

# Water and Natural Resources Committee

## Indian Water Rights Settlement Efforts in New Mexico

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# Background on Tribal Water Rights

- Congress relinquished to the states plenary control over water resources in the public domain.
  - 1877 Desert Lands Act
  - 1902 Reclamation Act
- NM exercises jurisdiction over public waters within the state's boundaries.
- Federally reserved water rights for Tribal Nations are an exception to state authority.
- Tribal Water Rights were established either by Tribes reserving water for themselves in treaties or by Congress reserving water for the Tribes.

# Background on Tribal Water Rights

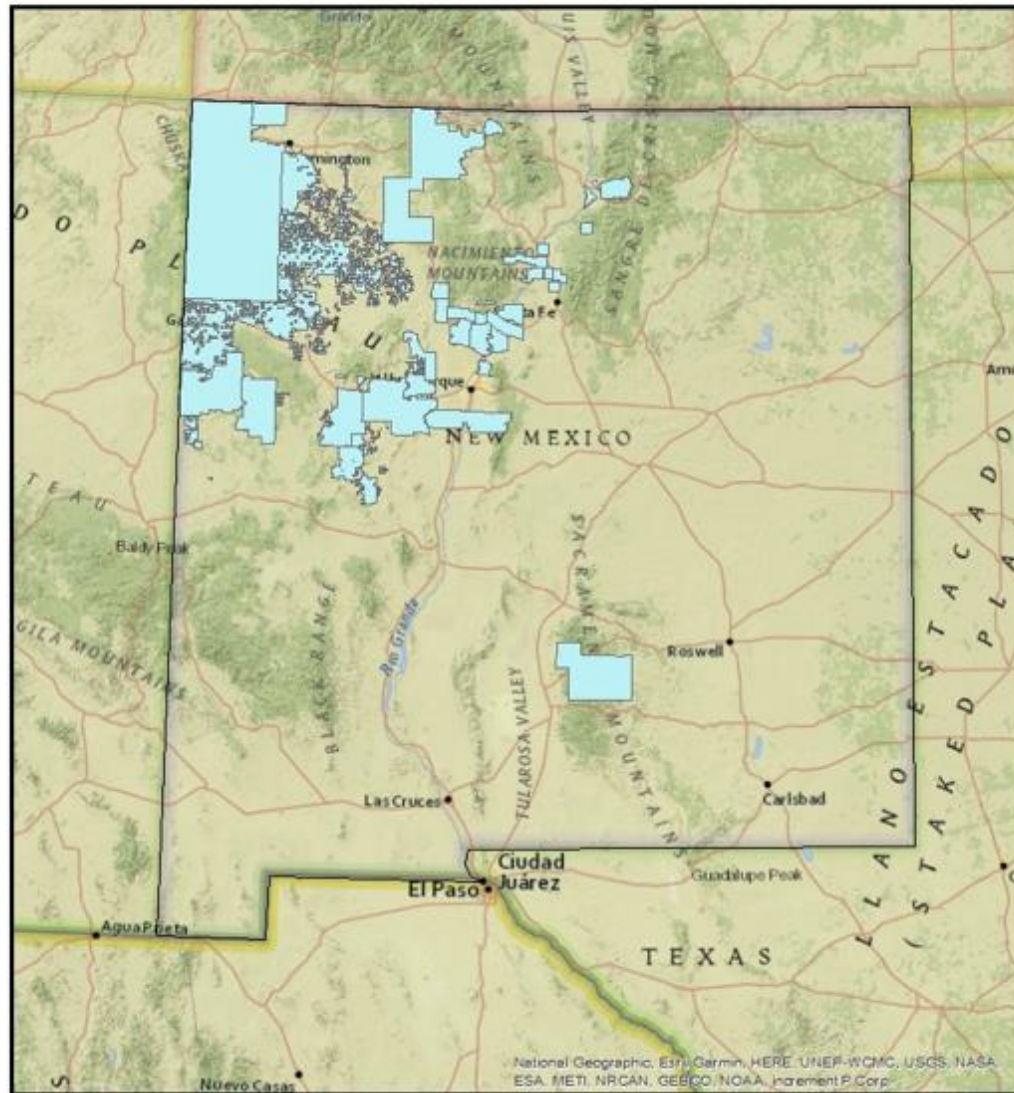
- Reserved Water Rights Doctrine (*Winters* Rights)
  - Water rights impliedly reserved by Congress to satisfy the present and future needs of the Tribe to meet the homeland purpose of the reservation.
- Aboriginal Water Rights (*Winans* Rights)
  - Pueblo grant lands were either granted by Spain or never extinguished by Spain, Mexico, or US.
  - Water rights appurtenant to Pueblo grant lands are aboriginal.
- Tribal Water Rights are different from State Water Rights.
  - Tribal water rights are not established by use.
  - Tribal water rights cannot be lost due to non-use.

# Background on Tribal Water Rights

- Tribes have claims for past, present and future uses.
- Tribes have claims for virtually every type of water use:
  - Irrigation
  - Municipal
  - Domestic
  - Commercial
  - Industrial
  - Environmental
  - Livestock
  - Religious/Ceremonial
- Tribes have claims to every water source:
  - Surface Water
  - Groundwater
  - Springs and Seeps

# OVERVIEW

## New Mexico Tribal Lands



# OVERVIEW

- New Mexico is home to 19 Pueblos, the Navajo Nation, the Jicarilla Apache Nation, the Fort Sill Apache, the Mescalero Apache Nation and the Ute Mountain Ute Tribe.
- Completed Settlement
  - Jicarilla Apache Nation - San Juan River, Rio Chama
- Settlement Agreement Final - Implementation of Projects
  - Navajo Nation - San Juan River Basin
  - Pueblos of Nambe, Pojoaque, Tesuque and San Ildefonso - Pojoaque River Basin (*Aamodt*)
  - Taos Pueblo - Taos Valley Stream System (*Abeyta*)

# CREATION OF NEW BUREAU AT OSE FOR TRIBES, PUEBLOS, AND NATIONS

- In order to provide increased responsiveness and focus to the negotiation of settlements with New Mexico's Tribes, Pueblos, and Nations, OSE created a new Bureau in early 2022 dedicated to that task.
- Dedicated legal and technical staff have enabled New Mexico to keep negotiations moving forward in line with the expectations of other negotiating parties.
- Completion of settlements will not be held up by OSE resource constraints.

# OVERVIEW

## Settlement Negotiation

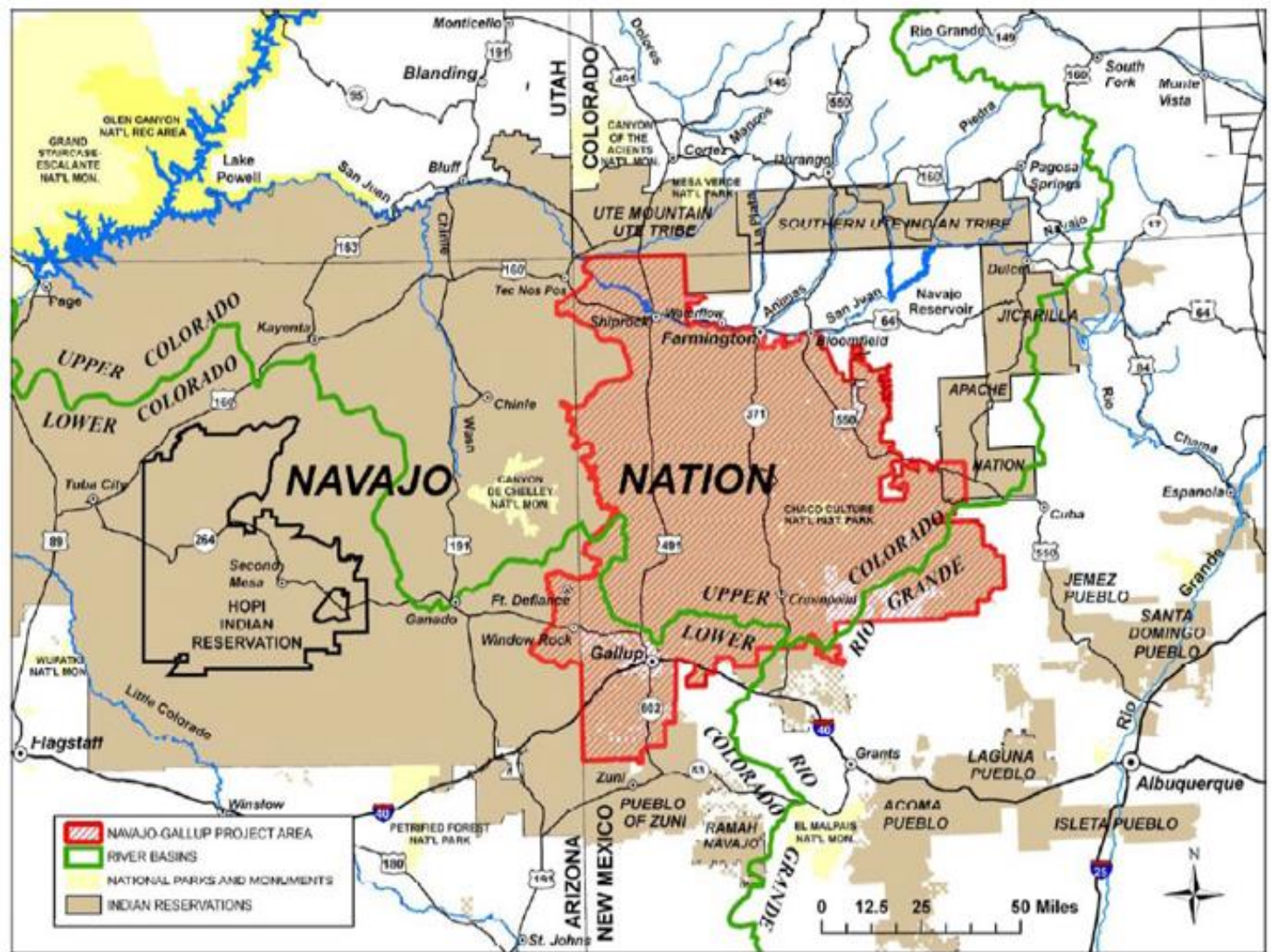
- Pueblos of Jemez and Zia (Santa Ana Pueblo is not participating) – Rio Jemez (*Abousleman*)
- Pueblos of Acoma and Laguna, and Navajo Nation – Rio San Jose (*Kerr-McGee*)
- Zuni Pueblo and Navajo Nation - Zuni River Basin (*A&R Productions*)
- Pueblos of Ohkay Owingeh and Santa Clara - Rio Chama, Rio Santa Cruz and Rio Grande (*Abbot and Aragon*)
- Ute Mountain Ute Tribe – San Juan River (*N.M. v. U.S.*)

## Settlement Assessment

- Pueblos of Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia and Isleta



# NAVAJO/SAN JUAN SETTLEMENT IMPLEMENTATION





# NAVAJO/SAN JUAN SETTLEMENT IMPLEMENTATION

- Congress authorized the Navajo-San Juan NM Settlement in 2009, through P.L. 111-11, settling the Nation's claims to the San Juan River Basin.
- The parties to the Settlement are the US, the Navajo Nation, and the State of New Mexico.
- Settlement includes provisions for the Navajo-Gallup Water Supply Project; Shiprock Irrigation Projects Rehabilitation; Conjunctive Use Wells; and Trust Fund.
- The State of NM has met its \$50 million cost share under the settlement.
- The Cutter Lateral is completed and operational, the San Juan Lateral is not completed.

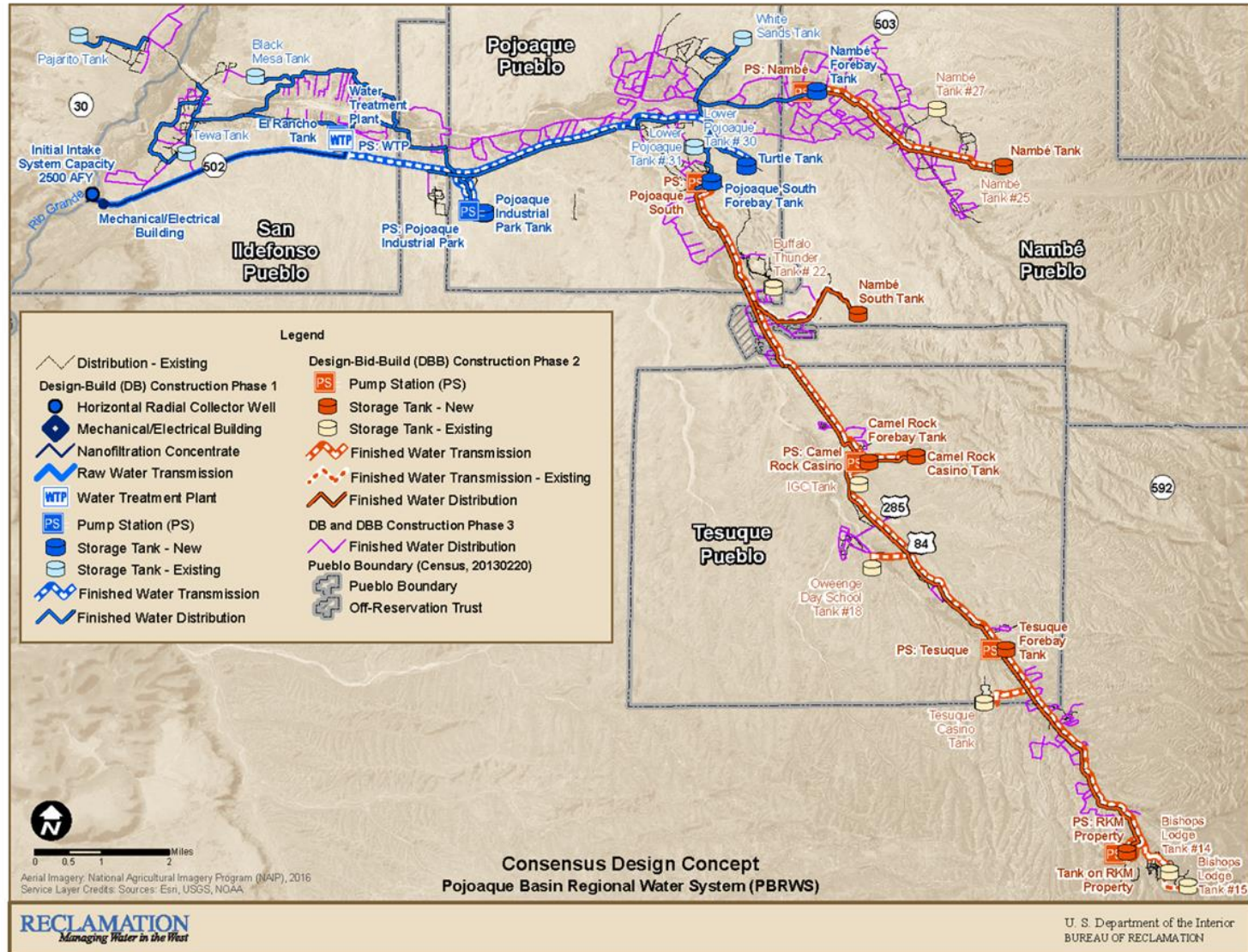
# NAVAJO/SAN JUAN SETTLEMENT IMPLEMENTATION

- Following the Gold King Mine spill, BOR decided to change the location of the San Juan River intake to protect against pollution issues.
- Other delays in construction occurred.
- The project will not be finished by its original completion date of 2024.
- NM has appropriated additional funds for the City of Gallup to drill groundwater wells so Gallup can provide groundwater for the San Juan Lateral.

# NAVAJO/SAN JUAN SETTLEMENT IMPLEMENTATION

- Funding Gap for NGWSP is projected to be ~\$513 million.
- NGWSP partners are working on proposed amendments to the Settlement Act that could increase cost of the project by an additional ~\$172 million or more.
- One amendment also requests waiving OM&R cost for up to 15 years for Project beneficiaries. This OM&R waiver would add additional ~\$300+ million of Federal obligation over the waiver period.
- Several other proposed amendments have no or unknown cost implications.

# AAMODT SETTLEMENT IMPLEMENTATION



# AAMODT SETTLEMENT IMPLEMENTATION

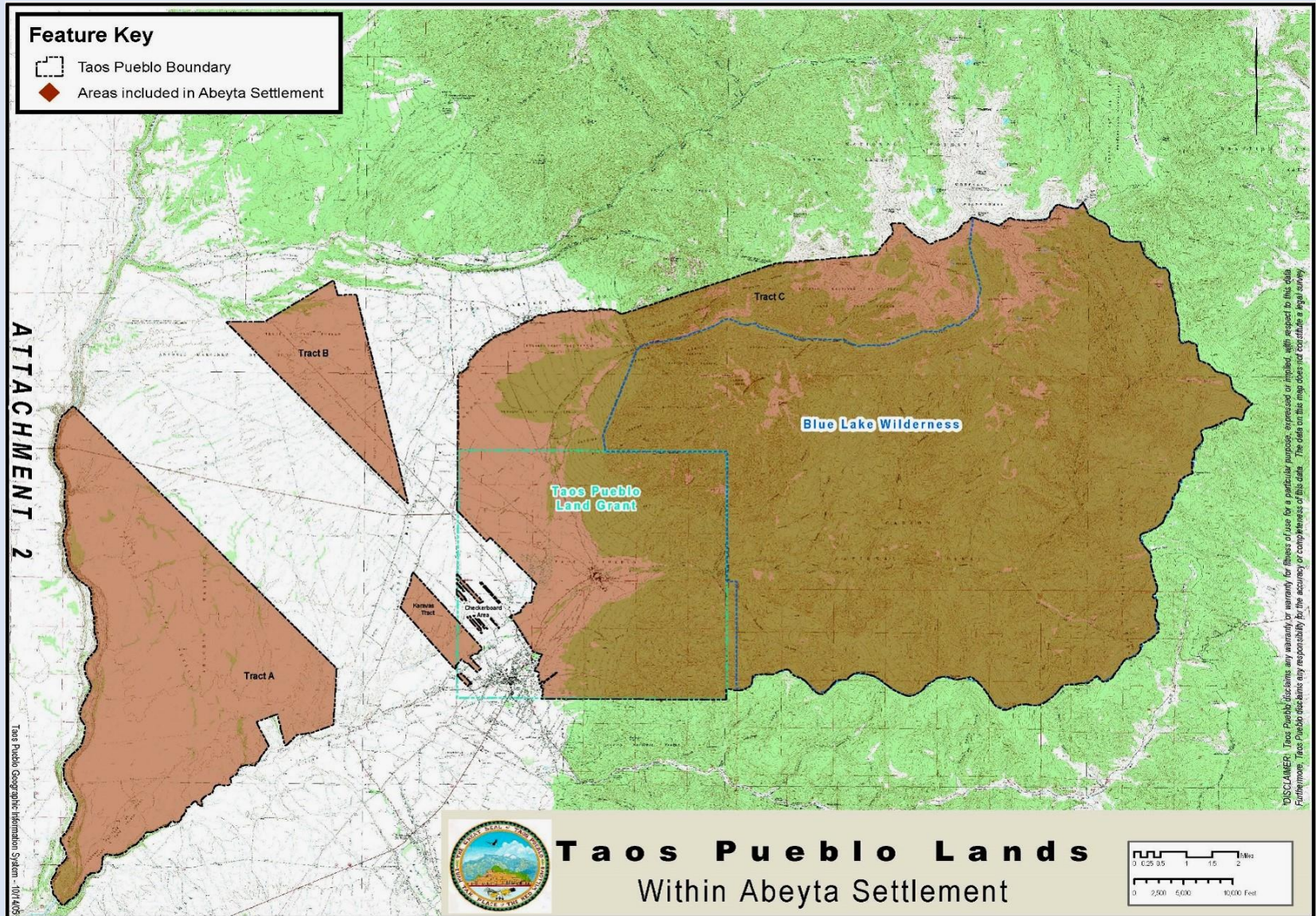
- Congress authorized the Aamodt Litigation Settlement Act in 2010, through 111 Pub. L. 291, settling the Pueblos' claims to the Pojoaque River Basin.
- The parties to the Settlement are US, the Pueblos of Nambe, Pojoaque, San Ildefonso and Tesuque, NM, County of Santa Fe and City of Santa Fe.
- The 4 Pueblos water rights were established by decree on March 23, 2016, and the settlement terms became enforceable on September 15, 2017.

# AAMODT SETTLEMENT IMPLEMENTATION

- The centerpiece of the Settlement is construction of the Pojoaque Basin Regional Water System (RWS).
- In 2017, BOR identified a sizable cost gap and negotiated a resolution with the parties.
- Congress amended the Aamodt Settlement in 2020, 116 Pub. L. 260, increasing the Federal cost-ceiling by \$137 million to a total of \$243.4 million.
- New Mexico has appropriated its full cost share, approximately \$104.5 million.
- Phase 1 of construction is underway.



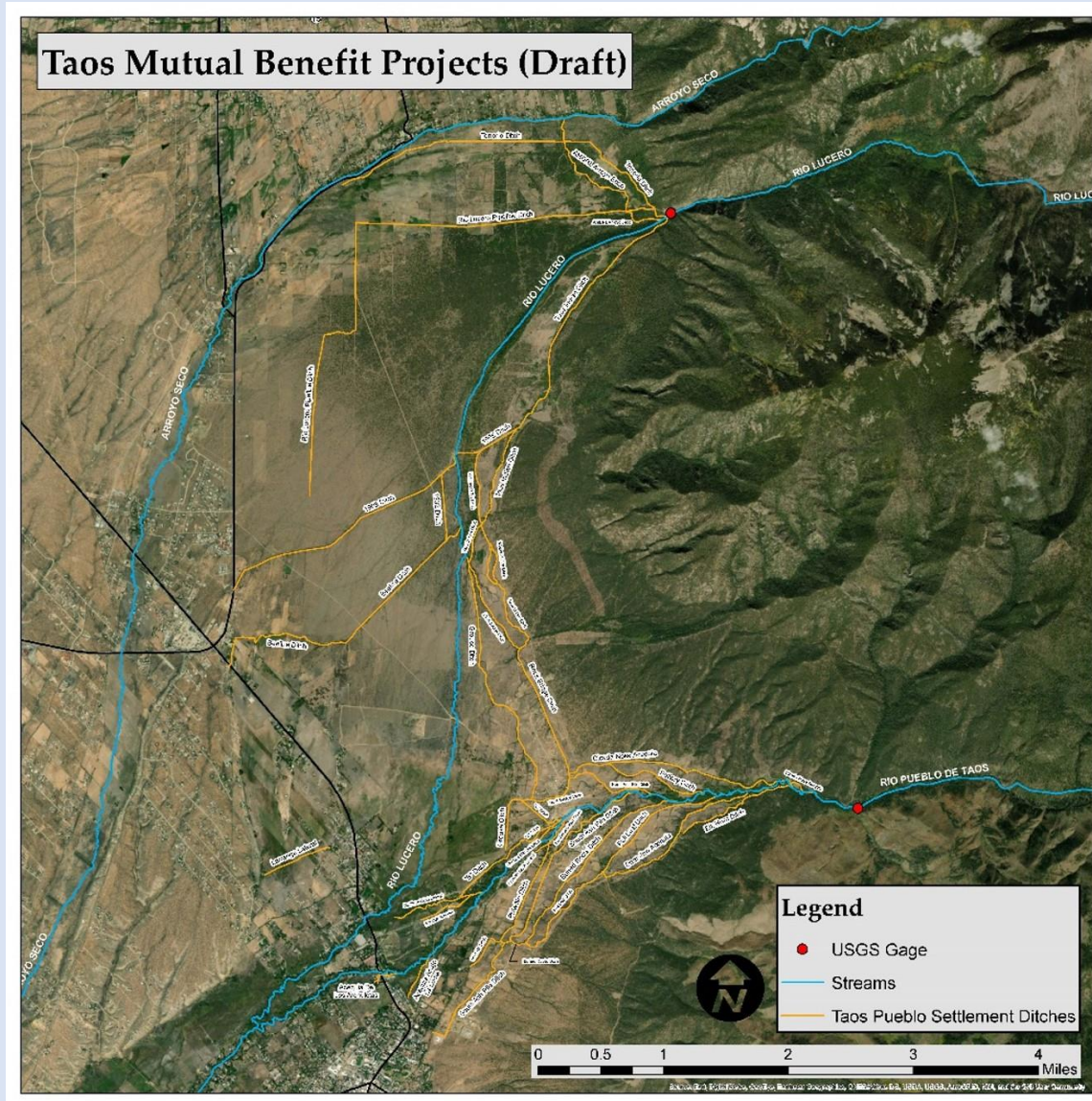
# TAOS SETTLEMENT IMPLEMENTATION



# TAOS SETTLEMENT IMPLEMENTATION

- Congress authorized the Taos Settlement Act in 2010, through P.L. No. 111-291, settling the Pueblo's claims to the Rio Hondo and Rio Pueblo de Taos stream systems.
- The Settlement parties include the US, Taos Pueblo, the State of NM, the Taos Valley Acequia Association (54 members), the Town of Taos, El Prado Water and Sanitation District, and the 12 Taos-area Mutual Domestic Water Consumer Associations.
- A key feature of the Settlement is funding for non-Indian Mutual Benefit Projects (MBP) to offset surface water depletion effects of groundwater pumping.

# TAOS SETTLEMENT IMPLEMENTATION



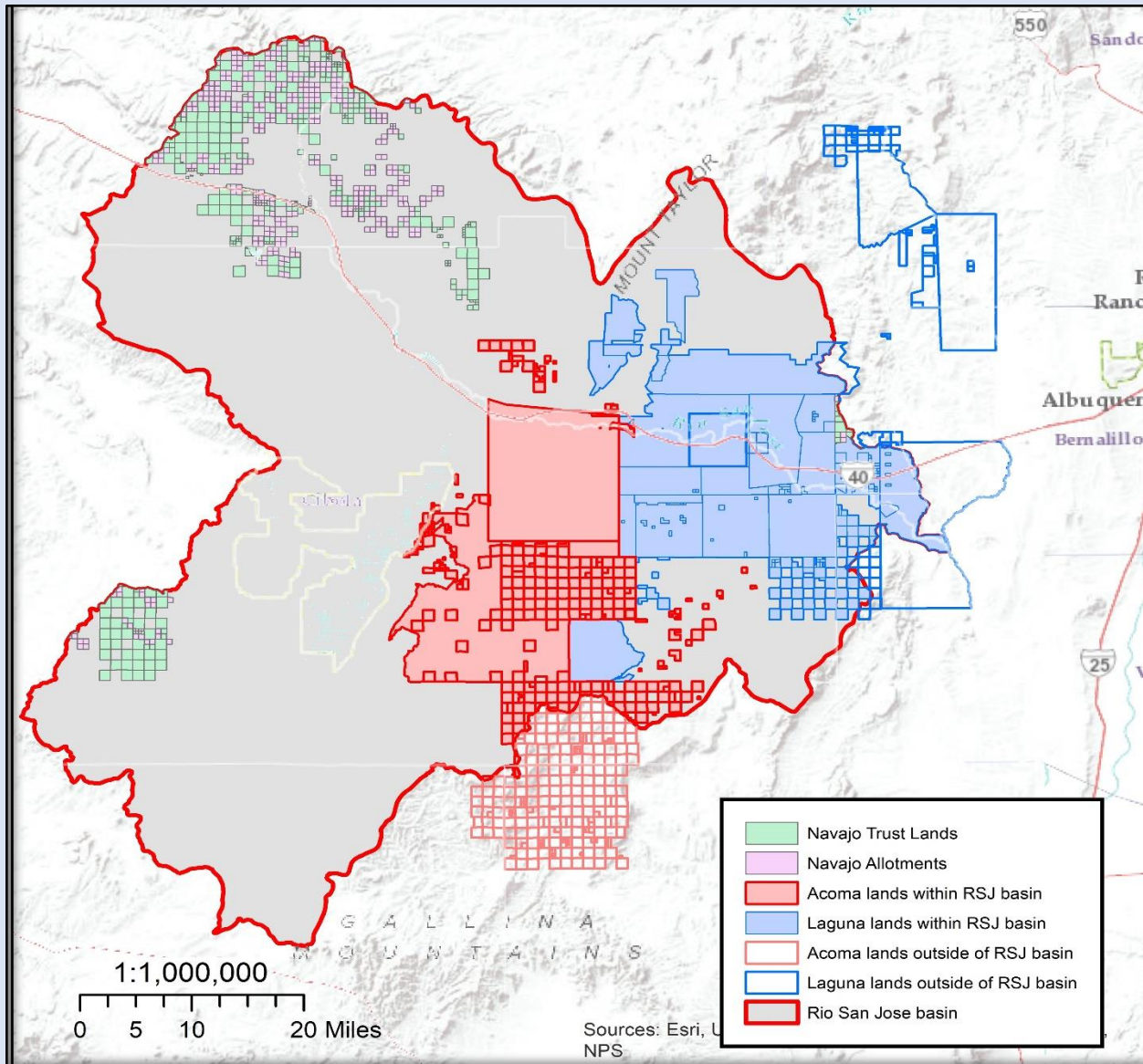
# TAOS SETTLEMENT IMPLEMENTATION

- The Settlement Act authorizes and directs Reclamation to provide financial assistance in the form of grants to plan, permit, design, engineer and construct MBP's.
- The parties are at different stages of implementation.
- Several Settlement parties are now opposed to implementing their projects, and there is some local public opposition to some of the projects.
- NM has paid its full cost share of \$20 million.

# TAOS SETTLEMENT IMPLEMENTATION

- Recent hydrologic and geologic investigations of the area have made it evident that some project locations need to be reassessed.
- Taos Pueblo, Town of Taos, and El Prado Mutual Domestic have notified DOI that the current level of settlement funding is insufficient to complete all MBPs. Local parties are preparing revised cost estimates and will be requesting additional federal and state funding.
- The Settlement provides the option to renegotiate certain terms with approval of all settling parties.

# KERR-McGEE SETTLEMENT NEGOTIATION



# KERR-McGEE SETTLEMENT NEGOTIATION

- *NM v. Kerr-McGee* is the general stream adjudication of the Rio San Jose Basin, filed in 1983.
- Recognizes water rights of the Pueblos of Acoma and Laguna and Navajo Nation in the Rio San Jose Basin.
- In June 2022, the local parties signed a Settlement Agreement settling the water rights claims of the Pueblos of Acoma and Laguna, and are working on draft federal legislation for introduction this session of Congress for funding and approval by the Secretary of the Interior.
- Local Settlement Parties are the Pueblos of Acoma and Laguna, State of New Mexico, City of Grants, Village of Milan, Association of Community Ditches of the Rio San Jose.
- The parties are still negotiating with the Navajo Nation to reach a settlement agreement to incorporate into the Settlement Agreement with the Pueblos of Acoma and Laguna and proposed federal legislation.

# KERR-McGEE SETTLEMENT PROJECTS & BENEFITS

- Provides federal funding for projects that will provide a reliable groundwater supply of water for the Pueblos for irrigation, domestic, commercial, municipal and industrial uses on Pueblo Lands;
- Protects the non-Pueblo irrigators in a chronically water-short basin from the threat of a priority call;
- Provides state funding for critical water supply and wastewater infrastructure projects for City of Grants and Village of Milan, including water re-use, water conservation and augmentation, and improved drinking water supply;
- Provides state funding for improvements to water supply infrastructure for Acequia Associations;
- Recognizes the Pueblos' water rights in a manner that recognizes the unique historic, social, cultural, and geographic characteristics of both Pueblo and non-Pueblo water users, and the unique hydrologic characteristics of the Rio San Jose Basin;
- Provides certainty regarding how water rights will be administered on the Rio San Jose Stream System during times of shortage.



# KERR-McGEE SETTLEMENT COSTS

## **State Funding Requested:**

<b>Party</b>	<b>Amount</b>
Signatory Acequias of the Association of Community Ditches of the Rio San Jose Project Funding	12,000,000
Impairment/Mitigation Fund	500,000
Joint Grants-Milan Project for Water Re-Use, Water Conservation, and Augmentation	16,000,000
Village of Milan Projects Funding	3,500,000
City of Grants Project Funding	4,000,000
State/State Engineer – two full time employees (Water Master, Staff)	TBD – if water master appointed
<b>TOTAL</b>	<b>\$36,000,000 + staffing</b>

## **Federal Funding for Pueblos Requested:**

<b>Party</b>	<b>Amount</b>
Pueblo of Acoma Settlement Trust Fund	296,000,000
Pueblo of Acoma O & M	14,000,000
Pueblo of Acoma Feasibility Studies	1,750,000
Pueblo of Laguna Settlement Trust Fund	464,000,000
Pueblo of Laguna O & M	26,000,000
Pueblo of Laguna Feasibility Studies	3,250,000
Acomita Reservoir Dam Safety, Inlet and Outlet Works	45,000,000
<b>TOTAL</b>	<b>\$850,000,000</b>



# ABOUSLEMAN SETTLEMENT NEGOTIATION

- *United States, et al. v. Abousleman* is the general stream adjudication of the Rio Jemez, filed in 1983.
- It involves the water rights of the Pueblos of Jemez, Santa Ana and Zia.
- In June 2022, the local parties signed a Settlement Agreement settling the water rights claims of the Pueblos of Jemez and Zia, and are working on draft federal legislation for introduction this session of Congress for funding and approval by the Secretary of the Interior.
- Local Settlement Parties are the Pueblos of Jemez and Zia, the State of New Mexico, the City of Rio Rancho, the Jemez River Basin Water Users Coalition, and the San Ysidro Community Ditch Association

# ABOUSLEMAN SETTLEMENT NEGOTIATION

- Santa Ana Pueblo elected to continue litigation instead of settlement and is not participating in negotiations.
- In 2017, the District Court issued a decision finding that the Pueblos' aboriginal claims were extinguished when Spain established its sovereignty in the area.
- In 2020, the 10th Circuit Court of Appeals overturned the District Court's decision.

# ABOUSLEMAN SETTLEMENT PROJECTS & BENEFITS

- Provides federal funding for water augmentation projects, wastewater infrastructure improvements, watershed protection, water-related Pueblo community welfare and economic development
- Provides state funding to San Ysidro Community Ditch Associations for irrigation infrastructure improvements
- Provides reliable supply of irrigation water for Pueblos and Non-Pueblo irrigators in chronically water-short basin
- Provides certainty regarding how water will be administered in the Jemez River Basin during times of shortage and protects acequias and non-Pueblo users from the threat of a priority call
- City of Rio Rancho will receive protections of its water rights due to Pueblo uses and will coordinate to avoid interference between Pueblo and City well pumping

# ABOUSLEMAN SETTLEMENT COSTS

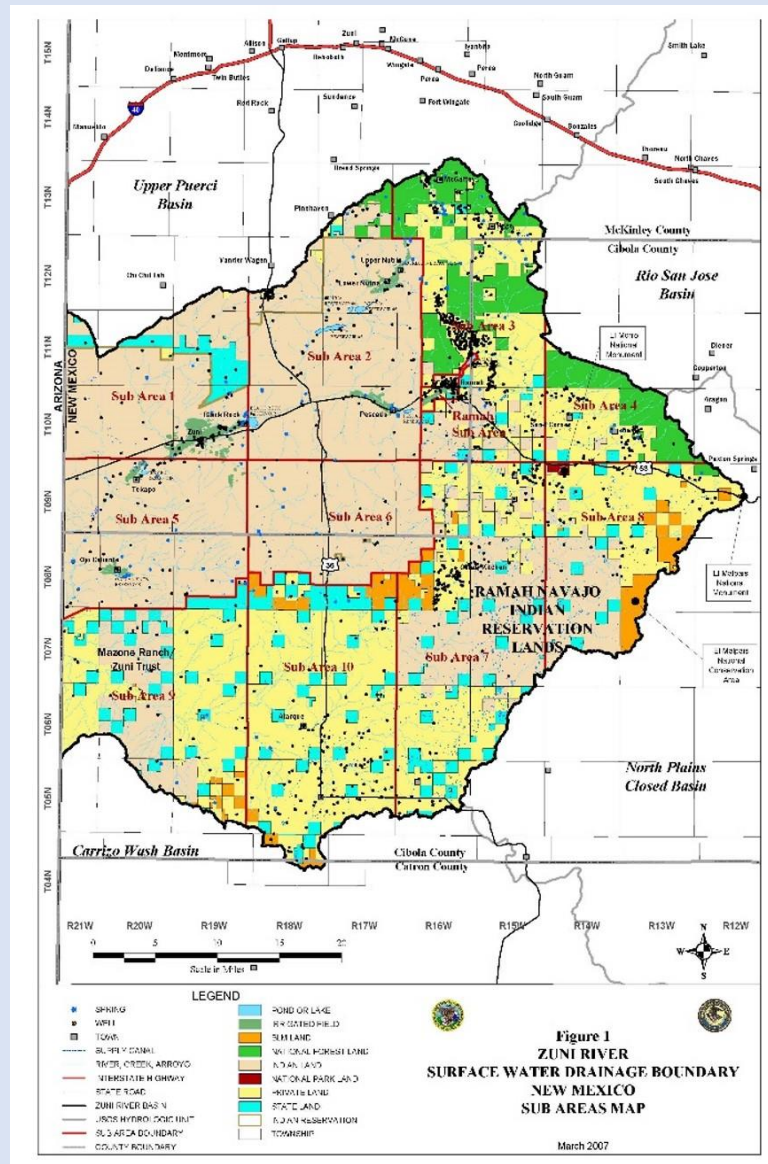
## State Funding Requested:

Party	Amount
San Ysidro Community Ditch Association	3,400,000
Acequias (pursuant to allocation plan)	16,159,000
State/State Engineer – two full time employees (Water Master, Staff)	TBD – if water master appointed
Mitigation Fund (to be added to SA)	500,000
<b>TOTAL</b>	<b>\$20,059,000 + staff funding</b>

## Federal Funding for Pueblos Requested:

Party	Amount
Pueblo of Jemez Settlement Fund	290,000,000
Pueblo of Zia Settlement Fund	200,000,000
<b>TOTAL</b>	<b>\$490,000,000</b>

# ZUNI SETTLEMENT NEGOTIATION

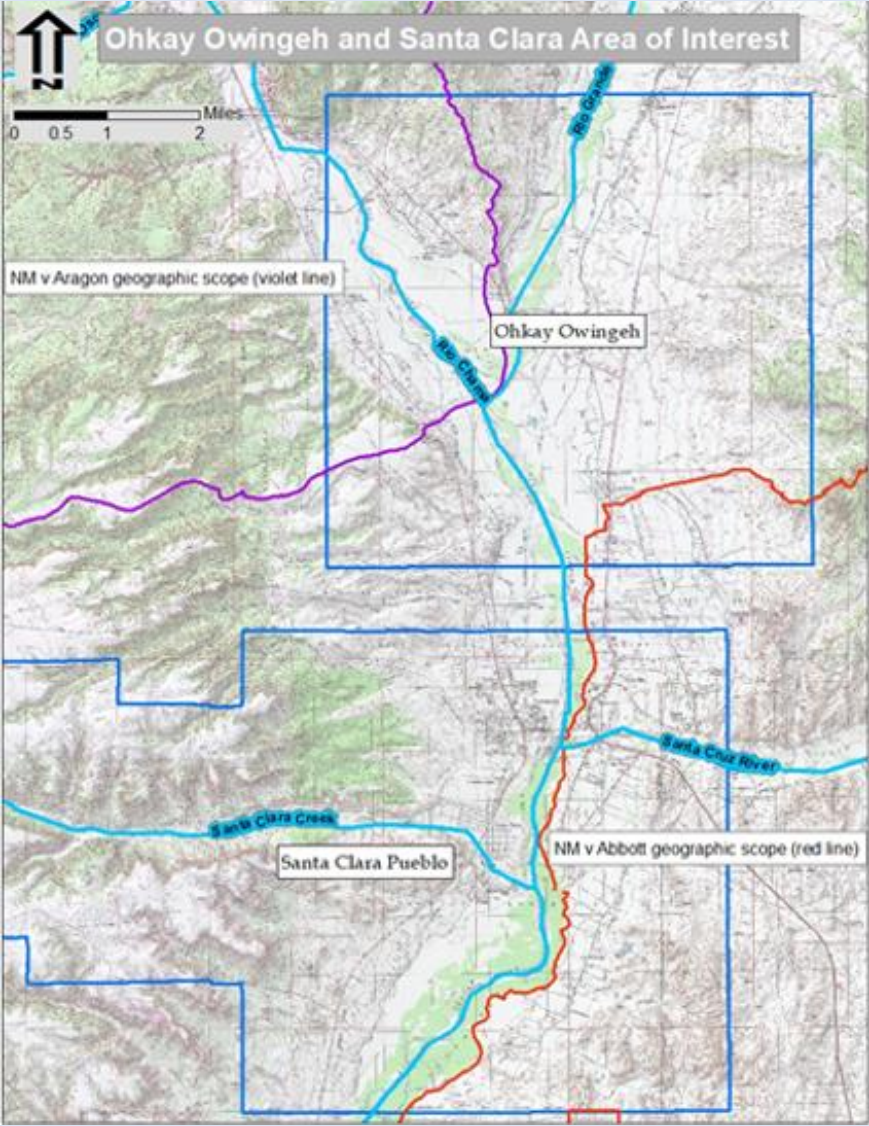


# ZUNI SETTLEMENT NEGOTIATION

- *US v. A&R Productions* is the general stream adjudication of the Zuni River Basin, filed in 2000.
- Involves water rights of the Zuni Tribe and Navajo Nation.
- Federal Negotiation Team appointed in 1993.
- The Zuni Tribe, the State of NM and the Federal team have been meeting to negotiate a settlement of Zuni's claims.
- The Navajo Nation is developing its settlement proposal.



# OHKAY OWINGEH/SANTA CLARA SETTLEMENT NEGOTIATION



# OHKAY OWINGEH/SANTA CLARA SETTLEMENT NEGOTIATION

- *NM v. Abbott* and *NM v. Aragon* are the general stream adjudications of the Rio Santa Cruz Basin and Rio Chama Basin, respectively, both filed in the 1960s.
  - Ohkay Owingeh has claims in both, but Santa Clara only has claims in *NM v. Aragon*.
- Federal Assessment Team appointed in 2015 for Ohkay Owingeh and expanded to accommodate Santa Clara Pueblo in 2020.
- Parties are in active negotiations.

# 6 MIDDLE RIO GRANDE PUEBLOS SETTLEMENT ASSESSMENT



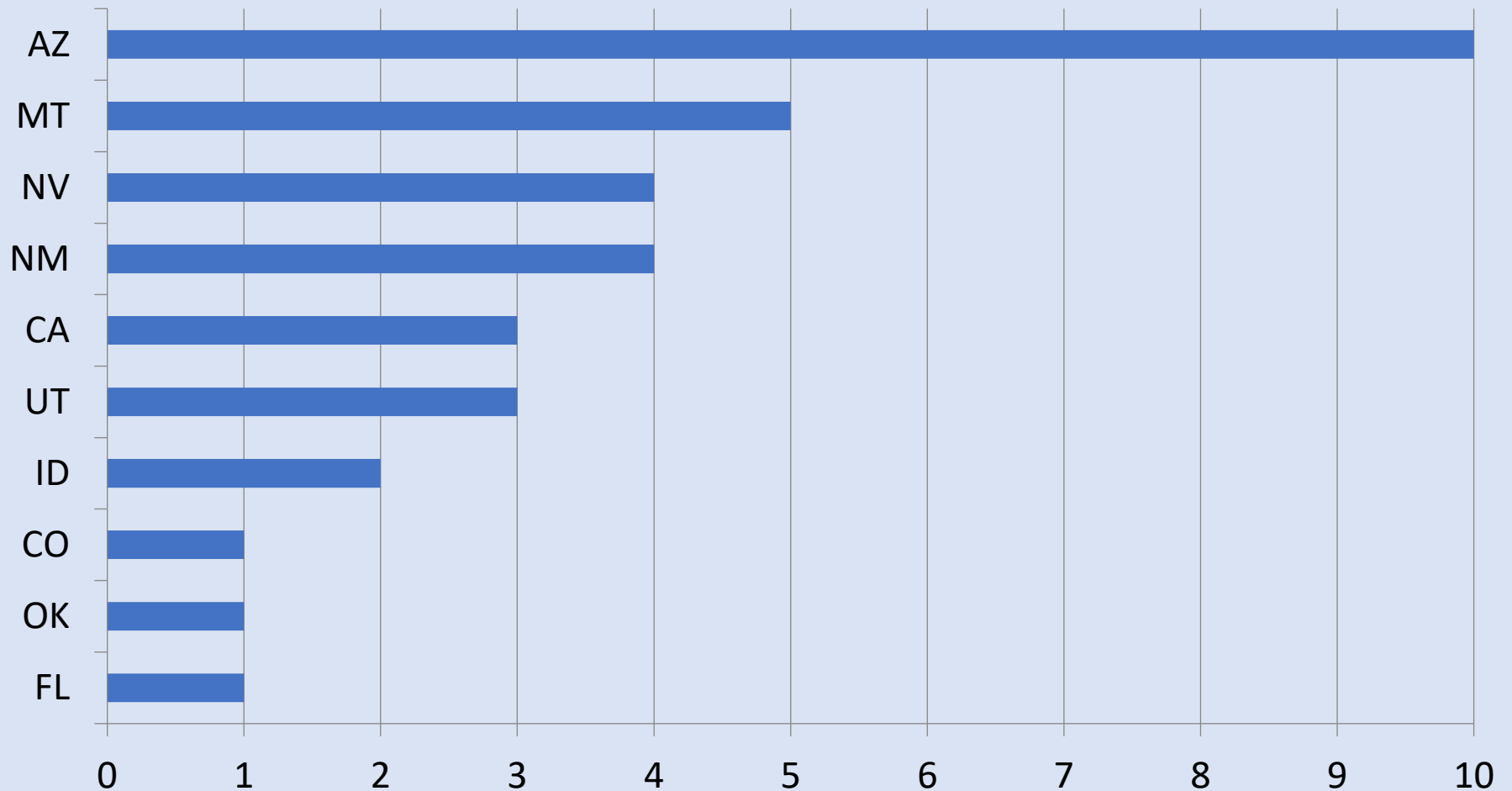
## 6 MIDDLE RIO GRANDE PUEBLOS SETTLEMENT ASSESSMENT

- Involves the Pueblos of Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia and Isleta.
- There is not a general stream adjudication of the middle Rio Grande Basin.
- Federal Assessment Team appointed in 2022 to determine if it is feasible to resolve the 6 Coalition Pueblos' water rights claims through negotiated settlement.
- Critical question: how to achieve an enforceable settlement without an adjudication already filed?



# Overview of Indian Water Rights Settlements

# INDIAN WATER RIGHTS SETTLEMENTS WITH FEDERAL LEGISLATION, BY STATE



# BENEFITS OF SETTLEMENTS

- Wet Water
  - Provide “wet water” to tribes; litigation provides “paper water”
- Win-Win
  - Provide water to tribes while protecting existing non-Indian water users
- Local Solutions
  - Allow parties to develop and implement creative solutions to water use problems based on local knowledge and values



# BENEFITS OF SETTLEMENTS

- Certainty and Economic Development
  - Provide certainty to tribes and neighboring communities, support economic development for tribes, and replace historic tension with cooperation
- Unified Administration
  - Allows for a unified administration scheme to apply for tribal and non-tribal water rights, allowing for better protection of each.





# CRITERIA AND PROCEDURES

*The Criteria & Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9223-9225, Mar. 12, 1990:

- Provide guidelines for Administration's participation in settlements,
- Include factors to be considered in deciding Federal contribution to settlement cost share, and
- Four-Phase Settlement Procedure.

# CRITERIA AND PROCEDURES

## Criteria

- Settlements should achieve finality and resolve all outstanding water claims.
- Settlements should be structured to promote economic efficiency on reservations and tribal self-sufficiency.
- Settlements should be conducive to long-term harmony and cooperation among all the interested parties through respect for the sovereignty of the States and tribes.

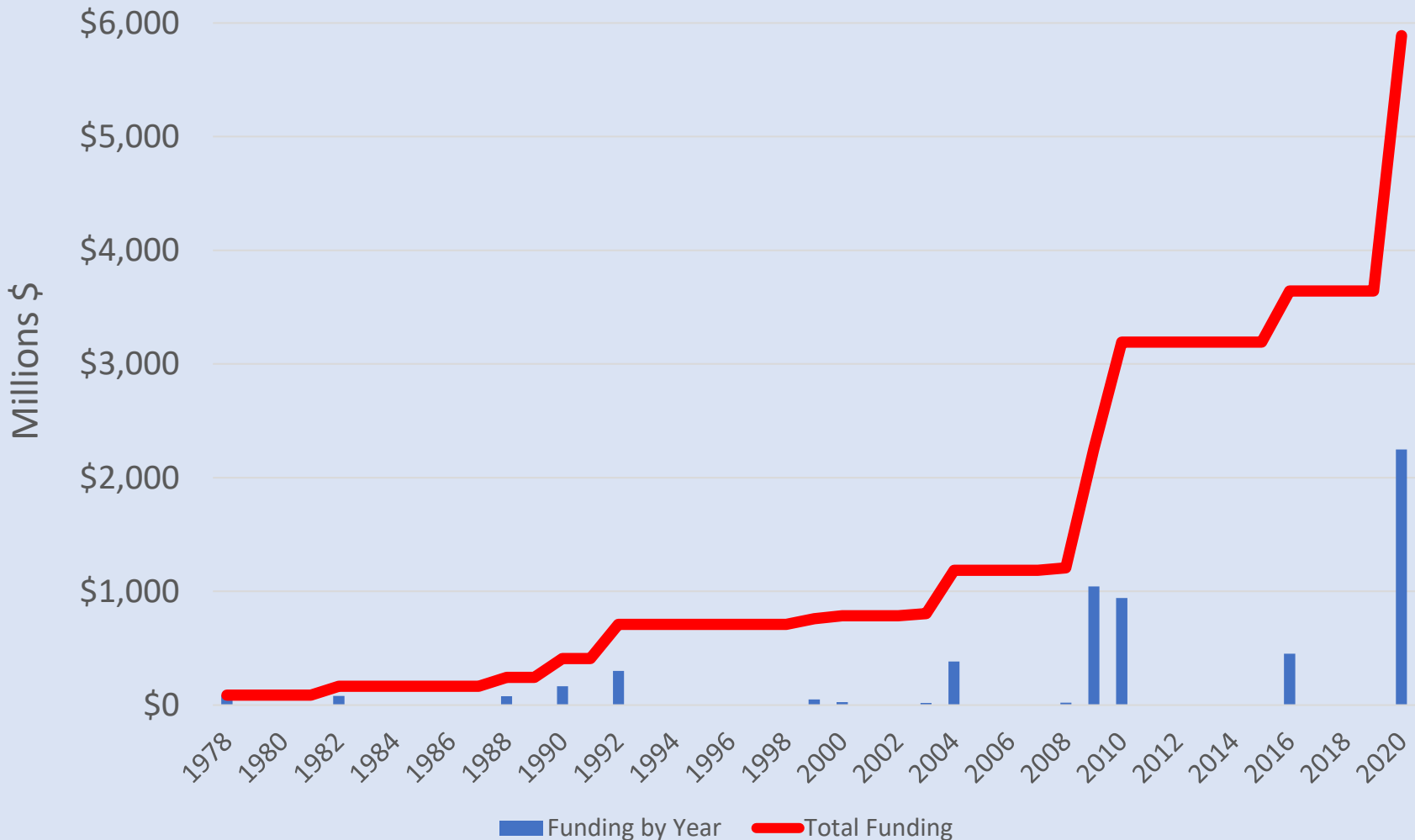
# CRITERIA AND PROCEDURES

## Criteria

- Federal contributions should not exceed the sum of:
  - Calculable legal exposure: litigation costs and judgment obligations if the case is lost; and
  - Additional costs related to Federal trust or programmatic responsibilities.
- Settlements should include a non-Federal cost share proportionate to the benefits received by the non-Federal parties.

# SETTLEMENT CHALLENGES

## Cost & Budgetary Issues



# SETTLEMENT CHALLENGES

## Fund-Based Settlements

- Many of the recently enacted settlements included construction of large and specific infrastructure projects with cost-estimates based on appraisal-level studies.
- One way to address low confidence cost-estimates and project scoping issues is by establishing trust funds for Tribes to use for infrastructure projects to be built over time and based on the Tribe's evolving needs and priorities.

# SETTLEMENT CHALLENGES

## Design and Cost-Estimating

- Navajo Utah Water Rights Settlement, P.L. 116-260 (2020).
  - Montana Water Rights Protection Act (Confederated Salish and Kootenai Tribes), P.L. 116-260 (2020)

A wide, calm river flows through a landscape. In the background, there are mountains under a clear blue sky. The banks are lined with dense green vegetation. The water is a light brown color, and there are some rocks visible in the shallows. The overall scene is a natural, scenic view of a river valley.

# Questions?