

DISTRICT COURT  
SAN JUAN COUNTY, N.M.  
FILED  
2013 MAY 10 PM 1:35

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

STATE OF NEW MEXICO, <i>ex rel.</i> State Engineer,	)	
	)	CV-75-184
	)	
Plaintiff,	)	JAMES J. WECHSLER
	)	Presiding Judge
vs.	)	
	)	SAN JUAN RIVER
UNITED STATES OF AMERICA, <i>et al.</i> ,	)	ADJUDICATION
	)	
Defendants.	)	CLAIMS OF THE NAVAJO NATION
	)	Case No. AB-07-1
JICARILLA APACHE TRIBE,	)	
	)	
Defendant-Intervenor.	)	

**NAME OF PARTY:** BHP Navajo Coal Company and Enterprise Field Services, LLC

**DESCRIPTIVE SUMMARY:** Response in Support of the Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion and Response in Support of the State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees

**NUMBER OF PAGES:** 9

**DATE OF FILING:** May 10, 2013

**BHP NAVAJO COAL COMPANY AND ENTERPRISE FIELD SERVICES LLC'S  
RESPONSE IN SUPPORT OF THE JOINT MEMORANDUM OF THE NAVAJO  
NATION AND THE UNITED STATES IN SUPPORT OF THE SETTLEMENT MOTION  
AND RESPONSE IN SUPPORT OF THE STATE OF NEW MEXICO'S  
MEMORANDUM IN SUPPORT OF SETTLEMENT MOTION FOR ENTRY OF  
PARTIAL FINAL DECREES**

BHP Navajo Coal Company ("BNCC") and Enterprise Field Services, LLC ("Enterprise") by and through their attorneys of record, Modrall, Sperling, Roehl, Harris & Sisk, P.A., hereby submits this Response in Support of the Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion filed April 15, 2013 and in Support of

0✓

the State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees filed April 15, 2013 ("Settling Parties' Memorandums"). BNCC and Enterprise request that this Court grant the Settlement Motion and enter the proposed Partial Final Decree and proposed Supplemental Partial final Decrees (collectively "Proposed Decrees") for all of the reasons presented in the Settling Parties' Memorandums and for the additional reasons stated herein.

**I. The Court Should Grant The Settlement Motion And Enter The Proposed Decrees.**

The Court should grant the Settlement Motion and enter the Proposed Decrees as the Settling Parties have met the burden of persuasion set forth by this Court in its *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decree and Respective Burdens*, entered April 19, 2012. As explained in the Settling Parties' Memorandums, and as discussed at length below, the Settling Parties have met the burden by providing this Court with sufficient evidence demonstrating that (1) the Settlement Agreement is the product of good faith, arms-length negotiations; (2) the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate<sup>1</sup> impacts on junior water rights; (3) 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 (4) that the Settlement Agreement is consistent with public policy and applicable law. Accordingly, BNCC and Enterprise request the Court grant the Settlement Motion and enter the Proposed Decrees.

**A. The Settling Parties Have Presented Sufficient Evidence to Show that the Settlement Agreement is the Product Of Good Faith, Arms-Length Negotiations.**

---

<sup>1</sup> BNCC and Enterprise note that elimination of impacts is an impossible burden.

The Settling Parties' have provided a thorough history of the negotiation in their Memorandums. This historic evidence shows that the Settlement Agreement is the product of good faith, arms-length negotiations. The objecting parties fail to present any argument or evidence that supports a contrary finding. Moreover, multiple non-Indian water users provided input on the settlement during the public comment period and the record clearly reflects the Settling Parties' statement that, as a direct result of the public comments, the settlement documents were revised to provide even greater protection to non-Indian water users from potential impacts of the Navajo water rights recognized in the Settlement.

**B. Entering The Settlement Agreement Promotes The Public Interest, Protects Junior San Juan Basin Users And Provides For Less Than The Potential Claims That Could Be Secured At Trial.**

The Settling Parties' Memorandums accurately articulate why the Settlement Motion should be granted and the Proposed Decrees entered by this Court. As comprehensively presented in the Memorandums, the terms of the Settlement Agreement and the Proposed Decrees are fair, reasonable and protect the public interest. The Settlement Agreement most notably protects the public interest by removing the uncertainty of the unquantified claims of the Navajo Nation and providing protections for junior non-Indian users in the exercise of the Nation's quantified rights. The Settlement Agreement addresses potential risks to existing state-law based water rights owners and reflects a fair and reasonable approach to the settlement of senior Indian water rights claims in the San Juan Basin.

*i. Junior Water Users Rights Are Protected By The Settlement Agreement And Proposed Decrees*

In the Memorandums, the Settling Parties specifically discuss the terms and conditions of Settlement Agreement that provide protections for junior users of the San Juan River Basin. BNCC and Enterprise recognize that one of the most important protections, as highlighted in the

Memorandums, is evidenced by the Navajo Nation's agreement to subordinate its senior priority dates for the majority of water rights recognized and quantified in the Settlement Agreement. Under the terms of the proposed Settlement Agreement the Navajo Nation agreed to subordinate its 1868 senior priority date for the Nation's reserved water rights for the Navajo Indian Irrigation Project ("NIIP") and the Navajo-Gallup Water Supply Project ("NGWSP") to the Navajo Nation's June 1955 priority date under the Navajo Reservoir. (Partial Decree 3(a)(b)). Only if the Navajo Reservoir supply is "irretrievably lost" can the Navajo Nation assert the reserved priority date of 1868. (Partial Final Decree 5(a)). Additionally, the Nation's rights under NIIP and NGWSP are subject to the sharing of shortages as provided in Section 11 of the Act of June 13, 1962 (76 Stat. 96) and Section 403 of the San Juan Basin in New Mexico Water Projects and Settlements Act.

The Settling Parties correctly indicate that the Settlement Agreement further protects junior water users by quantifying and limiting the Navajo Nation's water rights. The terms of the settlement require a reduction of 155,000 afy on the amount of water to be diverted from Navajo Reservoir for a permitted use of 405,950 afy. (Partial Final Decree 5(e)(1)(vi)). The agreement requires that if any portion of the NIIP right is used for purposes other than irrigation, then the Nation would have to apply to the State Engineer for a permit to allow the total diversion to exceed 353,000 afy, which would be subject to non-impairment of existing water rights. (Partial Final Decree 5(e)(4)). Finally, the settlement limits the NIIP's annual average depletion of 270,000 afy during any period of ten consecutive years. (Partial Final Decree 5(f)).

The Settlement Agreement further limits the Navajo Nation water rights by imposing a limitation of depletions from the Hogback and Cudei projects. As stated in the Settling Parties' Memorandums, this provides further protection for junior water rights. The total number of acres

subject to irrigation in the absence of the Settlement Agreement is between 11,000 and 14,000 acres, the proposed settlement limits the water rights recognized for irrigation of these projects to 8,830 acres based on Land Use Permits the BIA issued to the Navajo Nation and its members. (Partial Final Decree 3(e)). Additionally, under the terms of the agreement, the Navajo Nation agreed that in times of shortage the Hogback and Cudei projects will use up to 12,000 afy of water from NIIP to obviate a priority call on junior users. (Settlement Agreement 9.2.1 (1)).

Junior users are also protected under the legislation associated with the Settlement Agreement, 123 Stat. 1371, §10401(b)(16)(a). As provided by this legislation, the Secretary of the Interior may create and operate within the available capacity of Navajo Reservoir a top water bank. This legislation makes available top water bank storage to native flow users in Navajo Reservoir. *See* 123 Stat. 1371, §10401. Currently, only those with contracts for Navajo Reservoir storage are entitled to Navajo Reservoir water. Absent the Settlement Agreement non-contract water users, the majority of non-Indian water users in Basin, would have no ability to store water, an important drought protection.

ii. *The Settling Parties Have Demonstrated That It Is Reasonable To Conclude That The Settlement Agreement Provides For Less Water Than The Potential Claims That Could Be Secured At Trial*

The Settling Parties' Memorandums fully illustrate the potential claims that the Navajo Nation would receive at trial. The rights set forth in the Settlement Agreement and Proposed Decrees quantify those claims to the benefit of all junior water rights users in the San Juan Basin. As noted in the Memorandums, if litigated the Navajo Nation may be able to prove a quantified right of equal or larger magnitude than is provided in the Settlement Agreement. Regardless of the magnitude of any claim, any claim stemming from litigation would not provide protections for junior water users. The Navajo Nation's and United States' Joint Memorandum clearly states

that the United States is prepared to “assert a claim to divert 920,745 acre-feet per year”, Joint Memorandum, 2; this is substantially more than the 635,729 acre-feet year that is recognized in the Proposed Decrees. The Settling Parties correctly note in the Memorandums that without settlement not only would the junior water rights owners in the San Juan Basin not have the protections guaranteed by the Settlement, but the Court could potentially recognize a larger water right for the Navajo Nation with the most senior priority in the San Juan River Basin.

*iii. The Settlement Agreement and Proposed Decrees Protect the Public Interest*

The Settlement Agreement limits the out of state marketing of water, which directly protects preservation of the public interest as well as of junior users’ claims. The Navajo Nation has agreed under the terms of the proposed settlement to refrain from marketing water out of state without the consent of the New Mexico Interstate Stream Commission. (Settlement Agreement 9.9, Partial Final Decree 17(g)).

Additionally, the proposed Settlement Agreement recognizes that the New Mexico State Engineer is authorized to monitor the Navajo Nations diversion and use from the San Juan River stream system to ensure that the waters are being beneficially used in compliance with the settlement and has the authority to request that the Nation make appropriate adjustments to its diversions as necessary to comply with the decree and the proper administration of diversions in the San Juan River Basin. (Partial Final Decree 17(h)). The Settlement Agreement explicitly provides that the State of New Mexico may administer priority water rights in the San Juan River Basin as may be necessary for New Mexico to comply with its obligations under interstate compacts and other applicable law. (Settlement Agreement 9.3.1). Furthermore, the Settlement Agreement restricts the Navajo Nation’s ability to administer the water rights quantified by the Settlement Agreement. Transfers off of Nation lands would be subject to the jurisdiction of the

Office of the State Engineer. (Settlement Agreement 9.9). All of these protections, in addition to those discussed in the Settling Parties' Memorandums, serve to protect the public interest and promote public welfare.

**II. The Settlement Agreement Achieves A Delicate Balance By Protecting Existing Non-Indian Uses and The Navajo Nation's Reserved Water Rights.**

BNCC and Enterprise support the proposed Settlement Agreement and the Proposed Decrees for all of the reasons set forth in the Settling Parties' Memorandums. The settlement of Indian water rights claims requires a delicate balancing of claims and interests to ensure protection of existing non-Indian uses and adequate recognition of the reserved water rights of the Navajo Nation. The Settlement Agreement and Proposed Decrees achieve this delicate balance. The Settlement Agreement recognizes and protects the interests of both existing water rights owners and the Navajo Nation. The Settlement Agreement is comprehensive and addresses myriad concerns that would remain in the absence of such an agreement. The Court should grant the Settlement Motion and enter the Proposed Decrees.

WHEREFORE, for the reasons set forth above, BNCC and Enterprise supports the Navajo Nation's and the United States' Joint Memorandum in Support of the Settlement Motion and the State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees and therefore respectfully request the Court to grant the Settlement Motion and enter the Proposed Decrees.

Respectfully Submitted,  
MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, P.A.

By:   
Marja O'Brien  
Christina C. Sheehan

*Attorneys for BHP Navajo Coal Company and Enterprise  
Field Services, LLC*

P.O. Box 2168

Albuquerque, New Mexico 87103-2168

Telephone: (505) 848-1800

Fax: (505) 848-9710

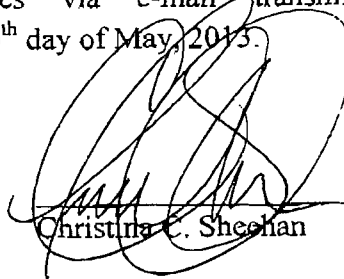
[mobrien@modrall.com](mailto:mobrien@modrall.com)

[ccs@modrall.com](mailto:ccs@modrall.com)



**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of BHP Navajo Coal Company and Enterprise Field Services, LLC.'s Response in Support of the Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion and Response in Support of the State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees was served on all parties via e-mail transmission by e-mailing to wnavajointerse@nmcourts.gov on this 10<sup>th</sup> day of May, 2013.



Christina C. Sheehan

K:\dox\client\14993\147\W1926049.DOCX