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

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER, **Plaintiff,** **vs.**	CV-75-184 Hon. James J. Wechsler Presiding Judge
UNITED STATES OF AMERICA, *et al.*, **Defendants,**	SAN JUAN RIVER GENERAL STREAM ADJUDICATION
JICARILLA APACHE TRIBE and NAVAJO NATION, **Defendant-Intervenors.**	Claims of the Navajo Nation Case No. AB-07-1

Name of Party: Ute Mountain Ute Tribe

Descriptive Summary: The Ute Mountain Ute Tribe's Answer Brief to Several Dispositive Motions and Briefs Filed by the Non-Settling Parties

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UTE MOUNTAIN UTE TRIBE'S ANSWER BRIEF OPPOSING NON-SETTLING PARTIES' DISPOSITIVE MOTIONS

Pursuant to NMRA 1-056(D)(2), LR11-104(B), and *Third Amended Order Granting Motions to Extend Deadlines in Part and Setting Schedule Governing Discovery and Remaining Proceedings* (March 15, 2013 at 3, ¶3(c)), the Ute Mountain Ute Tribe ("UMUT") submits this Answer Brief Opposing Non-Settling Parties' Dispositive Motions.[1]

[1] Specifically, UMUT requests this Court to deny the following motions: (1) Robert E Oxford's Dispositive Motion for Summary Judgment ("Oxford Mot. Summ. J."); (2)

INTRODUCTION

On April 19, 2012, this Court adopted the legal standard for evaluating the Settlement Agreement and the Proposed Decrees, requiring the Settling Parties to show that the Settlement Agreement and Proposed Decrees are "fair, adequate, and reasonable, and consistent with the public interest and applicable law." *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof,* (April 19, 2012 at 1-2, ¶ I) (hereafter "Legal Standards Order"). This Court also determined that the elements of proof necessary to meet this standard include showings that:

> (a) the Settlement Agreement is the product of good faith, arms-length negotiations, (b) the provisions contained in the Settlement Agreement and the 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 2, ¶ II.

The legal standards, the elements of proof, and the law from which both are derived make it clear that, in this expedited *inter se* proceeding, the Court is not adjudicating the merits of the Navajo Nation's underlying legal claims to federal Indian reserved water rights, and is instead evaluating the merits of a negotiated settlement agreement. *See* Joint Mem. of the Navajo Nation and the United States in Support of the Settlement Mot. 11. As a result, this Court's role in evaluating the merits of the Settlement Agreement and the Proposed

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Community Ditch Motion for Partial Summary Judgment Concerning Availability of Water and Impacts on Other Water Users ("CDD Water Availability Mot. Summ. J."); (3) Community Ditch Defendants' Motion for Partial Summary Judgment Concerning the Minimum Needs of the Navajo Reservation in New Mexico ("CDD Per Capita Mot. Summ. J."); (4) Gary L. Horner's Motion for Summary Judgment: That is, The "Settlement Motion of the United States, Navajo Nation and the State of New Mexico for Entry of Partial Final Decrees" Should be Denied ("Horner Mot. Summ. J."); and (5) Gary L. Horner's Motion for the Determination of the Applicable Standard for the Determination of Federal Reserved Water Rights ("Horner Mot. App. Leg. Std.").

Decrees is narrowly circumscribed. The elements of proof in the Legal Standards Order are not an invitation to litigate the underlying factual and legal bases of the claims of the Navajo Nation and the United States.

In their Dispositive Motions, the Non-Settling Parties raise both factual and legal issues related to the merits of the Navajo Nation's and the United States' underlying claims, and, in attempting to litigate such issues, the Non-Settling Parties present hackneyed legal arguments that inappropriately request this Court to ignore, radically alter, or overturn well-settled, applicable law on federal Indian reserved water rights claims. Through these Dispositive Motions, the Non-Settling Parties seek to convert this expedited *inter se* proceeding into a trial on the merits or a rehearsal for a trial. The Settling Parties reached agreement precisely to avoid the time, expense, and risks of trial. Accordingly, the UMUT requests that this Court deny the Non-Settling Parties' Dispositive Motions because these motions attempt to present—for summary judgment—factual and legal issues that are irrelevant to this Court's determination of the Settling Parties' request to approve the Settlement Agreement and Proposed Decrees.

ARGUMENT

In their Dispositive Motions, the Non-Settling Parties seek summary judgment determinations from this Court disapproving the Settlement Agreement and the Proposed Decrees. *See, e.g.*, Oxford Mot. Summ. J. 4; CDD Water Availability Mot. Summ. J. 2-3; Horner Mot. Summ. J. 3. These Dispositive Motions rely on statements of "undisputed" facts that are legally immaterial and that contain statements of opinion or are in fact legal conclusions.[2] *See, e.g.*, CDD Water Availability Mot. Summ. J.; Gary L. Horner's

[2] The UMUT also notes that many of the statements included in the Non-Settling Parties'

Memorandum in Support of Gary L. Horner's Motion for Summary Judgment ("Mem. in Supp. of Horner Mot. Summ. J."); Oxford Mot. Summ. J.

Lacking any credible factual basis for disapproving the Settlement Agreement, the Non-Settling Parties then urge this Court dramatically alter—or even overturn—settled law on federal Indian reserved water rights that has governed resolution of Indian water rights claims for decades and that, as set forth in Section III, *infra*, has guided Congress in approving Indian water rights settlements. Here, the Non-Settling Parties attack several aspects of this well-settled body of law, asking this Court to: (a) ignore the federal substantive law on federal Indian reserved water rights cases, and instead determine Indian water rights solely by reference to New Mexico state law;[3] and (b) develop new and highly restrictive legal tests or standards for quantifying federal reserved Indian water rights claims.[4] Stripped of their hyperbole, the Non-Settling Parties' arguments come down to a complaint that the law of federal reserved Indian water rights is unfair to them.[5] That

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recitation of "undisputed" facts are unsupported by citation to the record or any supporting admissible documents. *See, e.g.*, Mem. in Supp. of Horner Mot. Summ. J. 5-6. Under no circumstances have the Non-Settling Parties raised genuine issues of material fact warranting a factual hearing.

[3] *See, e.g.*, Mem. in Supp. of Horner Mot. Summ. J. 134 ("Therefore, if there is to be any notion of fairness with respect to the adjudication of water rights in the San Juan Basin, the water rights of Indian tribes must only be determined in the context of all other water users, in the context of the available water supply, and must ultimately be determined on the basis of established state law.").

[4] *See, e.g.*, Mem. in Supp. of Horner Mot. App. Leg. Std. 54 (requesting that this Court establish a legal standard for determining federal reserved water rights that, among other things, removes the well-established right to water for future uses and allows federal Indian reserved water rights to be lost for non-use); CDD Per Capita Mot. Summ. J. (requesting that this Court adopt a new "per capita" use standard for quantifying federal Indian water rights that has no basis in—and is a gross perversion of—existing legal methods for quantifying Indian water rights); CDD Water Availability Mot. Summ. J., Exhibit A, Conclusions (suggesting that constraints on interstate compacts and the "Law of the River" should impact Indian entitlement to and use of senior priority reserved water rights).

[5] *See generally* Oxford Mot. Summ. J.; Mem. in Supp. of Horner Mot. Summ. J. *See also*

question does not fall within the scope of this Court's role in deciding whether to approve the Settlement Agreement and Proposed Decrees. The fundamental question is whether the Settlement Agreement and Proposed Decrees are fair and reasonable, in light of the risks of litigation, the benefits achieved, and impacts to non-Indian water users.

This Court should deny the Non-Settling Parties Dispositive Motions for three reasons. First, under the Legal Standards Order, this Court's review of the Settlement Agreement and the Proposed Decrees in this expedited *inter se* proceeding is narrow in scope and does not authorize litigation of the underlying legal theories that give rise to the Navajo Nation's federal reserved rights claims and serve as the basis for quantifying those claims. Second, the well-established body of law on federal reserved rights claims provides a coherent, fair, and workable framework for evaluating the Settlement Agreement. Third, long-standing federal and state policies favoring negotiated settlements and the consistent practice of Congress in approving Indian water rights settlements provide guidance for approving the Settlement Agreement.

I. This Court's Narrow Scope of Review of the Settlement Agreement and Proposed Decree Does Not Permit Litigation of the Underlying Factual and Legal Elements of the Federal Indian Reserved Water Rights Claims of the Navajo Nation

This Court is evaluating the merits of a negotiated settlement agreement under a scope of review that is limited to determining the fairness, adequacy, and reasonableness of the Settlement Agreement and the Proposed Decrees. *Legal Standards Order* at 1-2, ¶ I.

Mem. in Supp. of Horner Mot. App. Leg. Std. 36-7 (proclaiming: "The Winters doctrine, as previously described, would ultimately reorder political power in the West by giving Indian tribes the right to control that greatest single element required for life on this planet (or apparently anywhere else in the universe) – water. The proposition that all water rights could be held by Indian tribes and that one must yield to the whims of such tribes in order to obtain such an essential of life is not only scary but unbelievably absurd.").

Within that narrow scope of review, this Court has placed both a burden of production and a burden of persuasion on the Settling Parties to demonstrate four elements of proof. If the Settling Parties establish each of the elements of the standard of proof by *prima facie* evidence, the burden shifts to the Non-Settling Parties to rebut that evidence. *Legal Standards Order* at 2-3, ¶¶ I-II.

In their Dispositive Motions, the Non-Settling Parties improperly seek to broaden the scope of this expedited *inter se* proceeding by expanding or distorting the elements of proof to encompass full-blown litigation of the underlying legal and factual claims of the Navajo Nation and the United States. *See, e.g.*, CDD Per Capita Mot. Summ. J. 3-4 (arguing that the "consistent with public policy and applicable law" element of proof allows the Community Ditch Defendants to: (1) introduce a new "per capita" metric for quantifying federal Indian reserved water rights; and (2) use the new "per capita" metric legal standard to challenge the Settlement Agreement and the Proposed Decrees because they are more than the amounts allowed by the *new* law).[6] The Non-Settling Parties also misconstrue the applicable legal standard of review, which focuses on the fairness of the Settlement Agreement, by arguing that it is "unfair" to allow Indians to exercise their senior priority *Winters* water rights within a state appropriative system. *See, e.g.*, Mem. in Supp. of Horner Mot. Summ. J. 133-34; Mem. in Supp. of Horner Mot. App. Leg. Std. 36 (both urging this court to overturn the *Winters* doctrine because the doctrine is unfair or "unworkable"). The Non-Settling Parties thus attempt to force the expedited *inter se* participants to fully litigate the underlying legal theories of and factual support for federal Indian reserved water rights to the point of a

[6] *See also* Mem. in Supp. of Horner Mot. App. Leg. Std. 4-5 (arguing that the "consistent with public policy and applicable law" element of proof entitles Horner to litigate and attempt to overturn the *Winters* doctrine in the expedited *inter se* proceeding).

comprehensive quantification of the federal reserved water rights of the Navajo Nation.

As a procedural matter, the Non-Settling Parties are not entitled to have this Court make legal or factual determinations on the Navajo Nation's underlying federal reserved rights claims at any point in this expedited *inter se* proceeding. For the sake of judicial efficiency, adherence to the *Third Amended Order Granting Motions to Extend Deadlines in Part and Setting Schedule Governing Discovery and Remaining Proceedings* (March 15, 2013), and allowing for the proper development of the elements of proof for the applicable legal standard in this expedited *inter se* proceeding, this Court should refuse to entertain arguments that are far outside the scope of settlement approval review identified in April of 2012. In addition, as set forth in Section III, *infra*, allowing complex litigation on the underlying merits of the Navajo Nation's federal Indian reserved water rights claims would impair long-standing state and federal policies encouraging the settlement of federal Indian reserved rights claims.

II. The *Winters* Doctrine is Based on Long-Established Law that Provides a Coherent, Fair, and Workable Framework for Approving Settlements Establishing Indian Water Rights.

If granted, the Non-Settling Parties' Dispositive Motions would lead to the wholesale rejection of binding United States Supreme Court precedent and subsequent judicial authority that has provided a sound and workable legal basis for the resolution of Indian water rights claims for more than a century.

A. Federal Substantive Law Controls the Determination of Federal Reserved Water Rights for Tribes

In his Dispositive Motions, Mr. Horner argues, among other things, that "trying to determine the water rights of Indian tribes based upon some sort of concept of federal reserved water rights is a complete disaster" and that this Court should determine the Navajo

Nation's water rights under state law (based upon a hydrographic survey of existing uses). Mem. in Supp. of Horner Mot. App. Leg. Std. 25; Mem. in Supp. Of Horner Mot. Summ. J. 134. *See also* Oxford Mot. Summ. J. 3-4 (suggesting that water rights decreed to the Hogback-Cudei Irrigation Project have been lost under New Mexico state law for non-use). The simple rejoinder to this argument is that both the United States Supreme Court and the New Mexico Court of Appeals have ruled that federal law (and not state law) controls the determination of federal Indian reserved rights to water. *See, e.g., Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983) ("State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment."); *State ex Rel. Martinez v. Lewis*, 116 N.M. 194, 203, 861 P.2d 235, 244 (Ct. App. 1993) ("*Lewis*").

Accordingly, this Court must reject all Non-Settling Parties' arguments that urge the Court to require the Navajo Nation to perfect its water rights using state law.

B. The *Winters* Doctrine is Settled Law, and Does Not Support the Non-Settling Parties' Legal Arguments

Several of the Non-Settling Parties' Dispositive Briefs urge this Court to develop new and highly restrictive legal standards for establishing and quantifying federal reserved Indian water rights claims. *See, e.g.*, CDD Per Capita Mot. Summ. J. (arguing for this Court to adopt a new quantification analysis based on the per capita water use of Navajo tribal members on the Navajo reservation in New Mexico); Mem. in Supp. of Horner Mot. App. Leg. Std. 36 (arguing for this Court to quantify federal reserved rights using a state-based, hydrographic survey analysis); *id.* at 54 (asking this Court to adopt a narrow "minimal

needs" standard that does not include rights for future uses). However, it is well established under United States Supreme Court and a large body of state and federal case law that, under the *Winters* doctrine, Tribes have federal reserved water rights to fulfill the purposes for which their reservations were established. *See, e.g.*, *Winters v. United States*, 207 U.S. 564 (1908); *New Mexico ex rel. State Engineer v. Commissioner of Public Lands*, 2009-NMCA-004, ¶ 14, 145 N.M. 433, 200 P.3d 86 ("*Commissioner of Public Lands*") (describing the *Winters* doctrine).

State and federal courts tasked with quantifying federal reserved water rights of Tribes have adopted varying standards for quantifying such rights. *Compare Arizona v. California*, 373 U.S. 546, 601 (1963) *overruled on other grounds by California v. United States,* 438 U.S. 645 (1978) (applying a practicably irrigated acreage standard), *with Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47-8 (9th Cir. 1981) (applying a practicably irrigated acreage standard, but also providing water to maintain a fishery resource to ensure that the federal reserved water right provided maintained a permanent homeland for the Colville Confederated Tribes). *See also Commissioner of Public Lands*, 2009-NMCA-004, ¶ 13 (citing *United States v. Washington*, 375 F. Supp. 2d 1050, 1066 (W.D. Wash. 2005) to note that the quantity of water impliedly reserved in an Indian reservation under a treaty was "a factual issue to be determined at trial"). Although the exact method of quantification can vary according to facts developed at trial for each Tribe, both state and federal courts have consistently quantified water rights sufficient to fulfill the purposes of the Indian reservation, including the present and future needs of the Indian Reservation. *See, e.g.*, *Arizona v. California*, 373 U.S. at 600; *In re Gila River Sys. & Source*, 35 P.3d 68, 72-3 (Ariz. 2001); *Colville Confederated Tribes v. Walton*, 647 F.2d at 47-8.

Neither the Community Ditch Defendants' "per capita" quantification argument nor Horner's arguments against allocating Tribes water for future use has any support in the law implementing the *Winters* doctrine. *See id.; see also Arizona v. California*, 373 U.S. at 600-1 (rejecting a non-Tribal attempt to assert a population-based quantification method); *In re Gila River Sys. & Source*, 35 P.3d at 80 (allowing for the "use [of] population evidence in conjunction with other factors in quantifying a tribe's *Winters* rights," but explicitly prohibiting the use of population data as the only factor in a quantification analysis).

Accordingly, this Court should reject the Non-Settling Parties' crabbed interpretation of the applicable law. The Settlement Agreement, which enables parties in this case to avoid the risks of litigating these issues, is fully consistent with the law applicable to federal Indian reserved water rights claims.

C. Well-Established Federal Law Provides a Fair Standard for Quantifying Indian Water Rights

Several of the Settling Parties' Dispositive Briefs misapply this Court's legal standard for evaluating the "fairness" of the Settlement Agreement and urge this Court to evaluate the "fairness" of the underlying body of law—along with New Mexico's prior appropriation water system—that allows Indians to exercise their senior priority water rights without perfecting such rights by beneficial use. *See* Oxford Mot. Summ. J. 3; Mem. in Supp. of Horner Mot. Summ. J. 133-34; Mem. in Supp. of Horner Mot. App. Leg. Std. 36. In doing so, the Non-Settling Parties rely on a policy argument for disregarding the *Winters* doctrine, the validity of property rights predicated on federal law, and the State of New Mexico's administration of water rights by priority date.

Because the *Winters* doctrine has been implemented by federal statutes and affirmed by the United States Supreme Court, along with numerous state and federal court cases, there

is no need for this Court to address the Settling Parties' arguments against approving a settlement agreement that establishes a fair and orderly process for administering water rights by priority date. To the extent that this Court finds the fairness of the law relevant to the approval determination, the UMUT urges this Court to consider that all three Tribes participating in the San Juan River General Stream Adjudication share the historic deprivation of the ability to use aboriginal water and land resources, non-Indian development of water resources previously used by Tribal people, and unequal access to the benefits of federal development of storage and infrastructure projects.[7] All three Tribes sought to address this history of land and water development policies through water settlements that provide the water necessary for the Tribes to survive and develop their economies, while at the same time providing some protection to existing non-Indian water uses. *See* Settlement Agreement and Proposed Decrees; Jicarilla Apache Tribe Water Rights Settlement Act, Pub. Law. No. 102-441, 106 Stat. 2237 (1992); Colorado Ute Indian Water Rights Settlement Act

[7] *See, e.g.*, *Report: Northwestern New Mexico Rural Water Projects Act, United States Senate*, 110th Cong. 401, at 26 (2008) ("40% of Navajo families have incomes below the poverty level, compared with less than 10% nationwide. The lack of infrastructure, economic development, and sustained poverty are all closely connected"); *Report: Jicarilla Apache Reservation Rural Water System Act, United States House of Representatives*, 107th Cong. 629, at 5 (2002) ("The current water system for . . . [the capitol of] Jicarilla Apache Reservation . . . has deteriorated over the years due to lack of capital improvements and maintenance by the Bureau of Indian Affairs. Because of this deterioration, the wastewater system and sewage lagoons operate at over 100 percent capacity during the summer months and over 500 percent capacity during the winter months"); *Animas-La Plata Water Rights Settlement: Hearing Before the Committee on Interior and Insular Affairs House of Representatives Regarding H.R. 2642 the Colorado Ute Indian Water Rights Settlement Act of 1987*, 100th Congress 72 (1987) (statement of Tom Colbert, County Commissioner, Montezuma County, Colorado, Member, Mancos River Water Conservancy District) ("We recognize and believe that the Indians, whose rights are senior to those of most non-Indians, have been deprived of opportunities in economic gain which could have come from being able to put the water to which they have rights to beneficial uses").

of 1988, Pub. Law. No. 100-585, 102 Stat. 2973 (1988) (as amended) (approving the UMUT's water rights settlement within the State of Colorado).

III. This Court's Review of the Settlement Agreement Should Be Informed by the Strong Public Policy and Practice Favoring Negotiated Resolution of Indian Water Rights Claims.

The Settling Parties were motivated to reach a negotiated resolution of the Navajo Nation's and the United States' claims by a desire to avoid the uncertainty, time and expense of litigation. The Non-Settling Parties seek to inject legal and factual issues outside the scope of the Legal Standards Order and applicable law. The strong public policy favoring negotiated settlements of Indian water rights claims underscores the wisdom of avoiding resolution of the underlying merits of the claims that have been settled. *See, e.g., Officers for Justice v. Civil Service Commission,* 688 F.2d. 615, 625 (9th Cir. 1982), *cert. denied sub nom, Byrd v. Civil Service Commission,* 459 U.S. 1217 (1983). By raising issues that go to the heart of the factual and legal bases of the Navajo Nation's and the United States' claims, the Non-Settling Parties are seeking to turn this fairness-of-settlement hearing into a "trial or rehearsal for trial on the merits," an outcome studiously to be avoided. *Id.* This Court's review and its decision to approve the Settlement Agreement is not, therefore, a "decision on the merits" of the Navajo Nation's and the United States' claims. *United States v. Oregon,* 913 F.2d 576, 580 (9th Cir. 1990), *cert. denied sub nom, Makah Indian Tribe v. United States,* 501 U.S. 1250 (1991).

This Court's review of Indian water settlement agreements should be informed by the fact that such settlement agreements implement federal, state and Tribal policies favoring negotiated settlements that have been in effect for decades. In fact, since *Winters* was decided in 1908, only a handful of stream systems connected to Indian reservations have

been adjudicated solely through litigation. *See, e.g., Arizona v. California,* 373 U.S. 546 (quantification of five Tribes' rights to Colorado River); *In re General Adjudication of All Rights to Use Water in the Big Horn System,* 753 P.2d 76 (Wyo. 1988), *aff'd by equally divided court, Wyoming v. United States,* 492 U.S. 406 (1989) (Wind River Reservation Tribes' rights to Big Horn River); *Lewis*, 116 N.M. at 203, 861 P.2d at 244 (Mescalero Apache Tribe rights to Rio Hondo River).

The policy favoring settlements has been the official policy of the United States for more than 23 years. In 1990, the U.S. Department of the Interior adopted Criteria and Procedures for the Participation of the Federal Government in the Negotiations for the Settlement of Indian Water Rights. 55 Fed. Reg. 9223 (Mar. 21, 1993). The Criteria state that it is the policy of the United States that "disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation." *Id.* Deputy Assistant Secretary of the U.S. Department of the Interior David J. Hayes recently reiterated that policy and explained its rationale in testimony before a congressional committee:

> Settlement negotiations foster a holistic, problem-solving approach that contrasts with the zero-sum logic of the courtroom, replacing abstract application of legal rules that may have unintended consequences for communities with a unique opportunity for creative, place-based solutions reflecting local knowledge and values.

U.S. SENATE COMMITTEE ON INDIAN AFFAIRS, INDIAN WATER RIGHTS: PROMOTING THE NEGOTIATION AND IMPLEMENTATION OF WATER SETTLEMENTS IN INDIAN COUNTRY (2012).

State policies likewise favor negotiated Indian water rights settlements over litigation. The Western States Water Council, of which New Mexico is a member, adopted a resolution in 2011 affirming its support for "the policy of encouraging negotiated settlements of Indian water rights disputes as the best solution to a critical problem that affects almost all of the

Western States." RESOLUTION OF THE WESTERN STATES WATER COUNCIL IN SUPPORT OF INDIAN WATER RIGHTS SETTLEMENTS (2011). *See also Settlement of Indian Reserved Rights, Res. 2013-6, in* 2012 RESOLUTIONS OF THE COLORADO RIVER WATER USERS ASSOCIATION 5 (2011) (supporting settlement of federal Indian reserved water rights claims in the Colorado River Basin); State of New Mexico's Mem. in Support of Settlement Motion for Entry of Partial Final Decrees 44 ("The settlement carries out the State of New Mexico's policy of seeking settlement of Indian water rights claims in order to recognize tribal water rights while simultaneously protecting rights of other water users.").

These policies are grounded in the practical realization that negotiated solutions are often less expensive than litigation, can be achieved more quickly than litigation, and offer a high degree of flexibility in devising solutions to a broad array of issues (such as water shortage and supply problems, the administration of water rights, and funding of infrastructure projects) that would not be possible through litigation, even if the Tribe were successful on each factual and legal contention. The Settlement Agreement before this Court is a manifestation of the implementation of this sound public policy.

In approving Indian water rights settlements, Congress has frequently acted on the premise that negotiated settlements promote the efficient use of resources, establish certainty and permanency with regard to Tribal and other water rights, and implement the fair and reasonable accommodation of affected water users. Between 1978 and 2010, twenty-nine Indian water rights claims were resolved by negotiated settlement. Twenty-seven obtained approval by Congress, and the other two were finalized without the necessity of congressional authorization and approval. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §19.05[2] n. 48 (Nell Jessup Newton ed., 2012).

Congressional approval of Indian water rights settlements also furthers the national policy in support of Indian self-determination. For example, in the Shoshone-Paiute Settlement in 2009, Congress found that "quantifying rights to water and development of facilities needed to use tribal water supplies is essential to the development of a viable Indian reservation economies and the establishment of a permanent reservation homeland." Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 10801(2), 123 Stat. 1367, 1406 (2009). In approving the Yavapai-Prescott Indian Tribe Water Rights Settlement, Congress found that the settlement furthers the "goals of Federal Indian policy and [] fulfill[s] the trust responsibility of the United States to the Tribe . . . so as to enable the Tribe to utilize fully its water entitlements in developing a diverse, efficient reservation economy." Yavapai-Prescott Indian Tribe Water Rights Settlement Act of 1994, Pub. L. No. 103-434, § 102(a)(9), 108 Stat. 4526, 4527 (1994). Against this uniform legal and political backdrop, in 2009, Congress approved the Settlement Agreement that is now before the Court. Pub. L. No. 111-1, 123 Stat. 1367 (2009).

Following congressional review and approval of the Settlement Agreement, the Settling Parties moved for entry of the Proposed Decrees to quantify the water rights of the Navajo Nation under the terms and conditions of the Settlement Agreement. This is the same process typically followed in Indian water rights settlements nationwide. The parties negotiate a settlement; Congress undertakes a thorough review of the agreement and modifies it as appropriate during the approval process; the parties make revisions necessary to conform the agreement as ratified by Congress; and the parties then ask the court hearing the case to enter a final decree incorporating the terms of the agreement. Although each case presents its own unique facts, a review of Indian water rights settlements finalized under this

process shows that court approval has almost always followed the court's careful review, particularly where the agreement implements a comprehensive solution to Tribal water rights while protecting water resources for other parties.

For example, the Arizona Supreme Court affirmed a judgment and decree in favor of the Tohono O'odham Nation that implemented a settlement approved by Congress in the Arizona Water Settlements Act of 2004. *In re Gila River Sys. & Source,* 173 P.3d 440, 448 (Ariz. 2007). The court rejected a broad-based challenge to the legal and factual sufficiency of the judgment and decree on the grounds that some of the arguments fell outside the narrow scope of review and the objectors were not bound by the settlement. *Id.* at 444.

Similarly, the Montana Water Court approved the Chippewa Cree Tribe-Montana Compact that was ratified by Congress in 1999. *Chippewa Cree Tribe of the Rocky Boy's Reservation Indian Reserved Water Rights Settlement and Water Supply Enhancement Act of 1999,* Pub. L. No. 106-163, 113 Stat. 1778 (1999). The Compact quantified the Tribe's water right as 20,000 acre feet per year, included provisions to protect water use by off-reservation water users, and provided for the importation of half of the Tribal Water Right from a source outside the Reservation, a Bureau of Reclamation ("BOR") storage facility. *See* MONT. CODE ANN. § 85-20-601 (2013). The parties acknowledged that the water supply on the Reservation was not adequate to satisfy the present and future needs of the Tribe and that the Tribe's pumping on the Reservation could adversely affect water users downstream. As a result, the parties relied on a source outside the Reservation in the form of the BOR storage facility to satisfy the Tribe's present and future needs and to protect against harm to the downstream users. The court approved the compact under a standard similar to the one adopted by this Court, concluding that "in the absence of federal authority prohibiting the

various compact provisions and in the absence of demonstrated injury to objectors by these provisions, compacting parties are within their authority to craft creative solutions to resolve difficult problems caused by ambiguous standards." *In the Matter of the Adjudication of Existing and Reserved Rights to the Use of Water, Both Surface and Underground, of the Chippewa Cree Tribe of the Rocky Boy's Reservation Within the State of Montana,* Case No. WC-2000-01, at 41 (June 12, 2000).

These decisions provide guidance for adopting the proper judicial approach to settlement approval determinations. They illustrate the process and standards by which other courts have resolved objections to Indian water rights settlements approved by Congress. Judicial review of these settlements was robust, but the courts carefully avoided adjudication of the legal and factual issues underlying the merits of the Tribal claims. That same approach is called for here to ensure that this Court's review is consistent with the practices other courts have adopted in the past few decades.

CONCLUSION

The Ute Mountain Ute Tribe urges this Court to deny the Non-Settling Parties' Dispositive Motions. The UMUT also respectfully requests that this Court maintain the narrow focus of the four elements of proof and the legal standard contained in the Legal Standards Order to ensure that its review of the Settlement Agreement and the Proposed Decrees acknowledges public policy regarding Indian water settlement agreements and avoids adjudicating the underlying legal and factual bases of the Tribal claims.

Respectfully submitted,

UTE MOUNTAIN UTE TRIBE

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CERTIFICATE OF SERVICE

The undersigned certifies that at approximately 7:30 AM on this 9th day of May, 2013, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of this document to an email sent to the following list servers: wrnavajointerse@nmcourts.gov.

Celene Hawkins