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: Reply Memorandum in support of the Settlement Motion (filed on January 3, 2011).

NUMBER OF PAGES: 19

DATE OF FILING: May 24, 2013

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

The Navajo Nation and the United States jointly submit this reply 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 reiterate their request that the Court grant the Settlement Motion on the filings before the Court and enter the proposed Partial Final Decree and the proposed Supplemental Partial Final Decree (collectively "Proposed Decrees").[1]

[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

ARGUMENT

I. THE SETTLING PARTIES HAVE MET THEIR BURDEN TO ESTABLISH A *PRIMA FACIE* CASE IN THEIR MEMORANDA IN SUPPORT OF THE SETTLEMENT MOTION

The Proposed Decrees are "fair, adequate, and reasonable, and consistent with the public interest and applicable law." The Court charged the Settling Parties with demonstrating that the Proposed Decrees meet this widely applied standard for the approval of consensual settlements of legal claims by production of evidence on four elements of proof. The Settling Parties have met their evidentiary burden to make a *prima facie* showing on each element of proof in their Settlement Memoranda.[2] The Objectors have attempted to secure summary disposition of their objections by filing motions for summary judgment ("Objectors' Motions"). The Objectors have failed to meet their burden, by summary judgment motion or otherwise, to rebut the *prima facie* case established by the Settling Parties. The hearing scheduled by the Court to consider the Settlement Motion and the Objectors' dispositive motions will provide the Objectors with an adequate opportunity to air their concerns. The Court should grant the Settlement Motion and enter the Proposed Decrees without requiring additional evidentiary hearings.

A. The Settling Parties Have Complied with the Procedures Established by the Court for Presentation of the Settlement Motion

The Objectors' responses to the Joint Memorandum and to the State Memorandum argue that the Settling Parties failed to comply with Rule 1-056 NMRA and that the Settlement Motion

---

2, 2012. *See Settling Parties Notice of Filing Revised Proposed Supplemental Partial Final Decree*, Attachment (Revised Appendix 2*)*.

[2] *Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion* (filed Apr. 15, 2013) ("Joint Memorandum"); *State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees* (filed Apr. 15, 2013) ("State Memorandum") (together, "Settlement Memoranda").

must be denied.[3] The arguments of the Objectors ignore the explicit directives of the Court both as to the timing of the filing of the Settlement Memoranda and the respective burdens of the Settling Parties and the Objectors.[4] Other courts reviewing water rights settlements have applied a standard comparable to summary judgment.[5] Recognizing the unique procedural posture of a proceeding dealing exclusively with the approval of a water rights settlement, those courts have never required the parties seeking approval of a settlement to comply with the summary judgment procedures set forth in Rule 1-056.[6] As this Court recently observed, the Court developed case management procedures under Rule 1-016(C)(10) NMRA specifically "to guide this proceeding [that] by necessity diverge from the usual rules of civil procedure." *Order Striking Community Ditch Defendants' Answer and Counterclaim* (filed Feb. 15, 2013) at 4. The

---

[3] *Gary L. Horner's Response to the Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion* (filed May 10, 2013) ("Horner Response to NN/US") at 1; *Community Ditch Response to Purported Dispositive Motions filed by the Navajo Nation, the United States, and the Office of the State Engineer* (filed May 10, 2013) ("Community Ditch Objectors' Response") at 2-4; *Defendants B Square Ranch, LLC et al.'s Consolidated Response to Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion and to State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Decrees* (filed May 10, 2013) ("B Square Ranch Objectors' Response") at 9-12.

[4] *Third Amended Order Granting Motions to Extend Deadlines in Part and Setting Schedule Governing Discovery and Remaining Proceedings* (filed Mar. 15, 2013) (setting deadline of April 15, 2013, for filing Settling Parties' memorandum in support of the Settlement Motion); *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of* Proof (filed Apr. 19, 2012) ("Legal Standards Order") at 3 (determining that the Settling Parties have the initial burden of production at which point the burden shifts to the Objectors).

[5] *See, e.g.,* Special Procedural Order Providing for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes (filed May 16, 1991) ("Arizona Procedural Order"), *In re the General Adjudication the Rights to Use Water in the Gila River System and Source*, at ¶ D(2) (motion for summary disposition of objections granted "applying the standards for deciding motions for summary judgment under Ariz. R. Civ. P. 56").

[6] In contrast, Objectors filed their various motions for summary judgment in explicit reliance on Rule 1-056 NMRA and utterly failed to comply with the requirements of the Rule.

Settlement Memoranda comply fully with this Court's Orders and the Settlement Motion should be decided on the filings before the Court.

In a similar vein, the Community Ditch Objectors complain that the Settlement Memoranda are deficient because they do not address objections to the settlement filed with the Court. Community Ditch Objectors' Response at 2. Again, Objectors ignore this Court's direction. Surely, in placing the burden of production on the Settling Parties, the Court did not intend to require the Settling Parties, in addition to making their own case, to set up each of the objections as straw men, and then proceed to knock them down. [7] Instead, by permitting the Objectors to file their own dispositive motions, the Court provided a very straightforward mechanism for objections to be raised, developed, and argued in the proper posture. That is, the Objectors asserted their objections by motions for summary judgment, in which the burden of production falls on them as proponents of the motions. And only when the Objectors have met *their* burden to establish a *prima facie* case for their objections does the burden shift to the Settling Parties to rebut those objections. *See, e.g., State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶ 61-62, 141 N.M. 1, 150 P.3d 375 (employing summary judgment to judge the proposed settlement against the dispositive motions of parties opposing its approval).

---

[7] In this case, Objectors have filed literally hundreds of objections that do no more than provide the Court with bare notice of the nature of the objection. To the extent that the objections are more fully presented in the Objectors' Motions, authority cited by the Community Ditch Objectors (*quoted in* Community Ditch Objectors' Response at 2) clarifies that:

> A claimant is entitled to summary judgment only when no genuine issue of material fact exists, the papers on the motion demonstrate the right to relief, *and every one of the defenses asserted legally are insufficient.*

10B Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 2734 (emphasis added). Because each of the Objectors' Motions, and each of the objections asserted therein, is legally insufficient, the Court should grant the Settlement Motion.

As the Settling Parties demonstrated in their Responses to the Objectors' Motions,[8] not a single motion for summary judgment filed by any Objector meets this burden. Objectors' Motions should be summarily denied, thereby disposing of the objections to the settlement.

B. The Settlement Memoranda Satisfy the Settling Parties' Burden of Production on Each of the Four Elements of Proof Established by the Court

The Settling Parties separately and cumulatively address each of the elements of proof established by the Court to meet the "fair and reasonable" standard.

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

The first element, addressing whether "the Settlement Agreement[9] is the product of good faith, arms-length negotiations," is primarily a fact-based inquiry. The Settling Parties established the extensive history of the negotiations between the Navajo Nation and the State and the compromises made to reach agreement. Joint Memorandum at 12-18; State Memorandum at 6-9. Detailed in this history were the opportunities for public review and comment on the draft settlement, and further modifications to the terms of the settlement documents to mitigate impacts to non-Navajo water users. Joint Memorandum at 18-21. Finally, the Memoranda described the introduction of federal legislation to approve the settlement, which was reintroduced twice before ratification by Congress, and additional changes to the settlement made in efforts to secure the support of the Bush and Obama Administrations. Joint

---

[8] *Response of the Navajo Nation and United States in Opposition to the Summary Judgment Motions of Objectors* (filed May 10, 2013) ("Navajo-U.S. Response"); *Response of the Navajo Nation and United States in Opposition to Community Ditch Objectors' Conditional Motion to Dismiss* (filed May 10, 2013) ("Response to Motion to Dismiss"); *State's Consolidated Response to Motion Filed by Community Ditch Defendants, Gary L. Horner, Robert E. Oxford and Defendants B Square Ranch, LLC et al. on April 15, 2013* (filed May 10, 2013) ("State's Consolidated Response"); and *The United States' Response to Motions Seeking to Invalidate Bureau of Reclamation Water Rights* (filed May 10, 2013) ("U.S. Permit Response").

[9] "Settlement Agreement" refers to the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (Dec. 17, 2010).

Memorandum at 21-24; State Memorandum at 8-9. These facts are supported by the sworn affidavits of participants in the settlement negotiation and approval process that satisfy the requirements of Rule 1-056, NMRA. *See* Affidavit of John W. Leeper, Ph.D., P.E. and Affidavit of Christopher Banet (Joint Memorandum, Attachments A and B, respectively); Affidavit of John J. Whipple (attached to State Memorandum). These facts remain undisputed by the Objectors and should be considered established by the Court.

Objectors assert with a great deal of vehemence, but little by way of facts, that the Settlement Agreement was not the product of good faith, arms-length negotiations. Horner Response to NN/US at 9-10; Community Ditch Objectors' Response at 3; Affidavit of Jim Rogers at 2-3.[10] The thrust of their objection is that their comments on and concerns about the proposed settlement were not properly addressed. *Id.* Assuming, *arguendo*, the truth of Objectors' complaint, the fact that a particular comment was not addressed to the satisfaction of the commenter or a requested modification was not adopted by the Settling Parties does not undermine the legitimacy of either the negotiation process or the resulting settlement. *See United States v. Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (when a settlement affects third parties, "the court must be satisfied that the effect on them is neither unreasonable nor proscribed") (footnote omitted). As the Settling Parties have explained, while they are allied in support of the settlement now, they came to the negotiations with different policy concerns and objectives. Joint Memorandum at 13-14. And despite Mr. Horner's protestations to the contrary, Horner

[10] Mr. Horner in particular chides the Settling Parties for "rearguing" the standard of review, Horner Response to NN/US at 4, but then he goes on to argue that this first of four elements of proof established by the Court "really has no relevance in the present matter," *id.* at 10.

Response to NN/US at 31-41,[11] counsel for the Settling Parties are not only aware of their obligations to the public, but at all times acted in the public interest. Objectors have offered only rhetoric, but no evidence, to the contrary.

2. *Element Two – The Proposed Decrees will Reduce or Eliminate Impacts on Junior Water Users*

The Court's second element of proof requires the Settling Parties to demonstrate that "the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights." Element Two requires the Court to interpret the legal effect of the relevant provisions of the Settlement Agreement and Proposed Decrees. The Settling Parties devoted a significant portion of their Settlement Memoranda to detailing those provisions that were carefully crafted to mitigate the impacts on non-Navajo water users with junior water rights. Joint Memorandum at 18-19, 45-62. The fact that the Settlement Agreement and Proposed Decrees reduce impacts on junior water users is beyond dispute. The Court's second element of proof does not dictate the degree to which these impacts must be mitigated. However, the Settling Parties have demonstrated that the Settlement Agreement and Proposed Decrees include significant, meaningful protections for junior water users. The Settling Parties have met their evidentiary burden on Element Two.

The Settling Parties feel it necessary to respond, in the context of Element Two, to Mr. Horner's false and inflammatory claims about the potential impacts of the entry of the Proposed Decrees on non-Navajos. Mr. Horner argues that the if the "Navajo Settlement is approved, the Navajo Nation will end up with the right to most of the water in the San Juan Basin in New

[11] Mr. Horner's lengthy attack on the scruples of the Settling Parties can be dismissed as the untoward rant of a frustrated litigant. *Id.* at 43. However, his statements about the competence of the Court, "it is not clear that the Special Master, or possibly even the Court, appear to comprehend counsel for the Settling Parties' obligation to represent the public interest," *id.* at 31, are beyond the pale.

Mexico, and current water users will be required to pay the Navajo Nation for the water they currently use." Horner Response to NN/US at 30. Mr. Horner's argument should be dismissed as hyperbole for several reasons.

First, it is simply wrong to suggest that the Navajo Settlement would grant the Navajo Nation rights to most of the water in the Basin. On the contrary, almost all of the water rights recognized in the Proposed Decrees are for water the Navajo Nation has historically used or has the right to use pursuant to existing authorizations. *See Technical Assessment of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement* (filed Sept. 6, 2012) ("OSE Technical Assessment") at 1-2 ("The Settlement Agreement is based on currently existing or authorized federal water projects."); *State of New Mexico's Revised Statement of Legal and Factual Bases for Settlement* (filed Sept. 6, 2012) ("State's Bases") at 3 ("With the settlement, the Navajo Nation accepts essentially the quantity that it currently has a right or authorization to use or develop.") The water rights of the Navajo Nation in the Proposed Decrees fit within the State of New Mexico's compact apportionment "without displacing existing and authorized non-Navajo water uses in the San Juan River Basin in New Mexico." OSE Technical Assessment at 23. In other words, it is plain that the water currently used by the non-Navajo water users *will not* be taken by the Navajo Nation as a consequence of entry of the Proposed Decrees.

Second, there are admittedly times when the water supply in the San Juan River is insufficient to satisfy all uses, "usually in late summer to early fall." *Id.* at 30. Litigation that recognizes a large senior Navajo water right without agreed-to administrative limitations could result in greater potential for priority calls against junior non-Navajo users. *Id.* at 30. In contrast, the settlement is structured so that almost 90% of the Navajo Nation's water rights are

subordinated and *junior* to non-Navajo water users. *See* Joint Memorandum at 46-50. All of the water rights recognized in the Echo Ditch Decree of 1948 would remain senior to almost 90% of Navajo Nation's water rights. *Id.* at 50.

In sum, under the settlement, existing non-Navajo water users would be entitled to make diversions pursuant to their senior water rights before the Navajo Nation could exercise its junior priority. The Navajo Nation has agreed to additional limitations on the remaining 10% of the Navajo rights that *are* senior to the current users, *i.e.* the water rights for the Hogback and Fruitland Projects. The Navajo Nation has agreed to satisfy up to 12,000 acre-feet per year ("afy") of those rights using its Navajo Reservoir contract storage rights before asserting a priority call against any junior users. Settlement Agreement, ¶ 9.2 ("Alternate Water Source").[12] The State estimates that the Alternate Water Source will significantly reduce the potential for Navajo priority calls. Without the Alternate Water Source, the possibility of a priority call is

[12] In response to the State Memorandum, Mr. Horner asserts the " 'Alternate water' offers no significant protection for 'directflow' users below Navajo Dam." *Gary L. Horner's Response to the State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees* (filed May 10, 2013) ("Horner Response to State") at 20. Aside from the fact that this assertion is based on pure speculation, supported only by an affidavit signed and notarized by Mr. Horner himself, his conjecture is based in large part on the erroneous assumption that the Alternate Water Source provisions of Paragraph 9.2 of the Settlement Agreement are available only when "Navajo Reservoir levels exceed 1,000,000 af on May 1 of any given year." *Id.* at 21. Mr. Horner confuses the Administration of Navajo Reservoir release provisions of Paragraph 9.1 that allow the State Engineer to make up to 225 cfs of releases from Navajo Reservoir available to direct flow diverters only when there is at least 1,000,000 acre-feet of storage available in Navajo Reservoir on May 1, with the Alternate Water Source provisions of Paragraph 9.2 of the Settlement Agreement. There is no requirement of any particular storage level in Navajo Reservoir as a condition to the Alternate Water Source. *See* Settlement Agreement ¶ 9.2.

Mr. Oxford's affidavit is similarly flawed, alleging "Mr. Leeper's Affidavit (paragraph 73) fails to mention that if Navajo Reservoir does not contain 1,000,000 acre-feet of water in storage on May 1st of each water year, the 12,000 acre-feet concession by the Navajo's to release to satisfy the Hogback-Cudei and Fruitland's diversion demand of 321 cfs will not be available." Affidavit of Robert E. Oxford (filed May 10, 2013) at 4, ¶ 14. Dr. Leeper's Affidavit does not mention such a 1,000,000 acre-feet storage requirement because there is none.

projected in approximately one year out of two in order to satisfy the water rights at the Hogback and Fruitland Projects. *See* OSE Technical Assessment at 30-31; OSE Responses to Public Comments, Appendix D; State's Bases at 14. With the Alternate Water Source, a conservative estimate is that the potential for a priority call would occur in only one year out of twenty. *Id.* Consequently, the water currently used by non-Navajos will be more protected from potential Navajo priority calls under the settlement than without the settlement so those water users are less likely to "pay the Navajo Nation [or anyone else] for water they currently use" (*quoting* Horner Response to NN/US at 30).

Finally, Mr. Horner mischaracterizes the impetus for the Navajo settlement as "the generation of revenues, just like that was the point of the Jicarilla Settlement and Decree." Horner Response to State at 16. The Jicarilla settlement decree consisted of 40,000 afy of water to be satisfied from a contract from the Navajo Reservoir supply with no identified purpose or place of use. *Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe* (Feb. 24, 1999) ("Jicarilla Decree") at 3, ¶ 3(a). The Jicarilla Decree also included 5,682.92 afy for historic uses identified in the United States' Hydrographic Survey Report prepared for the Jicarilla Apache Tribe (filed Nov. 3, 1997). *Id.* at 4, ¶ 4. In contrast, all of the water in the Navajo Proposed Decrees is needed for, specific current and authorized uses. The water rights described in the Partial Final Decree are for irrigation uses at NIIP and the Hogback and Fruitland Projects, or for municipal drinking water uses. Partial Final Decree at ¶¶ 3(a), 3(e) and (f), and 3(b), (c), (d) and 7, respectively. The water rights recognized in the Supplemental Partial Final Decree can only be transferred to new uses within the same tributary or ground water source. Supplemental Partial Final Decree, ¶¶ 12(a)(2) & (b)(3). The Navajo Nation cannot market water rights recognized in the Proposed Decrees without impairing existing and

authorized Navajo uses that are necessary to establish a permanent homeland for the Navajo people. Mr. Horner's concerns are unfounded.

3. Element Three – There is a Reasonable Basis to conclude that the Settlement Agreement and Proposed Decrees Recognize Water Rights that are Less Substantial than the Potential Claims that could be secured at Trial

Element Three requires the Settling Parties to prove that "there is a reasonable basis to conclude that the Settlement Agreement and Proposed Decrees provide for less than the potential claims that could be secured at trial." Objectors appear to construe this element of proof to expand the scope of this expedited *inter se* subproceeding and to allow challenges to the attributes (e.g., quantity, priority, characteristics of Indian reserved rights, purpose and place of use, and terms of administration) of every water right recognized in the Settlement Agreement and Proposed Decrees. However, in considering whether to enter the Proposed Decrees, the Court should not reach the merits of Objectors claims and instead must decide the single issue before the Court in this subproceeding "on the basis of legal principles regulating judicial review of settlement agreements." *Airlines Stewards And Stewardesses Ass'n, Local 550, TWU, AFL-CIO v. American Airlines, Inc.*, 573 F.2d 960, 962 (7th Cir.) *cert. denied sub nom. Ass'n of Professional Flight Attendants v. Airline Stewards and Stewardesses Ass'n, Local 550, TWU, AFL-CIO,* 439 U.S. 876 (1978).

Element Three appears to have its genesis in the report of the Special Master. In considering the scope of this subproceeding, the Special Master cited *In re Wireless Telephone Federal Cost Recovery Fees Litigation*, 396 F.3d 922, 932-33 (8th Cir. 2005) for the proposition that "[t]he district court need not make a detailed investigation consonant with trying the case; it must, however, provide the appellate court with a basis for determining that the decision rests on

'well-reasoned conclusions' ...." Special Master's Report[13] at 21. The Special Master observed that a "limited merits based review is particularly important in the context of a contested tribal water rights settlement so as to ensure that the water rights awarded under the settlement are no more extensive than the tribe could establish at trial." *Id.* The Special Master cited with approval the Arizona Supreme Court's decision in *In re the General Adjudication of All Rights to Use Water in the Gila River System*, 217 Ariz. 276, 173 P.3d 440 (Ariz. 2007) ("*Gila VII*"), and that Court's holding that the "trial court properly relied on [the] statement of claim filed by the United States on behalf of the tribe" in determining that the "water rights established in the settlement agreement do not exceed that which could be proved at trial." Special Master's Report at 21.[14]

It was this analysis by the Special Master, and his observation that "[n]o information concerning the claims of the Navajo Nation is on file with the Court" other than the exhibits attached to the Joint Motion, that led directly to the inclusion in the Special Master's proposed order of the requirement of additional disclosures by the Settling Parties, to include a hydrographic survey and statement of claims prepared by the United States. *Id.* and Exhibit A (Special Master's Proposed Order) ¶ 5 at 4-5. This part of the Special Master's Proposed Order was adopted by the Court in its *Order Establishing Initial Procedures for Entry of Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (filed Aug. 19, 2010), § II(B) at 12-14. The Special Master's discussion of the need to compare the Settlement Agreement

---

[13] *Special Master's Report Concerning Joint Motion for Order Governing Initial Procedures for Entry of Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (filed Apr. 15, 2010) ("Special Master's Report").

[14] The *Gila* Court made its determination in reliance on the Arizona Procedural Order, *supra*, n.4.

against fact-based assessments of the Nation's claims laid the foundation for the Court's adoption of Element Three.

To further assist the Court in its evaluation of the settlement, the State offered to prepare an analysis of the legal bases for the settlement, which the Court accepted. *See* State's Bases; OSE Technical Assessment. Around this same time, the United States filed the fifteen technical reports underlying the U.S. Statement of Claims.[15] *See 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* (filed Jan. 30, 2012). The claims asserted by the United States on behalf of the Navajo Nation far exceed the Navajo water rights recognized in the Proposed Decrees. *See* Joint Memorandum at 31-32. The current uses of the Navajo Nation, as determined by the State, are also less that the Navajo water rights recognized in the Proposed Decrees. *See* State Memorandum at 4-5. In considering Element Three, the Court should limit its inquiry to whether the U.S. Statement of Claims, including the fifteen technical reports underlying it, and the State's Bases, supported by the OSE Technical Assessment, provide a "reasonable basis" to conclude that the water rights in the Settlement Agreement and Proposed Decrees are less than the potential claims that the Nation could secure at trial. The record before the Court demonstrates establishes a reasonable basis to reach this conclusion.

In reliance on the same standard adopted by the Court in Element Three, the Arizona Supreme Court in *Gila VIII* concluded that because the settlement under consideration provided the Gila River Indian Community ("GRIC") with water rights that were less than the water

[15] "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).

rights claimed on its behalf by the United States and less than GRIC's current uses as determined by the Arizona Department of Water Resources, "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'." *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source,* 224 P.3d 178, 187 (Ariz. 2010) (*quoting* Arizona Procedural Order § (D)(6)(a)). [16] Because the Navajo Nation water rights recognized in the Proposed Decrees are less than the water rights asserted in the U.S. Statement of Claims and less than current Navajo water uses determined by the State, the Settling Parties have met their evidentiary burden on Element Three.

4. Element Four – The Settlement Agreement and Proposed Decrees are Consistent with Public Policy and Applicable Law

The final element of proof requires the Settling Parties to demonstrate that "the Settlement Agreement is consistent with public policy and applicable law." This is a purely legal question. The Settlement Memoranda establish that federal law is determinative of Indian reserved rights. The Memoranda also demonstrate that federal laws governs federal reclamation projects within the State, and that the United States has complied with applicable State law in securing permits to make diversions from such projects. Finally, the Memoranda describe the policy considerations that led the Navajo Nation and the United States to make significant concessions on the Nation's reserved water rights claims so that the water rights recognized in the Settlement Agreement and Proposed Decrees would fit within New Mexico's compact

[16] The fifteen technical reports prepared by the experts for the United States provide the Court with far more information, to compare the proposed settlement rights with the rights that might be secured at trial, than was available to the court in the Gila Adjudication. In construing the Indian water rights settlements at issue in both *Gila VII* and *Gila VIII*, the adjudication court relied only on the statement of claims filed on behalf of the tribes and the technical assessment of the settlement conducted by the Arizona Department of Water Resources.

apportionment and would not unduly burden existing water users. Complaints by the Objectors that the law is not as they wish it were and arguments to the Court urging changes to established law, no matter how extensive, will not suffice to overcome the *prima facie* case established by the Settling Parties.

II. THERE IS NO NEED FOR AN EVIDENTIARY HEARING IN THIS SUBPROCEEDING

Any hearing on whether to approve the Settlement Agreement and Proposed Decrees

> is not a trial, but instead has a very singular and narrow purpose—to determine whether the settlement at issue is fair, reasonable, and adequate. Historically, courts have commonly relied on affidavits, declarations, arguments made by counsel, and other materials in the record without also requiring live testimony.

UAW v. General Motors Corp., 235 F.R.D. 383, 387 (E.D. Mich. 2006) (discussing requirements of "fairness" hearing in class action settlement required by Rule 23, Fed. R. Civ. P), *aff'd* 497 F.3d 615 (6th Cir. 2007). There is absolutely no requirement that such a settlement hearing "entail the entire panoply of protections afforded by a full-blown trial on the merits." *Id.* 235 F.R.D. at 386 (quoting *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 567 (6th Cir. 2001)). And as the Second Court of Appeals determined in *Handschu v. Special Serv. Div.*, 787 F.2d 828, 834 (2d Cir. 1986), "it would be inconsistent with the salutary purpose of settlement to conduct a full trial in order to avoid one."

The Objectors argue that the affidavits and other documentation offered by the Settling Parties in support of the Settlement Motion fail to comport with the Rules of Evidence on hearsay, competency, and other admissibility grounds. Community Ditch Objectors' Response at 4-6; Horner Response to NN/US at 42-43; B Square Ranch Objectors' Response at 11-12. The Objectors' point appears to be that these materials do not provide the Court with an adequate foundation upon which to determine whether the settlement should be approved. However that

argument is unavailing because in proceedings to consider approval of a settlement "objectors [are] not entitled to live testimony and cross-examination of all declarants." *Union Asset Management Holding A.G. v. Dell, Inc.*, 669 F.3d 632, 642 (5th Cir.) (citation omitted), *cert. denied*, 133 S.Ct. 317 (2012); *see also UAW*, 235 F.R.D. at 387 (rejecting objector's arguments – like those of Objectors here – that affidavits and expert declarations were insufficient to support approval of settlement based on allegations of hearsay, and failure to comply with Rule 702, Fed. R. Evid., and the disclosure requirements of Rules 37 and 26(a)(2), Fed .R. Civ. P.). "The growing rule is that the trial court may limit its proceedings to whatever is necessary to aid it in reaching an informed, just and reasoned decision." *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990) (rejecting settlement objector's argument that it should have been allowed the opportunity to cross-examine witnesses whose testimony was presented by affidavits) (*quoting Cotton v. Hinton*, 559 F.2d 1926, 1931 (5th Cir. 1977)). "[A]n [objector] is not entitled, as a matter of right, to an evidentiary hearing during a settlement hearing." *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187 (10th Cir.2002) (*quoting Jones v. Nuclear Pharm., Inc.*, 741 F.2d 322, 325 (10th Cir. 1984). "Although the right to be heard is an integral part of due process, an [objector] is not entitled to dictate to the court the precise manner in which he is to be heard." *Jones*, 741 F.2d at 325.

The record before the Court is more than sufficient for the Court to find that the Settlement Agreement and Proposed Decrees represent a "reasonable factual and legal determination." *Oregon*, 913 F.2d at 581 (quoting *Miami*, 664 F.2d at 441). The hearing scheduled for June 11 and 12, 2013, will allow ample opportunity for supplementation of the existing record in a manner consistent with the narrow purpose of this expedited *inter se* subproceeding. No more is required.

Out of concerns stemming from the magnitude of the Navajo Nation water rights, the nature of this subproceeding, and the large number of participants, the Court imposed an unprecedented and unusually rigorous standard for approval of the Settlement Motion and entry of the Proposed Decrees. Legal Standards Order at 2-3. First, the Court placed on the Settling Parties the burden of proving by a preponderance of the evidence that the Proposed Decrees are "fair, adequate, and reasonable, and consistent with public interest and applicable law." *Id.* at 1-3. Second, Objectors were permitted to oppose the Settlement Motion without having to demonstrate injury to their water rights, or, in fact, any injury at all. *Id.* at 3. Third, the majority of decisions hold that a settlement agreement is entitled to deference – and the burden to demonstrate that the settlement is not fair and reasonable shifts to the Objectors – once parties moving the approval of a settlement have demonstrated that the settlement was achieved through good faith arms-length negotiations. *See, e.g., Oregon*, 913 F.2d at 581 (and additional cases cited therein). Here the Court accorded the Proposed Decrees no deference at all. Nevertheless, as demonstrated above, the Settling Parties have met the burden of production and persuasion in support of the Settlement Motion in a manner consistent with the Court's Orders. Under these circumstances, an evidentiary hearing on the merits of the settlement is unnecessary.

CONCLUSION

The Objectors have failed to rebut the *prima facie* case established by the Settling Parties, or to adequately support their separate motions for summary judgment. Broad claims that the settlement is unfair to the Objectors, or more generally to non-Navajos —a proposition that the Settling Parties deny—without more, do not suffice. There are striking parallels between this Navajo *inter* se and the proceedings to approve the Lummi Indian Nation's water rights

settlement. There the federal district court, after considering the objections of non-Indian landowners in that case, observed:

> The pro se defendants also complain that the Settlement Agreement is weighted too heavily in favor of the Lummi Nation, which is permitted to use its water for any purpose, including casinos and hotels. The perception of unfairness, however, appears to relate more to past interactions with the Lummi Nation and dissatisfaction with the course of negotiations in this case than to any substantive deficiency in the Settlement Agreement. When viewed through a less tainted lens, the Settlement Agreement exhibits a balance rarely seen in litigation concerning a precious and potentially scarce commodity; it preserves the resource rights of the Lummi Nation, while guaranteeing existing users a sufficient amount of water for their needs and making water available for a limited number of future users. The pro se objectors fail to explain how their concerns would be in any way better addressed by trial in this matter.

United State ex rel. Lummi Indian Nation v. Washington, 2007 WL 3273545, *7-8 (W.D. Wash. 2007), *aff'd* 328 Fed. Appx. 462 (9th Cir. 2009). Similarly, here the Proposed Decrees before the Court represent a balanced and responsible approach to the water rights claims of the Navajo Nation that also provides a significant measure of security for non-Navajo water users.

For all the foregoing reasons, as well as those set forth in the Settlement Memoranda, Navajo-U.S. Response, Response to Motion to Dismiss, State's Consolidated Response, and U.S. Permit Response, the Settling Parties request the Court to grant the Settlement Motion and enter the Proposed Decrees.

/

/

/

/

/

Respectfully submitted this 24th day of May, 2013.

NAVAJO NATION

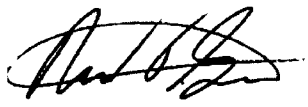
Stanley M. Pollack
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Navajo Nation (AZ) 86515

M. Kathryn Hoover
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Navajo Nation (AZ) 86515
(928) 871-7510

Samuel D. Gollis
Samuel D. Gollis, Attorney at Law, P.C.
901 Rio Grande Boulevard, Suite F-144
Albuquerque, New Mexico 87104
(505) 883-4696

Attorneys for the Navajo Nation

UNITED STATES OF AMERICA



Andrew J. "Guss" Guarino
U.S. Department of Justice
Environment & Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
(303) 844-1343

Attorney for the United States of America

CERTIFICATE OF SERVICE

I certify that on this 24th day of May, 2013, an electronic version of *Reply Memorandum of the Navajo Nation and United States in Support of the Settlement Motion* was served by electronic mail to: wrnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the list of parties identified on the Notice of Amended Service List (filed Feb. 25, 2013).

Stanley M. Pollack