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

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

NAME OF PARTY: State of New Mexico *ex rel.* State Engineer ("the State").

DESCRIPTIVE SUMMARY: State's *Consolidated Reply to Responses Filed by Community Ditch Defendants, Gary L. Horner, Robert E. Oxford and Defendants B Square Ranch, LLC.*

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STATE'S CONSOLIDATED REPLY TO RESPONSES FILED BY COMMUNITY DITCH DEFENDANTS, GARY L. HORNER, ROBERT E. OXFORD AND DEFENDANTS B SQUARE RANCH, LLC ET AL. ON MAY 10, 2013

The State of New Mexico *ex rel.* State Engineer ("State") submits this consolidated response to *Community Ditch Response to Purported Dispositive Motions Filed by the Navajo Nation, the United States, and the Office of the State Engineer; Gary L. Horner's Response to the State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees*; *Robert E. Oxford's Response to the Settling Parties Memorandums in Support of the Settlement Motion;* and *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 Final Decrees, filed on May 10, 2013.

I. The State's Dispositive Motion Meets the Requirements Established by the Court.

Community Ditch Defendants, Gary L. Horner and Defendants B Square Ranch, LLC *et al* claim that the State's Memorandum should be denied for failure to comply with the requirements of Rule 1-056 NMRA. *See Community Ditch Response to Purported Dispositive Motions Filed by the Navajo Nation, the United States, and the Office of the State Engineer ("Community Ditch Response")* at 2; *Gary L. Horner's Response to the State of New Mexico's Memorandum in Support of Settlement Motion For Entry of Partial Final Decrees* ("*Horner Response*") at 1; *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 Final Decrees* ("*B Square Ranch Response*") at unnumbered 8-10. As set forth in the *Reply Memorandum of the Navajo Nation and United States in Support of the Settlement Motion*, filed May 24, 2013, in which the State concurs, the State has fully complied with the Court's scheduling and procedural orders in this case requiring the Settling Parties to submit a "*Memorandum in Support of the Settlement Motion of the United States, Navajo Nation, and State of New Mexico for Entry of Partial Final Decrees, filed January 3, 2011.*" *See Third Amended Order Granting Motions to Extend Deadlines in Part and Setting Schedule Governing Discovery and Remaining Proceedings.* For this reason and the reasons set forth below, the Court should grant the Settlement Motion and enter the Proposed Decrees.

II. The Settling Parties Have Met Their Burden to Show That the Settlement Agreement is The Product of Good Faith, Arms-Length Negotiations.

Pursuant to the Court's April 19, 2012 *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decree and Respective Burdens*, the Settling Parties have provided ample evidence that the Settlement Agreement is the product of good faith, arms-length negotiations. As set forth in the *State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees*, filed April 15, 2013 ("State's Memorandum"), the agreement is the result of extensive negotiations and governmental processes spanning nearly fifteen years. *See State's Memorandum* at 6-8. These lengthy and often difficult negotiations led to significant concessions by the Navajo Nation and the United States. Through the negotiation process, the State succeeded in persuading the Navajo Nation and United States to give up expansive senior claims to additional water. *See Id.* at 9-11 and 26-31. In exchange for funding of the Navajo-Gallup Project, the Navajo Nation agreed to limit the quantity of its water rights to the amount for already-existing uses and authorized projects, to limit its priority calls, to share in shortages and to comply with state administration of water. *See Id.* at 11-26 and 30-39. These results could not have been achieved without good faith, arms-length negotiations.

Furthermore, the State engaged in an extensive public process that included numerous public meetings in the San Juan Basin, meetings with individual water user groups, and multiple opportunities to provide comments on the proposed settlement. *See Id; Affidavit of John J. Whipple ("Whipple Affidavit")* at 21-26*; Exhibit ("Ex.") 7 to Whipple Affidavit, Press Release, Public Comments Sought, Dec. 5, 2003; Ex. 8 to Whipple Affidavit, Press Release, Public Comments Available for Review, Feb. 2, 2004; Ex. 9 to Whipple Affidavit, Press Release, ISC Commissioners Meet in Special Session, Feb. 6, 2004; Ex. 10 to Whipple Affidavit, Timeline of the San Juan Agricultural Water Users Association's Participation in Activities Relating to the*

Navajo Nation Water Rights Settlement; Ex.11 to Whipple Affidavit, Minutes of the New Mexico Interstate Stream Commission, March 17, 2004; Ex. 12 to Whipple Affidavit, Press Release, Revised Proposed Settlement Available for Inspection, July 12, 2004; Ex. 13 to Whipple Affidavit, Press Release, Revisions to Be Reviewed at Farmington Civic Center, July 26, 2004; Ex. 14 to Whipple Affidavit, Memorandum by John Whipple dated Aug. 9, 2004, to the SJAWUA's Board. The draft Settlement Agreement was revised based on public input following each round of public comment. *See Whipple Affidavit* at 24-25*; Ex. 6 to Whipple Affidavit, Responses to Public Comments Received on Drafts of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement, Dec. 10, 2004 ("Ex. 6").*

Nonetheless, Community Ditch Defendants and Gary L. Horner contend the public participation process conducted by the State was inadequate and that public comments were not considered. *See Affidavit of Jim Rogers*, filed May 10, 2013 ("*Rogers Affidavit*") at 2, 6; *Horner Response* at 12-13. The State's evidence thoroughly refutes these arguments. In addition to allowing multiple opportunities for public input, the State gave careful consideration to every public comment that was received. The State prepared and made available to the public lengthy summaries of the public comments, with detailed responses to each comment. *See Whipple Affidavit* at 24, 26; *Ex. 6.* The State also provided individual responses to specific concerns. *See Ex. 14 to Whipple Affidavit, Memorandum by John Whipple dated August 9, 2004, to the SJAWUA's Board, Supplemental Whipple Affidavit of John J. Whipple,* filed with this brief ("*Supplemental Whipple Affidavit*"), at 3. All comments were made available to the public for review at the time and were also produced by the State in discovery. *See Whipple Affidavit* at 21; *Ex. 8 to Whipple Affidavit, Press Release, Public Comments Available for Review, Feb. 2, 2004, Supplemental Whipple Affidavit* at 2. In addition, oral comments made by the public at Interstate

Stream Commission meetings were documented in meeting minutes and were produced by the State in discovery. *See Ex.11 to Whipple Affidavit; Ex. 15 to Whipple Affidavit, Minutes of the New Mexico Interstate Stream Commission, Aug.17-18, 2004; Ex. 18 to Whipple Affidavit, Minutes of the New Mexico Interstate Stream Commission, Jan. 12, 2005, Supplemental Whipple Affidavit* at 2-3.

Following a final round of public comment in December 2004, the Settlement Agreement was again substantially revised. *See Ex. 6.* Provisions of the draft Settlement Agreement that were modified based upon public input include: clarification that lease and transfer of Navajo Nation's water rights for other uses in New Mexico are permitted, but not out-of-state without the State's consent (*Ex. 6* at 13); requirement of return flows reaching the San Juan River from the Navajo Indian Irrigation Project ("NIIP") (*Ex. 6* at 15-16); allocations of water for the Navajo-Gallup Water Supply Project during shortages (*Ex. 6* at 33); treatment of shortages for the San Juan-Chama Project (*Ex. 6* at 35); the provision of a top water bank (*Ex. 6* at 38); providing for the use of "alternate water" for Fruitland and Hogback Projects (*Ex. 6* at 39; *Supplemental Whipple Affidavit* at 8, 16); inclusion of a farm delivery requirement for the Fruitland and Hogback Projects consistent with the rights adjudicated by the Echo Ditch Decree (*Ex. 6* at 44; *Supplemental Whipple Affidavit* at 16); inclusion of a maximum ditch diversion rate of 100 cfs for the Fruitland Project (*Ex. 6* at 47) and 221 cfs for the Hogback Project (*Ex. 6* at 48); limitations on the diversion of carriage water (*Ex. 6* at 49); inclusion of a provision that the Navajo Nation would not exercise a portion of its water rights in an amount equal to any over-allocation of New Mexico's apportionment under the Upper Colorado River Basin Compact (*Ex. 6* at 52); an agreement by the Navajo Nation to not exercise a portion of its water rights if a call is made for the purpose of meeting the State's obligations under interstate compacts (*Ex. 6* at

54); the inclusion of annual diversion and depletion amounts for NIIP (*Ex. 6* at 66); an agreement by the Navajo Nation to not challenge certain provisions in the Echo Ditch Decree and to adhere to the State's administration of the Echo Ditch Decree (*Ex. 6* at73); removal of a condition regarding "alternate water" for Fruitland and Hogback Projects (*Ex. 6* at 77-78); clarifications regarding ownership of storage rights under federal projects (*Ex. 6* at 80); and clarification that Settlement Act does not affect section 208 of Public Law 108-137(*Ex. 6* at 87). Where public comment did not lead to negotiated modifications of the Settlement Agreement, the State addressed in detail the rationale for specific provisions in the Settlement Agreement. *See Ex. 6.*

Community Ditch Defendants and Horner provide no facts or credible evidence contradicting the State's evidence. Horner offers nothing more than his own self-notarized affidavit certifying that he personally prepared his pleadings and exhibits in this matter, and Community Ditch Defendants offer as their only evidence a statement comprised of hearsay and the uncorroborated opinions and perspective of one water user. *See generally Affidavit of Gary L. Horner, P.E., P.S., Esq.*, filed May 10, 2013*; Rogers Affidavit.* Rogers provides no facts to support his contention that the State's description of the negotiation process and the public review and input process was factually incorrect or misleading. As set forth above, the evidence provided by the State demonstrates that Rogers' perceptions regarding the adequacy of the public process are inaccurate. *See also Supplemental Affidavit of John J. Whipple.*

Likewise, there is no truth to Rogers' claims that "[t]he OSE and the ISC have finally admitted that the proposed agreement does not prevent the Navajo Nation from exporting the water if they are awarded it. They deliberately deceived the legislature and the public and us on this key issue for years, in order to get the agreement signed." *See Rogers Affidavit* at 3. The evidence indisputably demonstrates that far from "deceiving the legislature and the public", the

State has been clear from the beginning that the Settlement Agreement does not prohibit such exports, but instead imposes new contractual restrictions on the Navajo Nation's possible export of water from New Mexico that are in addition to existing limitations on all water right owners under federal and state law. *See Whipple Ex. 24, OSE fact sheet, Restrictions on the Export of Water from New Mexico, Nov. 5, 2007*; *Supplemental Whipple Affidavit* at 3.

Moreover, Rogers' statements regarding Tom Turney are inadmissible hearsay (*Rogers Affidavit* at 3). *See* Rule 11-802 NMRA; *Steck v. Home Indemnity Co.*, 74 N.M. 419, 421 (1964); *Seal v. Carlsbad Independent School Dist.*, 116 N.M. 101, 105 (1993). Community Ditch Defendants have not provided an affidavit or other evidence from Mr. Turney stating his position regarding the availability of water for the Navajo Nation water rights settlement. In fact, as New Mexico State Engineer, in 2001 Mr. Turney made presentations to water right owners in the San Juan River basin that a Navajo Nation settlement would include completion of the NIIP, the Navajo-Gallup Project and rehabilitation of the Hogback and Fruitland Projects. *See Ex. 3 to Whipple Affidavit, Comments of Thomas C. Turney Before the San Juan Water Commission, Aug. 21, 2001* at 4; *Supplemental Whipple Affidavit* at 7-8.

The evidence provided by the State demonstrates that the Settling Parties have met their burden that the Settlement Agreement is the product of good faith, arms-length negotiations. Far from attempting to mislead or deceive the public, the State has made a concerted effort to engage and inform the public in a cooperative and transparent process. No party has come forward with any credible evidence contradicting the State's evidence.

III. The Settling Parties Have Met Their Burden to Show That the Provisions Contained in the Settlement Agreement and the Proposed Decrees Will Reduce or Eliminate Impacts on Junior Water Rights.

The State has provided sufficient evidence to demonstrate that provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights.[1] A key objective for the State in negotiating the settlement was to obtain protections for non-Navajo junior water right owners. *See Whipple Affidavit* at 12. To that end, the Settlement Agreement contains significant protections for junior water rights. *See Id.* at 12-18. As demonstrated in the Technical Assessment, the Navajo Nation's water rights under the settlement are limited to the approximate amount, or less, of the total amount of their existing uses or authorizations. *See Id.* at 12-13.

Horner claims that the subordination of the Navajo Nation's 1868 priority date to junior priority dates associated with water stored in Navajo Reservoir and Lake Nighthorse is "misleading" because "pursuant to the State's concept of 'direct flow' and 'storage water Administration', storage water trumps senior rights in every instance." *See Horner Response* at 10. Robert E. Oxford makes similar arguments regarding the storage of water in Navajo Reservoir in his response. *See Oxford Response* at 2-3. The settlement's reliance on stored water, however, complies with requirements of New Mexico law that impoundment and release of water in storage may not harm prior existing water uses. The State has thoroughly addressed these issues in the *State's Consolidated Response to Motions Filed by Community Ditch Defendants, Gary L. Horner, Robert E. Oxford and Defendants B Square Ranch, LLC et al on April 15, 2013* ("*State's Consolidated Response*") *See State's Consolidated Response* at 11-19.

[1] While the Navajo Nation and United States have produced additional evidence in support of the legal standard, the State addresses only its own evidence in this Reply.

For the reasons set forth in the *State's Consolidated Response*, Horner's and Oxford's arguments have no merit.

A significant protection to junior water rights right owners under the settlement is the effective limitation of diversions by NIIP to 353,000 acre-feet per year ("afy") instead of the federal statutory amount of 508,000 afy. *See Whipple Affidavit* at 15; *Supplemental Whipple Affidavit* at 12. Horner claims this protection is illusory because there "is no federal statutory 508,000 af/y water right or authorization for NIIP" and the "limitation simply imposes the requirement that the Navajo Nation obtain approval for the use of NIIP water under certain conditions, when the diversions exceed 353,000 af/y." *See Horner Response* at 15. In fact, Public Law 87-483 authorizes the diversion of 508,000 afy, as does the NIIP water supply contract with the United States Bureau of Reclamation. Furthermore, any approval by the State Engineer of a permit for the Navajo Nation to divert more than 353,000 afy is subject to non-impairment of other water rights pursuant to paragraph 5(e)(4) of the Proposed Decree. Thus, there is no merit to Horner's claim.

An important settlement protection is the requirement in Paragraph 9.2 of the Settlement Agreement that the Navajo Nation use up to 12,000 afy of "alternate water" from storage for NIIP before making a priority call for the Hogback and Fruitland Projects. *See State's Memorandum* at 16-17. Several objectors respond that this provision does not provide real protection because they assert incorrectly that it does not apply when less than a million acre-feet is in storage. *See Horner Response* at 19-24, *Oxford's Affidavit* at para. 14, and *Rogers Affidavit* at paras. 11 and 14. These objectors simply are confusing Paragraphs 9.1 and 9.2 of the Settlement Agreement.

The million acre-foot requirement applies to Paragraph 9.1 but not to Paragraph 9.2. Under paragraph 9.1, the State Engineer has authority to administer reservoir releases of up to 225 cubic-feet-per-second ("cfs") for the benefit of direct flow diverters, even when inflows to the reservoir are at a lesser rate, so long as storage exceeds 1 million acre-feet. But that is not a requirement under Paragraph 9.2. The "alternate water" provision applies even when storage is below a million acre-feet. The availability of "alternate water" is instead tied to shortages allocated to NIIP deliveries by the Secretary pursuant to the Act of June 13, 1962, Section 11. As a result, the State's Technical Assessment shows that the "alternate water" protection is real and significant. *See Ex. 6 at Appendix D.* Using the historic hydrograph as a model, and applying the alternate water provision, shortages to direct flow water users might have occurred only under the driest years, 1956, 1959, 2002 and 2003. *See Supplemental Whipple Affidavit* at 11. The "alternate water" requirement provides significant protection to non-Navajo water right owners by avoiding or delaying possible priority calls.

Horner further argues that the data in the 2007 Hydrologic Determination was manipulated to "find enough water" available for the settlement. *See Horner Response* at 63-65. This is simply untrue, and irrelevant to this *inter se* proceeding. The Settlement Parties' *Settlement Motion* does not require the Court to review or evaluate the 2007 Hydrologic Determination. As described in the *State's Consolidated Response* at 7, Mr. Horner's attacks on federal contracts and authorizations and on State Engineer permits miss the point. Likewise, the 2007 Hydrologic Determination is not the basis for the Proposed Decrees. The U.S. Bureau of Reclamation has authority to enter into contracts for water from Navajo Reservoir supply regardless of the Navajo settlement.[2] Furthermore, it is important to understand that the purpose

[2] Nonetheless, the State firmly believes the 2007 Hydrologic Determination was properly carried out. It simply identified and addressed a technical inconsistency in the 1988 Hydrologic Determination which resulted in an

of hydrologic determinations prepared pursuant to PL-87-483 is not to determine the amount of water available for appropriation from the San Juan River in New Mexico. Rather, they fulfill a Reclamation contracting requirement by evaluating whether it is reasonably likely that sufficient water will be available from Navajo Reservoir storage to satisfy a proposed water supply contract. Such a determination has no effect on prior existing water rights, including the supply available to direct flow diverters.

Likewise, there is no merit to Horner's complaint that "if the San Juan Basin in New Mexico is required to reduce its use of water [to meet New Mexico's obligation under the Upper Colorado River Basin Compact], it would probably not be the Navajo Nation that would be cutoff, with all of its water rights having an 1868 priority date." *See Horner Response* at 65. In fact, the water supply for Navajo Reservoir contracts is diverted and stored with a priority of June 17, 1955, subject to non-impairment of more senior water rights. If curtailment of junior water rights becomes necessary, then diversions and deliveries under the Animas-La Plata Project and the Navajo Reservoir water supply would be curtailed first. The subordination of the Navajo Nation's reserved right priorities to its 1955 contract right priority provides a significant protection to junior water rights that would not exist without the Settlement Agreement and Proposed Decrees.

The evidence provided by the State demonstrates that the Settling Parties have met their burden to show that the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights. No party has come forward with any credible evidence contradicting the State's evidence.

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increase in the estimated amount of water available for use in New Mexico. *See Whipple Ex. 23, Summary of the 2007 Hydrologic Determination Relating to the Navajo Settlement, OSE Fact Sheet,* Nov. 5, 2007. The 2007 Hydrologic Determination was thoroughly and critically reviewed by engineers, lawyers and others within the United States Department of Interior, the New Mexico Interstate Stream Commission, and the other six Colorado River Basins states.

IV. The Settling Parties Have Met Their Burden to Show There is a Reasonable Basis to Conclude That the Settlement Agreement Provides For Less Than the Potential Claims That Could Be Secured at Trial.

The Settling Parties have thoroughly briefed the Court on the law of federal reserved water rights, including Indian water rights for future uses, and those arguments need not be repeated here. Nevertheless, Gary L. Horner continues to maintain that the Navajo Nation's water rights in the Proposed Decrees are not supported by law and should be limited to actual, current beneficial uses. *See Horner Response* at 26-27. Not only is Horner incorrect as a matter of law, the evidence in the record provides a reasonable basis to conclude that the Settlement Proposed Decrees provide for less than the potential water rights that could be secured at trial. As set forth in the *State's Memorandum* at 3-5, 10-12 and 28-42, the Navajo Nation's claims for water rights that may potentially be secured at trial are far in excess of the amount of water the Navajo Nation has agreed to accept under the settlement. Under federal law, the Navajo Nation could claim greater quantities of water than provided in the Proposed Decrees. The amounts claimed by the United States and filed with the Court on January 3, 2011, and amended April 13, 2012 ("US Claims") far exceed the amounts in the Settlement Agreement and Proposed Decrees. While determining the amount of water the Navajo Nation could obtain through litigation is difficult, the State believes that it is likely that a substantial amount of acreage would be recognized, beyond the amount that would be recognized under the Proposed Decrees.

The evidence in the record provides both the basis for the US Claims and the basis for the water rights in the Proposed Decrees. The conclusion that the Settlement Agreement provides for less than the potential claims that could be secured at trial is supported by substantial evidence in the record, including the *Reconnaissance-Level Reserved Water Rights Quantification in the San Juan and Colorado River Basins for the Navajo Nation in New Mexico,*

prepared by Natural Resources Consulting Engineers, Inc., for the Navajo Nation Department of Justice, March 2004 ("NRCE Report")[3]; the State's *Technical Assessment of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement,* September 6, 2012 ("Technical Assessment") and the State's *Quantification Analysis for the Proposed Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation*, April 2, 2012 ("Quantification Analysis").

A. The Evidence in the Record Provides a Reasonable Basis to Support a Conclusion That the Navajo Nation's Irrigation Water Rights Under the Settlement Are Based on Historic, Existing and/or Authorized Uses.

The State's quantification of the Navajo Nation's current rights based on historic and existing Navajo Nation water uses and existing authorizations is fully supported by the evidence in the record. Horner contends that the Navajo Nation's water rights have not been established or authorized by federal law, permits, or contracts. *See Horner Response* at 32. In fact, the State undertook a thorough analysis of the Navajo Nation's existing water uses and authorizations. The State conducted an independent comparison of proposed water rights to historic water uses, current rights and water right claims asserted by the United States for Navajo Nation water uses from the San Juan and Animas Rivers and from ground water. *See Technical Assessment* at 1. The Technical Assessment contains detailed explanations of the State's methodology used in estimating the Navajo Nation's historic and existing water uses. *See Technical Assessment* at 2-3. In preparing this analysis, the State considered historic data, including United States Bureau of Indian Affairs ("BIA") crop reports and irrigation data, scientific reports such as the Navajo Indian Irrigation Project Biological Assessment, and Interstate Stream Commission ("ISC")

[3] This report was provided to the parties in discovery and is available at: http://www.11thjdc.com/download/uploads/2-1-2013%20The%20Navajo%20Nations%20Second%20Supplemental%20Disclosure%20AB-07-1.pdf.

stream data. The State also calculated historic depletions for Hogback and Fruitland Projects. *Id.* In response to public comments, the depletion and diversion amounts for the Hogback and Fruitland Projects in the Proposed Decree were calculated using per-acre consumptive irrigation requirements ("CIR"), farm delivery requirements ("FDR") and project delivery requirements ("PDR") that were consistent with the estimates for non-Indian ditches in the *Report on the San Juan River Hydrographic Survey within San Juan, McKinley and Rio Arriba Counties, New Mexico, 1938*. *See Ex. 6 to Whipple Affidavit* at 42-46. The amounts of current water use were based on water projects currently existing or authorized by federal law prior to the Settlement Act, including NIIP, and existing BIA land use permits for acreage under the Hogback and Fruitland Projects. *See Technical Assessment* at 3. The State identified the amounts of irrigable acres based on existing records and project authorizations. *Id.* Diversions for irrigation were estimated based on assumed maximum diversion rates being maintained throughout the irrigation season. *Id.*

The State also prepared a comprehensive Quantification Analysis to provide an independent review of the water right claims made by the United States on behalf of the Navajo Nation for historic and existing uses of water from sources other than the San Juan River. *See Quantification Analysis* at 1. Like the Technical Assessment, the Quantification Analysis consisted of a thorough review of data, including aerial imagery, GIS data, annual crop reports and irrigated acres summaries for Navajo irrigation projects, information on measured reservoir depths, and files maintained by the State Engineer and ISC. *See Quantification Analysis* at 1.

Horner asserts that the Proposed Decree would award water rights to the Navajo Nation for the Hogback and Fruitland Projects that are in excess of their existing water uses. *See Horner Response* at 47. As set forth above, the Technical Assessment provides a detailed

explanation of the basis for determining the amounts of current water use. Horner provides no evidence that the State's assessment is incorrect. Instead, Horner attempts to undermine the State's assessment by claiming that the State failed to provide information regarding how much of the irrigated acreages of these projects have been idled or abandoned. *See Id.* However, a simple calculation to determine the number of acres that were idled or abandoned in any particular year since the mid 1960s may be performed by subtracting the number of acres irrigated in that year (as provided in the Technical Assessment) from the total project acreage. *See Supplemental Whipple Affidavit* at 15. Thus, the State's Technical Assessment supports a conclusion that the Navajo Nation's water rights for the Hogback and Fruitland Projects under the settlement are based upon their existing and/or authorized uses.

Robert E. Oxford disputes the State's data regarding the amount of irrigated acreage within the Hogback Project. *See Affidavit of Robert E. Oxford* at para. 7. In support of his argument, Oxford relies on information contained in the San Juan River operations and administration agreements for 2003 – 2012. However, disclaimers in these agreements state that they are not determinative of, and do not limit, any entity's water rights or claims. They also do not limit future water demands of the Navajo Nation associated with either NIIP or the Hogback and Fruitland Projects. *See Supplemental Whipple Affidavit*, at 12-13.

Oxford also questions the State's characterization of the depletion amounts negotiated for the Hogback and Fruitland Projects. *See Oxford Affidavit* at 2. Oxford states that the 1938 State Engineer Hydrographic Survey was not approved by the Echo Ditch Decree. *See Id.* In fact, the Echo Ditch Decree expressly approved the 1938 State Engineer Hydrographic Survey, including the CIRs, FDRs and PDRs for each ditch.

Oxford is also incorrect that "the increase in the Hogback-Cudei water needed for additional acres never before irrigated is new water." *See Oxford Affidavit* at 3. The number of water right acres included in the Proposed Decree for the Hogback and Fruitland Projects is based on acres under existing ditches that have been permitted for decades by the BIA for farming. *See Whipple Affidavit* at 9.

Finally, there is no merit to Oxford's claim that NIIP depletion limits cannot be measured or enforced. *See Oxford Affidavit* at 4. Under the Settlement Agreement, NIIP return flows must be demonstrated for the Navajo Nation to receive return flow credit. *See Supplemental Whipple Affidavit* at 15. NIIP depletions may be reasonably calculated based on diversions minus surface return flows measured in Gallegos Wash, Ojo Amarillo and springs at the northern NIIP boundary near the Fruitland Canal. Without settlement, there is no requirement of NIIP return flows; the settlement limits NIIP depletions by requiring the Navajo Nation demonstrate return flows to the San Juan River.

B. The Evidence in the Record Provides a Reasonable Basis to Support the Amount of Water Claimed for Domestic, Commercial, Municipal and Industrial Uses.

The Technical Assessment also includes a detailed explanation of the bases for the estimated current rights of the Navajo Nation for Domestic, Commercial, Municipal and Industrial ("DCMI") uses as well as heavy industrial uses. *See Technical Assessment* at 13-20. While Horner argues there is "no authority" for these water rights (*See Horner Response* at 53), he offers no evidence in support of this claim. As explained in the Technical Assessment, these rights are based on historic and/or authorized uses. *See Id.* The Technical Assessment assumes that the Navajo Nation's current authorization to divert and deplete water from the San Juan River for these uses are limited by its existing diversion and water treatment capabilities. *See Id.* at 13. The proposed amounts for non-project DCMI uses are based on: (1) the sum of the

amounts of historic DCMI diversions by the Shiprock Agency of the Navajo Tribal Utility Authority plus water purchases from the City of Farmington; (2) historic heavy industrial uses made at the Navajo (Shiprock) Helium Plant under OSE File No. 2472 and at the Navajo (Shiprock) Mill under OSE File No. 2807 and 2875; and (3) an assumed return flow of 50 percent.

Horner likewise argues that there is no authority for the proposed water rights for the Navajo Nation's DCMI projects because "the Colorado Ute Settlement Act Amendments of 2000 does not authorize or establish water rights for the Navajo Nation associated with the Animas-La Plata Project." *See Horner Response* at 54. In support of this claim, Horner cites Section 303 of that Act. *See Id.* This provision does not address the authorization of the Navajo Nation's ALP uses but merely provides that assignment of portions of the United States' interest in OSE File No. 2883 to other entities does not adversely affect the water rights of the Navajo Nation. Finally, Horner reiterates his arguments regarding the application of State law to Indian federal reserved water rights and the validity of State Engineer permits issued to the United States Department of Interior. *See Horner Response* at 31-47. The State has already addressed these arguments in the *State's Consolidated Response*. See *State's Consolidated Response* at 7-10. Horner's argument has no merit.

The evidence provided by the State demonstrates that the Settling Parties have met their burden that there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial. No party has come forward with any credible evidence contradicting the State's evidence.

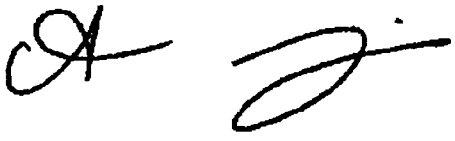
V. The Settling Parties Have Met Their Burden to Show The Settlement Agreement is Consistent With Public Policy and Applicable Law.

As explained in the State's Memorandum, the Settlement Agreement and the Proposed Decrees are consistent with public policy and applicable law. *See State's Memorandum* at 42-45. The State's Technical Assessment and Quantitative Analysis, which contain a detailed review of the Navajo Nation's water rights claims, provide ample support for the amount of water rights in the settlement.

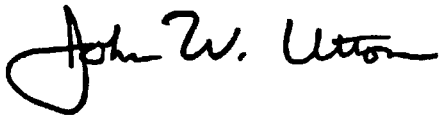
The Settling Parties have produced sufficient evidence to satisfy the four elements enunciated by the Court for entry of the Proposed Decrees. The objectors have failed to produce evidence in rebuttal. Accordingly, the Court should grant the Settlement Motion and enter the Proposed Decrees.

Respectfully submitted, this 24th day of May 2013.

STATE OF NEW MEXICO



Arianne Singer
Misty Braswell
Special Assistants Attorney General
New Mexico Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150



John W. Utton
Special Assistant Attorney General
Sheehan & Sheehan, P.A
Post Office Box 271
Albuquerque, New Mexico 87103
(505)247-0411

CERTIFICATE OF SERVICE

I certify that on this 24th day of May 2013, at approximately 4:30 pm, an electronic copy of this *Consolidated Reply to Responses filed by Community Ditch Defendants, Gary L. Horner, Bob Oxford and Defendants B Square Ranch LLC et al* was served by attaching an electronic copy to an email sent to: wrnavajointerse@nmcourts.gov.

/s/ Arianne Singer