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.	D-1116-CV-75-184 HON. JAMES J. WECHSLER Presiding Judge SAN JUAN RIVER GENERAL STREAM ADJUDICATION Claims of the Navajo Nation AB-07-1

NAME OF PARTY: The Navajo Nation and the United States of America

DESCRIPTIVE SUMMARY: Memorandum in support of the Settlement Motion filed on January 3, 2011

NUMBER OF PAGES: 76 (including cover page and table of contents; not including exhibits)

DATE OF FILING: April 15, 2013

JOINT MEMORANDUM OF THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT OF THE SETTLEMENT MOTION

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The Navajo Nation and the United States jointly submit this memorandum in support of the *Settlement Motion of United States, Navajo Nation, and State of New Mexico for Entry of Partial Final Decrees* (January 3, 2010) ("Settlement Motion"), and request that the Court grant the Settlement Motion at this time and enter the proposed Partial Final Decree and the proposed Supplemental Partial Final Decree (collectively "Proposed Decrees").[1]

I. INTRODUCTION

This matter comes before the Court on motion by the Settling Parties to approve the Proposed Decrees and finally quantify the water rights of the Navajo Nation in the San Juan River Basin in New Mexico ("Basin"). The Navajo people have resided throughout the Basin since time immemorial and the Navajo Nation is entitled to assert claims to water rights under the *Winters* federal reserved rights doctrine[2] to a vast quantity of water with a priority senior to all other appropriators in the Basin. Water development on the Navajo Reservation has lagged behind non-Navajo communities in the Basin and others have put water not yet appropriated, but nonetheless subject to a Navajo claim, to use. All water users in the Basin face the risk of water shortages if the Navajo Nation successfully litigates its paramount claim, and until the Nation's water rights are settled, all non-Navajos use water under a substantial cloud of uncertainty.

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[1] The Partial Final Decree was presented to the Court on January 3, 2011 as Attachment 2 to the Settlement Motion. The Supplemental Partial Final Decree was presented to the Court on April 2, 2012. *See Settling Parties Notice of Filing Revised Proposed Supplemental Partial Final Decree*, Attachment (Revised Appendix 2).

[2] *Winters v. United States*, 207 U.S. 564 (1908).

The Navajo *inter se* proceeding is the culmination of decades of work by the Settling Parties[3] to address the substantial water rights of the Navajo Nation in a manner that is equitable to all. In the simplest terms, the Settlement provides the Navajo Nation with sufficient water rights and resources to ensure that the Navajo Reservation [4] becomes a permanent homeland, while ensuring that the water uses already developed in the Basin will be protected.

The water rights claimed by the United States on behalf of the Navajo Nation stand in stark contrast the Navajo water rights recognized in the Proposed Decrees. While the United States stands ready to assert a claim to divert 920,745 acre-feet per year ("afy") (with a resulting depletion of 591,401 afy) the total rights recognized in the Proposed Decrees provide for total diversions of 635,729 afy (with a 334,542 afy depletion). The only "new" water recognized for the Navajo Nation is water to meet the municipal and domestic needs of Navajo communities in western New Mexico and the City of Gallup through the Navajo Gallup Water Supply Project ("NGWSP"). The NGWSP will be serviced out of existing contracts for water held by the United States, again with no impact on other water users. And this water supply is critical to providing safe, reliable drinking water to the Navajo people and their non-Indian neighbors. The Navajo Nation, and the United States as the Nation's trustee, has made tremendous concessions to avoid disruption of the system of water allocation in the State of New Mexico, and among the states of the larger Colorado River Basin.

The Navajo Nation and the United States urge the Court to find that the Settling Parties have met their burden to demonstrate that the Settlement Agreement and the Proposed Decrees

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[3] Throughout this Memorandum, reference to the "Settling Parties" refers collectively to the Navajo Nation, the State of New Mexico, and the United States.

[4] Lands throughout the Basin have been taken into trust by the United States on behalf of the Navajo Nation. In this Memorandum, lands in the Basin held in trust by the United States on behalf of the Navajo Nation are referred to as the "Navajo Reservation."

are fair, adequate and reasonable, and consistent with public policy and applicable law, and that the Settling Parties are entitled to entry of the Proposed Decrees as a matter of law.

II. STANDARD OF REVIEW

In its *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof* (filed Apr. 19, 2012) (hereinafter referred to as the "Legal Standards Order"), the Court enunciated the legal standard against which it will determine whether to approve the Settlement Agreement[5] and enter the Proposed Decrees. "The Settling Parties must demonstrate that the Proposed Decrees are 'fair, adequate, and reasonable, and consistent with the public interest and applicable law'." Legal Standards Order at 1-2 (quoting *Scheduling Order for Proceedings on Objections to the Entry of the Jicarilla Apache Tribe Partial Final Decree*, August 11, 1998 ("Jicarilla Procedural Order") and *Order Granting Joint Motion for Entry of a Partial Final Judgment and Decree on Water Rights of the Jicarilla Apache Tribe*, February 24, 1999, and citing *New Mexico ex rel. State Eng'r v. Aamodt*, 582 F. Supp. 2d 1313 (D.N.M. 2007)). As is apparent from the citations in the Legal Standards Order, the Court did not adopt this standard in a vacuum; the "fair, adequate and reasonable" standard was applied by this Court in the separate *inter se* proceeding ("Jicarilla *inter se*") that lead to the approval of the Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe (Feb. 24, 1999) ("Jicarilla Decree"), and was also adopted by the United States District Court in the *inter se* proceeding to approve the *Aamodt* Settlement. *Id.* And courts have long employed the standard in the review and approval of voluntary, negotiated agreements compromising claims in litigation. *See, e.g., Jones v. Nuclear Pharmacy, Inc.*, 741 F.2d 322, 324

[5] "Settlement Agreement" refers to the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (April 19, 2005).

(10th Cir. 1984) ("In exercising its discretion, the trial court must approve a settlement if it is fair, reasonable and adequate"); *WildEarth Guardians v. U.S. Forest Service*, 778 F. Supp. 2d 1143, 1148 (D.N.M. 2011) (following *Jones*); *In re Norwest Bank of New Mexico, N.A.*, 2003-NMCA-128, ¶ 22, 134 N.M. 516, 80 P.3d 98 (same).

Courts have applied different factors in construing the fairness, adequacy, and reasonableness of a settlement to fit the circumstances of the case. *See, e.g., Jones*, 741 F.2d at 324 and *Norwest Bank*, 2003-NMCA-128, ¶ 22 (directing trial court to assess "(1) whether the proposed settlement was fairly and honestly negotiated; (2) whether serious questions of law and fact exist, placing the ultimate outcome of the litigation in doubt; (3) whether the value of an immediate recovery outweighs the mere possibility of future relief after protracted and expensive litigation; and (4) the judgment of the parties that the settlement is fair and reasonable"). If a proposed settlement implicates the rights of third parties, courts typically consider their interests as well. *In re Masters Mates & Pilots Pension Plan and IRAP Litigation*, 957 F.2d 1020, 1026 (2d Cir. 1992) (citations omitted); *United States v. Oregon*, 699 F. Supp. 1456, 1461 (D. Or. 1988) ("When considering a consent decree that also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed"). This is particularly true in the water rights context, where a court must ensure that settlement of the claims of one water rights holder does not unfairly prejudice the interests of other water rights holders. *See State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 64, 141 N.M. 1, 150 P.3d 375 ("*Lewis*") ("The court presumably could have rejected the settlement agreement if it unfairly and adversely affected the water rights of third parties who were allowed to object to it.") (citing *Master Mates & Pilots, supra*); *see also* A. TARLOCK, LAW OF WATER RIGHTS AND RESOURCES, § 7:24 (West 2011) (same). Ultimately, the decision to approve a settlement lies in a court's

discretion, based on the particular facts and circumstances of each case. *Platte v. First Colony Life Insurance Co.*, 2008-NMSC-058, ¶ 7, 145 N.M. 77, 194 P.3d 108 (citing *Jones*, 741 F.2d at 324). However, the Court is not free to simply substitute its judgment for that of the parties to the Settlement Agreement. "The relevant standard, after all, is not whether the settlement is one which the court itself might have fashioned, or considers as ideal, but whether the proposed decree is fair, reasonable, and faithful to the objectives of the governing statute." *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 85 (1st Cir. 1990).

Based on "the particular factual circumstances of this case," the Court adopted four "elements of proof" as the tool by which to measure the Settlement Agreement and Proposed Decrees against "the fair, adequate, and reasonable standard." Legal Standards Order at 2 (emphasis added). Those four elements of proof require the Settling Parties to demonstrate that:

> (a) the Settlement Agreement is the product of good faith, arms-length negotiations, (b) the provisions contained in the Settlement Agreement and Proposed Decrees will reduce or eliminate impacts on junior water rights, (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, and (d) the Settlement Agreement is consistent with public policy and applicable law.

Id. at 3. As with the "fair, adequate, and reasonable standard" itself, the Court derived the elements of proof it will apply in this *inter* se proceeding from prior judicial decisions. [6]

[6] While in most respects the Legal Standards Order follows established precedent, the Order appears to be unique in permitting objectors to oppose, and potentially defeat, the settlement motion without demonstrating injury to their own water rights claims. *Id.* ("The Objectors need not demonstrate injury to their own water rights claims in order to state a cognizable objection.") All authority of which counsel are aware is to the contrary. *See* Jicarilla Procedural Order at 3 ("[Objectors] must state with particularity, what aspect or aspects of the proposed decree are objectionable and specifically how you will be harmed if the Court enters the decree as proposed."); *Lewis*, 2007-NMCA-008, ¶ 16, 141 N.M. 1, 150 P.3d 375 (objectors have the "initial burden to make a *prima facie* case showing how the[ir] water rights...will be adversely affected"); *Aamodt*, 582 F. Supp. 2d at 1315 ("Requiring objectors to describe how they will be injured or harmed by the settlement agreement in a legally cognizable way is also consistent with New Mexico water law."); *see also In re the General Adjudication of All Rights to Use Water in*

Courts that have considered motions to approve Indian water rights settlements have generally treated such dispositive motions as the equivalent of motions for summary judgment. *See, e.g., In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 223 Ariz. 362, 367 ¶ 6, 224 P.3d 178, 183 (Ariz. 2010) ("*Gila VIII*"). In the Legal Standards Order, the Court determined that the Settling Parties bear both the burden of production and the burden of persuasion as to each of the elements of proof. Legal Standards Order at 3. Once the Settling Parties have carried their burden of production and established each of the elements by *prima facie* evidence, the burden shifts to any objectors to rebut the Settling Parties' evidence. *Id.* The Settling Parties retain the burden of persuasion on each element by a preponderance of the evidence. *Id.* It is instructive to examine the manner in which courts have evaluated the elements of proof in light of the controlling burdens.

A. Element One: The Settlement Agreement is the Product of Good Faith, Arms-Length Negotiations

It is the public policy under state and federal law "to favor amicable settlement of claims without litigation when the agreements are fairly secured, are without fraud, misrepresentation, or overreaching, and when they are supported by consideration." *Ratzlaff v. Seven Bar Flying Service, Inc.*, 98 N.M. 159, 163, 664 P.2d 586, 590 (Ct. App. 1982) (citations omitted), *cert. denied* 98 N.M. 336 (1982); *Cannons*, 899 F.2d at 84 ("it is the policy of the law to encourage settlements"); *see also Carson v. American Brands, Inc.*, 450 U.S. 79, 88 (1981) (recognizing that parties to litigation have a "right to compromise their dispute on mutually agreeable terms" which may include incorporation of their settlement into a judicial decree). Where, as here, a

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the Gila River System and Source, 217 Ariz. 276, 279 ¶ 13, 173 P.3d 440, 443 (Ariz. 2007) ("*Gila VII*") ("To prevent approval, an objecting party must show that its claimed water right would suffer 'material injury'."). Of course, it does not follow necessarily from an objector's statement of a "cognizable objection" that the objector has met its burden.

settlement agreement must obtain the imprimatur of judicial approval to become effective, "the district court must ensure that the agreement is not illegal, a product of collusion, or against the public interest." *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991). In gauging the extent to which settling parties have engaged in good faith, arms-length negotiations, courts examine the "candor, openness, and bargaining balance" of the negotiation process to ensure that it was "full of adversarial vigor." *Cannons*, 899 F.2d at 86, 87 n.4. The volume of the record and, in the case of governmental litigants, their willingness to consider public comments on a proposed settlement are among the factors that courts have considered. *United States v. Akzo Coatings*, 949 F.2d 1409, 1435 (6th Cir. 1991); *see also Aamodt*, 582 F. Supp. 2d at 1320 ("the Court concludes that the negotiations were conducted at 'arms length,' meaning that the negotiations were conducted by unrelated parties, each acting on their own self interest"); *Cannons*, 899 F.2d at 84 (the general policy favoring settlements "has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.").

B. Element Two: The Provisions Contained in the Settlement Agreement and Proposed Decrees will Reduce or Eliminate Impacts on Junior Water Rights

Measuring the impact of the Settlement Agreement and Proposed Decrees on junior water rights enables the Court to determine not only that the settlement terms are fair to the Settling Parties, but that those terms "do not prejudice other claimants." TARLOCK, *supra*, § 7:24; *Lewis*, 2007-NMCA-008 at ¶ 64.[7] As the State has previously pointed out:

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[7] *See also Aamodt*, 582 F. Supp. 2d at 1315:

> Non-settling defendants, in general, lack standing to object to a partial settlement. *In re Integra Resources v. Fidelity Capital Appreciation Fund,* 262 F.3d 1089, 1102 (10th Cir.2001) (*citing* 5th, 9th and D.C. Circuit cases); *Waller v. Financial Corp. of America,* 828 F.2d 579, 582-583 (9th Cir.1987) (*citing* 1st, 5th and 7th

> The Settlement Agreement, including the Proposed Decrees, should be evaluated on the basis of comparing a future with the settlement against a future without settlement, which involves litigation risks associated with the water rights claims of the Navajo Nation and its members.

Technical Assessment of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (2012) (OSE Technical Assessment) at 23.

C. Element Three: There is a Reasonable Basis to Conclude that the Settlement Agreement Provides for Less than the Potential Claims that could be Secured at Trial

Requiring the Settling Parties to demonstrate there is a reasonable basis[8] to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial ensures that the Navajo Nation is not using the settlement "to gain additional rights to water" to which it otherwise would not be entitled. *Gila VII*, 217 Ariz. at 279 ¶ 13, 173 P.3d 443. "Put simply, the expectation ... is that a settlement will be approved if the settling tribe is no better off than it would be after the final adjudication of all claims...." *Id.*[9]

> Circuit cases). Courts have, however, recognized a limited exception to this rule where non-settling parties can demonstrate they are prejudiced by a settlement. *Id.* "This standard strikes a balance between the desire to promote settlements and the interests of justice." *Waller,* 828 F.2d at 583.

[8] To uphold a court's determination of "reasonable basis," the New Mexico Court of Appeals has required a showing of "evidence *or reasonable permissible inferences arising therefrom.*" *Huning Castle Neighborhood Association v. City of Albuquerque*, 1998-NMCA-123 ¶ 14, 125 N.M. 631, 964 P.2d 192, relying on *Las Cruces Prof'l Fire Fighters v. City of Las Cruces,* 1997-NMCA-044, ¶ 7, 123 N.M. 329, 940 P.2d 177 (emphasis in original).

[9] Implicit in this element is the principle that the Court cannot

> reach any ultimate conclusions on the contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements.

Officers for Justice v. Civil Service Comm'n, 688 F.2d 615, 625 (9th Cir. 1982), *cert. denied sub nom. Byrd v. Civil Service Comm'n*, 459 U.S. 1217 (1983).

This "less than could be secured at trial" element of proof was first enunciated by the Arizona Supreme Court in the Gila River adjudication. In 1991, the Arizona Supreme Court through entry of a Special Procedural Order established procedures for the approval of Indian water rights settlements, and included the legal standard to be applied ("*Gila* Procedural Order").[10] This element of the Court's legal standard is derived from the *Gila* Procedural Order; the interpretation of this element by the Arizona courts provides the only available guidance on application of the "less than can be proved at trial" element of proof, and those decisions are instructive in this case.[11] In reviewing adjudication court decisions applying this element, the Arizona Supreme Court measured the water rights of an Indian tribe under a water rights settlement against the water rights claimed on behalf of the tribe and its current water use. *Gila VIII*, 223 Ariz. at 370-71 ¶¶ 23-26, 224 P.3d at 186-187. That Court affirmed the adjudication court's analysis, which relied on the statement of claims filed by the federal government (as well as any supporting documentation filed in support of such statements) and the technical assessment by the State as the basis for the comparison.[12] *Id.*, *Gila VII*, 217 Ariz. at 283 ¶¶ 35-

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[10] *Special Procedural Order Providing for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes,* § D.(6)(a), *In re the General Adjudication the Rights to Use Water in the Gila River System and Source Nos. WC-79-001 through WC-79004 (consolidated)* (May, 16, 1991). Subsequently, the Arizona Supreme Court eliminated this element as part of the standard for approving Indian water rights settlements in the Little Colorado River Adjudication. *Administrative Order, In Re the Gen. Adjudication of All Rights to Use Water in the Little Colorado System and Source,* No. WC-79-0006 (Sep. 27, 2000). Both Procedural Orders are available at: http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/decisionsOrders.asp

[11] The Navajo Nation and the United States are not aware of the use of this element in any other jurisdiction, *see* n. 5, *supra*, and even in Arizona, it has not been used outside of the Gila River adjudication, *see* n.10, *supra.*

[12] Arizona law provides that the Arizona Department of Water Resources ("ADWR") will provide technical assistance to the Court in water rights adjudications. A.R.S. § 45–256; *U.S. v. Superior Court*, 144 Ariz. 265, 279, 697 P.2d 658, 672 (1985) ("The director's final and most

36, 173 P.3d at 447. Similarly, the U.S. Hydrographic Survey,[13] the U.S. Statement of Claims[14] with its supporting technical reports, and the OSE Technical Assessment are the principle documents that this Court must consider in evaluating the "less than could be secured at trial" element of proof here.

D. Element Four: The Settlement Agreement is Consistent with Public Policy and Applicable Law

As mentioned above, public policy generally favors settlement of claims in litigation. *See Ratzlaff*, 98 N.M. at 163, 646 P.2d at 590. In addition, because entry of the Proposed Decrees would constitute a final order under Rule 1-054(C) NMRA, *see State ex rel. State Engineer v. Parker Townsend Ranch Co.*, 118 N.M. 780, 781-82, 887 P.2d 1247, 1248-49 (1994), the Court must ensure that the Settlement Agreement and Decrees "conform to applicable laws." *United States v. Oregon*, 913 F.2d 576, 580-81 (9th Cir. 1990) (citations omitted), *cert. denied sub nom. Makah Indian Tribe v. United States*, 501 U.S. 1250 (1991). Specifically with regard to the proposed resolution of the Navajo Nation's water rights claims in the Basin, the Court also "must consider whether the [Settlement Agreement and Proposed Decrees are] 'consistent with the public objectives sought to be obtained by Congress' " in the

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important task with respect to the adjudication proceedings involves 'technical assistance'[.]") Here, as in Arizona, the OSE Technical Assessment of Navajo Nation water uses and water rights claims is relevant to the evaluation of this element of proof.

[13] "U.S. Hydrographic Survey" refers to *The United States' Hydrographic Survey of Navajo Lands in the San Juan River Basin* (filed Jan. 3, 2011).

[14] "U.S. Statement of Claims" refers to *The United States' Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation* (filed Jan. 3, 2011).

Settlement Act.[15] *United States v. Lexington-Fayette Urban County Government*, 591 F.3d 484, 490 (6th Cir. 2010) (quoting *Williams v. Vukovich*, 720 F.2d 909, 923 (6th Cir. 1983)).

In sum, the Legal Standards Order mandates a necessarily narrow scope of review. *See Lewis*, 2007-NMCA-008 at ¶ 63 ("The ultimate questions for the court were whether the court should approve and adopt the settlement agreement as the court's adjudication of water rights ... and reject Appellants' objections"); *Gila VIII*, 223 Ariz. at 369 ¶ 18, 224 P.3d at 185 ("[T]he court correctly ruled that their objections fell outside the limited scope of review prescribed by the Special Order"). The only *material* facts at issue in this proceeding are those necessary to determine, pursuant to the four elements of proof, the fairness, adequacy, and reasonableness of the Settlement Agreement and Proposed Decrees. *Lewis*, 2007-NMCA-008 at ¶ 62. And the only *genuine* issues are those related specifically to these elements of proof. *Id.*

III. THE SETTLING PARTIES HAVE ESTABLISHED THAT THE SETTLEMENT MOTION SHOULD BE GRANTED

The Settling Parties have met their burden of production to demonstrate that the Proposed Decrees are "fair, adequate, reasonable and consistent with public policy and applicable law." Each of the elements of proof identified by the Court is discussed below. The numerous compromises required to reach a settlement are recited in the context of Element One, which outlines the give and take of the settlement negotiations. The United States and the Navajo Nation next address the Court's Element Three, comparing the water rights recognized in the Proposed Decrees with the U.S. Statement of Claims, and extensively reviewing the legal and factual bases of those claims. Having described the water rights that would be recognized in the Proposed Decrees, the Navajo Nation and the United States return to Element Two and describe

[15] "Settlement Act" refers to the Northwestern New Mexico Rural Water Projects Act of 2009, Pub. L. 111-11; 123 Stat. 1367

the extensive measures included in the Settlement Agreement and the Proposed Decrees to protect non-Navajo water users, particularly those with rights that are junior in priority. Element Four requires the Settling Parties to demonstrate that the Settlement Agreement and the Proposed Decrees are consistent with applicable law; no law is more relevant than the Settlement Act, in which Congress approved the Settlement Agreement.

A. THE SETTLEMENT AGREEMENT IS THE PRODUCT OF GOOD FAITH, ARMS-LENGTH NEGOTIATIONS

That each Settling Party negotiated the Settlement Agreement in good faith and at arms-length is the only reasonable conclusion that can be drawn from the history of the negotiations set forth below.

1. Initial Negotiations between the Navajo Nation and the State – Navajo Concessions to Meet the State Goal of Compact Compliance and Secure Non-Indian Support

In 1996, Navajo Nation President Albert Hale wrote to New Mexico Governor Gary Johnson to inquire whether the State would be interested in pursuing a negotiated settlement of the Navajo Nation's claims to the San Juan River in New Mexico, and the State responded favorably.[16] Attachment A – Affidavit of John W. Leeper, Ph.D., P.E. ("Leeper Aff.") at ¶ 6 and Ex. 2. To authorize negotiations between the Nation and the State, a memorandum of agreement was executed by President Hale and Governor Johnson on July 23, 1997. *Id.* at ¶ 8 and Ex. 3.

[16] Earlier that year, the Navajo Nation, together with all of the other Indian tribes and Pueblos in New Mexico, entered into a government-to-government memorandum with the State of New Mexico committing to enter into settlement negotiations with the State before pursuing litigation against the State. At that time, the San Juan River general stream adjudication had languished for more than twenty years with little hope for progress absent a major initiative to settle the claims of the Navajo Nation, which are by far the largest claims for water in the Basin. The Jicarilla Apache Nation (formerly the Jicarilla Apache Tribe) entered into a water rights settlement with the State of New Mexico (State), approved by Congress in 1992, and the Navajo Nation believed that the time was right to explore the possibility of a Navajo settlement with the State. Leeper Aff. at ¶ 7.

Initial discussion between representatives of the Navajo Nation and the State occurred on April 3, 1998, in Santa Fe with the assistance of a neutral facilitator. The parties spent considerable time educating each other about their goals and objectives for a settlement.

The first priority of the Navajo Nation was to obtain a quantity of water sufficient to ensure that the Navajo Reservation could be sustained as a permanent homeland for the Navajo People. *Id.* at ¶ 10. To further this objective, the Nation requested the State's support for the construction of the long-anticipated NGWSP,[17] which would bring San Juan River water to Navajo and non-Indian communities lacking adequate access to clean water. *Id.* Finally, the Nation sought funding to complete the Navajo Indian Irrigation Project ("NIIP"), a large agricultural infrastructure development project with the potential to be a cornerstone of Navajo economic development and self-sufficiency.[18] The State's negotiating position was constrained by its obligations under interstate compacts; the State could not agree to a supply of water for the Navajo Nation that would put the State in jeopardy of violating such compacts.[19] In addition, the

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[17] Congress first authorized BOR to study ways to address water shortages on the eastern part of the Navajo Reservation and Gallup, New Mexico in 1971. Pub. L. 92-199. The 2009 FEIS for the NGWSP described the need for the project, including Navajo reliance on water hauling and a drop in Gallup's groundwater levels of approximately 200 feet in the preceding ten years, and concluded that the water supply is not anticipated to meet current water demands within the current decade. Leeper Aff. at ¶ 10.

[18] Although authorized by Congress in 1962, Pub. L. 87-483, 76 Stat. 96 (1962) ("1962 Act"), codified at 43 U.S.C. § 615ii *et seq.* ("NIIP Legislation"), NIIP remains substantially incomplete because insufficient federal appropriations have been provided to complete construction of the irrigation project. Today, of the 110,600 acres of land originally envisioned for the project, only 78,000 acres (approximately) of irrigated acres have been prepared to which irrigation water is being applied; in 1996 even fewer acres were developed. Leeper Aff. at ¶ 12. While NIIP was authorized in the same legislation that authorized the San Juan-Chama Project, which was designed to deliver water to the rapidly expanding metropolis of Albuquerque, eight years after the authorizing legislation only 17% of NIIP had been completed compared with 66% of the San Juan-Chama Project. *Id.*

[19] *See* note 48 *infra*.

State sought to protect the non-Navajo water users from a large, downstream, senior Navajo water right that could result in a priority call[20] on the river against the up-stream water users during dry years.

The distance between the positions of the Nation and the State quickly became evident. Technical data available to the Nation and the State further informed the negotiations. Leeper Aff. at ¶ 13. The parties had the benefit of the 1988 Hydrologic Determination prepared by the U.S. Bureau of Reclamation ("BOR") in connection with 1992 Jicarilla settlement. OSE Technical Assessment at 32. In addition, the State had recently updated its depletion schedule, a planning tool used to estimate the status of New Mexico's compliance with its compact obligations. Leeper Aff. at ¶ 13. Based on those data, it became apparent that a settlement would only be possible if the Navajo Nation did not demand significantly more water than its current and historic uses, including the Congressionally-authorized water use for the NIIP. *Id.* In lieu of a settlement that recognized a significant quantity of "new" water for the Navajo Nation consistent with the Navajo claims in the adjudication, the parties pursued discussions of how the water for the Navajo Nation could be made more beneficial through the infusion of federal funding to construct the NGWSP and complete the NIIP. *Id.*

In order to have a good faith discussion about federal funding, it became necessary to invite representatives of the federal government to join the discussions. In September 1999, the Navajo Nation and the State requested the Department of the Interior ("Interior") to appoint a Federal Assessment Team to help the parties continue their exploration of whether a settlement

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[20] Priority "calls" against upstream junior water right holders requires them to pass more water downstream in order to satisfy the rights of the downstream senior water user. *See Kansas v. Colorado*, 2003 WL 24027914 (2003) at *44; *Lewis*, 141 N.M. at 9 ¶ 27, 150 P.3d at 383 ("[C]entral to the doctrine of prior appropriation is the superiority of senior rights and enforcement of those superior rights through priority calls in times of water shortages.").

would be possible. *Id.* at ¶ 14 and Exs. 8 and 9. In addition, the State Engineer sought the support of Senators Domenici and Bingaman for a Federal Assessment Team. *Id.* at ¶ 14 and Exs. 10 and 11. The Interior Deputy Secretary designated a Federal Assessment Team in the Fall of 2000. *Id.* at ¶ 14 and Ex. 12.

2. Federal Participation in the Negotiations – Limited by Federal Budgetary Concerns.

Federal representatives[21] began attending the negotiation discussions in October of 2000. The Assessment Team was made up of five persons from federal agencies both within and without Interior, with knowledge of the Navajo Nation's water rights claims and the Basin. *See* Attachment B – Affidavit of Christopher Banet (Banet Aff.) at ¶ 3. Shortly thereafter, the State and the Nation agreed that the negotiations had progressed to a point warranting an escalation in the substance of the discussions and the involvement of the United States. Leeper Aff. at ¶ 15. After several meetings with the Federal Assessment Team, the Navajo Nation requested that Interior designate the members of the Federal Assessment Team as a Federal Negotiation Team. *Id.* at ¶ 15 and Ex. 13.

Interior agreed to the designation of a formal federal negotiation team. Banet Aff. at ¶ 4; Leeper Aff. at ¶ 15 and Ex. 14. The Federal Negotiating Team met frequently with representatives of the Navajo Nation and the State of New Mexico. Banet Aff. at ¶ 4. To the extent it was necessary, members of the team consulted with personnel throughout the federal government to obtain information and to address unique issues and questions as they arose

[21] In this proceeding, the government of the United States of America is denominated a "Settling Party." For the purposes of this discussion, it is necessary to distinguish between the roles and actions of the Executive and Legislative Branches of the United States, respectively. Accordingly, actions taken by Interior and other Executive Branch agencies will be referred to as "the Administration" or by reference to the specific agency and actions by the Congress will be described as such. As described herein, ultimately both branches approved the Settlement.

during negotiations. *Id.* In 2001, the State and the Navajo Nation entered into a second memorandum of agreement that reflected the progress made ("2001 MOA"). Leeper Aff. at ¶ 16 and Ex. 15. The 2001 MOA was significant because it established the principles that served as the foundation for a final settlement:

> As a result of these discussions, representatives of the State of New Mexico and the Navajo Nation believe that additional efforts should be undertaken to develop and implement a settlement that equitably quantifies the Navajo Nation's reserved water rights in the San Juan River basin. Such a settlement should:
>
> a. Acknowledge an entitlement of Navajo Claims;
>
> b. Provide for the development of "wet water" on Navajo nation [*sic*] lands, including the development of domestic water supplies for municipal and industrial purposes;
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> c. Provide a long term revenue [stream] for water infrastructure projects within the San Juan Basin including the completion of the Navajo Indian Irrigation Project and the rehabilitation of the existing Shiprock irrigation systems; and [*sic*]
>
> d. Recognize the political reality that there is non-Indian dependence on water in the San Juan Basin and that a settlement will require non-Indian support [and];
>
> e. Provide stability for Indians and non-Indians within the San Juan Basin.

Id. at 17 and Ex. 15.

Consistent with these principles, the Navajo Nation and the State developed a water budget for the settlement that recognized current and historic Navajo water uses, including the water authorized for NIIP, the water authorized for the Navajo Nation's share of the Animas-LaPlata Project ("ALP"),[22] and water to be used for the NGWSP. *Id.* at ¶ 18. The only "new"

[22] The Colorado Ute Settlement Act Amendments of 2000 authorized construction of the Animas-La Plata Project, consisting of Ridges Basin Dam and Reservoir (known as Lake Nighthorse), the Durango Pumping Plant, Ridges Basin Inlet conduit and the Navajo Nation

water in the budget—that is, water other than that constituting the Navajo Nation's current and historic uses, and the congressionally authorized NIIP water—was the allocation for the NGWSP. *Id.* To further reduce the impact of this new use, the Nation and the State agreed that water for the NGWSP would be administered with a priority junior to almost every other water user in the Basin. *Id.* at ¶ 19.

Through these settlement negotiations, the Navajo Nation agreed to forgo the pursuit of the large claim asserted by the United States for additional water ("paper water") in return for the promise of funding to put its historic and existing water rights to actual beneficial use ("wet water"). This exchange of "paper water" rights for "wet water" development is the common paradigm for the settlement of Indian water rights claims. *See* Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CAL. L. REV. 1133, 1133 (2010); B. COLBY, J. THORSON, and S. BRITTON, NEGOTIATING TRIBAL WATER RIGHTS at 31 (2005).

Municipal Pipeline to convey project water from Farmington to Shiprock. Pub. L. 106-554, 114 Stat. 2763, Title III, §§ 301-303. *See also*: http://www.usbr.gov/uc/progact/animas/overview.html. The act also provided the Navajo Nation with, "a municipal and industrial water allocation [from the project] with an average annual depletion not to exceed 2,340 acre-feet of water, to the Navajo Nation for its present and future needs." *Id.* at § 302(a)(1)(A)(ii)(III). During times when the flow in the Animas River is adequate to meet the demands of the senior direct flows diverters, ALP participants may divert Project water directly from the flows of the Animas River. Water is also pumped from the Animas River at the Durango Pumping Plant during the early spring when the Animas River has high flows resulting from snowmelt from the San Juan Mountains in Colorado to be stored off-stream in Lake Nighthorse to be released during times of low flows. After satisfying the direct flow diverters, if the water remaining in Animas River is insufficient to satisfy the water permits held by the Colorado and New Mexico Project participants, ALP water can be released from Lake Nighthorse back into the Animas River to meet the ALP participants' needs. The New Mexico Project participants are the San Juan Water Commission, the La Plata Conservancy District, and the Navajo Nation. Once the Navajo Nation Municipal Pipeline is completed, the Navajo Nation's ALP project water will be diverted from the Animas River at the City of Farmington's intake structure. This water will subsequently be treated by the City of Farmington and conveyed to the Navajo Nation Municipal Pipeline for delivery to Navajo communities between Farmington and Shiprock. Leeper Aff.at ¶ 20.

By early 2003, the Navajo Nation and the State began drafting the documents to memorialize their agreement, including a proposed settlement agreement, draft federal legislation, and proposed decrees incorporating the proposed water rights for the Navajo Nation. Leeper Aff. at ¶ 21. The Federal Negotiation Team did not participate significantly in the drafting of these documents because of Administration concerns that centered on the significant costs to fund the proposed NGWSP and complete NIIP. Banet Aff. at ¶ 5. In December, 2003, the Nation and the State made the initial set of settlement documents available for public review. *See State of New Mexico's Revised Statement of Legal and Factual Bases for Settlement* (Sep. 7, 2012) ("State's Bases") at 5.

3. Public Input on the Settlement – Navajo Concessions to Protect Junior Water Users and to Ensure Viability of the Settlement Legislation.

Public meetings were held in Farmington over the next few months and the State of New Mexico received numerous public comments on the draft settlement. *Id. See* Leeper Aff. at ¶ 22. The direct result of these public meetings and comments was revision of the settlement documents to provide greater protections to non-Navajo water users from potential impacts of the Navajo water rights recognized in the Settlement. Leeper Aff. at ¶¶ 22-23. Representatives of the Navajo Nation and the State held further negotiations and developed a number of new provisions, which included: (1) dedicating 12,000 afy, from the water supply for NIIP, to be released from Navajo Reservoir before the Navajo Nation placed calls on the upstream water users, (2) authorizing minimum releases from Navajo Reservoir of 225 cfs when there is at least one million acre-feet in storage, (3) reducing the diversion rates for the Hogback and Fruitland

projects[23] so there will be less demands on the river during the late summer months, (4) authorizing appropriations for the rehabilitation of Navajo and non-Navajo ditches to further reduce the demands on the river, (5) limiting the Navajo Nation's ability to challenge the rights that were adjudicated in the 1948 Echo Ditch Decree, (6) setting a normal diversion requirement for the San Juan Chama Project at 135,000 acre-feet per year ("afy"), even though San Juan Chama diversions have historically averaged less than 110,000 afy, and (7) limiting the total diversion requirement for the rights associated with NIIP when the use of such rights is changed from irrigation to other authorized uses.[24] *Id.* at ¶ 23.

Simultaneously, representatives of the Navajo Nation and the State were working with the staffs of Senators Domenici and Bingaman to ensure that the resulting settlement legislation would be politically viable when brought to Congress. *Id.* at ¶ 24. The initial draft settlement legislation included spending authorizations of $1.1 billion, which included $589.6 million for the NGWSP, an additional $351 million for the completion of NIIP, and $31.8 million to rehabilitate existing NIIP facilities. *Id.*. In September of 2004, Senators Domenici and Bingaman met together with Navajo Nation President Shirley to advise him that they could not support a settlement conditioned on the completion of NIIP. *Id.* The Senators were concerned that the Congressional Budget Office would "score" or attribute all of the costs to complete NIIP

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[23] There are two BIA irrigation projects on the Navajo Reservation that make use of direct diversions from the San Juan River, the Hogback-Cudei Irrigation Project "Hogback Project" and the Fruitland-Cambridge Irrigation Project "Fruitland Project."

[24] Each of these protections remains a part of the settlement. *See* Section C, *infra*, at C(3) (alternate water supply); C(6) (Navajo Reservoir releases); C(4) (diversion limits on Hogback and Fruitland Projects); C(5) (ditch rehabilitation); C(8) (protections for Echo Ditch Decree rights); C(11) (San Juan Chama diversion established); and C(9) (limitations on NIIP diversions).

against the cost of the settlement, which was already approaching one billion dollars without including the costs to complete NIIP. *Id.*

The Navajo Nation had struggled to secure funds to complete NIIP ever since the project was authorized in 1962, and full funding for NIIP was a fundamental objective of the Navajo Nation when it entered into the water rights settlement negotiations. *Id.* at ¶ 25. Nevertheless, following the September 2004 meeting in Washington, the Navajo Nation conceded the completion of NIIP as a condition of the settlement and agreed to the removal of funding for NIIP from the draft settlement legislation. *Id.* The proposed settlement documents were revised accordingly and reviewed by the Federal Negotiation Team and by various officials in Interior, who provided additional constructive suggestions to clarify the language and to ensure the terms of the settlement were entirely consistent with federal law. *Id.* at ¶ 26. After several more meetings between representatives of the Navajo Nation and State, a final draft settlement package, which included the proposed settlement agreement, the proposed legislation, draft final decrees, and a draft water delivery contract, were ready to be submitted for approval.[25]

[25] The initial settlement agreement did not include the United States as a signatory. Enforceability of the settlement agreement was conditioned upon Congressional approval of the proposed settlement legislation, in a form substantially similar to the draft legislation appended to the agreement. The settlement legislation would in turn direct the Secretary of the Interior to execute the settlement agreement, amended as necessary to be consistent with the ultimate legislation approved by Congress. This process was similar to the process employed in recent water settlements. *See e.g.* Zuni Indian Tribe Water Rights Settlement Act of 2003, Pub. L. 108-34 (Jun. 23, 2003), § 4 ("To the extent the Settlement Agreement does not conflict with the provisions of this Act, such Settlement Agreement is hereby approved, ratified, confirmed, and declared to be valid. The Secretary is authorized and directed to execute the Settlement Agreement and any amendments approved by the parties necessary to make the Settlement Agreement consistent with this Act.").

On November 18, 2004, the Navajo Nation Water Rights Commission[26] approved the proposed settlement agreement and recommended to the Navajo Nation Council that it do the same. *Id.* at ¶ 28 and Ex. 16. The Resources Committee of the Navajo Nation Council took similar action on December 7, 2004.[27] On December 29, 2004, the Navajo Nation Council approved the settlement agreement by a vote of 62-18. *Id.* at ¶ 28 and Ex. 17.

On April 19, 2005, the settlement agreement was executed by President Shirley on behalf of the Navajo Nation and by Governor Richardson on behalf of the State of New Mexico. *Id.* at ¶ 28. At no time following the execution of the settlement agreement were the proposed water rights of the Navajo Nation, as described in the proposed decrees modified, and the Settling Parties have presented them to the Court in substantially the same form as in the executed settlement agreement. *See* Settlement Motion of United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees, Jan. 3, 2011.

4. Congressional Review and Approval

Following the execution of the settlement agreement, the Navajo Nation and the State of New Mexico worked with Congressional staff and with Interior officials[28] to further refine the

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[26] The Navajo Nation Water Rights Commission was created by the Navajo Nation Council to "ensure that the water rights of the Navajo Nation are vigorously pursued, effectively coordinated, and to enhance the communication between all entities engaged in water rights efforts on behalf of the Navajo Nation." 2 N.N.C. § 1552.

[27] The Resources Committee was established to "insure the optimum utilization of all resources of the Navajo Nation and to protect the rights, and interests and freedoms of the Navajo Nation and People to such resources." 2 N.N.C. § 693 (1995 ed.) In 2011, the Navajo Nation Council amended Title II of the Navajo Nation Code to restructure the Council and its standing Committees. The authorities formerly vested in the Resources Committee are now held by the Resources and Development Committee. 2 N.N.C. §§ 500 *et seq.*

[28] Although the Administration did not support the 2005 settlement agreement, Interior officials provided helpful drafting suggestions to ensure that the proposed settlement legislation was consistent with federal law and as consistent as possible with Interior policies. *Id.* at ¶ 29.

proposed federal legislation in preparation for its introduction by members of the New Mexico Congressional Delegation. *Id.* at ¶ 29. Among other changes, the draft settlement legislation was modified to authorize the creation of the Reclamation Water Settlements Fund as a funding mechanism for the construction of the NGWSP and other pending Indian water rights settlements.

The federal legislation drafted as part of the settlement package was first introduced before the 109th Congress on December 8, 2006. *See* 109 H.R. 6439 (Northwestern New Mexico Rural Water Projects Act). The United States engaged in an open, public, and transparent process as the draft settlement agreement and proposed settlement legislation wound its way through the U.S. House of Representatives and the U.S. Senate. During the subsequent almost four-year period, settlement legislation was re-introduced in various forms before the U.S. House of Representatives, *see* 110 H.R.1970 (2007); 111 H.R. 925 (2009); and 111 H.R. 146 (2009), and the U.S. Senate, *see* 109 S. 4108 (2006); 110 S. 1970 (2007); 110 S. 1171 (2007); 110 S. 3213 (2007); 111 S. 22 (2009). During that process, two public hearings were conducted, one before the U.S. House of Representatives (July 24, 2007) and one before the U.S. Senate (July 25, 2007), at which both supporters and opponents of the legislation testified. Banet Aff. at ¶ 6. The Administration initially opposed the proposed settlement. This opposition was informed by and reiterated cost concerns expressed by the Federal Negotiation Team during settlement discussions prior to the introduction of the federal legislation. *Id.* On July 27, 2007, numerous high-ranking Administration officials outlined the reasons for the Administration's opposition to the federal legislation in written testimony before the U.S. Senate. *Id.* As a result of this extensive public review and debate process, the proposed legislation underwent a series of revisions that addressed many of the concerns expressed, and by the end of 2008 the

Administration withdrew its opposition to the settlement legislation. Leeper Aff. at ¶32. After passing both chambers of Congress early in 2009, President Barack H. Obama signed the Settlement Act into law on March 30, 2009.

The Settlement Act directed the Secretary to sign the settlement agreement only after the agreement was conformed to be consistent with the Settlement Act. *See* Settlement Act § 10701(a)(2). After the Settlement Act was signed into law, Interior formed a Federal Implementation Team to, *inter alia*, revise the draft settlement agreement, water delivery contract, and partial final decrees. Banet Aff. at ¶ 7. Like the Federal Negotiation Team, the Federal Implementation Team was made up of federal agency officials knowledgeable about the Basin and the waters rights of the Navajo Nation. *Id.* For more than two years, representatives of the Administration, the State, and the Navajo Nation met frequently in sometimes contentious sessions to conform the draft settlement documents to the Settlement Act. *Id.* On December 17, 2010, the Settling Parties signed the revised and conformed Settlement Agreement and the Secretary and the President of the Navajo Nation executed the revised and conformed water delivery contract.

In addition, although the Settlement Act contemplated that the Court would enter the Partial Final Decree by the end of 2013 and the Supplemental Partial Final Decree by the end of 2016, a number of non-settling parties complained that such a bifurcated process was unfair to them. *See e.g., San Juan Water Commission's Response to Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (September 17, 2009). Therefore, at the insistence of the non-settling parties the Settling Parties acquiesced and the Court instructed the Settling Parties to complete their negotiations on the Supplemental Partial Final Decree. *Scheduling Order Governing Initial*

Proceedings (September 29, 2010) at 4. Throughout 2011, the Settling Parties applied substantial resources and effort to complete the negotiation of the terms of the Supplemental Partial Final Decree. Banet Aff. at ¶ 7; Leeper Aff. at ¶ 36. The Settling Parties concluded those negotiations well in advance of the 2016 deadline set in the Settlement Act and presented the revised and completed Supplemental Partial Final Decree to the Court. *See Settling Parties' Notice of Filing Revised Supplemental Partial Final Decree* (April 2, 2012).

5. No Evidence Exists that the Settlement Agreement is the Product of Fraud, Collusion, of Self-Dealing.

In this proceeding, the United States has asserted and defended the interests of the Navajo Nation in fulfillment of its trust obligation to the Navajo Nation. Naturally, over the course of decades and throughout these proceedings the United States and the Navajo Nation have consulted closely with respect to the Navajo Nation's interests; however, the trust relationship between the United States and the Navajo Nation requires neither to blindly adopt the views of the other. Whenever the United States represents in litigation the interests of an Indian tribe, the United States must balance its trust responsibility with its other priorities, including other statutory requirements. *See Nevada v. United States*, 463 U.S. 110, 128 (1983) (when simultaneously representing tribal and other interests, "[t]he Government does not 'compromise' its obligation to one interest that Congress obliges it to represent by the mere fact that it simultaneously performs another task for another interest that Congress has obligated it by statute to do.").

During the course of the settlement negotiations, the United States acted not only in accordance with its trust obligations to the Navajo Nation, but also consistent with its other obligations under federal law, and its general obligations to act in the public interest. *See id.* And, despite the participation of the Administration in the negotiation process, ultimately only

Congress, through the exercise of its plenary authority under the Indian Commerce Clause, may direct the federal government in the disposition of Indian trust resources, such as water rights, held on behalf of the Navajo Nation or any federally recognized Indian tribe. *Gibson v. Chouteau,* 80 U.S. 92 (1871) ("Only Congress, and not an executive branch agency, can authorize the disposition of federal property."). Thus, the Administration's obligation to balance multiple, often competing, interests and Congress' ultimate, independent, authority to approve or reject a proposed Indian water rights settlement provide inherent protection to ensure that the United States acts in good faith and at arms-length in such a settlement process.

For its part, the Navajo Nation moved significantly from its initial position in negotiations to accommodate the concerns of the State, the United States and other water users. Ultimately, the Nation agreed to a settlement that provided for far less water than it could secure at trial in exchange for infrastructure development that would ensure that Navajos in the Basin benefited from some of the modern amenities that their fellow New Mexicans enjoy.

There is absolutely no evidence to suggest that the settlement is other than a freely-negotiated agreement that is fair to the Settling Parties and the constituents they represent.

B. A REASONABLE BASIS EXISTS TO CONCLUDE THAT THE SETTLEMENT AGREEMENT PROVIDES FOR LESS WATER THAN THE POTENTIAL CLAIMS THAT COULD BE SECURED AT TRIAL

The Settling Parties, in briefing the legal standard that would be applied in this *inter se* proceeding, proposed four elements of proof that they suggested should be evaluated by the Court in reliance on the legal standard applied by this Court in the Jicarilla *inter se.* While accepting much of the Settling Parties' proposal, the Court modified the standard previously used in this state, and determined that the Settling Parties would need to demonstrate that "there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential

claims that could be secured at trial. ..." Legal Standards Order at 3. This element of proof, never before required in a New Mexico *inter se* proceeding, derives from procedures established by the Arizona Supreme Court. *Gila* Procedural Order § D(6)(a). Accordingly, this Court must look to the decisions of the Arizona Supreme Court for direction in the proper construction of this element of proof.

In *Gila VII* (reviewing the approval of a settlement of the water rights of the Tohono O'odham Nation) and again in *Gila VIII* (reviewing the approval of the settlement of the water rights of the Gila River Indian Community ("GRIC")) the Arizona Supreme Court affirmed the use of the statements of claims filed by the United States and the technical report prepared by the ADWR as the proper sources of comparison to determine whether an Indian water right settlement was fair and reasonable. In *Gila VIII* the Arizona Supreme Court concluded that:

> In sum, the water claimed on behalf of GRIC [by the United States], its current water use [as determined by ADWR], and GRIC's Globe Equity Decree rights are each considerably greater than the amount allocated to it under the settlement agreement. Accordingly the adjudication court had 'a reasonable basis to conclude that [GRIC's] water rights...established in the settlement agreement...are no more extensive than [GRIC] would have been able to prove at trial.

Gila VIII, 223 Ariz. ¶ ¶ 24-26, 224 P.3d at 187 (quoting *Gila* Procedural Order § (D)(6)(a)). In *Gila VII*, the Supreme Court went further:

> But in compliance with the terms of the [Procedural] Order, *see* §(D)(6)(a), the quantity of water received by the Nation under the settlement is below the lowest amount of water the Nation might have succeeded in proving at trial. As a matter of law, therefore, the [objecting Pascua Yaqui] Tribe cannot demonstrate material injury to its water rights.

Gila VII, 217 Ariz. ¶26, 173 P.3d at 446. Here, as in the *Gila* decisions, the Court must compare the potential claims of the Navajo Nation, as presented in the U.S. Statement of Claims and supported by the extensive technical reports of the United States, and the OSE Technical

Assessment, with the water rights provided for in the Proposed Decrees. And here, as in the *Gila* decisions, there is a reasonable basis to conclude that the Navajo Nation's water rights as recognized in the Proposed Decrees are less than could be proved at trial as a matter of law.

Finally, the Court's scrutiny of the settlement does not require consideration of the Navajo Nation's use of water for NIIP, NGWSP, and ALP or the water for these projects ("Project Water") in its analysis. The Navajo Nation draws Project Water under the existing permanent contract BOR contracts and is permitted to use Project Water pursuant State Permit Nos. 2849, 2883, and 3215 as authorized by Congress in the 1962 Act, the Colorado Ute Settlement Act Amendments of 2000, *see* n. 22, *supra*, and the Settlement Act § 10701(b)(1)(B). Since this water is only available for use pursuant to contract with the United States, it is not available for appropriation by other water users and should be excluded from the Court's analysis of whether there is a reasonable basis to conclude the Navajo Nation settled for less water than it could prove at trial. *See Gila VIII*, 224 P. 3d at 189; 223 Ariz. at 373 ("[Central Arizona Project ("CAP")] water is delivered pursuant to contract with the federal government and is not subject to appropriation under state law. [citation omitted] Therefore, CAP water, which is outside the jurisdiction of the adjudication court, was properly excluded from ADWR's analysis."). Stated another way, the Navajo Nation could enter into contracts at any time with the United States to receive water from federal projects, and the amount of water the Navajo Nation receives by way of contract would be beyond the scrutiny of this Court. Under the Proposed Decrees the Navajo Nation has agreed to subordinate its reserved water rights in exchange for water to be provided pursuant to the Settlement Contract. Like the CAP water included in the GRIC settlement in *Gila VIII*, Navajo Nation Project Water should not be part of the analysis of whether the Navajo Nation settled for less water than it could prove at trial.

Even if the Court included the Project Water in its analysis, as illustrated in the paragraphs below, both because the quantity of water rights recognized in the Proposed Decrees, including the Project Water, is less than the amount claimed in the U.S. Statement of Claims, and because the attributes of those proposed decree rights are less substantial than the rights that could be awarded in litigation, a reasonable basis exists for this Court to conclude that the Settlement Agreement provides the Navajo Nation with less water rights than the potential claims that could be secured at trial.

Even if the Court included the Project Water in its analysis, as illustrated in the paragraphs below, both because the quantity of water rights recognized in the Proposed Decrees, including the Project Water, is less than the amount claimed in the U.S. Statement of Claims, and because the attributes of those rights are less substantial than the rights that could be awarded in litigation, a reasonable basis exists for this Court to conclude that the Settlement Agreement provides the Navajo Nation with less water rights than the potential claims that could be secured at trial.

1. The U.S. Statement of Claims and the Technical Basis Thereof Stand as the "Potential Claims that could be Secured at Trial" against which the Court Must Compare the Reasonableness of the Settlement Agreement and Proposed Decrees.

In its *Order Establishing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (August 19, 2010) ("Procedural Order") the Court ordered the following disclosures: (i) the terms of the Settlement Agreement as well as those of the Proposed Decrees (*id.* at 12); (ii) a hydrographic survey prepared by the United States (*id.* at 12-13); and (iii) a statement of claims by the United States (*id.* at 13-14) to provide the foundation for the Court and other water rights claimants to evaluate the Proposed Decrees.

The U.S. Statement of Claims and the U.S. Hydrographic Survey were filed with the Court on January 3, 2011. The U.S. Statement of Claims is supported by extensive technical work summarized in fifteen technical reports, filed with the Court on February 2, 2012. *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* ("U.S. Technical Reports").[29]

[29] The accuracy of each of the 15 technical reports has been verified by the authors of the reports and such verification has been submitted in Attachments C through K to this Memorandum. Collectively, these fifteen technical reports, U.S. Technical Reports, Attachments A through O, include the following:

1. *Development of Navajo Trust Lands Map for the San Juan Surface Water Basin* (*id.* at Att. A);
2. *Future Navajo Nation Population and Domestic, Commercial, Municipal and Light Industrial Water Use in the San Juan River Basin* (*id.* at Att.B);
3. *Past and Present Large Industrial Water Claims on Navajo Nation in the San Juan River Basin* (*id.* at Att.C);
4. *Future Large Industrial Water Claims on Navajo Nation in the San Juan River Basin* (*id.* at Att.D);
5. *Navajo San Juan Livestock Water Requirements* (*id.* at Att.E);
6. *NM vs. USA Potential Grazing Capacity* (*id.* at Att.F);
7. *Navajo San Juan Main Stem and NIIP Historically Irrigated Acreage* (*id.* at Att.G);
8. *Navajo San Juan Tributary Consumptive Irrigation Requirements* (*id.* at Att.H);
9. *Inventory of Navajo Lands within the San Juan Basin in New Mexico Irrigated by Groundwater and Tributaries of the San Juan River* (*id.* at Att.I);
10. *Navajo San Juan Pre-Feasibility Irrigation Suitability Land Classification* (*id.* at Att.J);
11. *Water Resource Assessment to Support the BIA's Groundwater PIA Claim on Behalf of the Navajo Nation in the San Juan River Basin Adjudication* (*id.* at Att.K);
12. *Economic Analysis of Practicably Irrigable Acreage – Trust Lands, San Juan Basin, New Mexico* (*id.* at Att.L);
13. *Navajo San Juan River Basin Practicably Irrigable Acreage Study – Surface Water* (*id.* at Att.M);
14. *Navajo San Juan River Basin Practicably Irrigable Acreage Study – Ground Water* (*id.* at Att.N); and
15. *San Juan Stream System Navajo Water Use Report on Impoundments, Wells, and Springs* (*id.* at Att.O).

The U.S. Statement of Claims asserts that quantification of the Navajo Claims is "to fulfill the purposes of the trust lands of the [Basin] as a permanent home and abiding place for the Navajo people." *Id.* at 12 § A.

> A permanent homeland for [an Indian Tribe] requires development of present and future use of water. [ ] A permanent homeland for [an Indian Tribe] requires water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the "arts of civilization. [ ] Self-sufficiency of [an Indian Tribe] on their reservation requires multiple and varied used of water for recreation, agriculture, domestic, stock, commercial, industrial, and other uses for the "arts of civilization."

New Mexico, ex rel., Reynolds v. Lewis, et al., Chaves County District Court (unpublished opinion) (July 11, 1989) at 9 ¶¶ 13 – 18, *aff'd in substantive part, New Mexico, ex rel., Martinez v. Lewis, et al.,* 116 N.M. 194, 861 P.2d 235 (hereinafter "Mescalero"),[30] *see Winters v. United States*, 207 U.S. 564 (1908) (establishing the federal reserved rights doctrine and the permanent homeland standard); and *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 313 ¶¶ 41-47 (2001) ("*Gila V*") (in identifying the water rights necessary to establish a permanent homeland the considerations should include a tribe's history, culture, geography, topography, natural resources including groundwater, economic base, economic development (and attendant water uses), past water uses, and present/future population).[31]

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[30] The Court of Appeals reversed the Chavez County District Court opinion with respect to the district court's determination concerning the Mescalero Apache Tribe's water right priority date (861 P.2d at 198-203) and affirmed the district court's determination concerning whether the Mescalero Apache Tribe had sufficiently established at trial its water right claim associated with practicably irrigable acres ("PIA") (861 P.2d at 205-210).

[31] *See also Arizona v. California*, 373 U.S. 546 (1963) (applying the PIA standard to quantify federal reserved rights for Indian reservations); *United States v. Ahtanum Irrigation District*, 236 F.2d 321, 326 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957) (recognizing Indians' right to use water based on their historic right of use and occupancy); *Colville Confederated Tribes v.*

Without a settlement, the United States will claim a federal reserved water right for the Navajo Nation for no less than a diversion of 920,745 afy with a resulting depletion of 591,401 afy. *See* U.S. Statement of Claims at 23.[32] The table below summarizes the quantities of water, in terms of diversions and depletions, asserted by the United States on behalf of the Navajo Nation in the U.S. Statement of Claim and compares those quantities with the diversions and depletions described in the Proposed Decrees. In short, the quantities of water identified in the proposed decrees, 635,729 afy of diversion with 334,542 afy depletion, are significantly less than the potential claims that could be secured at trial as described in the U.S. Statement of Claim.

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Walton, 647 F.2d 42, 47 (9th Cir. 1981) ("The general purpose [of an Indian reservation], to provide a home for the Indians, is a broad one and must be liberally construed. We are mindful that the reservation was created for the Indians, not for the benefit of the government.")

[32] A "diversion" is the amount of water that a water right holder is permitted to remove from the water system. The United States Geological Survey (USGS) defines "diversion" as "[a] turning aside or alteration of the natural course of a flow of water, normally considered physically to leave the natural channel." http://water.usgs.gov/water-basics_glossary.html#D. "Depletion" is the amount of water that is consumptively used – water that does not return to the source -- as a result of the diversion. The USGS defines "consumptive use" as "[t]he quantity of water that is not available for immediate reuse because it has been evaporated, transpired, or incorporated into products, plant tissue, or animal tissue." *Id.*

COMPARISON BETWEEN U.S. CLAIM and PROPOSED SETTLEMENT DECREES (All numbers expressed in acre-feet/year)				
Element	**US Claim**		**Proposed Decree**	
	Diversion	Depletion	Diversion	Depletion
Irrigation				
• Navajo Indian Irrigation Project	375,155	280,256	508,000	270,000
• Hogback-Cudei Irrigation Project	137,937	34,930	48,550	21,280
• Fruitland-Cambridge Irrigation			18,180	7,970
• Other Irrigation			0	0
• Future Irrigation (PIA)	189,628	153,781	0	0
Irrigation Subtotal	**702,720**	**468,967**	**574,730**	**299,250**
DCMI				
• Navajo Gallup Water Supply Project	36,592	36,592	22,650	20,780
• Animas-La Plata Project			4,680	2,340
• San Juan River DCMI			2,600	1,300
• Groundwater			2,000	2,000
Heavy Industrial	100,659	60,883	0	0
Non Irrigation Subtotal	**137,251**	**97,475**	**29,930**	**26,420**
Other				
Livestock	1,173	733	517	517
Historic Tributary Irrigation Projects	70,490	18,766	24,867	8,355
Historic Tributary Irrigation Misc.	9,111	5,460	3,599	
Industrial Groundwater	---		86	
Tributary Subtotal	**80,774**	**24,959**	**29,069**	**8,872**
Impoundments	Right to fill and refill 65,647		Right to fill and refill 11,687 with depletion of 12,613	
TOTAL	**920,745**	**591,401**	**635,729**	**334,542**
	Totals do not include impoundments			

The quantities of water available to the Navajo Nation through the Proposed Decrees, as described in the table above, are effectively subject to even further reduction as a result of additional conditions that are imposed in the Proposed Decrees. For example, the Navajo Nation's right to divert 508,000 afy from the San Juan River for NIIP is subordinated to its

contract right to have water for NIIP diverted from Navajo Reservoir, and the NIIP diversion is effectively further limited to an average annual diversion of 353,000 afy, not 508,000 afy, as a result of the conditions imposed in the Partial Final Decree. Partial Final Decree, ¶¶ 5(a) and 5(e)(1)(v); OSE Technical Assessment at 10 and 27. The diversion for NIIP under the Partial Final Decree is effectively reduced by 155,000 afy, thus reducing the total Navajo diversions from 635,729 afy to 480,729 afy. In addition, as described at subsection 3(b) *infra*, the Proposed Decrees do not include 51,600 afy of diversion or 39,000 afy of depletion associated existing thermal electric power generation at the Four Corners Power Plant and for the associated mining of coal at the Navajo Mine, located on the Navajo Reservation. OSE Technical Assessment at 18. This water alone is more than the "new" water included in the settlement for NGWSP.

2. The OSE Technical Assessment Confirms that the Quantity of the Water Rights in the Proposed Decree is Less than the Quantity in the U.S. Statement of Claims.

The comparison of the water rights claimed in the U.S. Statement of Claims with the rights asserted in the Proposed Decree is only one tool available to the Court in its evaluation of whether the Settlement Agreement provides for less than the potential claims that could be secured at trial. The Court also has the benefit of the OSE Technical Assessment filed on September 6, 2012. The OSE Technical Assessment analyzes the current Navajo Nation water uses, the claims asserted in the U.S. Statement of Claims, and the potential claims that could be asserted by the Navajo Nation and compares them to the water rights recognized in the Proposed Decrees. OSE Technical Assessment. The Office of the State Engineer concluded that the "water right claims for the Navajo Nation asserted by the US Claims are much greater than the water rights for the Navajo Nation that would be provided by the proposed decrees." *Id.* at 23.

Based on the comparison of the water rights claims asserted in the U.S. Statement of Claims with those identified in the Proposed Decrees and the report of the State Engineer, the Court has ample basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial. *See Gila VIII,* 223 Ariz. ¶ ¶ 24-26, 224 P.3d at 187.

3. The Legal and Factual Bases for the Water Rights Asserted in the U.S. Statement of Claims.

The United States provided a detailed account of the legal and factual basis for the water rights asserted on behalf of the Navajo Nation in the U.S. Statement of Claims. The U.S. Statement of Claims was derived from documented present and historical uses by the Navajo Nation as well as projected, economically feasible future uses necessary for the Navajo Nation to continue to grow and develop so that the Navajo Reservation remains a permanent homeland. Consistent with the permanent homeland concept and notions of tribal self-sufficiency that undergird it, the United States identified and developed the following water use categories as the basis for the Navajo Nation's water rights claims:

i. Domestic, Commercial, Municipal, and Industrial (U.S. Statement of Claims at 9);
ii. Heavy Industrial Activities (*id.* at 10);
iii. Livestock (*id.* at 14);
iv. Irrigation (*id.* at 15-18); and
v. Impoundment/Storage (*id.* at 20).

Each category of water rights and the basis for the water right is briefly described in the paragraphs below.

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a. Water rights required to meet past, present, and future Domestic, Commercial, Municipal, and Industrial water use needs

Domestic, commercial, municipal, and industrial (DCMI) water is that water used by individuals for their daily domestic and commercial activities. This water is commonly referred to as "drinking water" and includes several components including residential indoor use, residential outdoor use including irrigation for residential landscape and gardens, light commercial use, light industrial use, municipal public use, and system losses. As is true in every community, sufficient DCMI water is necessary for the very existence and survival of the Navajo Nation as a viable place for the Navajo people to live and thrive. As the Arizona Supreme Court opined:

> If a federally reserved water right is to be tailored to a reservation's ''minimal need,'' as we believe it must, then population necessarily must be part of the equation. To act without regard to population would ignore the fact that water will always be used, most importantly, for human needs. Therefore, the number of humans is a necessary element in quantifying water rights.

Gila V, 201 Ariz. at 313 ¶ 47. Without sufficient DCMI water both now and in the future, the Navajo Nation has no hope of maintaining the Navajo Reservation in New Mexico as a permanent homeland. It is estimated that 30 to 40 percent of Navajo Reservation households lack running water. S. Rep. No. 401, 110th Cong., 2nd Sess. 2008.at 26. The water recognized in the Proposed Decrees for DCMI uses will only begin to address this alarming deficiency. *Id.* Replacement of water hauling with indoor plumbing has been documented to improve health and quality of life and relieve burdens on already overtaxed Indian Health Service facilities on the Reservation.[33]

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[33] *See* Draft Water Resources Development Strategy for the Navajo Nation (July 2011) at IX. Available at: http://www.frontiernet.net/~nndwr_wmb/PDF/NNWaterStrategyDraft_7-13.pdf.

The DCMI water demand is typically estimated taking into account the per capita demand in gallons per day ("gpcpd") and the projected population of an area. To determine both the projected population of the Navajo Reservation and the per capita demand, the United States relied upon the expertise of demographer Gretchen Greene, Ph.D. *See* Attachment D – Affidavit of Dr. Gretchen Greene. Comparing local area water use, with state and regional averages, Dr. Greene determined that the Navajo Nation's per capita demand to meet present and future water needs is an average of 160 gpcpd. U.S. Technical Reports at Att. B. This per capita demand figure is typical for the Basin. Leeper Aff. at ¶ 39. Dr. Greene also analyzed the population of Navajo Indians in the Basin and projected that over the course of the next century the population of Navajo Indians is expected to grow from approximately 55,000 persons to 203,900 persons. *Id.* Using Dr. Greene's average per capita water use figure and anticipated future population, the United States calculated that the Navajo Nation is entitled to a depletion water right for DCMI purposes of approximately 36,600 afy to meet the present and future homeland purposes of the Navajo Nation in the Basin.[34] *See* U.S. Statement of Claims, section III.A. Leeper Aff. at ¶¶ 39-43. Objectors to the Settlement Motion have offered no expert evidence to refute the DCMI claims.

b. Water rights necessary to satisfy past, present and future heavy industrial water uses

In addition to DCMI water uses, communities throughout the United States rely upon heavier (*i.e.*, more labor, capital, and/or resource intensive) industrial and commercial activities

[34] In the U.S. Statement of Claims, the United States detailed the Navajo Nation water right associated with each component use to the nearest annual acre foot of water. For the purposes of this memorandum, in describing the reasonable basis for each of the water rights claims that could be secured at trial, each component water right are described to the nearest hundred acre foot of water. Therefore, here the water right associated with present and future DCMI uses was rounded to 36,600 afy.

to develop available natural resources and manufacturing opportunities and to promote economic development. Many of these heavy industrial activities are unique to a geographic area or a natural resource deposit and have water demands that are over and above those contemplated for DCMI purposes. The Navajo Nation must be permitted, in furtherance of its sovereignty, independence, and the development of a permanent homeland, to engage in economic development. And the Navajo Nation must have sufficient water rights to support its present development and foster future economic growth.

The Navajo Nation has engaged in heavy industrial activities throughout the Navajo Reservation. To identify the historic and present industrial activities as well as the potential future activities on the Navajo Reservation, the United States relied upon the expertise of Senior Economist Travis Greenwalt of CardnoEntrix. *See* Attachment E – Affidavit of Travis Greenwalt. Mr. Greenwalt first examined the past and present heavy industrial activities that have occurred on the Navajo Reservation. U.S. Technical Reports at Att. C. In addition to identifying the water uses necessary for the Navajo Nation to continue the heavy industrial activities already developed, Mr. Greenwalt also investigated the heavy industrial activities that have a reasonable likelihood of being developed in the future. *Id.* at Att. D. In his examination of past and present economic conditions on the Navajo Reservation, and prospects for future development, Mr. Greenwalt reviewed a host of heavy industries including mineral development, energy development, agricultural processing, helium processing, and the potential for developing an industrial park. *Id.* at Att. C and D. Mr. Greenwalt identified the quantity of water necessary for each heavy industrial activity considered. *Id.* In reliance on Mr. Greenwalt's work, the United States determined that the Navajo Nation needs and is entitled to a water right for heavy industrial purposes of approximately 105,700 afy diversion (65,600 afy depletion) to meet the

present and future homeland purposes of the Navajo Reservation. *See* U.S. Statement of Claims, section III.B. Leeper Aff. at ¶¶ 44-45. Objectors to the Settlement Motion have offered no expert evidence to refute the U.S. claims for heavy industrial uses.

It is important for the Court to recognize here that with the exception of 86 afy of historical industrial groundwater use identified in the Supplemental Partial Final Decree, the Proposed Decrees do not include a water right for any heavy industrial water uses despite the fact there are significant heavy industrial water uses that exist on the Navajo Reservation today. Those uses include water used by BHP-Navajo Coal Company under OSE File No. 2838 to divert up to 51,600 afy with a depletion of 39,000 afy for thermal electric power generation at the Four Corners Power Plant and for the associated mining of coal at the Navajo Mine, located on the Navajo Reservation. OSE Technical Assessment at 18.

c. Water rights for past, present and future livestock water uses

Historically, the raising of livestock has been a significant part of the economies of Indian and non-Indian communities alike throughout the Basin. Long before the formation of the United States when the first Spanish explorers and settlers introduced animal husbandry, the Navajo Nation developed an economy based on raising livestock that has thrived into the present on the Navajo Reservation. The Navajo Nation is famous around the world for the quality of its wool and the tapestries woven by its people. While perhaps best known as growers of sheep, the Navajo people are also actively engaged in ranching, and raise all of the livestock common on the western range. Livestock raised on the Navajo Reservation must have sufficient range and water to survive in the arid lands of the Basin.

To determine the amount of water needed to raise livestock on the Navajo Reservation, the United States first identified the potential rangeland available to the Navajo Nation, and then

reviewed the quantity of rangeland and water required to support livestock in the Basin. The United States relied upon the expertise of Edward Lucero, an experienced rangeland specialist with the Bureau of Indian Affairs, to identify the potential rangeland and carrying capacity of the Navajo Reservation.[35] *See* Attachment F – Affidavit of Edward Lucero. Mr. Lucero determined that approximately 2,345,600 acres of potential rangeland exist on the Navajo Reservation. U.S. Technical Reports at Att. F. Mr. Lucero also determined that the carrying capacity of such land is approximately 50,800 animal units (AU).[36] *Id.* To determine the water needs of livestock, the United States relied upon the expertise of Aaron Beutler, a Professional Engineer with Keller - Bliesner Engineering, LLC. *See* Attachment G – Affidavit of Aaron Beutler ("Beutler Aff."). Mr. Beutler determined the water consumption for each AU identified to be 12.5 gallons per day. *Id.* Based on the analysis of Messrs. Lucero and Beutler, the United States determined that the Navajo Nation is entitled to a water right for livestock purposes of approximately 1,200 afy diversion (730 afy depletion) to meet present and future livestock needs on the Navajo Reservation. *See* U.S. Statement of Claims, section III.C. Leeper Aff. at ¶¶ 46-47. Objectors to the Settlement Motion have offered no expert evidence to refute the U.S. claims for livestock uses. Moreover, no additional water for future livestock uses is included in the Proposed Decrees.

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[35] "Carrying capacity" refers to the maximum number of animals which can graze on a given area of range without inducing a downward trend in forage production, forage quality, or soil when the range is in excellent ecological range condition and adequate watering sources are available to make full use of the range.

[36] An "animal unit" (AU) is a standard of measurement for the burden that livestock might have on resources (i.e., land, water, etc.). Each species of livestock (horse, cattle, sheep, etc.) can be expressed as a whole or partial animal unit.

d. Water rights associated with irrigation water uses

The Navajo people historically have irrigated fields and raised crops throughout the Navajo Reservation and agriculture is tightly woven into the fabric of Navajo culture. As part of their agricultural pursuits, the Navajo people have long diverted waters of the San Juan River and its tributaries for both subsistence and commercial farming purposes. A permanent homeland for the Navajo people must include the ability to engage in irrigated agriculture, and the Navajo Nation must have sufficient water to continue to farm on the Navajo Reservation. To identify the amount of water needed for irrigation purposes on the Navajo Reservation, the United States considered four distinct uses or practices outlined below.

i. Water rights for past and present mainstem irrigation

The Navajo Nation has engaged in significant irrigation activities along the mainstem of the San Juan River that depend upon direct diversions from the river. These mainstem irrigation activities are divided between two BIA irrigation projects: the Hogback Project and the Fruitland Project. To identify the extent of past and present irrigation that has occurred within the Hogback and Fruitland Projects, and to determine the amount of water necessary to continue to irrigate the lands of these Projects, the United States relied upon the expertise of Keller-Bliesner Engineering, LLC, and more specifically Professional Engineer Aaron Beutler. *See* Beutler Aff. Approximately 13,000 acres of land have been irrigated historically as part of these Projects. To continue to irrigate these lands, the Navajo Nation must divert approximately 137,900 afy (34,900 afy depletion) from the San Juan River. U.S. Technical Reports at Att. G. Based on the work of Keller-Bliesner Engineering, the United States has determined that the Navajo Nation is entitled to a water right for past and present irrigation purposes of approximately 137,900 afy

(34,900 afy depletion) to meet the present and future homeland purposes of the Navajo Reservation. *See* U.S. Statement of Claims at section III.D. Leeper Aff. at ¶ 48.

ii. Water rights for past and present tributary irrigation

In addition to mainstem irrigation activities, the Navajo Nation has pursued irrigation practices throughout the Basin that depend upon direct diversions from the smaller, ephemeral streams that are tributary to the San Juan River. To identify the extent of past and present tributary irrigation on the Navajo Reservation, the United States relied upon the expertise of Dr. Eileen Camilli of Ebert and Associates, Inc. *See* Attachment H – Affidavit of Dr. Camilli ("Camilli Aff."). Through a combination of on-the-ground inspections and advanced aerial-photo interpretation techniques, Dr. Camilli determined that approximately 12,200 acres of land have been irrigated throughout the Navajo Reservation. U.S. Technical Reports at Att. I. The United States relied upon Keller-Bliesner Engineering and Mr. Beutler to determine the consumptive irrigation requirement (or depletion) associated with the identified tributary irrigation fields. *See* U.S. Technical Reports at Att. H. Dr. Camilli and Keller-Bliesner Engineering also determined that to continue to support these lands through irrigation, the Navajo Nation must divert approximately 79,700 afy with 24,200 afy of depletion. *Id.* at Att. I. The U.S. Statement of Claims incorporates rights in these amounts to meet the present and future needs of the Navajo Nation for homeland purposes of the Navajo Reservation. *See* U.S. Statement of Claims at section III.D. Leeper Aff. at ¶ 48.

iii. Water rights for future irrigation

In addition to historically irrigated lands of the Navajo Reservation, the Navajo Reservation has a significant amount of arable land that can be practicably developed as irrigated fields. The United States assembled a team of experts both to identify such lands and to

determine the water necessary to irrigate them in the future. First, to identify undeveloped arable lands within the Navajo Reservation, the United States relied on soils specialist Cliff Landers of Stetson Engineering, Inc. *See* Attachment I – Affidavit of Cliff Landers; *see also* U.S. Technical Reports at Att. J. Second, to determine the design of new fields and the necessary components of new irrigation systems for these undeveloped lands, the United States relied upon Keller-Bliesner Engineering, LLC and Mr. Beutler. *See* Beutler Aff.; *see also* U.S. Technical Reports at Att. M and N. Third, to ensure the development of lands proposed for future irrigation was economically feasible, the United States relied upon Senior Economist Travis Greenwalt of CardnoEntrix. *See* Greenwalt Aff.; *see also* U.S. Technical Reports at Att. D and L. Finally, for those relatively few acres of land for which groundwater irrigation could be developed, the United States relied upon groundwater hydrologist Dean "Tony" Zimmerman of the BIA to determine the availability of groundwater to such fields. *See* Attachment J – Affidavit of Dean "Tony" Zimmerman; *see also* U.S. Technical Reports at Att. K.

Based on the coordinated effort of this team of experts, the United States determined that approximately 53,900 additional acres of arable land may be practicably developed requiring additional diversions of irrigation water. Keller-Bliesner Engineering also determined that the Navajo Nation must divert approximately 201,200 afy (152,900 afy depletion) from surface and groundwater sources to irrigate these additional lands. The U.S. Statement of Claims incorporates these water right for new future irrigation purposes to meet the future homeland purposes of the Navajo Reservation. *See* U.S. Statement of Claims, at section III.F. Although this represents a significant amount of water in the U.S. Statement of Claims, the Proposed Decrees contain no new water for future irrigation. Leeper Aff. at ¶¶ 56-59.

iv. Water Rights for NIIP

Congress authorized the construction of NIIP in the 1962 Act. To ensure the viability of the irrigation project, Congress also authorized the diversion of up to 508,000 afy to irrigate the project acres (approximately 110,600 acres in area) located on the Navajo Reservation. 43 U.S.C. § 615jj. In the NIIP Legislation, the BOR is tasked with construction of NIIP. Since 1962, the United States has worked to complete the NIIP, but to date appropriations have been insufficient and only about 78,300 acres of irrigated land have been developed. Approximately 34,800 acres remain to be developed under the 1962 authorization.[37]

Through the NIIP Legislation, Congress expressly authorized reserved water to be applied to NIIP in the quantities outlined above. To determine the quantity of water necessary to supply both the historic and existing acres, and the additional acres yet to be developed within the NIIP, the United States relied upon Keller-Bliesner Engineering, LCC and Mr. Beutler. *See* Beutler Aff. Based upon Mr. Beutler's analysis, the United States determined that the Navajo Nation would need approximately 259,600 afy diversion (193,900 afy depletion) to continue to irrigate the historically irrigated lands of NIIP. The United States determined that in addition, the Navajo Nation would need approximately 115,600 afy diversion (86,300 afy depletion) to irrigate the remaining undeveloped acres of NIIP. *Id.*; *see also* U.S. Technical Reports at Att. G. Based on the work described above, the United States has determined that the Navajo Nation is

[37] As described, approximately 78,300 acres of land have been irrigated as part of the NIIP. *See* U.S. Technical Reports at Att. G. When construction for the project was begun in the 1960s, fields were generally rectangular in shape and irrigated by side-roll, sprinkler irrigation. Since the 1960s, the NIIP has transitioned to more efficient center-pivot, sprinkler irrigation and fields are generally circular in shape. As a result, approximately 2,500 acres that were once irrigated by side-roll, sprinklers (constituting the corners of previously irrigated rectangular fields) are not currently irrigated today by center-pivot sprinklers. Nonetheless, the NIIP Legislation authorizes a project of 110,600 acres under center-pivot irrigation and the 2,500 acres constitutes lands of the Navajo Reservation that have been irrigated, continue to be arable, and are entitled to a water right.

entitled to a total water right for the NIIP of approximately 375,200 afy diversion (280,200 afy depletion) to meet the present and future needs of NIIP and the present and future homeland purposes of the Navajo Reservation. *See* U.S. Statement of Claims, sections III.D and E. Objectors to the Settlement Motion have offered no expert evidence to refute the U.S. claims for past, present and future irrigation uses.

e. Water Rights for Historic and Existing Impoundment Storage

Throughout the arid southwest, farmers and ranchers impound water to increase its availability and utility for livestock, irrigation, and other recognized purposes. The Navajo Reservation is no exception, and the Navajo Nation has developed many impoundments to capture and store water. The Navajo Nation must be able to continue to rely on its impoundments and it must have sufficient storage water rights associated with such impoundments. The storage water right associated with Navajo impoundments can be quantified based on their location and volume, and the United States relied on the expertise of Keller-Bliesner Engineering, LLC and Engineer Aaron Bliesner to make this assessment. *See* Attachment K – Affidavit of Aaron Bliesner. Mr. Bliesner identified approximately 1,300 impoundments on the Navajo Reservation with a cumulative calculated volume of approximately 65,600 acre feet ("af"). *Id.*; *see also* U.S. Technical Reports at Att. O. Based on Mr. Bliesner's work, the United States has determined that the Navajo Nation is entitled to a storage water right of approximately 65,600 af to meet the present and future homeland purposes of the Navajo Reservation. *See* U.S. Statement of Claims, section III.20 (such water right includes the right to fill and re-fill the impoundments to the extent water is available). Objectors to the Settlement Motion have offered no expert evidence to refute the U.S. claims for past and existing Navajo impoundments.

Water rights are characterized by a number of attributes including quantity, priority and limitations on use, whether absolute or affected through administration. *See* NMSA § 72-4-19; *see also Lewis*, 2007 NMCA at 8, ¶16, 141 N.M. at 7, 150 P.3d at 381 (citing with approval the adjudication court's procedural order establishing that objectors had the "initial burden to make a *prima facie* case showing how the[ir] water rights . . . will be adversely affected by the priority, amount, purpose, periods and place of use, or other matters as set forth in the Proposed Partial Final Decree"). To fully analyze the water rights recognized in the Proposed Decrees, the Court must consider not only the quantity of the water rights secured, but also the attributes of those rights, which are addressed in the context of the Court's second element of proof.

C. THE SETTLEMENT AGREEMENT AND THE PROPOSED DECREES WILL REDUCE OR ELIMINATE IMPACTS ON JUNIOR WATER RIGHTS

The second element of proof identified by the Court, is whether "the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights ...." Legal Standards Order at 3. From the very beginning of the settlement negotiations, the Navajo Nation and the State of New Mexico recognized the need for non-Indian support for the Settlement Agreement and the need to balance the competing demands of equity and stability for Indian and non-Indian water rights alike. Leeper Aff. at ¶¶ 16-17 and Ex. 14. To that end, the Settlement Agreement contains numerous provisions to mitigate the impact of the Navajo Nation's substantial and senior water rights on the non-Indian water users, even though such protections would not be available in the absence of the settlement.

As a threshold matter, it is important to note that because the settlement awards less water than could be obtained at trial, the settlement inherently reduces impacts on junior water users from the exercise of the Navajo Nation's water rights than in absence of the settlement. *See* OSE

Technical Assessment at 21; State's Bases at 4-5; Leeper Aff. at ¶ 66. As outlined above, in the U.S. Statement of Claims the United States has detailed a potential claim it stands ready to pursue on behalf of the Navajo Nation that, in quantity and priority, is substantially larger than those rights recognized under the Proposed Decrees and that offers no protections to junior water users. A much larger water right for the Navajo Nation, obtained from litigation of its claims, would almost certainly result in more frequent priority calls against junior direct-flow water users during the typically water-short, high-demand summer and fall months. State's Bases at 4; Leeper Aff. at ¶ 66. In addition, a larger direct flow water right for the Navajo Nation would also reduce the amount of water available for storage in Navajo Reservoir in the spring, increasing the risk of shortages for water users with Navajo Reservoir and San Juan-Chama Project water delivery contracts. *Id.* A comparison of the quantities of water in the Proposed Decrees with the quantities of water that could be awarded at trial is set forth at Section II.B, *supra*. The following sections explain in detail the additional concessions made in the attributes of the water rights recognized in the Proposed Decrees to protect non-Navajo water users in the Basin.

1. Almost 90% of the Water in the Proposed Partial Final Decree would be Administered with a Priority Junior to Most of the Water Users.

The Partial Final Decree recognizes a reserved water right, with a June 1, 1868 priority, to divert 606,660 acre-feet per year (afy) with a depletion not to exceed 325,670 afy. [38] Of the 606,660 afy of diversion rights, 535,330 afy, or 88.24% would be administered with priorities of June 17, 1955, or later, making the Navajo rights junior to virtually all of the non-Navajo water

[38] The proposed Supplemental Partial Final Decree includes an additional 26,872 afy of diversion with a depletion of 11,061 afy; however, those uses are from ephemeral tributaries on the Navajo Nation downstream of the non-Navajo water users, supplied from water sources other than the San Juan River. *See* OSE, *Quantification Analysis for the Proposed Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (Apr. 2, 2012) at 1.

uses in the Basin, with the exception of ALP and a few others. [39] This represents a significant concession of priority, one of the key attributes of the Navajo claim.

It is beyond dispute that the aboriginal lands of the Navajo Nation include the entire San Juan River Basin. *Navajo Tribe of Indians v. United States of America*, 23 Ind. Cl. Comm. 244, 251 (1970) (finding that the lands throughout the San Juan River Basin are the aboriginal territory of the Navajo Nation). Lands of the Navajo Reservation that were drawn from the Navajo Nation's aboriginal territory are entitled to a "time immemorial" priority (*i.e.*, one that predates all non-Indian water right priorities). *See United States v. Winans*, 198 US. 371, 381 (1905) ("the treaty was not a grant of rights to the Indians, but a grant of right from them, - a reservation of those not granted."); *Winters,* 207 U.S. at 576-77 (1908); *United States v. Adair*, 763 F.2d at 1401 (9th Cir. 1984).

The United States has identified with specificity all lands of the Navajo Reservation. *See* Attachment C - Affidavit of William Fogleman; U.S. Technical Reports at Att. A. The U.S. Statement of Claims asserts a time-immemorial priority for Navajo Nation water rights associated with these Reservation lands.

Further, the New Mexico Court of Appeals has specifically recognized that Indian reserved water rights are entitled to a priority date of at least the date of the first treaty of peace between a tribe and the United States. Mescalero, 861 P.2d at 244 (an Indian tribe occupying its aboriginal territory, such as the Navajo Nation, is entitled to a water right priority for all lands

[39] There are very few water uses in the San Juan River Basin in New Mexico who hold a water right with a priority junior to 1956. Among them are the United States, which holds OSE Permit No. 3215 with a 1968 priority, and the City of Farmington, which holds OSE Permit No. 2995 with an August 20, 1959 priority on the Animas River. The City of Farmington City Council passed a resolution in support of the Navajo Settlement. Resolution No. 2005-1132-A, Resolution Endorsing and Supporting the Proposed Navajo Water Rights Settlement, Feb. 8, 2005. Leeper Aff. at ¶ 19.

held in trust of at least the first treaty of peace between the tribe and the United States). The United States first entered into a treaty of peace with the Navajo Nation on September 9, 1849. Treaty of September 9, 1849; Ratified by the Senate September 9, 1850; Proclaimed by the President September 24, 1850, 9 Stat. 974 (1850). The Treaty subjected the Navajo Nation to the United States' sovereignty and rule (article I), assured peace between the Navajo Nation and the United States (article II), and recognized the existence and permanence of Navajo territory (article VII and IX). *Id.* Accordingly, although the United States would claim a time immemorial priority for all Navajo Reservation lands within the Basin, lands taken into trust by the United States on behalf of the Navajo Nation after the 1849 Treaty are entitled to a priority date no later than the year of the Treaty.

The Settlement Agreement and Proposed Decrees recognize reserved water rights of the Navajo Nation with a priority of June 1, 1868, the date of the second treaty with the United States that created the initial Navajo reservation. Treaty of June 1, 1868; Ratification advised July 25, 1868; Proclaimed August 12, 1868, 15 Stat.667 (1868). The June 1, 1868 priority represents a significant compromise in the settlement from a priority of September 9, 1849, let alone a time immemorial priority. Nevertheless, the Navajo Nation agreed that almost 90% of the water rights recognized under the Partial Final Decree would be administered with a priority of June 17, 1955 or later.

The Partial Final Decree recognizes reserved water rights for the Navajo Nation with a priority date of June 1, 1868, the date the Navajo Reservation was first established through a treaty with the United States; however, under the Settlement, the Navajo Nation's reserved rights under the Partial Final Decree for NIIP, NGWSP, and ALP (Partial Final Decree ¶¶ 3(a), (b), and (c)) are subordinated to rights that it has under its existing, permanent contract with BOR,

Reclamation Contract No. 10-WC-40-384 ("BOR Contract") to divert an average of 535,330 afy from the Navajo Reservoir with a June 17, 1955 priority. Partial Final Decree at ¶ 5(a). These reserved water rights can only be exercised by the Navajo Nation out of direct flows from the San Juan River if rights to use water under the Settlement Contract have been "irretrievably lost."[40] For all practical purposes, and under every foreseeable circumstance, the effect of this limitation is that the Navajo Nation may only satisfy its water rights recognized under paragraphs 3(a), 3(b), and 3(c) of the Partial Final Decree from water stored in the Navajo Reservoir and available through the currently existing BOR Contract. *Id.; see also* Leeper Aff. at ¶ 64.

As a result, the Navajo Nation's rights for water for NIIP and NGWSP are fulfilled or serviced by OSE Permit No. 2849, held by the United States, with a priority date of June 17, 1955 for those waters originating in the Basin above Navajo Dam, and by Permit No. 3215, also held by the United States, with a priority date of December 16, 1968, for inflow to the San Juan River below Navajo Dam. Partial Final Decree at ¶ 5(b). The water rights for the Navajo portion of ALP would be fulfilled or serviced by Permit No. 2883, held by the United States, with a priority date of May 1, 1956 for water from the Animas River. *Id.* at ¶ 5(c).

Thus, the Partial Final Decree effectively subordinates almost 90%[41] of the rights recognized in the Partial Final Decree to 1955 or later thereby significantly reducing the impacts

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[40] The concept that the reserved rights of the Navajo Nation can be subordinated and satisfied out of permits held by the United States, but revert to an earlier priority date only in the event that the Navajo Reservoir water supply is irretrievably lost is identical to the Court's treatment of the reserved rights of the Jicarilla Apache Nation. Jicarilla Decree, ¶ 3(b).

[41] The Partial Final Decree recognizes direct flow diversions from the San Juan River of not more than 69,330 afy, specifically 2,600 afy for municipal and domestic uses, 48,550 afy for the Hogback Project, and 18,180 afy for the Fruitland Project. Partial Final Decree ¶¶ 3(d), (e) and (f). These direct flow rights are not subordinated and; however, because the Alternate Water Source provisions in the Settlement Agreement at ¶ 9.2, as discussed at subsection 3, *infra*, require the Navajo Nation to use up to 12,000 afy of its Settlement Contract for Navajo

of the exercise of Navajo water rights on junior water rights. As such all water rights recognized in the Echo Ditch Decree of 1948 would remain senior to almost 90% of Navajo Nation's water rights. *Id.* The protections afforded by this subordination are available only through the Settlement, and the Navajo Nation would not agree to subordinate its reserved rights awarded in litigation.

2. Under the Terms of the Settlement, Most of the Water Rights of the Navajo Nation would be Supplied from Storage Rights with no Impact on Direct Flow Diverters.

Under the Settlement, the water rights for NIIP, ALP and NGWSP are supplied by permits previously issued by the State. All of the water for NIIP is supplied from Permit 2749, held by the United States, to store water in the Navajo Reservoir. Partial Final Decree ¶ 5(b). All of the water for ALP is supplied from Permit 2883, held by the United States, which relies on releases from Lake Nighthorse when direct flows in the Animas River are not sufficient to meet project demands. *See* n. 22, *supra*. The water for the NGWSP is partially supplied from Navajo Reservoir and partially from inflows into the San Juan River below Navajo Reservoir pursuant to Permit No. 3215, with a priority date of December 16, 1968. *Id.* ¶ 5(b); Settlement Act § 10701(b)(1).

It is a well-recognized principle of water law that a reservoir appropriator is subject to senior direct flow rights. TARLOCK, *supra*, § 5:37. Consequently, in the case of Navajo Reservoir, during times that downstream direct flow diverters, with priorities senior to June 17, 1955, are in need of water, water flowing into the reservoir must be released to satisfy those senior water rights; however, all other water may be retained in the reservoir unless additional

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Reservoir storage water before priority calls are made against upstream water users, the amount of direct flow diversion rights of the Navajo Nation can be reduced by another 12,000 afy, thus making the percentage of water used by the Navajo Nation from storage higher than 88.24%.

releases are mandated to satisfy other legal requirements such as downstream compact requirements. Water in storage may only be used by water users possessing storage rights. *Id.*; *City and County of Denver v. Northern Colorado Water Conservancy District*, 130 Colo. 375, 388 276 P.2d 992 (1954) ("To the amount that [water] is to be held in a reservoir for later use, a storage decree must be sought."). Therefore, water released out of storage to satisfy the water rights of the Navajo Nation has no effect on the water rights of any direct flow diverters.[42] In the case of ALP, water is diverted from the Animas River with a May 1, 1956 priority and stored off-channel in Lake Nighthorse. Such storage occurs only after all senior downstream water rights have been satisfied. Leeper Aff. at ¶ 20.

As described above, direct flow diverters do not have the right to use water from storage without a separate right to that stored water.[43] As a matter of federal law, no water stored in Navajo Reservoir may be used by a water user without a contract with the Secretary of the Interior. 1962 Act § 11(a).[44] Further, releases from Navajo Reservoir or Lake Nighthorse for

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[42] The term "direct flow" refers to water in the river that is part of the natural flow and does not include water in the river that has been diverted or put into storage then subsequently released into the river channel. Thus, the term "direct flow diverter" refers to water users diverting water from the direct flow, *i.e.* water that has not been stored in a reservoir and released into the river. *See* CITIZENS GUIDE TO COLORADO WATER LAW (2004) at 6 ("There are two basic types of prior appropriation water rights: direct flow rights and storage rights. The first takes water directly from a stream to its place of use. The second puts water into a reservoir for later use."). Available at: http://www.colorado.edu/geography/class_homepages/geog_4501_s13/readings/CG-Law2004.pdf

[43] Water is stored in the reservoirs in priority during those times that water is available (typically in spring months during high-flow, run-off periods). Once water is stored, it no longer is part of the direct flows from the river, and is not available for appropriation, even when it is released.

[44] Section 11(a) provides:

> No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project and the San Juan-Chama project authorized by section 2 and 8 of this Act, of water stored in Navajo Reservoir or