

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

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STATE OF NEW MEXICO
SAN JUAN COUNTY
THE ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,

CV-75-184

Plaintiff,

HON. JAMES J. WECHSLER
Presiding Judge

vs.

THE UNITED STATES OF AMERICA, *et al.*,

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

Defendants,

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

Claims of the Navajo Nation

Defendant-Intervenors.

Case No. AB-07-1

NAME OF PARTY: United States of America

DESCRIPTIVE SUMMARY: United States' request that the Court reconsider its Order of November 30, 2012 and issue an expedited ruling.

NUMBER OF PAGES: 10

DATE OF FILING: December 14, 2012

**THE UNITED STATES' MOTION FOR RECONSIDERATION OF THE COURT'S
ORDER OF NOVEMBER 30, 2012 AND REQUEST FOR EXPEDITED RULING**

The United States requests that the Court reconsider a specific subparagraph of the *Order Concerning the Responses and Objections of the [N]on-Settling Parties to Discovery Requests* (filed Nov. 30, 2012) ("November Discovery Order"). As explained in greater detail below, subparagraph 3(A) of the November Discovery Order appears to erroneously bar the Settling Parties from relying on (1) *The U.S. Statement of Claims of the Navajo Nation in the San Juan River Basin of New Mexico* (Jan. 3, 2011) ("U.S. Statement of Claims"); (2) the technical

(factual) basis developed to support the U.S. Statement of Claims;¹ and (3) the legal basis developed to support the U.S. Statement of Claims to satisfy the burden of the Settling Parties under the *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof* (filed Apr. 19, 2012) (“Amended Standards Order”). The particular language in question states:

After considering the needs of this proceeding, the limitations on the parties’ resources, and the importance of the issues at stake in the litigation pursuant to Rule 1-026(B)(2)(c), the Court has determined that requests concerning the following subjects are not generally reasonably calculated to lead to the discovery of admissible evidence, the subject matter is not relevant to the legal standard in this proceeding, or the burden or expense of the proposed discovery outweighs its likely benefit: (A) the United States’ good faith legal and technical basis for its Statement of Claims, because the Statement of Claims is not a basis for evaluating any prong of the legal standard; ...

November Discovery Order at 2-3, ¶ 3(A) (emphasis added).

Given that the U.S. Statement of Claims serves as the only basis for the potential water rights claims of the Navajo Nation, and that the Amended Standards Order requires the Settling Parties, among other things, to establish a reduced impact on junior water users and to compare the Settlement Agreement with “the potential claims that could be secured at trial,” the above-quoted language of the November Discovery Order appears to stand in direct conflict with the Amended Standards Order. In fact, the November Discovery Order appears to erroneously preclude the use of the U.S. Statement of Claims and the good faith legal and technical basis thereof in their entirety. For this reason, the Court should reconsider the November Discovery Order.

¹ As explained in more detail below, the technical (factual) basis for the U.S. Statement of Claims is described in the technical reports that were prepared by the United States and filed with the Court. *See Technical Reports Supporting the United States’ Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation and Disclosures of Individuals with Information Concerning Such Technical Reports*, Attachments A through O (Feb.3, 2012) (“U.S. Technical Reports”).

Also, given that the Court's position on this issue could fundamentally prohibit the United States from presenting the only evidence that it has to satisfy specific elements of proof identified by the Court, the United States requests that this Court address and resolve this motion in an expedited manner. Although the United States does not believe that oral argument is necessary for this motion, to the extent that the Court considers oral argument necessary, the United States requests that such argument occur at the hearing currently scheduled for January 9, 2013.

PROCEDURAL BACKGROUND

For almost four years,² the Settling Parties have worked diligently to pursue the procedures identified by this Court and to present the bases for this Court to consider and decide the Settlement Motion.³ More than two years ago, this Court determined that more detail needed to be added to the claims statement that the United States originally filed.⁴ *See Order Establishing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (filed Aug. 19, 2010) ("August 2010 Order") at 12-13, § II.B.2. The Court decided that such detail was necessary to provide the Court and non-settling parties with a

² The Northwestern New Mexico Rural Projects Act, P.L. 111-11 ("Settlement Act") was passed by Congress and subsequently signed into law by the President on March 30, 2009. Over the four years since that time, the Settling Parties have worked to present the proposed decrees associated with Settlement Agreement to the Court for its consideration.

³ The Settlement Motion raises the discrete question whether the Court should enter the proposed partial final decrees as contemplated by the Settlement Agreement. If it grants the Settlement Motion and approves the proposed decrees, the Court would conclude more than three decades of highly contested litigation associated with the Navajo Nation's water rights in the San Juan River Basin of New Mexico.

⁴ In filings submitted at the initiation of these proceedings in 1975, the United States and the Navajo Nation asserted claims that broadly identified the water rights claims sought on behalf of the Navajo Nation. Although both the United States and the Navajo Nation were actively engaged in litigation between 1975 and 2010, at no time during that period did the water rights claims of the Navajo Nation progress toward resolution on the merits. Further, at no time during that period was the United States or the Navajo Nation required to prepare a more detailed statement of claims. Under circumstances not involving a settlement, a statement of claims always serves as the factual basis for litigation of Indian water rights claims. Such a claims statement typically requires between three to five years to prepare. Here, in response to this Court's orders and for the purposes of these settlement proceedings, the U.S. Statement of Claims was prepared over a much shorter period (a matter of months).

sufficient basis upon which to evaluate the Settlement Agreement. *Id.* at 12, § II.B. More specifically, the purpose for preparing such a document was so that the rights recognized under the Settlement Agreement could be compared to the United States' more detailed statement of claims. *See id.* at 13, § II.B.2 ("the United States shall file a Statement of Claims summarizing the water rights claimed on behalf of the Navajo Nation throughout the San Juan River Basin should the settlement fail").

Although at the time of the August 2010 Order the United States had been in the process of preparing a hydrographic survey of Navajo Nation water uses in the San Juan River Basin, prior to these settlement proceedings and the August 2010 Order the United States had not developed, nor was it required to develop, a more detailed statement of the water rights claims for the Navajo Nation. Nonetheless, the United States responded to the Court's Order by quickly marshaling significant public resources, employing numerous experts, and coordinating the efforts of dozens of personnel to identify and develop the good faith technical (factual) and legal basis for a detailed statement of claims for the Navajo Nation. As instructed by the Court, and again for the purposes of these settlement proceedings, the United States filed a more detailed statement of claims of the Navajo Nation on January 3, 2011. *See U.S. Statement of Claims.*⁵ In addition, to conclusively establish in advance for the Court and non-settling parties that each of the claims contained in the U.S. Statement of Claims had a good faith technical (factual) basis, the United States instructed each principal expert to prepare an expert report outlining the factual basis for each element of the stated claims. *See U.S. Technical Reports.*

⁵ The more detailed statement of claims prepared by the United States in response to this Court's orders is a document designed exclusively for these settlement proceedings. As the United States previously described, based on the information available today the U.S. Statement of Claims are those water rights claims that the United States is prepared to pursue in the event that the Court denies the Settlement Motion and the United States and Navajo Nation are required to litigate in full the Navajo Nation's water rights claims. *See U.S. Statement of Claims* pg. 4-5.

Earlier this year, the Court set out the legal standard that it would employ to resolve the Settlement Motion. The Court concluded that it would consider the following “elements of proof” to determine whether entry of the partial final decrees was fair and reasonable:

1. whether “the Settlement Agreement is the product of good faith, arms-length negotiations”;
2. whether the provisions of the Settlement Agreement “will reduce or eliminate impacts on junior water rights”;
3. whether “a reasonable basis” exists “to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial”; and
4. whether “the Settlement Agreement is consistent with public policy and applicable law.”

See Amended Standards Order at pg. 3.

Finally, in the course of issuing discovery to non-settling parties, the United States crafted discovery requests (requests for admission (“RFAs”), interrogatories, and requests for production of documents (“RFPs”)) that were strictly tied to the elements specifically identified in the Amended Standards Order. Relevant to this motion, the United States submitted the following RFAs to all objecting non-settling parties:

RFA No. 2: Admit that the United States had a good faith legal and technical basis for the U.S. Statement of Claims.

RFA No. 3: As compared to the water rights described in the U.S. Statement of Claims, admit that the provisions of the Settlement Agreement will reduce impacts on junior water rights.

RFA No. 4: Admit that the provisions of the Settlement Agreement describe Navajo Nation water rights that are less than those described in the U.S. Statement of Claims.

See *United States’ Response To Discovery Objections Of Non-Settling Parties* (Nov. 20, 2012) at e.g., Attachment A. These discovery requests are the only discovery requests that reference or are associated with the U.S. Statement of Claims. Thus, the language of the November

Discovery Order (at pg. 2-3, ¶ 3(A)), which is the subject of this motion, appears to apply to each of the identified RFAs and their associated interrogatories and RFPs.

ARGUMENT

I. THE UNITED STATES' GOOD FAITH LEGAL AND TECHNICAL BASES FOR ITS STATEMENT OF CLAIMS ARE RELEVANT AND APPROPRIATE BASES FOR EVALUATING THE SECOND AND THIRD ELEMENTS OF THE LEGAL STANDARD PREVIOUSLY IDENTIFIED BY THE COURT

To determine whether the proposed settlement decrees are "fair, adequate, and reasonable, and consistent with the public interest and applicable law," Amended Standards Order at pgs. 1-2 (internal quotations and citations omitted), the Settling Parties must establish that "(b) the provisions contained in the Settlement Agreement and Proposed Decrees will reduce or eliminate impacts on junior water rights," and that "(c) there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial" *Id.* at pg. 3 (hereafter elements (b) and (c) will be referred to as the "Second Element" and "Third Element," respectively).

Since the Court articulated the elements of its legal standard, it has been the Settling Parties understanding that to satisfy their burden of proof with regard to the Second Element, the Settling Parties must present evidence demonstrating how impacts on junior water users will be reduced under the Settlement Agreement as compared to a potential litigation result of the water rights claims of the Navajo Nation in the San Juan River Basin of New Mexico. Similarly, with regard to the Third Element, the Settling Parties must present a "reasonable basis" of the comparison between the water rights provided pursuant to the Settlement Agreement and the water rights that might be secured during the course of trial. As described above, the only detailed analysis of the potential water rights of the Navajo Nation that might be secured at trial is the one prepared by the United States in conjunction the U.S. Statement of Claims. Given the

very nature of these documents and the fact that the United States prepared the claims materials specifically in response to this Court's orders, the United States must be permitted to rely upon these documents to meet the burdens only recently articulated by the Court (specifically, the Second and Third Elements).⁶

This expedited *inter se* proceeding does not involve the litigation of Navajo Nation's water rights or, more broadly resolve the complicated, contested issues generally associated with the nature of reserved Indian water rights. On the contrary, this is a settlement proceeding in which the Court is asked to approve the partial final decrees that were crafted as part of a settlement of the potential water rights of the Navajo Nation in the San Juan River Basin of New Mexico. If the Court were to issue a decision on the merits of the underlying claim as part of this settlement proceeding, then the Court would erode the basis for settlement and would gravely compromise the interests of Settling Parties. Although the Court may consider aspects of the Navajo Nation's water rights that might be secured at trial in weighing the evidence relevant to the Third Element of the legal standard, the Court may not decide the factual or legal parameters of such water rights. *Airline Stewards and Stewardesses Ass'n, Local 550, TWU, AFL-CIO v. American*, 573 F.2d 960, 963 (7th Cir. 1978) (courts ""should not attempt to decide the merits of

⁶ The analysis associated with the Third Element that the United States discusses here is seemingly identical to that adopted in Indian water rights settlement cases in Arizona. Reviewing approval of an Indian water rights settlement, the Arizona Supreme Court observed:

the adjudication court appropriately considered the Statement of Claimant filed by the United States on behalf of the Nation and the supporting assessment by ADWR regarding the range of water rights the Nation could claim. ... the range of water rights set forth in these documents was greater than the rights granted under the Nation's settlement. Consequently, the adjudication court did not err in determining that the settling parties met their burden [that there is a reasonable basis to conclude that the water rights of the Indian tribe ... established in the settlement agreement and set forth in the stipulation are no more extensive than the Indian Tribe ... would have been able to prove at trial].

In re the General Adjudication the Rights to Use Water in the Gila River System, 173 P.3d 440, 447, ¶¶ 35-36 (Ariz. 2007) (commonly referred to as "*Gila VII*").

the controversy ... (because) (a)ny virtue which may reside in a compromise is based upon doing away with the effect of such a decision” (quoting *Patterson v. Stovall*, 528 F.2d 108, 114 (7th Cir. 1976)); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14 (1981) (with respect to settlement review, “[courts] do not decide the merits of the case or resolve unsettled legal questions”) (citations omitted); *U.S. v. Cannons Engineering*, 899 F.2d 79, 85 (1st Cir. 1990); *U.S. v. City of Jackson*, 519 F.2d 1147, 1151-1152 (5th Cir. 1975). Of course, were this Court to deny the Settlement Motion, this subfile proceeding would return to litigation and all contested issues associated with Navajo Nation water rights would be resolved by the Court.

II. THE NOVEMBER DISCOVERY ORDER APPEARS TO BAR THE SETTLING PARTIES FROM USING THE UNITED STATES’ GOOD FAITH LEGAL AND TECHNICAL BASES FOR ITS STATEMENT OF CLAIMS TO SATISFY THEIR BURDEN AS SET FORTH IN THE AMENDED STANDARDS ORDER

In the November Discovery Order, the Court states that “the United States’ good faith legal and technical basis for its Statement of Claims” “is not relevant” “because the Statement of Claims is not a basis for evaluating any prong of the legal standard.” November Discovery Order at pgs. 2 and 3. This language appears to declare all material associated with the U.S. Statement of Claims irrelevant. Further, the Order appears to strip the United States of its ability to present and argue the most appropriate evidence, in fact the only evidence in the United States’ possession, to establish a reasonable basis to judge the impacts on junior water users and to compare the water rights secured under the Settlement Agreement and the potential Navajo Nation water rights that could be secured at trial.

The decisions of this Court embodied in the Amended Standard Order and the November Discovery Order are in conflict and cannot coexist. The United States and the Settling Parties should be able to rely upon and present the good faith legal and technical basis for the U.S. Statement of Claims. The United States also believes that the Settling Parties should be able to

rely upon the summary and explanation of the historic, present, and future water rights presented in U.S. Statement Claims that resulted from the United States' legal and technical analysis. No other document or material could be more relevant to the United States' effort to satisfy the Settling Parties' burden in this proceeding under the Second and Third Elements.

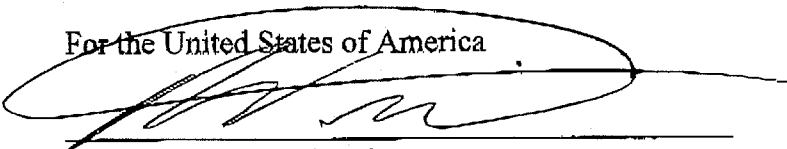
CONCLUSION

The U.S. Statement of Claims and the good faith legal and technical basis for the statement of claims are relevant to these settlement proceedings and the Settling Parties should be able to rely upon these documents to establish the Second and Third Elements of the legal standard adopted by the Court. Thus, for the reasons articulated above, the United States requests that the Court reconsider the language of subparagraph 3(A) of the November Discovery Order. The United States proposes that the Court delete from the November Discovery Order subparagraph 3(A) or take such other steps as the Court deems appropriate to eliminate the conflict between the November Discovery Order and the Amended Standards Order.

The United States requests that motion be addressed and resolved by the Court in an expedited manner.

Respectfully submitted this 14th day of December 2012.

For the United States of America



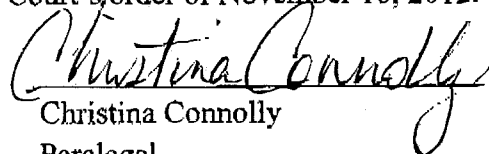
Andrew J. "Guss" Guarino
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of December 2012, a true and accurate copy of

THE UNITED STATES' RESPONSE TO DISCOVERY OBJECTIONS OF NON-SETTLING PARTIES AND REQUEST FOR EXPEDITED RULING

was served by attaching an electronic copy to an email sent to the following address: wnavajointerse@nmcourts.gov.⁷ In addition, an electronic copy of this document was sent by e-mail to the list of persons identified in the Court's order of November 16, 2012.


Christina Connolly
Paralegal

⁷ Prior to filing this motion, the United States provided a draft of this motion to the parties. The following indicated that they concur with this motion: the State of New Mexico and the Navajo Nation. The following indicated that they do not object to this motion: the Jicarilla Apache Nation and the Ute Mountain Ute Tribe. The following indicated that they object to this motion: LPAA *et al.*, the Marshall Interests, ConocoPhillips/El Paso Natural Gas, SJWC, ABWUA *et al.*, Gary Horner, the Cities of Aztec and Bloomfield, B-Square Ranch *et al.*, and the Bloomfield School District.