

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

**DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED**

**2013 MAY 10 PM 12:17**

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

CV-75-184

**Plaintiff,**

HON. JAMES J. WECHSLER  
Presiding Judge

**vs.**

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

SAN JUAN RIVER  
GENERAL STREAM  
ADJUDICATION

**Defendants,**

**THE JICARILLA APACHE TRIBE AND THE  
NAVAJO NATION,**

Claims of the Navajo Nation  
Case No. AB-07-1

**Defendants-Intervenors.**

Name of Party: Jicarilla Apache Nation

DESCRIPTIVE SUMMARY: The Jicarilla Apache Nation files a brief in support of the Settling Parties Motion requesting that the Court grant the Settlement Motion and enter the proposed Partial Final Decrees.

NUMBER OF PAGES: 5.

DATE FILED by Fax: 10 May 2013.

**INTRODUCTION**

The Jicarilla Apache Nation submits this brief in support of the State of New Mexico, the Navajo Nation, and the United States' (Settling Parties) that the Court grant the Settlement Motion and enter the proposed Partial Final Decree and the proposed Supplemental Partial Final Decree. The Settling Parties filings demonstrate: (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.

**THE SETTLEMENT IS A PRODUCT OF GOOD FAITH ARMS-LENGTH  
NEGOTIATIONS**

The Navajo settlement was a product of good faith, arms-length negotiations over an extended period of time. As evidenced by the *State's Memorandum in Support of Settlement for Entry of Partial Final Decrees* ("State's Memorandum") filed on the 15<sup>th</sup> of April as well as by the Affidavit of John J. Whipple, the State has performed the due diligence in ensuring that the Settlement Agreement is the product of good faith negotiations and that the Partial Final Decrees deserve to be entered by the Court. Together, the State's Memorandum and the Affidavit of John Whipple provide a very detailed narrative of the years of negotiations and legislative action that have gone into reaching the Settlement. Negotiations and changes made to the proposed settlement also involved other non-Navajo water users that participated at publicly-held meetings.

The *Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion* ("Joint Memorandum") filed on the 15<sup>th</sup> of April further supports the position that the Settlement Agreement was negotiated in good faith and at arms-length. As detailed on pages 12 through 15 of the Joint Memorandum, the initial negotiations between the Navajo Nation and the State included due consideration of how the Settlement Agreement would impact non-Navajo water users in the San Juan Basin. Based on the Joint Memorandum, one of the ways the interests of non-Navajo water users has been protected is by the Navajo Nation forfeiting its right to demand significantly more water than its current and historic uses. Even in negotiating the amount of water to be allocated for the Navajo Gallup Water Supply Project (NGWSP), the

Navajo Nation and the United States aimed to further reduce the impact of the water use of the Navajo Nation by agreeing that water for the NGWSP would be administered with a priority junior to almost every other water user in the Basin.

Together, the evidence presented by the State, the Navajo Nation, and the United States proves that these negotiations were in good faith and that they considered and sought to protect junior non-Navajo water users in their negotiations of the Settlement Agreement.

**THE NAVAJO SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE**

The Navajo Settlement is fair, adequate, and reasonable which is fully supported by the Statement of Claims of Water Rights filed by the United States on the 3<sup>rd</sup> of January 2012, Technical Reports filed by the United States on the 27<sup>th</sup> of January 2012, the State's Technical Assessment and Quantitative Analysis, the Affidavit of John Whipple. Those documents describe the many benefits that the State of New Mexico and other non-Navajo water users derive from the Settlement that could not be obtained in litigation. Some of those benefits include, but are not limited to, limitations on the quantities of the Navajo Nation's water rights, subordination of priority dates, and agreement by the Navajo Nation to share in times of shortage. As demonstrated by Table 1 on page 5 of the State's Memorandum, the amount of water agreed to by the Settling Parties for the Navajo Nation is far less than the claims filed by the United States on behalf of the Navajo Nation and even less than the Navajo Nation's current right. This assertion is further bolstered by the Joint Memorandum submitted by the Navajo Nation and the United States in which they provide a table on page 32 that offers a detailed comparison of the water rights claimed in the U.S. Statement of Claims with the rights asserted in the Proposed Decrees.

It is obvious based on both the State's Memorandum and the Joint Memorandum that the quantities of water available to the Navajo Nation have been reduced as result of the conditions imposed in the Proposed Decrees. In exchange, the Navajo Nation will benefit by receiving funding for and construction of the Navajo Gallup Water Supply Project, which as the State points out, will provide domestic and municipal water supply to the Navajo Nation.

**THE SETTLEMENT IS CONSISTENT WITH PUBLIC INTEREST AND  
APPLICABLE LAW**

Entry of the decrees is consistent with applicable law. Federal law controls the determination of the Navajo Nation's water rights. *Winters v. United States*, 207 U.S. 564 (1908); *Arizona v. California*, 373 U.S. 546 (1963); *State v. Lewis et al.*, 116 N.M. 194 (Ct App. NM 1993); *Arizona v. San Carlos Apache*, 463 U.S. 545 (1983).

As already noted in the Brief filed by the Jicarilla Apache Nation on the 21<sup>st</sup> of September 2012, the settling parties have submitted a vast amount of material in support of the water rights described in the proposed Decrees. The State's Memorandum along with the Affidavit of John Whipple and the Joint Memorandum filed by the Navajo Nation and the United States has only added to the vast amount of material that has already been produced. Together, these materials are more than sufficient to enable all the parties to make a determination whether the settlement is fair and reasonable and fully complies with federal law as applicable. Certainly, the quantity and quality of data presented here far exceeds that submitted in this Court on behalf of the settlement of the Jicarilla Apache Nation's claims. In the Jicarilla matter, the hydrographic survey was deemed sufficient by the Court to support the settlement entered into by the United States, the State of New Mexico, and the Jicarilla Apache Nation. Further, the involvement of other non-Navajo water users during the initial settlement negotiations furthers the State's policy

of seeking settlement of Indian water right claims while simultaneously protecting the rights of other water users.

It is the recommendation of the Jicarilla Apache Nation that the Court hold that the Settling Parties have complied with federal law, met their burden of establishing that the Settlement is fair, adequate, reasonable and consistent with public interest and applicable law, and enter the proposed Partial Final Decrees.

Respectfully submitted, this 10<sup>th</sup> day of May 2013.

JICARILLA APACHE NATION

*/s/ Natasha Cuylear*

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CERTIFICATE OF SERVICE

I certify that on this 10<sup>th</sup> day of May 2013, at approximately 11:35 am, 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 and aoccaj@nmcourts.gov and to the list of parties identified on the *Notice of Amended Services List* filed February 25, 2013.

*/s/ Natasha Cuylear*

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