

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,

Plaintiff,

vs.

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

Defendants,

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

Defendant-Intervenors.

CV-75-184

HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

Claims of the Navajo Nation

Case No. AB-07-1

NAME OF PARTY: United States of America

DESCRIPTIVE SUMMARY: Supplemental disclosures concerning expert report of Chris Banet.

NUMBER OF PAGES: 2

DATE OF FILING : December 21, 2012

THE UNITED STATES' SUPPLEMENTAL DISCLOSURES

This pleading serves as a supplemental disclosure to the *United States' Initial Disclosures* (April 2, 2012) ("U.S. Initial Disclosures") as well as a supplemental response to any relevant discovery request previously issued to the United States in this Navajo *Inter se* sub-file proceeding.

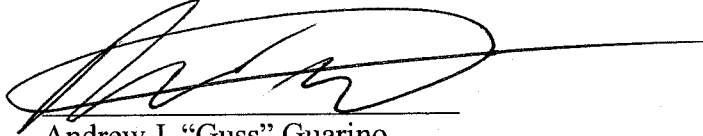
In the U.S. Initial Disclosures, the United States identified persons who the United States may use to support the Settlement Motion and who may likely have discoverable information. The United States also identified documents that the United States may use to support the Settlement Motion. *See id.* Among the persons identified, the United States described Mr. Chris Banet of the Southwest Region of the Bureau of Indian Affairs as a person who the United States

may use to support the Settlement Motion. Since April 2, 2012, Mr. Banet has prepared an expert report concerning his opinion regarding the specific elements associated with the Settlement Motion previously identified by the Court. A copy of Mr. Banet's report has been attached to this supplemental disclosure as Attachment A. *See Attachment A (Informational Report on San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement).*

In the event that any matter arises in conjunction with the Navajo *Inter Se* that relates to those matters described in Mr. Banet's report, the United States will rely upon Mr. Banet and his prepared report as necessary.

Respectfully submitted this 21st day of December, 2012.

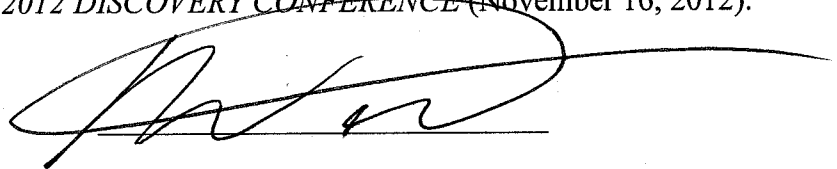
UNITED STATES OF AMERICA



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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of December 2012, a true and accurate copy of **THE UNITED STATES' SUPPLEMENTAL DISCLOSURES** was served by attaching an electronic copy to an email sent to the following address, wnavajointerse@nmcourts.gov, and to those e-mail addresses identified in the *ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBR 6, 2012 DISCOVERY CONFERENCE* (November 16, 2012).



Informational Report on
San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement
Agreement

Christopher Banet
United States Department of Interior
Bureau of Indian Affairs

December 20, 2012

Introduction

This report is offered and prepared to provide information regarding the *San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement* (Settlement Agreement), and its appended draft Partial Final Decree (PFD) and draft Supplemental Partial Final Decree (SPFD), specifically information relating to the development of the Settlement, PFD and SPFD and to the consequences of their becoming approved.

By way of providing a background, negotiation of Indian water rights, in my experience, generally takes place in three phases. The first phase precedes the introduction of federal legislation and involves the non-federal settling parties in discussions amongst themselves and with a Department of Interior Indian Water Rights Negotiation Team. The second phase involves the non-federal parties interacting with the legislative branch of the federal government. If successful this results in enactment of federal legislation, at which time the third, settlement implementation, phase begins. This implementation phase commonly includes negotiations over matters that were left unresolved in the two negotiation phases. The Settlement Agreement of the Navajo Nation water rights in the San Juan River Basin in New Mexico followed this three phased outline.

The Settlement and its attendant draft Partial Final Decree and draft Supplemental Partial Final Decree specify the negotiated water rights of the Navajo Nation, limitations on their exercise and directives on the administration of the rights.

I. The Settlement Agreement is a product of good faith, arms-length negotiations during two negotiation phases and implementation phase

Phase 1. Negotiations prior to Introduction of federal legislation

The Department of Interior formally entered the negotiations related to the water rights of the Navajo Nation in the San Juan Basin of New Mexico in October of 2002¹. A Department of Interior negotiating team was established at that time. Meetings among the three settling parties took place between October of 2002 and April 19, 2005. Members of the Interior team attended regularly. Attachment 2 provides two examples of attendee lists that disclose attendance of several Interior team members. These led to a partially executed settlement agreement and a draft PFD and SPFD which were considered by the US Congress under S. 1171/H.R. 1970.

Phase 2. Negotiations after Introduction of federal legislation

Once legislation was introduced, the legislative branch of the United States took part in discussions. Department of Interior officials were asked for and provided testimony (see Attachment 3, testimony of July 27, 2007). At the time, these officials expressed opposition to the settlement based on several concerns. This opposition was informed by the Interior team and other Interior officials and reiterated concerns expressed by the Interior team during settlement discussions prior to introduction of the legislation. Numerous drafts of the federal legislation, through a continuous editing process, were prepared to accommodate input such diverse groups as the San Juan Agricultural Water Users Association, Jicarilla Apache Nation, Electors Concerned about Animas Water, Citizens Progressive Alliance, Central Arizona Water Conservation District, the Wyoming State Engineer, Upper Colorado River Commission, Bernalillo County Water Utility Authority and others (see Attachment 3).

Phase 3. Negotiations after Passage of Public Law 111-11

With the enactment of Public Law 111-11, the “Omnibus Public Land Management Act of 2009” (see attachment 4), enacted on March 30, 2009, the position of the United States was determined conclusively. Negotiations then continued among the three settling parties so that the Settlement could be fully executed. This continued negotiation, conformed the three documents to PL 111-11, which law enunciates the policy and positions of the United States. At this time a Department of Interior Implementation Team was organized, of which I have been the BIA member. I was personally involved with the negotiation of the three documents. Over the course of the twenty months following March 30, 2009, the Settlement Agreement and draft PFD were conformed. The Settlement Agreement was fully executed by the three parties in December of 2010. The draft PFD was completed to the satisfaction of the settling parties at the same time. The SPFD was somewhat more difficult than the other two documents. Technical work needed to complete the draft SPFD had not been completed until 2011. This necessitated several hard-fought negotiating sessions during early 2012. Nevertheless the settling parties satisfactorily concluded negotiations on the SPFD in April of 2012.

¹ See attachment 1. Letter Woolridge, Sue Ellen, Deputy Chief of Staff and Counselor to the Secretary, to Thomas Turney, New Mexico State Engineer.

Conclusions

The PFD, SPFD and Settlement are the result of good faith, arms-length negotiations. I note that throughout the negotiations representations by the United States made during negotiations were sincere and untainted with pretense or ulterior motive. The fact that the United States acted through a several member team with individuals from multiple agencies, as well as other individuals, from various US agencies, who were not team members, indicates that the settlement was crafted through sincere motives related to resolving the issues in the settlement, and without unspoken agendas or unrelated intentions.

The formation of an Interior team and its attendant expenditure of resources and presence of Interior team members at the sessions indicate that the United States took the negotiations seriously and worked earnestly within existing constraints.

During the first two phases, good faith is manifest by observing that the United States did not sign the agreement of April 19, 2005, and Interior officials opposed the Settlement at Congressional hearings on July 27, 2010, and that this was consistent with representations made during the negotiation sessions.

The legislative phase of negotiations, phase two, which took place across four years, exposed every settlement provision to public scrutiny in a challenging process. Numerous non-settling parties weighed in on the settlement over this time period. This vetting is evidence that the settlement came out of an open, clear and public process, with terms clearly known.

During the last phase of negotiations, the implementation phase, guided by the enacted legislation, the United States' positions were clearly brought forth and remained unchanged throughout. Section 14.1 of the settlement agreement contains the following passage:

This Agreement, including its Appendices, constitutes the entire understanding among the Parties. The Parties have, among themselves, negotiated in good faith for the purposes of advancing the settlement of legal disputes including pending litigation.

This declaration, made by all three settling parties, is an affirmation that each party believes the other to have acted in good faith while negotiating the Settlement and the two decrees.

The United States did not initiate the settlement talks, but joined at the request of the other two settling parties. Since the United States did not initiate settlement discussions, this tends to show that the United States had no intent to coerce or influence the other parties under duress.

There are a number of other written understandings related to the Settlement Agreement, the PFD and the SPFD, such as cost-sharing agreements and water contracts, referred to as offshoot agreements. All of the offshoot agreements were contemplated and developed to be part of the settlement of the Navajo Nation's water rights. The three settling parties were each aware of the need and purpose of the offshoot agreements. I know of no offshoot agreements that are not known and understood by the three settling parties. These offshoot agreements, along with the Settlement Agreement, and PFD and SPFD, articulate the full sum of benefits accruing to each settling party. There are no unspoken agreements or agreements made under duress.

With respect to the negotiations being arms-length, they were unquestionable so.

II. Provisions in the Settlement Agreement and Proposed Decrees will reduce or eliminate impacts on junior water rights

The Settlement Agreement contains provisions which, when implemented, reduce negative impacts to water rights of junior water right holders.

1. **Settlement Section 8.1.** This provision addresses the situation when water is available through the Animas-La Plata Project (State Engineer permit 2883, issued to Bureau of Reclamation) beyond what is necessary to meet the needs of New Mexico quantified in the Colorado Ute Settlement Act Amendments of 2000 (Public Law 106-554). In this event, Navajo Nation agrees to limit its allocation of such surplus water to 50 % of the available water, while the remainder is devoted to members of the San Juan Water Commission.

To summarize:

Without the Settlement Agreement 100% of the surplus water available under Permit 2883 is claimed by the Navajo Nation and the US on behalf of Navajo Nation.

With the Settlement Agreement - Navajo Nation and San Juan Water Commission members would share equally in available surplus water. This would provide a water source to Commission members which would, by providing water to satisfy existing water rights, reduce impacts to the Commission members which hold junior water rights.

2. **Settlement Section 8.2.** This provision deals with the condition during which the yield of water available for development by the Upper Basin under Article III of the Colorado River Compact is greater than that described in the Hydrologic Determination of May 23, 2007. In this situation, Navajo Nation would receive no more than one half of the available water to New Mexico, with the remainder reserved for non-Navajo interests.

To summarize:

Without the Settlement Agreement additional water available to New Mexico greater than that in the Hydrologic Determination, if within the amount claimed by the Navajo Nation or the US on behalf of Navajo Nation would be fought over and claimed by Navajo Nation and US on behalf of Navajo Nation.

With the Settlement Agreement Navajo Nation would share equally in available water with non-Navajo entities. This would provide a water source to non-Navajo entities, and, by providing a more definite and secure water source to satisfy existing water rights, reduce impacts to these non-Indian entities which hold junior water rights.

3. **Settlement Section 9.1.** This provision addresses operation of the Navajo Reservoir. At present, during the irrigation season, releases from Navajo Reservoir for downstream irrigators are set equal to the amount flowing into Navajo Reservoir, when inflows are less than 225 cubic feet per second (cfs). Under this provision, when the reservoir storage exceeds 1,000,000 acre-feet (and other conditions are met), the Navajo Nations agrees not to challenge the New Mexico State Engineer making available to direct-flow users downstream from the reservoir up to 225 cubic feet per second (cfs) while the inflow to the reservoir is less than 225 cfs.

To summarize:

Without the Settlement Agreement Releases from Navajo Reservoir for direct-flow users downstream are limited to Navajo Reservoir inflow rates and non-Indian water users and non-Indian users are not entitled to releases greater than inflows to the reservoir.

With the Settlement Agreement – Mainstem San Juan River Direct flow users, many of whom are junior water rights holders, will not be limited to the natural flow of the San Juan River measured as inflow to the Navajo Reservoir. Instead, subject to State Engineer administration, additional water, up to 225 cfs, could be made available, when water volume in the reservoir exceeds 1,000,000 acre-feet. This represents a reduction in negative impacts to junior water rights.

4. **Settlement Section 9.2.** Under this provision, when the Shiprock community surface water supply or Navajo Nation Hogback-Cudei irrigation project or the Fruitland-Cambridge irrigation project are water short, the Navajo Nation will make a portion of its Navajo Reservoir stored supply available for those projects, up to 12,000 acre-feet per year.

To summarize:

Without the Settlement Agreement, when water shortages are experienced at the Shiprock community water supply or the two irrigation projects, the Navajo Nation and

the US on behalf of the Navajo Nation, may make a call for water against upstream water users with water rights junior to the Navajo Nation water rights.

With the Settlement Agreement - No priority call would be made by Navajo Nation until the shortage that the Navajo Nation experiences exceeds 12,000 acre-feet in a given year.

5. **Settlement Section 9.3.2.** This provision of the Settlement would be invoked when it is determined that the consumptive use of water in New Mexico from the San Juan River Basin exceeds the State of New Mexico's Upper Colorado River Basin Compact Article III(a) apportionment. In this situation, the Navajo Nation agrees to not exercise a portion of its water rights that would be decreed under the proposed PFD, according to a specified formula; and this before other uses on the river would be curtailed. Further, these voluntary cessations would be additive to other reductions in Navajo water uses agreed to in the Settlement.

To summarize:

Without the Settlement Agreement, under the condition when New Mexico water uses in the San Juan Basin exceed what is allowed under the Upper Colorado River Basin Compact, the State Engineer may institute priority administration in the San Juan River Basin. Exercise of the most junior water rights would be curtailed until New Mexico is in compliance.

With the Settlement Agreement, under the condition when New Mexico water uses in the San Juan Basin exceed what is allowed under the Upper Colorado River Basin, the Navajo Nation voluntarily ceases certain water uses, then junior water rights may be curtailed, in order of priority.

6. **Settlement Section 9.3.3.** This provision of the Settlement would be invoked when it is determined, under Article V of the Upper Colorado River Basin Compact, that the State of New Mexico must curtail its consumptive uses of water for some period of time to allow the Upper Basin to comply with Article III of the Colorado River Compact. In this case the Navajo Nation agrees to not exercise a portion of its water rights that would be decreed under the proposed PFD, according to a specified formula; and this before other uses on the river would be curtailed. These cessations would be additive to other reductions in Navajo water users agreed to in the Settlement.

In summary:

Without the Settlement Agreement, under the condition when New Mexico must curtail water uses in the San Juan Basin to satisfy the terms of the Colorado River Basin, the State Engineer would institute priority administration in the San Juan River Basin.

Exercise of the most junior water rights would be curtailed first, until New Mexico is in compliance.

With the Settlement Agreement - under the condition when New Mexico must curtail water uses in the San Juan Basin to satisfy the terms of the Colorado River Basin, the Navajo Nation would voluntarily cease certain water uses, and then junior water rights would be curtailed, in order of priority.

7. **Settlement Section 9.6.1.** This provision addresses water rights previously adjudicated in the Echo Ditch Decree. The Navajo Nation and the US as trustee for the Navajo Nation agree not to challenge such rights except for forfeiture or abandonment for non-use or unauthorized use. This would be in effect as long as:
 - a. The quantity of water adjudicated by the decree are based on the per acre consumptive use requirements described by the hydrographic survey approved by the Echo Ditch Decree.
 - b. Maximum ditch diversion rates associated with the rights are based on the per acre diversion rates approved by the Echo Ditch Decree.
 - c. Priority dates attached to rights are based on the priority dates adjudicated by the Echo Ditch Decree.

In summary:

Without the Settlement Agreement the Navajo Nation and the United States as trustee for the Navajo Nation may challenge all elements of Echo Ditch Decree adjudicated water rights on any basis.

With the Settlement Agreement - Navajo Nation and the United States as trustee for the Navajo Nation may only challenge elements of Echo Ditch Decree adjudicated water rights if the challenges are based on forfeiture or abandonment for non-use.

8. **Settlement Section 9.6.2.** This provision outlines elements of water rights **not** previously adjudicated in the Echo Ditch Decree. The Navajo Nation and the US as trustee for the Navajo Nation agree not to challenge these rights except based on forfeiture or abandonment for non-use or unauthorized use, and agree not to challenge priority dates except those that may conflict with law. This would be in effect as long as:
 - a. The quantity of water adjudicated in the stream adjudication are based on the per acre consumptive use requirements described by State Engineer permits, licenses, or are based on a methodology consistent with those described by the hydrographic survey approved by the Echo Ditch Decree.

- b. Maximum ditch diversion rates adjudicated in the stream adjudication are based on diversion rates indicated in State Engineer permits or licenses, or are based on a methodology that results in maximum per acre diversion rates consistent with those approved by the Echo Ditch Decree.

In addition, the quantity of water rights within the Bureau of Reclamation's Hammond Irrigation Project based on total water right acreage for the project of 3,900 acres would not be challenged.

In summary:

Without the Settlement Agreement - Navajo Nation and the United States as trustee for the Navajo Nation may challenge on any basis, all water rights not previously adjudicated in the Echo Ditch Decree.

With the Settlement Agreement - Navajo Nation and the United States as trustee for the Navajo Nation may only challenge on certain bases water rights not adjudicated by the Echo Ditch Decree, such as challenges based on forfeiture or abandonment for non-use and challenges of priority dates that may conflict with law.

9. **Settlement Section 9.7.** With regard to Navajo Reservoir water supply contracts, the Navajo Nation and United States as trustee for Navajo Nation agree to not object to contracts and subcontracts that have been approved by December 17, 2010; and agree to not object to State Engineer permits approved by December 17, 2010 which allow the diversion and use of water delivered under the contracts and subcontracts.

In summary:

Without the Settlement Agreement – Navajo Nation and United States as trustee for the Navajo Nation may challenge contracts and subcontracts for Navajo Reservoir water supply contract and subcontracts.

With the Settlement Agreement – There would be no challenges by the Navajo Nation and the US on behalf of the Navajo Nation to Navajo Reservoir water supply contracts and subcontracts approved prior to December 17, 2010.

10. **Partial Final Decree, Paragraph 3(d).** This provision in the PFD provides that any domestic, commercial municipal and industrial uses supplied to the Navajo Nation taken as direct flow from the San Juan River, must be diverted from downstream of the confluence of the La Plata and San Juan Rivers, and are limited to 2,600 acre-feet per year of diversion and 1,300 acre-feet per year of depletion. This puts a cap on water available to the Navajo Nation for these purposes.

In summary:

Without the Settlement Agreement – The Navajo Nation and the United States on behalf of the Navajo Nation claim direct flow rights for municipal and domestic uses, as well as industrial and commercial uses. These rights amount to a much greater quantity than 1,300 acre-feet per year of depletion – 96,475 acre-feet of depletion per year. These rights could be satisfied from any source available to the Navajo Nation, including direct flow of the San Juan River.

With the Settlement Agreement – Diversion of direct flow from the San Juan River would be limited. The historical practice of diverting river flow for Shiprock and other Navajo communities would be able to continue, up to the limit of 2,600 acre-feet per year of diversion or 1,300 acre-feet per year of depletion, whichever is less. This limitation reduces impacts to junior users who have rights to direct flow of the San Juan River.

11. **Partial Final Decree, Paragraph 11.** Concerning water rights appurtenant to Navajo allotments within the San Juan River Basin, any water rights awarded by the court for future uses, that is, beyond awards for existing uses; any such awards which are exercised, will be offset by water rights already owned by Navajo Nation. The way this would operate is that when any future use water rights become exercised at an allotment, an equivalent quantity of water rights will be forborne, or unused, by the Navajo Nation. Ultimately this will reduce the impact of groundwater diversions on the mainstem San Juan River, protecting users of the surface water in the mainstem. It will also reduce impacts to groundwater producers in the basin, by limiting total groundwater diversions from Navajo Nation and allotment wells.

In summary:

Without the Settlement Agreement when allotment owners, or the United States, on behalf of allotment owners, make claims for future uses, and are decreed water rights by the court, they would be additive, or in addition to, any water rights decreed to the Navajo Nation.

With the Settlement Agreement – The Navajo Nation agrees to decline exercise of its own water rights to the extent that allotment owners exercise future based water rights.

12. **Transferability of Water Rights.** The sources and locations for diversion vary between the potential claims that may be secured at trial and the agreed to water rights enunciated in the Settlement and the proposed Decrees. Most water rights claimed by the United States on behalf of the Navajo Nation are asserted to be diverted from either groundwater or surface water, and from any sources that flow through, along or under lands held in

trust for the Navajo Nation by the United States. In addition, the claimed water rights are asserted to be transferrable among uses and sources.

Water rights devolving from the agreed-to Settlement and proposed Decrees have numerous limitations placed on them with respect to purpose of use and transferability of place of use. These limitations, in turn, create a benefit that accrues to junior water users, in that their ability to exercise their water rights is increased and protected, through minimizing the diminution of available supply.

In summary:

Without the Settlement Agreement the Navajo Nation is free to exercise its asserted water rights from groundwater or surface water for any purpose and from any source; and this freedom would be defended as part of litigating claims. Exercise of this ability to transfer without restriction could impact junior water users under a variety of scenarios. Source and transferability of water rights with the Settlement Agreement compared to those potentially secured at trial are summarized by use in Table 1.

With the Settlement Agreement – The Navajo Nation agrees to limit the transfer of water rights as summarized in Table 1. Numerous agreed to limitation are outlined in the PFD and SPFD, particularly in paragraphs 5, 7 and 17 of the PFD and paragraphs 5 and 7 of the SPFD.

13. **Partial Final Decree, Paragraph 7.** Limits on Groundwater diversions. The proposed PFD would provide water rights for production of groundwater, to the Navajo Nation, of 2,000 acre-feet consumptive use, for domestic, commercial, municipal, and industrial and other uses. Diversion amounts beyond this would be subject to an administrative process that includes the possibility of protests by non-Navajos and Navajos.

In summary:

Without the Settlement Agreement the Navajo Nation is free to exercise its asserted water rights from groundwater (or any other source). The asserted water rights far exceed 2,000 acre-feet. The heavy industrial component of claims asserted by the US on behalf of the Navajo Nation is, by itself, 60,883 acre-feet per year (See Table 2). This would come mainly from groundwater.

With the Settlement Agreement the Navajo Nation's production of groundwater is limited to 2,000 acre-feet per year. Beyond that production the Navajo Nation would essentially be confined to using a state-based process to acquire water rights. This would reduce negative impacts to junior groundwater users throughout the basin by limiting water level declines from Navajo pumping.

Table 1. Comparison of Transferability of Navajo Nation Water Rights between Without the Settlement Agreement and With the Settlement Agreement

Use	Source and Transferability under Without the Settlement Agreement	Sources and Transferability under With the Settlement Agreement
DCMI	Surface water and groundwater, unlimited for transfer of source, place and purpose of use.	Surface water and groundwater, source cannot be changed; limitations on transferring place and purpose of use, requires NM State Engineer approval.
Heavy Industrial and Commercial Activities	Surface water and groundwater, unlimited for transfer of source, place and purpose of use.	none
Livestock	Surface water and groundwater, unlimited for transfer of source, place and purpose of use.	Surface water and groundwater, source cannot be changed; limitations for transfer of place and purpose of use.
Historic and Present Irrigation	Surface water and groundwater, limitation on NIIP uses; other uses unlimited for transfer of source, place and purpose of use.	Surface water and groundwater, source cannot be changed; limitations on transferring place and purpose of use, requires NM State Engineer approval.
Future NIIP Irrigation	Surface water only, with limitations on transferring place and purpose of use.	Surface water only, with limitations on transferring place and purpose of use, requires NM State Engineer approval.
Additional Future Irrigation	Unlimited as to source (ground or surface water), purpose of use, and place of use.	none
Impoundment Storage Right (65,647 acre-feet – Fill and Refill)	Surface and groundwater, for any use, may be enlarged and moved in place of use.	Surface and groundwater at existing uses, limited in moving place of use, not to be enlarged.
Multiple Uses	none	Groundwater (not transferrable to surface water).

Taken together, these thirteen points elucidate strong benefits accruing to junior water rights holders in the San Juan Basin of New Mexico, should the proposed decrees be approved. These benefits would not only maintain the present day operation of the river, but also provide measures to mitigate water shortages not available at present. In other words, the provisions in the Settlement Agreement and the Proposed Decrees will reduce impacts on junior water rights.

III. The Settlement Agreement provides to the Navajo Nation less than the potential claims for water rights that could be secured at trial

The claims filed by the United States on behalf of the Navajo Nation, filed January 3, 2011 and updated by notice of errata filed on April 16, 2012, represent the potential award of water rights that could be secured at trial, to the Navajo Nation, for water rights appurtenant to land held in trust for the Navajo Nation. They represent quantities of water sufficient to provide for the present and future water needs necessary to fulfill the purposes of the trust lands in the San Juan River Basin as a permanent home and abiding place for the Navajo Nation. The United States spent considerable effort in collecting data, conducting analysis and developing the claims. The claims are based on credible factual data and reasonable analysis and the United States will stalwartly defend them at trial. Seventeen reports have been made available which provide the technical basis for the claims. They were filed on January 30, 2012 and are delineated:

1. *Development of Navajo Trust Lands Map for the San Juan Surface Water Basin principally authored by William Fogleman, Geo-Relational Information Technologies ("GRIT") Inc.*
2. *Future Navajo Nation Population and Domestic, Commercial, Municipal and Light Industrial Water Use in the San Juan River Basin* principally authored by Gretchen Greene, Ph.D., ENVIRON International Corporation.
3. *Past and Present Large Industrial Water Claims on Navajo Nation in the San Juan River Basin* principally authored by Travis Greenwalt, Senior Economist, CardnoEntrix.
4. *Future Large Industrial Water Claims on Navajo Nation in the San Juan River Basin* principally authored by Travis Greenwalt, Senior Economist, CardnoEntrix.
5. *Navajo San Juan Livestock Water Requirements* principally authored by Aaron Beutler, Keller - Bliesner Engineering, LLC.
6. *NM vs. USA Potential Grazing Capacity* principally authored by Edward Lucero, Bureau of Indian Affairs (BIA), Southwest Region BIA, 1001 Indian School Road, NW, Albuquerque, New Mexico.
7. *Navajo San Juan Main Stem and NIIP Historically Irrigated Acreage* principally authored by Aaron Beutler, Keller - Bliesner Engineering, LLC.
8. *Navajo San Juan Tributary Consumptive Irrigation Requirements* principally authored by Aaron Beutler, Keller - Bliesner Engineering, LLC.
9. *Inventory of Navajo Lands within the San Juan Basin in New Mexico Irrigated by Groundwater and Tributaries of the San Juan River* principally authored by Eileen Camilli, Ebert and Associates, Inc.

10. *Navajo San Juan Main Stem and NIIP Historically Irrigated Acreage* principally authored by Aaron Beutler, Keller - Bliesner Engineering, LLC.
11. *Navajo San Juan Pre-Feasibility Irrigation Suitability Land Classification* principally authored by Clifford R. Landers, C.P.S.S., Stetson Engineers Inc.
12. *Water Resource Assessment to Support the BIA's Groundwater PIA Claim on Behalf of the Navajo Nation in the San Juan River Basin Adjudication* principally authored by Dean (Tony) Zimmerman, BIA Southwest Regional Office, 1001 Indian School Road, NW Albuquerque, New Mexico, and Neil Deeds, INTERRA, Inc., 1812 Centre Creek Drive, Suite 300, Austin, Texas, 78754.
13. *Economic Analysis of Practicably Irrigable Acreage - Trust Lands, San Juan Basin, New Mexico* principally authored by Travis Greenwalt CardnoEntrix.
14. *Navajo San Juan River Basin Practicably Irrigable Acreage Study - Surface Water* principally authored by Aaron Beutler, Keller - Bliesner Engineering, LLC.
15. *Navajo San Juan River Basin Practicably Irrigable Acreage Study - Groundwater* principally authored by Aaron Beutler Keller - Bliesner Engineering, LLC.
16. *San Juan Stream System Navajo Water Use Report on Impoundments, Wells, and Springs* principally authored by Aaron Bliesner, Keller - Bliesner Engineering, LLC.

I incorporate these reports herein to this report and rely on them, in part, for my conclusions.

The most conspicuous elements of the US water rights claim on behalf of the Navajo Nation are 1) quantity, and 2) priority. These elements of the US claim can be compared with the same elements coming forth from the Settlement and proposed Decrees.

1. Quantity of water.

The quantity of the various categories of claims are summarized on page 23 on the US claims document in the Navajo Claims Summary Table (referred to for the purposes of this report as Table 2), reproduced here; units are in acre-feet per year (afy):

DCMI. The claim for domestic, commercial, municipal and light industrial demand (DCMI) is based on estimates of future population living on Navajo trust land within the San Juan River Basin. The future population, projected to stabilize in the year 2110, is estimated at 203,935 individuals. The 36,575 afy is developed from a use rate of 160 gallons per capita per day.

Heavy Industrial and Commercial Activities. This claim is founded on water requirements associated with existing uses of mineral resource and energy development along with other heavy industrial endeavors including agricultural product processing and helium processing. It also includes water requirements for anticipated future heavy industrial activities.

Navajo Claims Summary Table (Table 2) Numbers reflect those in original Statement of Claims filed January 3, 2011, and changes described in notice of errata filed April 16, 2012		
Type of Claim	Diversion (afy)	Depletion (afy)
DCMI	36,575	36,575
Heavy Industrial and Commercial Activities	105,761	65,697
Livestock	1,173	733
Historic and Present Irrigation	477,370	253,059
Future NIIP Irrigation	115,579	86,342
Additional Future Irrigation	201,150	152,851
Impoundment Storage Right (65,647 acre-feet – Fill and Refill)	Variable	Variable
Total Claim¹	937,608	595,257

¹ As the Navajo Nations' storage right is one to fill and refill impoundments as water is available, the quantities described here for total diversion and depletion do not include the amount associated with the described impoundment storage right (65,647 acre-feet).

Livestock. Livestock claims are based on the maximum carrying capacity of rangeland within the Navajo trust lands of the San Juan River Basin. The approximately 2,345,604 acres of range could sustain 52,343 animal units if in very good condition. Quantities are based on a diversion rate of 20 gallons per animal unit per day with 60% efficiency.

Historic and Present Irrigation. Water claimed under this category is from past and present uses in four subcategories:

- a. Mainstem San Juan River Projects (Hogback, Fruitland, and others) amounting to 13,030 acres.
- b. Irrigated land in the Navajo Indian irrigation Project (NIIP) accruing to 78,336 acres.
- c. Tributary irrigation projects such as Captain Tom and Sheep Springs, which sum to 8,426 acres. These projects have been using water from numerous tributaries of the San Juan River including Whiskey Creek and Crystal Wash.
- d. Tributary irrigation outside of identified projects adds up to 3,728 acres. These acres utilize diverted water from any of numerous tributaries of the San Juan River and are spread throughout the basin.

Quantities claimed for irrigation use based on the best technical data and methodology available.

Future NIIP Irrigation. Approximately 34,880 acres of the original Congressionally authorized acreage have not been brought under the plow and sprinkler. This category of claim is based on irrigation of these acres with quantities developed from the best technical data and methodology available.

Additional Future Irrigation. Water claimed for future irrigation devolves from identification of 53,888 acres of practicably irrigable acres. Based on extensive analysis, farming, through irrigation, of these acres would meet the practicably irrigated acreage (PIA) standard.

Impoundment Storage Right. The combined capacity of impoundments, including stock ponds, irrigation reservoirs and recreational water bodies located on Navajo trust lands is 65,647 acre-feet. The US claims the ability to capture and use water in these impoundments as it is available, to fill and refill the structures.

Comparing the quantities of water claimed and potentially awarded, to those agreed to in the Settlement, the proposed PRD and the proposed SPFD, yields the amounts in Table 3.

Table 3. Comparison of Water Quantity Table	Navajo Claims Summary		Navajo Settlement Summary		
	Water Use	Diversion (afy)	Depletion (afy)	Diversion (afy)	Depletion (afy)
DCMI	36,575	36,575	27,330	23,120	Navajo-Gallup pipeline (2 sources, Navajo Reservoir and ALP)
			2,600	1,300	Mainstem direct flow rights
Heavy Industrial and Commercial Activities	105,761	65,697	0	0	
Livestock	1,173	733	482	482	
Historic and Present Irrigation	477,370	253,059	458,224	226,078	Present NIIP + Hogback + Fruitland + Tributary
Future NIIP Irrigation	115,579	86,342	156,506	83,183	
Additional Future Irrigation	201,150	152,851	0	0	
Impoundment Storage Right (65,647 acre-feet – Fill and Refill)	Variable	Variable	Variable	Variable	
Multiple Uses	0	0	2,000	2,000	
Total Claim	937,608	595,257	646,660	335,681	

2. Priority date of the claimed water compared with priority date of the agreed to Settlement and proposed Decrees water.

The priority date for *all* the water claimed on behalf of the Navajo Nation by the United States is time immemorial. The agreed to priority dates out of the proposed Decrees vary by category of water right and are *all* later than time immemorial. To the extent that the

priority dates in the proposed Decrees are later than those in the claim, and depending on water supply in a given year, they could represent a provision of less water than the amount that could be secured at trial. This is because under priority administration, a time immemorial claim would be senior to all others and would never be curtailed through priority administration. On the other hand, during priority administration, should one or more categories of Navajo Nation water rights be junior to any non-Navajo water rights, the Navajo Nation exercise would be curtailed. This provision agreed to in the Settlement creates functionally less water in certain situations for the Navajo Nation than that potentially secured at trial. Using the same categories of water, Table 4 compares the priority dates for the claimed water and the Settlement agreed to water.

The subordination of priority to a mid-20th Century priority is a significant provision agreed to in the Settlement and proposed Decrees.

The above descriptions provide a reasonable basis to conclude that the Settlement Agreement and the Proposed Decrees provide the Navajo Nation with less than the potential claims that could be secured at trial.

IV. The Settlement is consistent with public policy and applicable law

The simplest and most straightforward showing that the Settlement is consistent with public policy and applicable law is that it has been brought into conformance with the March 30, 2009 *Omnibus Public Land Management Act of 2009* (P.L. 111-11) (Act). The Act is the most complete and closely related statement of the United States policy and law with respect to the Settlement. Title X, Subtitle B of this Act is titled *Northwestern New Mexico Rural Water Projects Act*. Part IV of Subtitle B is titled *Navajo Nation Water Rights*. In referring to the Settlement in Part IV, Section 10701 (a) (1) the Act states:

Except to the extent that any provision of the Agreement conflicts with this subtitle, Congress approves, ratifies, and confirms the Agreement (including any amendments to the Agreement that are executed to make the Agreement consistent with this subtitle).

And in Section 10701 (a) (2):

The Secretary shall enter into the Agreement to the extent that the Agreement does not conflict with this subtitle, including-

- (A) any exhibits to the Agreement requiring the signature of the Secretary; and
- (B) any amendment to the Agreement necessary to make the Agreement consistent with this subtitle.

Through a 20-month long and diligent conforming process the Settlement was in fact made consistent with the Act, enabling the Secretary to sign the Settlement on December 17, 2010. The other two settling

parties also signed the conformed Settlement, the State of New Mexico on December 10, 2010 and the Navajo Nation on December 17, 2010.

Table 4. Comparison of Water Priority Table	Navajo Claims	Navajo Settlement
Water Use	Priority Date	Priority Date
DCMI	time immemorial	1868 , subordinated to 1955 and 1968 for Navajo Gallup pipeline served by Navajo Reservoir while Navajo Reservoir is extant
		1868, subordinated to 1956 for Navajo Gallup pipeline served by Animas-La Plata Project, while Animas-La Plata Project is extant
		1868 for mainstem direct flow rights
Heavy Industrial and Commercial Activities	time immemorial	None
Livestock	time immemorial	1868
Historic and Present Irrigation	time immemorial	1868 subordinated to 1962, for present uses at NIIP, while Navajo Reservoir is extant
		1868 for Hogback-Cudei
		1868 for Fruitland-Cambridge
		1868 for tributary irrigation
Future NIIP Irrigation	time immemorial	1868, subordinated to 1962 while Navajo Reservoir is extant
Additional Future Irrigation	time immemorial	none
Impoundment Storage Right (65,647 acre-feet – Fill and Refill)	time immemorial	1868
Multiple Uses	time immemorial	1868

The simplest and most straightforward showing that the Settlement is consistent with public policy and applicable law is that it has been brought into conformance with the March 30, 2009 *Omnibus Public*

In the introduction to subtitle B of the Act at Section 10303 (b), Congress affirmed that “In carrying out this subtitle, the Secretary shall comply with each law of the Federal Government relating to the protection of the environment, including – (1) the National Environmental Policy Act of 1969 (42 U.S.C.

4321 et seq.); and (2) the Endangered Species Act of 1983 (16 U.S.C. 1531 et seq.).” Later in the introduction, at Section 10304, Congress carefully considers the “Colorado River Storage Project Act (43 U.S.C. 620 et seq.) as it relates to the Act. This theme is revisited throughout the Act, as needed.

In Title 10, Subtitle B, Part I of the Act, Congress addresses the Colorado River Storage Project Act, which impacts the operation of Navajo Reservoir. In creating a “Top Water Bank” in Navajo Reservoir for storage of water that otherwise could be diverted by downstream irrigators (including non-Indian irrigators), Congress is mindful of existing law that relates to Settlement provisions and acknowledges the validity of several New Mexico State Engineer water rights files (2847, 2848, 2849, 2917 and 3215)

In Title 10, Subtitle B, Part IV of the Act, dealing with Navajo Nation Water Rights, Section 10701 specifically addresses the Settlement. In this Section, the US Congress took careful consideration of the requirements of the Indian Non-Intercourse Act (Section 2116 of the revised statutes 25 U.S.C. 177). In addition, compliance with “any applicable law” is mentioned when Congress addresses quantities of water available to the Navajo Nation through contract, use of return flows, changes in places or purpose of use or point of diversion, subcontracts and water leases.

The Act is the quintessential expression of US public policy and law applicable to the Settlement. Because the Act intimately addresses the Settlement; because the Act incorporates and addresses other federal legislation; because the Act recognizes the validity of particular New Mexico State Engineer water rights files related to the administration of the San Juan River; because the Act calls for the operation of applicable law in several citations; and because the Settlement has been made consistent with the Act, it may be concluded with certainty that the Settlement is consistent with and is a reflection of public policy and applicable law.

Conclusion

In addressing these matters, I am exercising my understanding and practice as a water rights specialist with a technical background. My experience in negotiations and litigation of water rights leads me to present these opinions. These are opinions which draw on the most salient and readily apparent, and most significant provisions in the Settlement and the two proposed Decrees. It should be clear, through examination of the documents that the agreed to terms represent a good faith, arms-length negotiation, reduce impacts to junior water rights, provide the Navajo Nation with less water rights than the Nation could potentially secure at trial, and are consistent with US public policy and applicable law.