of the supply sought to be appropriated and whether the use of such water is a beneficial use pursuant to this Code and the laws of the Jicarilla Apache Nation. Such report shall be advisory only and shall be subject to rebuttal by any interested party in accordance with this Code.

(B) *Contents.* The report of the Water Administrator shall include but not be limited to the following:

(1) A description of the area of study that shall include the geographic area which is the subject of the application;

(2) Identification of the sources of water in the area;

(3) A determination of the available water supply;

(4) Identification of all permitted water uses from the source, including the identity of each permitted user and the quantity permitted;

(5) Conclusions and recommendations of the Water Administrator regarding the subject matter of the application; and

(6) Any recommended conditions that should be placed upon the applicant if the permit is granted.

§ 3 NOTICE AND HEARING BY THE WATER COMMISSION.

(A) *Notice.* Upon the request of any protestant or if the Water Commission deems necessary, a hearing shall be set on any application to appropriate water or any other action affecting the water resources of the Nation. The notice shall be the same as set forth in J.A.N.C. § 21-12-1(B).

(B) *Hearing.* Hearings shall be conducted in accordance with the procedure set forth in J.A.N.C. § 21-12-2.

(C) *Evidence.* All evidence presented at the hearing and that to be exclusively relied upon by the Commission in making a decision shall relate to water availability, beneficial use and impairment of existing permitted water uses. The procedural requirements for the introduction of evidence shall be the same as set forth in J.A.N.C. § 21-12-2(D).

§ 4 DECISION OF THE WATER COMMISSION.

(A) *Form of Decision.* Within thirty (30) calendar days of hearing or within thirty (30) calendar days of the transmittal of the Water Administrator's report if no hearing is held, the Water Commission shall render its decision. The Commission may:

(1) Deny the application based upon the lack of a water resource available for appropriation, failure to prove that the water would be put to a beneficial use within a reasonable time, or failure to prove that there would be no impairment to existing permitted water uses;

(2) Grant the application with or without conditions for use; or

(3) Set the matter for further hearings with instructions regarding the particular matters to be heard.

All decisions shall be on forms prepared and approved by the Water Commission.

(B) *Modification of Permits.* The Water Commission shall retain jurisdiction over all water uses within the Nation and may modify water use permits as circumstances warrant except that the Commission may not modify a permit which will reduce the amount of water permitted for use except upon the giving of notice and a hearing as provided in J.A.N.C. §§ 21-12-1 and 21-12-2.

CHAPTER 10: TRANSFER OF PERMITTED USES

§ 1 TRANSFER.

(A) *Change of Ownership.* A permit to appropriate water approved by the Water Commission grants only a conditional right to use water and does not confer legal ownership of the water to the permittee. A permitted use is transferable if it has first been put to beneficial use. A change of ownership of permit does not confer any rights beyond those contained in the permit and does not authorize a change in the nature or place of use of water. A change of ownership of permit shall be on the form authorized by the Water Commission and all such changes shall be recorded with the Water Commission. Such changes in ownership shall be on the same terms and conditions as the original permit unless a change in hydrological conditions clearly warrants a modification of the permit.

(B) *Heirship.* Heirs of permittees may file for a change of ownership of permit which shall be freely granted if the permitted water has been put to beneficial use by the decedent. Such changes in ownership shall be on the same terms and conditions as the original permit unless a change in hydrological conditions clearly warrants a modification of the permit.

(C) *Priority of Right to Use.* The change of ownership of a water permit by any of the above means shall have no effect upon the priority of the right to use which shall be the date granted to the original permittee by the Water Commission.

§ 2 CHANGE IN PLACE OR PURPOSE OF USE/ENLARGE PLACE OF USE.

(A) *Procedural Requirements.* An application to change place or purpose of use or to enlarge the place of use shall be filed on the form prescribed by the Water Commission. The application shall be investigated by the Water Administrator to determine if the water is being beneficially used by the permittee and whether the proposed change in place or purpose of use or enlargement of area of use will impair the existing permitted water uses of others. Within forty-five (45) calendar days of the filing of such application, the Water Administrator shall issue a report containing the findings of the investigation and conclusions and recommendations for the Water Commission.

(B) *Notice and Hearing.* The requirement for public notice shall be the same as set forth in J.A.N.C. § 21-12-1(B)(2) for applications to appropriate water. The procedure for hearings is contained in J.A.N.C. § 21-12-2. A hearing shall be required only if the application is protested by a party having an interest in the water resource affected by the application or if the Water Commission determines that the application is of sufficient public interest to warrant a public hearing.

(C) *Decision of the Water Commission.* Within thirty (30) calendar days of the transmittal of the Water Administrator's report or within thirty (30) calendar days of the completion of the public hearing, the Water Commission shall render its decision. The Commission may:

- (1) Deny the application upon a finding that to grant the application would impair existing permitted water uses;
- (2) Grant the application with or without conditions; or
- (3) Set the matter for further hearings with instructions regarding the particular matters to be heard.

All decisions shall be on forms prepared and approved by the Water Commission. Such permits may be modified as deemed necessary by the Water Commission except that any modification which impairs the use of water by the permittee shall require notice and a hearing as set forth in this Section.

CHAPTER 11: LOSS OF PERMITTED WATER USES

§ 1 VOLUNTARY RELINQUISHMENT THROUGH ABANDONMENT.

Any permitted water use may be relinquished or abandoned voluntarily by an expression of a desire to relinquish or by actions which manifest an intent to relinquish.

§ 2 NONUSE.

Failure to use permitted water or a portion thereof for a period of five (5) consecutive years may result in the loss of the permit or unused portion by forfeiture. Such forfeited uses shall return to the public domain and shall be subject to application for appropriation by others. The loss of a permitted water use by nonuse shall not prejudice the right of a member of the Nation to file an application for a new permit.

§ 3 EXCUSABLE NONUSE.

Causes beyond the control of a permittee preventing the use of permitted water shall not result in forfeiture or abandonment of the permit. Excusable nonuse shall include:

(A) Unavailability of water due to drought or other circumstances beyond the control of the permittee;

(B) Service in the armed forces;

(C) The enactment of a Council ordinance preventing the use of water;

(D) Compliance with conditions contained in the permit requiring periods of nonuse; and

(E) Any other failure to use water which is beyond the control of the permittee.

§ 4 LOSS BY ADVERSE POSSESSION.

No right to use water may be acquired by adverse possession, prescription, estoppel, or acquiescence.

§ 5 PERMIT REVIEW.

Each permit to use water shall be reviewed by the Water Administrator at no less than five (5) year intervals to ensure compliance with any conditions contained therein and to certify that the water is being put to beneficial use. Failure to comply with such conditions or to beneficially use the waters of the Nation may result in forfeiture of such permitted uses or the imposition of other sanctions as contained in this Code.

§ 6 NOTICE.

There shall be no forfeiture of permitted water pursuant to the provisions of this Section unless notice is first given to the permittee of an opportunity to appear before a hearing conducted by the Water Commission and there to show cause why such water use permit should not be forfeited.

CHAPTER 12: HEARING PROCEDURES

§ 1 RIGHT TO HEARING.

(A) *Application for Permit to Appropriate Water.* Any interested party who protests an application to appropriate water shall be entitled to a hearing as set forth in this Chapter. Any applicant whose unprotested application is denied by the Water Commission may request that a hearing be held on the application. Any permittee whose water use permit is directly affected by an action of the Water Administrator or the Water Commission may request a hearing pursuant to this Chapter.

(B) *Notice.*

(1) *Generally.* All parties whose water permit or property rights may be affected by an action or a proposed action of the Water Administrator or the Water Commission shall be entitled to notice of hearings held under this Chapter. Such notice shall be published in the newspaper of general local circulation within the Nation and personal notice shall be given, when possible, to each party who may be directly affected by the proposed action.

(2) *Notice for Applications to Appropriate Water/Notice for Change in Place or Purpose.* Such notice shall contain the name of applicant, the general nature of the application, the availability of the report of the Water Administrator, and the date, time, and location for the public hearing.

(C) *Informed Disposition.* When no protests have been filed and the Water Commission deems that the disposition of a matter will involve no issues of public policy, it may proceed to render its decision on an application or other matter within its jurisdiction without public hearing.

(D) *Time and Place of Hearings.* Hearings shall be at such times and at such locations as determined by the Water Commission. The Commission shall make every effort to accommodate the requests of the interested parties with regard to the time and place of hearings.

§ 2 PROCEDURE.

(A) *Representation.* Any applicant or interested party may be represented by a spokesperson or attorney in hearings before the Water Commission.

(B) *Hearing Conduct.* Hearings for applications to appropriate water, modification of permits, and requests to change the place or purpose of use shall be conducted in the manner discussed below.

(1) All hearings shall be presided over by the Chairperson of the Commission or the Chairperson's designee.

(2) The Water Administrator shall present any relevant findings and recommendations and, for applications to appropriate water or to change place or purpose of use, the findings of the report previously filed with the Commission.

(3) The applicant and protestants may question the Water Administrator regarding his findings and recommendations and/or the contents of the report.

(4) The applicant may present any evidence, either documentary or by oral testimony of sworn witnesses, which may tend to support a conclusion as to water availability, beneficial use, and impairment.

(5) Any protestant may present like testimony which would tend to rebut either the findings and recommendations of the Water Administrator or the evidence of the applicant.

(6) The Water Commission may interview any and all witnesses at their discretion.

(7) Public comment shall be allowed if related to the application which is the subject of the hearing.

(8) The hearing shall be adjourned at the conclusion of all testimony and statements.

(C) *Burden of Proof.* An applicant for permit to appropriate water or to change the place or purpose of use/enlarge place of use shall have the burden of proving that water is available for appropriation and that the granting of the application will not impair existing permitted water uses. A permittee granted notice and hearing on forfeiture or loss of water through abandonment shall have the burden of showing cause, if any exists, why the permitted rights should not be revoked.

(D) *Evidence.* At hearing both oral and written evidence may be introduced. Any party may introduce the testimony of witnesses, including expert witnesses. There shall be no formal rules of evidence but the Chairperson of the Commission, who shall act as the presiding officer at all hearings, may make such decisions as to the introduction of evidence and the course of conduct of the proceeding as will expedite the proceeding in an orderly fashion and enable the Water Commission to make an informed decision.

(E) *Continuance.* The Water Commission may grant a continuance of a scheduled hearing for good cause and may continue or recess a hearing from time to time as deemed necessary.

(F) *Consolidation.* When two (2) or more applications are pending which involve the same parties and water source, the Water Commission may consolidate the applications for the purpose of hearing.

(G) *Record of Proceedings.* The Water Commission or any party may request that a hearing record be made by electronic recording. If the request is made by an applicant or interested party, the cost of recording the proceedings shall be borne by the party making the request.

(H) *Decisions.* Within thirty (30) calendar days of the completion of the hearing, the Water Commission shall render its decision. The Commission may consult with the Water Administrator in reaching its decision which shall be in writing and notice of which shall be given in the same manner as notice of hearing set forth in J.A.N.C. § 21-12-1(B).

Water Code

CHAPTER 13: APPELLATE REVIEW

§ 1 RIGHT TO APPEAL.

Any party aggrieved by the final action of the Water Commission may appeal the decision to the Jicarilla Apache Nation Court. Such appeal shall be filed with the Court within thirty (30) calendar days of the final action of the Commission. Final action shall mean any action taken which disposes of the matter before the Commission and which requires no further deliberation of the Commission.

§ 2 PROCEDURE.

(A) *Record.* The record on appeal shall consist of the report of the Water Administrator, the decision of the Water Commission, any written evidence admitted in the proceeding before the Commission, and the recording of the proceedings, if any.

(B) *Written Statements and Briefs.* Any party to an appeal may submit written statements or legal briefs to the Court setting forth the party's position on appeal and arguments supporting the party's position. Such briefs shall be in the form as directed by the Court.

(C) *Standard of Review.* The Court shall be limited to a review of the Commission's decision or ruling. No new evidence shall be considered by the Court. The Court may modify, reverse, or remand a decision or ruling of the Commission only when such decision or ruling is without substantial basis in fact, is contrary to the Nation's law, or is clearly arbitrary or capricious.

(D) *Oral Argument.* The Court may request or may grant the request of a party for oral argument on appeal. A date shall be set at least fifteen (15) calendar days in advance of oral argument.

(E) *Finality.* The decision of the Court on appeal shall be final.

Water Code

CHAPTER 14: VIOLATIONS AND PENALTIES

§ 1 WASTE.

Beneficial use shall be the measure and the limit of the right to use the water resources of the Nation and any use that is not beneficial as determined by the Water Administrator pursuant to Title 21, Chapter 9 herein shall be deemed waste. No permittee shall be allowed to commit waste.

§ 2 UNAUTHORIZED USE OF WATER.

The use of the waters of the Nation shall be governed by the provisions of this Code and any regulations promulgated by the Water Commission. Use of water in violation of this Code and those regulations adopted by the Water Commission shall be considered an unauthorized use and is expressly prohibited.

§ 3 OBSTRUCTION OF WATER OFFICIALS.

The obstruction of or interference with water officials of the Nation in the performance of their duties under this Code shall be a violation of this Code.

§ 4 PENALTIES.

Violation of the provisions of this Chapter may result in the suspension or termination of the right to use water under this Code. In addition to the right to suspend or terminate a permitted water use, the Water Commission may enjoin the activities of individuals committing any of the above violations and may assess damages for injury to permittees occasioned by violation of this Chapter. The Water Commission may exercise broad discretionary powers in enforcing the provisions of this Chapter.

Water Code

CHAPTER 15: WATER MARKETING

§ 1 LEASING WITHIN THE NATION.

(A) *Mineral Resource Development.* Any developer or producer of oil and gas or any other mineral resource within the Nation may apply for a permit to appropriate groundwater or surface water as provided in Title 21, Chapter 7. Such application may be granted if, upon notice and hearing as provided in Title 21, Chapter 12, a determination is made by the Water Commission that the proposed use of water will not adversely impact existing water uses. Issuance of permits shall be conditioned upon payment to the Nation for the use of water at rates to be established by the Water Commission. Water appropriated by a developer or producer shall not be piped, trucked, or otherwise transported off the Nation nor shall such water be resold or subleased by the permittee.

(B) *Short-term Water Use of One Acre Foot or Less.* Any mineral resource developer or producer or industrial user of water within the Nation, including construction contractors, requiring the use of less than one (1) acre-foot of water for a period of less than six (6) months, must apply to the Water Commission for a permit to use such water. The Commission may, after investigation of the request, grant such permit without notice and public hearing. The permit shall identify the source(s) from which the water may be taken and the issuance of the permit shall be conditioned upon receipt of payment at rates established by the Water Commission for the use of water. The permittee may not transport water from the Nation nor shall the water be subleased or resold.

§ 2 LEASING OUTSIDE THE NATION.

(A) *Authority.* Public Law 102-441, Section 7, and the contract between the United States and the Jicarilla Apache Nation dated December 8, 1992, authorize the Nation to subcontract with third parties for the use of its future use reserved rights outside the Nation.

(B) *Policy.* When the Nation's future use water rights are not being used by the Nation, the Nation may lease all or a portion of its rights by subcontract, subject to Secretarial approval, to water users outside the exterior boundaries of the Nation. Such uses shall be consistent with and shall consider the Nation's culture and economic goals and shall be for a term and contain conditions that will ensure the ability of the Nation to retrieve the water resource for development within the Nation at the earliest opportunity. Development of the Nation's future use water rights to the greater benefit of the Nation as a whole shall be the policy of the Water Commission and the Council when considering development

of the Nation's water resources outside the Nation. There shall be no lease of the Nation's water rights for use outside the Nation which lease would jeopardize the ability of the Nation to recoup such resources for development within the Nation.

(C) *Role of the Water Commission.* All inquiries regarding leasing or subcontracting of the Nation's water resources for use outside the Nation shall be referred to the Water Commission for investigation and recommendation. The Water Commission shall review the request in light of the policy set forth in J.A.N.C. § 21-15-2(B) to determine whether or not the proposed use benefits the Nation.

(D) *Role of the Water Administrator.* The Water Administrator shall investigate the hydrologic and economic feasibility of all requests for the lease of the Nation's water, including the source and availability of the supply, legal impediments to the delivery, transportation losses, and an analysis of the benefits of the proposal to the Nation. The Water Administrator shall report all findings to the Water Commission, including a recommendation as to the feasibility of the proposal.

(E) *Utilization of Experts.* In conducting the investigation and preparing the analysis, the Water Administrator may request the services of such experts as may be required, with the prior approval of the Water Commission, except that the Water Administrator shall be solely responsible for the preparation of the report and recommendation.

(F) *Concurrence of the Council.* Upon completion of the report and recommendation by the Water Administrator and decision thereon by the Water Commission, the recommendation of the Water Commission shall then be presented to the Council by the Water Commission. The Council may reject or accept the recommendation of the Water Commission and shall, by resolution, either reject the proposal or authorize the Water Commission to enter into negotiation of the terms and conditions of an agreement to lease or subcontract the waters of the Nation.

(G) *Negotiations.* No direct negotiations shall be conducted without the approval of the Council by resolution, nor shall the Water Administrator or Water Commission be vested with the authority to enter into a binding agreement for the leasing or subcontracting of the Nation's water rights. The Water Commission may utilize the services of the Water Administrator, its staff, and such experts as are necessary. All negotiated agreements shall be subject to final approval by the Council and the Secretary of the Interior.

CHAPTER 16: CONTRACT ADMINISTRATION AND ACCOUNTING REQUIREMENTS

§ 1 CONTRACTUAL REQUIREMENTS.

The requirements and provisions set forth in this Chapter are in compliance with the terms and conditions of the contract between the United States and the Jicarilla Apache Nation dated December 8, 1992 and fulfill the requirements of P. L. 102-441.

§ 2 WATER ACCOUNTING.

(A) *Navajo River*. The Nation's future use reserved right may be diverted from the Navajo River in an amount not to exceed 33,500 acre-feet per annum with consumptive use not to exceed 25,500 acre-feet per annum. The Water Administrator shall notify the contracting officer of the Bureau of Indian Affairs at least thirty (30) calendar days prior to any such diversion of the amount and timing of such diversion. The Water Administrator, in fulfillment of this duty, shall establish a reliable methodology for forecasting water use on the Nation and for reporting and accounting for such use.

(B) *Navajo Reservoir*. There shall be made available from the Navajo Reservoir up to 33,500 acre-feet per annum for diversion and up to 25,500 acre-feet per annum for consumptive use by the Nation or its subcontractors. The Water Administrator shall account for such water as is diverted by or on behalf of the Nation on an annual basis as a means of reconciling the accounting of the United States Bureau of Reclamation for withdrawals. Such accounting shall include a balance sheet identifying water diverted in the current year, water which was not diverted and thus released, and the balance of the Nation's water within the system which is stored, banked, or exchanged.

(C) *Heron Reservoir*. There shall be made available to the Nation up to 6,500 acre-feet per annum from the San Juan-Chama Project for consumptive use by the Nation or its subcontractors. The point of delivery of such water shall be the outlet works of Heron Reservoir unless otherwise agreed by the Nation and the Secretary. The Water Administrator shall account for such water as is delivered to the Nation or its subcontractors on an annual basis and shall reconcile such delivery with an annual accounting of the United States Bureau of Reclamation, showing the amount of water delivered, the amount undelivered, and the balance of any amount stored, banked, or exchanged.

(D) *Storage, Banking, or Exchange of Water for Future use*. The Water Commission is authorized to seek alternative methods for the storage, banking, or exchange of carry-over water to avoid loss of water on an annual basis to the greatest possible extent and preserve the resource for future use. The

Commission shall rely upon the Water Administrator and staff to identify potential storage facilities, banking, or exchange opportunities and to evaluate the feasibility of each. The Commission may negotiate with the authority responsible for the administration of each storage facility, bank, or exchange and may make recommendations to the Council regarding the terms and conditions of use of any storage facility, banking, or exchange opportunity. The Water Commission may not bind the Nation to any agreement.

(E) *Sharing of Available Water Supply.* With respect to the water made available from the Navajo Reservoir or the San Juan-Chama Project under the terms of the contract between the United States and the Nation dated December 8, 1992, during periods when the Secretary finds that the actual available water supply is more or less than the estimated firm yield of the project, the Nation shall share in the available water supply in the ratio that its contract amount bears to the firm yield. In times of shortage, the Nation will share in the available water supply in the manner set forth in Section 11(a) of the Act of June 13, 1962, 76 Stat. 96, 99-100. The Water Administrator shall audit the findings of the Secretary on an annual basis and reconcile those findings with the Water Administrator's records of the Nation's water diversions and use.

§ 3 COST ACCOUNTING.

(A) *Navajo Reservoir.*

(1) *Construction Costs.* For water delivered from the Navajo Reservoir supply as set forth in J.A.N.C. § 21-16-2(B), construction costs shall be charged at the annual amortization rate of \$2.60 per acre-foot ending in the year 2012 for water delivered for irrigation, municipal, and industrial uses. Construction charges for water delivered for irrigation of Indian land shall be allocated and payment deferred under the provisions of the Leavitt Act, 47 Stat. 564, as authorized in Section 4(d) of the Colorado River Storage Project Act. The Water Administrator shall account for all water delivered for which there is an obligation to pay such costs, reconcile such amounts with the calculations of the Secretary, and ensure that payments are made in a timely manner. The Secretary or his designee shall bill the Nation for such costs on or before September 1 of the year preceding the year of use. Payment of all accrued costs shall be made within thirty (30) calendar days after receipt of the bill.

(2) *Operation, Maintenance, and Replacement Costs.* The Water Administrator shall audit and reconcile the Nation's proportionate share of the annual operation, maintenance, and replacement (OM&R) costs assignable to the amount of water made available to the Nation from the Navajo Reservoir supply. The Secretary or his designee will bill the Nation for OM&R costs for Navajo Reservoir on or before September 1 of the year preceding the year of use. Payment of all accrued costs shall be made within thirty (30) calendar days after receipt of the bill.

(B) *San Juan-Chama Project.*

(1) *Construction Costs for Irrigation.* For water delivered from the San Juan-Chama Project for irrigation, construction costs shall be charged at an annual amortization rate of \$3.25 per acre-foot ending in the year 2021. Construction charges for water delivered for irrigation on Indian lands shall be allocated and payment deferred under the provisions of the Leavitt Act, 47 Stat. 564, as authorized in Section 4(d) of the Colorado River Storage Project Act. The Water Administrator shall audit all water deliveries charged against the Nation's San Juan-Chama allocation for which there is an obligation to pay such costs, reconcile the audit with the charges billed by the Secretary, and ensure that payments are made in a timely manner. Payment of all accrued costs shall be made within thirty (30) calendar days after receipt of the bill.

(2) *Construction Costs for Municipal and Industrial Water.* For irrigation water delivered from the San Juan-Chama Project converted and designated as municipal and industrial water, construction costs shall be charged at an annual amortization rate of \$29.40 per acre-foot ending in the year 2021. The Water Administrator shall audit all municipal and industrial water deliveries charged against the Nation's San Juan-Chama allocation for which there is an obligation to pay such costs, reconcile the audit with the charges billed by the Secretary, and ensure that payments are made in a timely manner. Payments of all accrued costs shall be made within thirty (30) calendar days after receipt of the bill.

(3) *Operation, Maintenance, and Replacement Costs.* The Water Administrator shall be responsible for authorizing payment of OM&R costs for the San Juan-Chama Project. Such costs shall be paid on the basis of annual estimates made by the Secretary. A billing from the Secretary will be sent to the Nation on or before May 1 for the succeeding years' annual reimbursable OM&R costs assessed to the Nation. The costs shall be advanced quarterly on December 31, March 10, May 10, and August 30. The Nation's share of OM&R costs shall be based upon the ratio of the number of acre feet allocated to the Nation to the total number of acre-feet under contract by all contractors of San Juan-Chama water. In the event of a deficit in OM&R funds, the Secretary may issue a supplemental bill. The Water Administrator shall audit all billings from the Secretary to ensure their accuracy and the Nation's liability therefor.

§ 4 ANNUAL NOTICES.

(A) *Water Use by the Nation.* In addition to the notice required in J.A.N.C. § 21-16-2(A), the Water Administrator will provide an annual notice to the Secretary listing the amount of water estimated to be used by the Nation, the estimated period and point of diversion for each intended purpose, and a listing of all executed subcontracts with third parties, including those subcontracts anticipated to be executed during the succeeding year. The purpose of such notice is for billing. Notice shall be sent on or before February 1 of the year preceding the year of use described in the notice.

(B) *Waiver of OM&R Costs.* All or part of the annual construction and OM&R costs may be waived if there is a demonstration to the Secretary that no market exists for all or part of the Nation's Navajo Reservoir or San Juan-Chama Project water supplies. The Water Administrator shall provide such demonstration in written form which shall accompany the notice of annual water use by the Nation required by J.A.N.C. § 21-16-4(A).

§ 5 WATER CONSERVATION.

Prior to the delivery of the Nation's water provided from or conveyed through Navajo Reservoir or the San Juan-Chama Project, the Water Administrator shall develop and recommend an effective water conservation program to the Water Commission which shall contain definite water conservation objectives, appropriate economically feasible water conservation measures, and time schedules for meeting those objectives. At subsequent three-year intervals, the Water Administrator shall prepare and submit a report on the results of the program to the Water Commission and Secretary for review. Based on the conclusions of the review, the Secretary and the Water Commission shall consult and agree to continue or to revise the existing water conservation program.

CHAPTER 17: ENFORCEMENT OF PRIORITY OF USE

§ 1 GUIDELINES.

The Nation's water shall be allocated according to priority date of the permit, which shall be based upon the date of first use for all rights established prior to the effective date of this Code and the date of filing of the application to appropriate surface water or groundwater for any permit issued subsequent to the effective date of this Code. Users of the Nation's water shall divert only that quantity of water to which they are legally entitled under the terms and conditions of the permit unless otherwise authorized by the Water Commission. Surplus waters of the Nation may be used ratably by permitted water users at the discretion of the Water Commission. In the event of drought, water shall be allocated on a priority basis.

§ 2 AUTHORITY OF THE WATER COMMISSION.

(A) *Supervisory Powers.* The Water Commission shall:

(1) Supervise the apportionment of water within the Nation in accordance with permits issued by the Water Commission and their predecessors and upon conditions imposed by the Council and the Nation's Court;

(2) Regulate the distribution of water from the various surface and groundwater sources within the Nation under the provisions of this Water Code; and

(3) Be authorized to enjoin diversions and uses of water which the Commission has determined impair prior existing water uses, trespass upon the property of others without the consent of the assignee thereof, or because water shortages exist.

(B) *Subpoena Powers.* The Water Commission shall have the power to subpoena documents, records, or persons. In the event of failure or refusal on the part of any person to comply with any subpoena issued by the Water Commission, or on the refusal of any witnesses to testify or to answer as to any matters regarding which he may be lawfully questioned, the judge of the Nation's Court, on application of the Water Commission, may compel such person to comply with the subpoena and to appear before the Water Commission and produce such documents, and give his testimony upon such matters as may be lawfully required, and the judge shall have the power to punish for contempt as in the case of disobedience of a like subpoena issued by him for refusal to testify therein.

(C) *Appellate Review.* Any party aggrieved by the final action of the Water Commission may appeal the decision to the Nation's Court as set forth in Title 21, Chapter 13.

CHAPTER 18: WATER RIGHTS TRUST FUND

§ 1 FUND CREATED.

A permanent trust fund is hereby created under the name “The Water Rights Trust Fund” which shall be owned by the Jicarilla Apache Nation.

§ 2 PURPOSE.

(A) The Water Rights Trust Fund shall be available for the express purposes in this Chapter and the Management Plan approved pursuant to J.A.N.C. § 21-18-6, and as otherwise approved by the Legislative Council, subject to §§ 8(b)(1) and (c) of the Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-442, 106 Stat. 2237 (1992), as modified by Pub. L. No. 104-261, 110 Stat. 3176 (1996) and Pub. L. No. 105-256, 112 Stat. 1896 (1998) (“Settlement Act”).

(B) The purpose of the Water Rights Trust Fund shall be to further the water rights protection, water management, and water development goals of the Nation, as determined from time to time by Council resolution, for the benefit of the Nation, its members, and its future generations.

(C) The Water Rights Trust Fund shall not be used to maintain or repair existing water delivery or wastewater systems.

§ 3 CONTRIBUTIONS TO THE FUND.

(A) All contributions into the Water Rights Trust Fund shall be deposited into accounts established at a Custodian Bank approved by the Council.

(B) The initial contribution to the Water Rights Trust Fund shall consist of all funds transferred from the Jicarilla Apache Water Resources Development Trust Fund maintained by the United States in the United States Treasury Account No. JA9134691 pursuant to the Settlement Act.

(C) The Council, in its discretion, may make additional contributions to the Water Rights Trust Fund consistent with applicable law of the Nation and the United States.

§ 4 MANAGEMENT PLAN.

(A) Prior to any withdrawal of monies from the Water Rights Trust Fund, a Management Plan shall be approved by the Council.

(B) The Management Plan shall state the Nation's investment goals for the Water Rights Trust Fund and the strategy for achieving those goals. The Management Plan shall also contain the policies for the administration of the Water Rights Trust Fund and other appropriate information required by applicable federal law for the transfer of funds from the Jicarilla Apache Water Resources Development Trust Fund maintained by the United States.

§ 5 FUND MANAGEMENT.

(A) The Water Rights Trust Fund shall be managed, directed, and supervised by the Council in strict compliance with a Management Plan approved by the Council and subject to any applicable requirements of the laws of the Nation and the United States.

(B) The Council shall select and retain a competent Investment Advisor. The Investment Advisor, under the direction and supervision of the Council, shall supervise, direct, and evaluate the performance of such Fund Managers as may be retained by the Council.

(C) The Council shall arrange for, and approve as appropriate, written contracts for the professional and qualified management of the Water Rights Trust Fund, which shall include, but not be limited to, the following services:

- (1) Investment;
- (2) Custodial;
- (3) Record keeping;
- (4) Reporting;
- (5) Legal;
- (6) Accounting; and
- (7) Auditing.

§ 6 SEPARATE PRINCIPAL AND EXPENDITURE ACCOUNTS.

(A) The Custodian Bank of the Water Rights Trust Fund shall maintain separate principal and expenditure accounts.

(B) The initial principal account shall consist of a minimum of Six Million Dollars (\$6,000,000) and the initial expenditure account shall consist of the balance of the funds transferred from the United States Treasury Account No. JA9134691.

(C) The Council, in its discretion, may authorize the transfer of funds from the principal account to the expenditure account; provided that no transfer shall be made to the expenditure account if the year-end market value of the principal account is less than Six Million Dollars (\$6,000,000) or would be reduced below Six Million Dollars (\$6,000,000) by the transfer. The market value of the principal account shall be determined by the annual audit pursuant to J.A.N.C. § 21-18-10(a).

§ 7 EXPENSES OF THE FUND.

(A) All expenses directly associated with the administration, management, and protection of the Water Rights Trust Fund, including investment advisory and management fees and audit costs, shall be paid from the Water Rights Trust Fund expenditure account, subject to approval by the Council.

(B) All contracts for services related to the administration, management and protection of the Water Rights Trust Fund shall be valid only if approved by the Council.

§ 8 RESTRICTIONS ON DISTRIBUTIONS AND WITHDRAWALS.

(A) No part of the principal of the Water Rights Trust Fund, or of the income accruing to the Water Rights Trust Fund, or of the revenue from any water use subcontract of the Nation's water rights shall be distributed to any member of the Nation on a per capita basis.

(B) No withdrawal shall ever be allowed from the Water Rights Trust Fund which would be in violation of the management plan or which would result in the principal of the Water Rights Trust Fund falling below Six Million Dollars (\$6,000,000) .

(C) Withdrawal of monies from the Water Rights Trust Fund shall require approval by a majority vote of the Council at a duly-called meeting at which a quorum is present.

§ 9 AMENDMENT.

Any amendment of this Chapter or of the Management Plan shall be valid only if approved by a majority vote of the Council at a duly-called meeting at which a quorum is present.

§ 10 AUDITING AND REPORTING.

(A) The Management Plan shall provide for adequate accounting of all financial transactions involving the Water Rights Trust Fund, including a comprehensive annual audit and report on performance of the Water Rights Trust Fund by a competent, professional, independent certified public accountant.

(B) The Investment Advisor shall provide copies of each such annual audit and report to the President, the Vice President, the Council, and the Nation's Treasurer.

§ 11 SITUS OF THE WATER RIGHTS TRUST FUND.

The situs of the Water Rights Trust Fund shall be deemed to be the headquarters of the Jicarilla Apache Nation. The validity, construction, and all rights with respect to this Ordinance and the Water Rights Trust Fund shall be governed by the laws of the Jicarilla Apache Nation, the Management Plan approved by the Council, and such federal laws as may be applicable.

§ 12 CONFLICT PROVISION.

If the provisions of this Chapter or the Management Plan conflict with any other provisions of law of the Nation, then the applicable provisions of this Chapter or the Management Plan shall govern to the extent of such inconsistency.

§ 13 SAVINGS CLAUSE.

In the event any provision of this Chapter is determined to be unlawful or invalid for any reason, the remaining provisions shall continue to be valid and in full force and effect.

Water Code

TITLE 21 HISTORY

Title 21, Water Code, was enacted by Ordinance No. 98-O-571-12 on December 4, 1998. The Ordinance was received and recommended for approval by the Bureau of Indian Affairs on December 11, 1998. The effective date of approval is based upon the failure of the Secretary to disapprove within the required 120 days pursuant to Article XI, Section 2 of the Jicarilla Tribal Constitution and therefore deemed approved as of April 12, 1999. The Ordinance reads as follows:

WHEREAS, Article XI, Section 1(a)(3) of the Revised Constitution of the Jicarilla Apache Tribe authorizes the Jicarilla Apache Tribal Council to enact ordinances governing the development of natural resources where such development is designed for the general welfare of the Tribe as a whole; and

WHEREAS, Article XI, Section 1(d) of the Revised Constitution of the Jicarilla Apache Tribe authorizes the Jicarilla Apache Tribal Council to enact ordinances to promote the peace, safety, property, health and general welfare of the people of the Jicarilla Apache Reservation; and

WHEREAS, the property and general welfare of the Jicarilla Apache Tribe and of the people of the Jicarilla Apache Reservation will benefit from the adoption of rules and regulations governing the development of the water resources of the Jicarilla Apache Tribe.

NOW, THEREFORE, BE IT ORDAINED by the Tribal Council of the Jicarilla Apache Tribe hereby adopts the following Ordinances, to be codified as Title 21, Chapter 1 of the Jicarilla Apache Tribal Code. [Text of Ordinance]

Title 21, Chapter 18, Water Rights Trust Fund, was enacted by Ordinance No. 2002-O-229-04 on April 22, 2002, and repealed by Ordinance No. 2004-O-200-05 on May 17, 2004. On June 1, 2004, Ordinance No. 2004-O-245-06 was enacted and received Secretarial approval on July 7, 2004. The Ordinance reads as follows:

WHEREAS, Article XI, Section 1(a)(3) of the Revised Constitution of the Jicarilla Apache Nation (1987) ("Revised Constitution") authorizes the Legislative Council of the Jicarilla Apache Nation to enact ordinances to govern the development of the Jicarilla Apache Nation's ("Nation") natural resources for the general welfare of the Nation as a whole; and

WHEREAS, Article XI, Section 1(c) of the Revised Constitution authorizes the Legislative Council to manage all funds within the control of the Nation and to appropriate available tribal funds for public, business and governmental purposes; and

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WHEREAS, in April of 1999, the Nation completed all of the prerequisites of the Jicarilla Apache Tribe Water Rights Settlement Act, Pub. L. No. 102-441, 106 Stat. 2237 (1992), as modified by Pub. L. 104-261, 110 Stat. 3176 (1996), and Pub. L. No. 105-256, 112 Stat. 1896 (1998) (the "Settlement Act"); and

WHEREAS, in accordance with Section 8 of the Settlement Act, the Nation may now expend monies from a trust fund established in the United States Treasury in Account No. JA9134691 and managed by the Office of Trust Fund Management of the Department of the Interior ("OTFM"), known as the Jicarilla Apache Water Resources Development Trust Fund ("Treasury Trust Fund"); and

WHEREAS, Section 8 of the Settlement Act provides that the Treasury Trust Fund may "be expended by the Tribe for any water resource development costs" provided that "[n]o part of the principal of the fund, or the income accruing to such fund, or the revenue from any water use subcontract, shall be distributed to any member of the Tribe on a per capita basis"; and

WHEREAS, at the date of enactment of this ordinance, the Treasury Trust Fund is worth approximately Nine Million Nine Hundred and Fifty-Seven Dollars and 92/100 (\$9,000,957.92); and

WHEREAS, the American Indian Trust Fund Management Reform Act of 1994, Pub. L. 103-412, 108 Stat. 4239, 25 U.S.C. § 4001 *et seq.*, and its implementing regulations at 25 C.F.R. Part 1200, set forth the rules and procedures by which the Nation may request that funds in the Treasury Trust Fund be taken out of federal trust status; and

WHEREAS, the Nation now wishes to remove from federal trust status the funds in the Treasury Trust Fund and transfer them to a trust fund under the Nation's control, responsibility and management; and

WHEREAS, pursuant to 25 C.F.R. § 1200.13(b)(2), the Legislative Council recognizes that the funds, once withdrawn in accordance with the American Indian Trust Fund Management Reform Act, will no longer be held in trust status by the United States government and that the United States will have no further responsibility or liability for the funds; and

WHEREAS, in accordance with 25 C.F.R. §§ 1200.13(b)(3)(i) and (ii), the Legislative Council recognizes that neither the Nation or the United States necessarily accepts the accuracy of the account balance at the time of the withdrawal of funds from the Treasury Trust Fund, and neither party waives any right regarding the account balance, including the right to seek compensation for incorrect balances; and

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WHEREAS, in accordance with 25 C.F.R. § 1200.13(f), the ordinance set forth below, to be codified as Chapter 18 of Title 21 of the Tribal Code, sets forth the conditions for the uses of the funds and income from the funds and requires strict compliance with a Management Plan that is to be approved by the Legislative Council.

NOW, THEREFORE, BE IT ORDAINED, by the Legislative Council of the Jicarilla Apache Nation that, subject to any necessary approvals by the Secretary of the Interior or his authorized representative and the OTFM, the following ordinance is hereby enacted, to be codified as Chapter 18 of Title 21 of the Tribal Code. [Text of Ordinance]

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