

SJ-17
Navajo Settle
Sept. 2, 2009

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 |
| |) | ROZIER E. SANCHEZ |
| Plaintiff, |) | District Judge, <i>pro tempore</i> |
| |) | |
| v. |) | SAN JUAN RIVER BASIN |
| |) | ADJUDICATION |
| |) | |
| THE UNITED STATES OF AMERICA |) | |
| <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

**JOINT MOTION FOR
ORDER GOVERNING INITIAL PROCEDURES
FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE
OF THE WATER RIGHTS OF THE NAVAJO NATION**

The United States of America ("United States"), the State of New Mexico *ex rel.* State Engineer ("State") and the Navajo Nation ("Navajo Nation") (collectively "Settling Parties") hereby submit this Joint Motion ("Joint Motion") for an Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation ("Navajo Decree"). This Joint Motion is supported by the attached Memorandum in Support of Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation ("Memorandum in Support").

1. The Settling Parties anticipate filing a Motion for Entry of the Partial Final Judgment and Decree of the Water Rights of the Navajo Nation in the San Juan River Basin in

New Mexico ("Motion for Entry of Navajo Decree") within 90 days of the execution of a revised "San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement" ("the Settlement Agreement"). Earlier this year Congress enacted and the President signed into law on March 30, 2009, the Northwestern New Mexico Rural Water Projects Act ("Settlement Act"), Title X, Subtitle B of the Omnibus Public Land Management Act of 2009, Public Law 111-11, authorizing and directing the Secretary of the Interior to execute the Settlement Agreement to the extent that it does not conflict with the Settlement Act.

2. In order to advance consideration by the Court of the issues that will be raised by the Motion for Entry of the Navajo Decree, the Settling Parties believe it is timely for the Settling Parties to request the Court to adopt procedural standards that will guide the Navajo Decree Proceeding.

3. Pursuant to Provisional Rule 1-071.2(B) NMRA 2009, the Settling Parties request the Court to order designation of an expedited *inter se* proceeding ("Navajo Decree Proceeding"), setting initial procedures and establishing notice requirements and approval standards for entry of the Navajo Decree. A proposed form of order is attached to this Joint Motion as Exhibit A.

4. The proposed Order:

a. designates the Navajo Decree Proceeding as an expedited *inter se* proceeding pursuant to Provisional Rule 1-071.2(B) NMRA 2009;

b. establishes initial procedures for the Settling Parties to file a Motion for Entry of the Navajo Decree setting forth the Navajo Nation's water rights in accordance with the Settlement Agreement;

c. approves a form of Notice of Expedited *Inter Se* Proceeding to Adjudicate the Water Rights of the Navajo Nation ("Notice") and approves notice procedures for notifying persons and entities claiming water rights in the San Juan River Basin of the terms of the proposed Navajo Decree and procedures for filing objections thereto;

d. sets a deadline for filing objections to the proposed Navajo Decree;

e. sets a Mandatory Pre-Hearing Scheduling Conference for the Settling Parties and all objectors to participate in the Navajo Decree Proceeding; and

f. confirms the standard of review and burden of proof to be applied in the Navajo Decree Proceeding.

5. A proposed Notice is attached to this Joint Motion as Exhibit B. The form of the proposed Notice provides:

a. a summary of the Navajo Decree Proceeding;

b. a summary of the proposed Navajo Decree;

c. an explanation of the rights and options of water rights claimants;

d. a statement that a water right claimant's failure to file a timely objection will preclude that water right claimant from later objecting to the Navajo Decree, even if the terms and conditions as approved by the Court ultimately vary from those originally proposed by the Motion for Entry of the Navajo Decree;

e. locations and resources available to provide additional information;

f. a deadline for filing objections to entry of the proposed Navajo Decree;

and,

g. the time, date and location of a mandatory pre-hearing scheduling conference to be held by the Court, required to be attended by the Settling Parties and all objectors.

6. With respect to the standard of review and burden of proof to be applied in the Navajo Decree Proceeding, the Joint Movants respectfully request that the Court apply the same principles adopted in the proceeding utilized for entry of the Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe and in other similar settlements in New Mexico. Under such standard of review and burden of proof, objectors are required to demonstrate that entry of the proposed Navajo Decree is not fair, adequate, or reasonable; is not in the public interest; or is not consistent with applicable law.

7. The Settling Parties request that the Court hold a hearing of this Joint Motion on October 7, 2009, the date of the next scheduled Status Conference in this case, to consider and approve designation of the Navajo Decree Proceeding as an expedited *inter se* proceeding and to adopt the proposed form of Order and Notice attached to this Joint Motion, Exhibits A and B, respectively.

8. Because the Hydrographic Survey Report contemplated five years ago is no longer necessary (either in design or timing) now that the Settlement Act has been enacted by Congress, the Settling Parties also request that the Court vacate its August 20, 2004 Order regarding the preparation and filing of a Hydrographic Survey Report.

The Settling Parties provided a copy of this Joint Motion and the Memorandum in Support by email to the counsel of record listed in Exhibit C. The following counsel do not oppose this Joint Motion: Maria O'Brien (BHP-Navajo Coal Company), Herb Becker (Jicarilla Apache Nation) and Dan Israel (Ute Mountain Ute Tribe). The following counsel do oppose this

Joint Motion: Gary Horner (Bloomfield Irrigation District & Gary L. Horner, *pro per*) and Steven Hughes (NM Commissioner of Public Lands). The San Juan Water Commission responded with editorial comments, but takes no position on the Joint Motion.

WHEREFORE, Joint Movants request the Court to hold a hearing on October 7, 2009, the date of the next scheduled Status Conference in this case, to consider and approve the Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, including the designation of the Navajo Decree Proceeding as an expedited *inter se* proceeding and to adopt the proposed form of Order and Notice attached to this Joint Motion, Exhibits A and B, respectively.

Respectfully submitted this 2nd day of September 2009.

NAVAJO NATION

Approved August 31, 2009

Stanley M. Pollack
Bidtah N. Becker
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Navajo Nation (AZ) 86515
(928) 871-7510

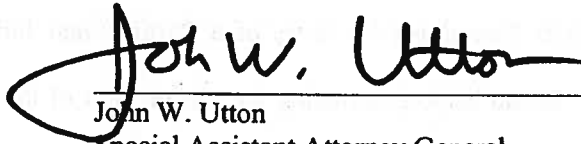
UNITED STATES OF AMERICA

Approved August 31, 2009

Guss Guarino
U.S. Department of Justice
Environment and Natural Resources Division
1961 Stout Street, 8th Floor
Denver, CO 80294
(303) 844-1343

STATE OF NEW MEXICO

DL Sanders
Arianne Singer
Tracy L. Hofmann
Special Assistant Attorneys General
New Mexico Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150

A handwritten signature in black ink that reads "John W. Utton". The signature is written in a cursive style with a large, sweeping initial "J".

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

Exhibit A

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

| | | |
|-------------------------------------|---|------------------------------------|
| STATE OF NEW MEXICO, <i>ex rel.</i> |) | CV-75-184 |
| STATE ENGINEER, |) | ROZIER E. SANCHEZ |
| |) | District Judge, <i>pro tempore</i> |
| Plaintiff, |) | |
| |) | SAN JUAN RIVER BASIN |
| v. |) | ADJUDICATION |
| |) | |
| THE UNITED STATES OF AMERICA |) | |
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| |) | |
| Defendants. |) | |

**[PROPOSED] ORDER GOVERNING INITIAL PROCEDURES
FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE
OF THE WATER RIGHTS OF THE NAVAJO NATION**

THIS MATTER comes before the Court on the Joint Motion for an Order Governing Initial Procedures for Entry of Partial Final Judgment and Decree of the Water Rights of Navajo Nation (“Joint Motion”) filed by the Navajo Nation (“Navajo Nation”), the United States of America (“United States”) and the State of New Mexico *ex rel.* State Engineer (“State”).

This Order approves commencement of an expedited *inter se* proceeding (“Navajo Decree Proceeding”) pursuant to Provisional Rule 1-071.2(B) NMRA 2009 that will result in a final order and judgment approving and entering the Partial Final Judgment and Decree of the Navajo Nation Water Rights within the San Juan River Basin in New Mexico (“Navajo Decree”) that will be binding on all persons and entities claiming water rights or claiming the use of water

in the San Juan River System and the San Juan River Underground Water Basin within the State of New Mexico ("San Juan River Basin"). In particular, this Order (1) designates the Navajo Decree Proceeding as an expedited *inter se* proceeding pursuant to Provisional Rule 1-071.2(B) NMRA 2009; (2) establishes initial procedures for the Navajo Nation, the United States and the State ("Settling Parties") to file a Motion for Entry of a Partial Final Judgment and Decree ("Motion for Entry of the Navajo Decree") setting forth the Navajo Nation's water rights in accordance with the "San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement" ("the Settlement Agreement"); (3) approves a form of Notice of Expedited *Inter Se* Proceeding to Adjudicate the Water Rights of the Navajo Nation ("Notice") and approves notice procedures for notifying persons and entities claiming water rights in the San Juan River Basin of the terms of the proposed Navajo Decree and procedures for filing objections thereto; (4) sets a deadline for filing objections; (5) sets a Mandatory Pre-Hearing Scheduling Conference for the Settling Parties and all objectors to participate in the Navajo Decree Proceeding; (6) confirms the standard of review and burden of proof to be applied in the Navajo Decree Proceeding; and (7) will aid in resolution of claims and management of this case.

This Order is also entered by the Court pursuant to Rule 1-016(B) NMRA 2009 to further guide the course of the adjudication of the water rights claimed in this adjudication by the Navajo Nation and by the United States, acting as Trustee for the benefit of the Nation.

Being fully advised in the premises, the Court FINDS:

1. Designation of an expedited *inter se* proceeding will promote judicial efficiency and expeditious completion of the adjudication by facilitating settlement and final resolution of the Navajo Nation's claims to water rights within the San Juan River Basin. Failure to proceed will injure the Navajo Nation by causing the statutory condition to fail, jeopardizing approval of

the settlement and delaying final determination of the Navajo Nation water rights. Designation of an expedited *inter se* proceeding will not injure any other parties.

2. The proposed initial schedule for the Navajo Decree Proceeding, consisting of initial filings by the Settling Parties, convening of public meetings and setting a deadline for filing objections provide a full and fair opportunity for all water right owners within the San Juan River Basin to review the necessary documents, to understand the proceeding and proposed settlement terms and to be heard on any objection prior to consideration of the proposed Navajo Decree.

3. The form of proposed Notice fairly and reasonably informs defendants and other potential water right claimants in the San Juan River Basin of the proposed Navajo Decree and of their rights to file an objection and to be heard on any objection and to participate in the Navajo Decree Proceeding. The Notice also clearly explains that if a claimant does not file an objection that the claimant will be bound by the Navajo Decree Proceeding regardless of the outcome and will be bound by the terms of any Partial Final Judgment and Decree entered by the Court even if those terms vary from the terms of the proposed Navajo Decree. The Notice's reduced margins, single-spaced lines and double-sided text promote efficient use of limited resources without diminishing the purpose and effect of the Notice.

4. Compliance with the proposed procedures for giving notice will constitute reasonable diligence by the Settling Parties in ascertaining the names and mailing addresses of and notifying all known potential water right claimants and in providing notice to all unknown claimants and that said procedures are reasonably calculated to allow full opportunity for participation of all defendants and potential water rights claimants in the Navajo Decree

Proceeding in compliance with Provisional Rule 1-071.2(C) and in satisfaction of applicable due process requirements.

5. The Navajo settlement was reached by the State of New Mexico, the Navajo Nation and the United States after years of intensive and active negotiations, conducted in good faith and at arms-length.

The Court concludes that the Joint Motion is well taken and should be granted.

IT IS THEREFORE ORDERED:

A. Designation of Expedited Inter Se Proceeding.

The Navajo Decree Proceeding is designated and shall be conducted as an expedited *inter se* proceeding pursuant to Provisional Rule 1-071.2(B) NMRA 2009. Pursuant to Rule 1-071.2(D), the Navajo Decree Proceeding will result in a partial final judgment and decree adjudicating the water rights of the Navajo Nation in the San Juan River Basin that binds all water rights claimants who are given notice under Rule 1-071.2(C) regardless of whether they were served and joined as defendants, participated in, or received actual notice of the proceeding.

B. Filing of Motion for Entry of Partial Final Decree

Within 90 days of execution of the revised Settlement Agreement by the State, the United States and the Navajo Nation, the Settling Parties shall file with the Court the Motion for Entry of the Navajo Decree. At the time of filing of the Motion for Entry of the Navajo Decree, the Settling Parties shall provide an electronic copy of the motion, along with the proposed Navajo Decree and executed Settlement Agreement, in Portable Document Format ("PDF"), to the Clerk of Court for posting on the Court's website. No response or objection to the Motion for Entry of the Navajo Decree will be required until the deadline for filing objections to the entry of the proposed Navajo Decree, as set forth in the Notice approved below.

C. Form of Notice and Notice Procedures

The Court approves the form of Notice attached as Exhibit B to the Joint Motion and approves the notice procedures proposed by the Settling Parties. For purposes of the Navajo Decree Proceedings, the "Commencement Date" is that date upon which all of the following events have occurred: first, the Court approves the notice procedures; second, the Court approves the form of the Notice; third, the revised Settlement Agreement has been executed by the Settling Parties; and finally, the Settling Parties file the Motion for Entry of the Navajo Decree. Upon occurrence of the Commencement Date, the Settling Parties shall give notice by completing the following:

1. Notice by Regular First Class Mail. Not later than 90 days after the Commencement Date, the Settling Parties shall send the Notice by first class mail to all persons and entities claiming ownership of water rights within the San Juan River Basin identified from the following sources:
 - (a) Existing hydrographic survey and court records for the adjudication;
 - (b) the respective public records of the San Juan, McKinley, Rio Arriba and Sandoval County Assessors;
 - (c) the public records of the State Engineer; and
 - (d) the respective public records of irrigation districts, acequias, water conservancy districts and other water associations or commissions.

2. Notice by Publication. Not later than 60 days after the Commencement Date, the Settling Parties shall publish the approved Notice pursuant to NMSA 1978, Sec. 14-11-10 (2008) in Spanish and English, once a week for four (4) consecutive weeks in

the *Navajo Times*, the *Gallup Independent*, the *Farmington Daily Times*, the *Rio Rancho Observer*, the *Rio Grande Sun*, and the *Albuquerque Journal*. Publication shall serve as notification to those water rights claimants who were not known to the Settling Parties and claimants whose addresses could not be determined after exercise of reasonable diligence as described in paragraph C.1, above. Publication shall also notify claimants of the times and locations of the public meeting described in paragraph C.3, below. In conjunction with the certification required by paragraph C.4, the Settling Parties shall file with the Court affidavits of publication from the publishers, managers or agents of the aforementioned newspapers.

3. Public Meetings. Not later than 120 days after the Commencement Date, the Settling Parties shall hold one public meeting within each of the following locations, for a total of five public meetings: (1) the city of Farmington; (2) the Shiprock Chapter of the Navajo Nation; (3) the town of Aztec; (4) the town of Bloomfield; and, (5) the Crownpoint Chapter of the Navajo Nation. In addition to the notice of the public meetings to be provided pursuant to paragraph C.2, above, the Settling Parties shall further publicize the public meetings by purchasing a quarter-page advertisement or larger once a week for three consecutive weeks in the *Gallup Independent*, the *Farmington Daily Times*, and the *Navajo Times*. The first advertisement shall occur no later than two weeks before the first public meeting. The advertisements shall describe the purpose of the public meetings and shall set forth the times, dates and locations of the five meetings. Furthermore, the Settling Parties shall publicize the public meetings by purchasing 30-second radio advertisements at least three times a day on the day before and the day of each

public meeting to be run on at least two radio stations broadcasting in the area of the public meeting.

4. Certification of Notice. Upon completion of the notice requirements described in paragraphs C.1, C.2 and C.3, the Settling Parties shall file with the Court a certification describing the fulfillment of the provisions required by those paragraphs.

D. Deadline for Filing Objections and Form of Objections

All objections to entry of the proposed Navajo Decree shall be filed with the Court not later than 150 days of the Commencement Date. The filing of an objection will satisfy the requirement of Provisional Rule 1-071.2(C)(3) of the filing of a notice of intent to participate and no other pleading shall be required to be filed by the deadline in order for a claimant to participate in the proceeding as an objector. Objections must include the following: (1) name and address of the objector; (2) description of water rights claimed by the objector; (3) statement of the specific legal and factual basis of the objection; and (4) how the objector will be injured or harmed by the Settlement Agreement or entry of the Navajo Decree in a legally cognizable way. Failure to file a timely objection and notice including the information described above will preclude that water rights claimant's subsequent participation in the Navajo Decree Proceeding; nonetheless, the water rights claimant will be bound by said proceedings whether the claimant was served and joined as a defendant, participated in, or received actual notice of the proceeding. Notwithstanding the above, failure by a claimant to object to or participate in the Navajo Decree Proceeding will not bar the claimant from objecting to or participating in a later proceeding to consider additional Navajo Nation water rights not described in the Navajo Decree that are the subject of a supplemental decree. A separate schedule and additional procedures for

participating in such a supplemental decree proceeding will be established by the Court at a future time.

E. Mandatory Pre-Hearing Scheduling Conference

The Court will hold a Mandatory Pre-Hearing Scheduling Conference within 180 days of the Commencement Date to set a schedule to hear objections to entry by the Court of the proposed Navajo Decree and to govern the Navajo Decree Proceeding. Prior to the scheduling conference, the Settling Parties shall submit to the Court a proposed scheduling order to hear objections that are timely filed. Any party that has filed a timely objection will be required to appear in person or through legal counsel at the scheduling conference. Failure to appear at the scheduling conference, will result in dismissal of the objection and will preclude that water rights claimant's subsequent participation in the Navajo Decree Proceeding; nonetheless, all water rights claimant will be bound by said proceedings whether the claimant was served and joined as a defendant, participated in, or received actual notice of the proceeding. Notwithstanding the above, failure by a claimant to object to or participate in the Navajo Decree Proceeding will not bar the claimant from objecting to or participating in a later proceeding to consider additional Navajo Nation water rights not described in the Navajo Decree that are the subject of a supplemental decree. A separate schedule and additional procedures for participating in such a supplemental decree proceeding will be established by the Court at a future time.

F. Standard of Review and Burden of Proof

The burden shall be on the objecting party to demonstrate that the rights proposed to be settled pursuant to the proposed Navajo Decree should not be quantified and administered as proposed therein. Objectors shall be required to demonstrate that entry of the proposed Navajo

Decree is not fair, adequate, or reasonable; is not in the public interest; or is not consistent with applicable law.

G. Hydrographic Survey Report

The outstanding remainder of this Court's August 20, 2004 Order shall be vacated.

SO ORDERED, this _____ day of _____ 2009.

ROZIER E. SANCHEZ
DISTRICT JUDGE *PRO TEMPORE*

Exhibit B

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

| | | |
|-------------------------------------|---|------------------------------------|
| STATE OF NEW MEXICO, <i>ex rel.</i> |) | CV-75-184 |
| STATE ENGINEER, |) | ROZIER E. SANCHEZ |
| |) | District Judge, <i>pro tempore</i> |
| Plaintiff, |) | |
| |) | |
| v. |) | SAN JUAN RIVER BASIN |
| |) | ADJUDICATION |
| |) | |
| THE UNITED STATES OF AMERICA |) | |
| <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |
| |) | |

**NOTICE OF EXPEDITED INTER SE PROCEEDING
TO ADJUDICATE THE WATER RIGHTS OF THE NAVAJO NATION**

To: ALL PERSONS AND ENTITIES CLAIMING WATER RIGHTS IN THE SAN JUAN RIVER SYSTEM AND THE SAN JUAN RIVER UNDERGROUND WATER BASIN WITHIN THE STATE OF NEW MEXICO, INCLUDING PERSONS PREVIOUSLY JOINED AS DEFENDANTS IN THE ABOVE-CAPTIONED ACTION, AND ALL UNKNOWN CLAIMANTS OF INTEREST

YOU ARE HEREBY NOTIFIED of the deadline established by the Eleventh Judicial District Court for the State of New Mexico for filing objections to a proposed Partial Final Judgment and Decree of the Water Rights of the Navajo Nation ("Navajo Decree") that would adjudicate the water rights of the Navajo Nation in the San Juan River Basin. This notice describes the litigation concerning water rights in the San Juan River Basin and the proposed Navajo Decree, and states the deadline established by the Court for objecting to the proposed Navajo Decree.

PLEASE READ THIS NOTICE CAREFULLY. IT DESCRIBES THE ONLY OPPORTUNITY YOU WILL HAVE TO OBJECT TO THE PROPOSED NAVAJO DECREE.

By Order of the Eleventh Judicial District Court, a comprehensive proceeding, known as an expedited *inter se* proceeding (the "Navajo Decree Proceeding"), has been scheduled so that all water right claimants within the San Juan River Basin shall be given notice of, and an opportunity to object to, the Navajo Decree proposed by the Navajo Nation, the State of New Mexico on the relation of the State Engineer ("State"), and the United States of America ("United States") (collectively "the Settling Parties"). If you own water rights in the San Juan River Basin, you have the right to file an objection to the proposed Navajo Decree ("Objection"), but you must exercise that right in the manner, and within the deadline, established by the Court or you will be barred from further participation in this proceeding. The Court has established _____ as the deadline for filing an Objection. If you do not file an Objection you will be bound by the results of the proceeding, regardless of the

outcome, including being bound by the terms of the Navajo Decree entered by the Court, even if those terms vary from the terms of the proposed decree.

Summary of the Proceedings:

A lawsuit to determine all surface and underground water rights in the San Juan River Basin was filed in 1975 by the State of New Mexico against the United States of America, on its own behalf and on behalf of the Jicarilla Apache Tribe, the Navajo Nation, and the Ute Mountain Ute Tribe, and against other water rights claimants. The Navajo Nation was granted leave to intervene on its own behalf. Negotiations for settlement of the Navajo Nation’s water rights in this suit began in 1997. In 2005, the State and the Navajo Nation signed the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (“Settlement Agreement”). In 2009, the United States Congress enacted the Northwestern New Mexico Rural Water Projects Act (“Settlement Act”), Title X, Subtitle B of the Omnibus Public Land Management Act of 2009, Public Law 111-11, which was signed into law by the President on March 30, 2009. The Settlement Act authorized the Secretary of the Interior to sign the Settlement Agreement, which calls for the Settling Parties to move the Court to enter a proposed partial final judgment and decree setting forth the Navajo Nation’s water rights in the San Juan River Basin in New Mexico.

Summary of the Proposed Partial Final Judgment and Decree:

The proposed Partial Final Judgment and Decree confirms reserved water rights of the Navajo Nation for the diversion and use of 606,660 acre-feet per year (afy) or the quantity of water necessary to supply a depletion of 325,670 afy, whichever is less. The rights are summarized in the box below. Although the proposed Navajo Decree generally describes the priority date for these reserved water rights as June 1, 1868, pursuant to the terms of the settlement, the Navajo Nation has agreed in the Settlement Agreement that the uses served by projects built by the Bureau of Reclamation shall be administered with the priorities designated by the “*” below, in accordance with the terms of the Navajo Decree.

| | <u>Diversion (afy)</u> | <u>Depletion (afy)</u> | <u>Priority</u> |
|--|------------------------|------------------------|-----------------|
| Navajo Indian Irrigation Project | 508,000 | 270,000 | 06/17/1955 * |
| Fruitland-Cambridge Irrigation Project | 18,180 | 7,970 | 06/01/1868 |
| Hogback-Cudei Irrigation Project | 48,550 | 21,280 | 06/01/1868 |
| Navajo-Gallup Water Supply Project | 22,650 | 20,780 | 06/17/1955 * |
| Animas-La Plata Project | 4,680 | 2,340 | 05/01/1956 * |
| San Juan River municipal/industrial uses | 2,600 | 1,300 | 06/01/1868 |
| Ground water uses | 2,000 | 2,000 | 06/01/1868 |
| TOTAL: | 606,600 | 325,670 | |

The water made available to the Navajo Nation for the Navajo Indian Irrigation Project and the Navajo-Gallup Water Supply Project is based upon water rights held by the United States pursuant to New Mexico State Engineer File No. 2849 with a priority date of June 17, 1955 for uses from Navajo

Reservoir, and pursuant to New Mexico State Engineer File No. 3215 with a priority date of December 16, 1968, for water originating in the drainage of the San Juan River below Navajo Dam. The Navajo Nation would share in shortages in the Navajo Reservoir supply with the San Juan-Chama Project, the Jicarilla Apache Nation, the Hammond Irrigation Project and other Navajo Reservoir contractors.

The water made available to the Navajo Nation for the Animas-La Plata Project is based upon water rights held by the United States pursuant to New Mexico State Engineer File No. 2883 with a priority date of May 1, 1956. The Navajo Nation would share in shortages in the Project water supply with the San Juan Water Commission and other Project contractors.

The direct-flow water rights of the Navajo Nation in the San Juan River Basin would retain a senior priority and not share shortages. However, when the direct flow of the San Juan River is insufficient to supply current beneficial uses of direct-flow diverters in New Mexico, the Navajo Nation agrees to make up to 12,000 afy of water available from its Navajo Reservoir supply to service the reserved rights for the Shiprock municipal uses and the Hogback-Cudei and Fruitland-Cambridge irrigation projects prior to making a call for priority administration of the river system. This alternate water source provision of the Settlement Agreement, incorporated by the Decree, reduces the risks and occurrences of shortage to direct-flow users that otherwise would be anticipated to result from priority calls on the river. Under the Navajo Decree, the Hogback-Cudei and Fruitland-Cambridge irrigation projects would have rights to divert up to 221 cfs and 100 cfs, respectively, from the direct flow of the San Juan River to the extent necessary to meet beneficial use demands.

In addition to the rights described above, the Navajo Nation: (1) may divert supplemental carriage water, if needed, at such times as the New Mexico State Engineer determines that there is surface water available for such diversion without impairment to water rights in New Mexico; (2) may develop additional ground water on Navajo lands subject to no impairment of other water rights and forbearance of surface water rights to offset any amount of depletion of San Juan River flows above 2,000 acre-feet per year caused by the aggregate of Navajo Nation ground water diversions; (3) would have a small amount of rights it has acquired under state law; (4) would have additional rights to *de minimus* residential domestic and stock uses that are not served by public water supply systems; and (5) may re-use tail water or waste water so long as the re-use does not cause the Nation's diversion and depletion rights to be exceeded. In all instances, the rights of the Navajo Nation to divert and use water from the San Juan River Basin in New Mexico would be limited to the amounts of water necessary for beneficial uses.

Individual members of the Navajo Nation that have been allotted land by the United States are not bound by the Settlement Agreement and may have additional claims to historic and existing agriculture, stock and domestic uses in the San Juan River Basin. However, any reserved rights that may be adjudicated to such members for additional future uses would be serviced by, or offset by corresponding reductions in use under, the rights of the Navajo Nation.

Under the Navajo Decree, the Navajo Nation would administer its rights on Navajo lands in New Mexico subject to non-impairment of non-Navajo Nation water rights and subject to the provisions of the Navajo Decree and the Settlement Agreement. Transfers of water uses by the Navajo Nation to locations off Navajo lands would require approval of the State Engineer. The Navajo Nation would be responsible for measuring and reporting water uses under its rights, and the State Engineer would monitor Navajo Nation water uses for compliance with the decree.

Rights of the Navajo Nation to historic and existing irrigation, recreation, and livestock uses on Navajo lands from surface water diverted from tributaries to the San Juan River or groundwater withdrawn from the San Juan River Underground Water Basin will be described in a Joint Hydrographic Survey of Supplemental Navajo Uses. Once the Joint Hydrographic Survey of Supplemental Uses is completed, the Settling Parties will file a Motion for Entry of a Supplemental Decree describing such uses. No objection to such uses is required to be filed at this time.

This is only a brief summary of the water rights described in the proposed Navajo Decree. The complete text of the proposed decree will be available for review as detailed below.

Rights and Options of Water Right Claimants:

If you own water rights in the San Juan River Basin, you have the following rights and options:

1. You may do nothing. If you do not wish to file an objection to the proposed Navajo Decree, you do not have to take any further action. Whether you object or not, you will be bound by the partial final judgment and decree ultimately entered by the Court, even though its terms may be different from the terms of the proposed Navajo Decree.
2. You may file an objection to the proposed Navajo Decree. If you wish to object, you or your attorney must file an objection to the proposed Navajo Decree ("Objection") with the Court Clerk for the Eleventh Judicial District Court, 103 South Oliver Driver, Aztec, NM 87410, on or before _____. There is no fee for filing an Objection. You may, but are not required, to be represented by an attorney.

This Court will approve the Navajo Decree if it finds that settlement is fair, adequate, and reasonable, and consistent with the public interest and applicable law. In addition to any other information that an Objection provides, an Objection must describe why you believe the proposed Navajo Decree does not meet this standard. An Objection must also include the following information: (a) name and address of the objector; (b) description of water rights claimed by the objector; (c) statement of the specific legal and factual basis of the objection; and (d) how the objector will be injured or harmed by the proposed Navajo Decree in a legally cognizable way. Objections that do not provide all of the required information will be subject to dismissal.

IF YOU FILE AN OBJECTION YOU ARE AGREEING TO PARTICIPATE IN THE NAVAJO DECREE PROCEEDING. IF YOU FILE AN OBJECTION BY _____, YOU WILL BE REQUIRED TO ATTEND OR HAVE YOUR LEGAL COUNSEL ATTEND ON YOUR BEHALF A MANDATORY PRE-HEARING SCHEDULING CONFERENCE TO BE HELD BEFORE THE COURT ON _____. Further proceedings on your Objection will be scheduled at that scheduling conference.

A water right claimant's failure to file a timely Objection or failure to appear at the pre-hearing scheduling conference shall preclude that claimant's subsequent participation in the Navajo Decree Proceeding, but that water rights claimant will be bound by said proceeding whether the claimant was served and joined as a defendant, participated in, or received actual notice of the proceeding.

Public Meetings:

The United States, the State and the Navajo Nation will be hosting a series of public meetings regarding the proposed Navajo Decree and the proceeding to adjudicate the Navajo Nation's water rights in the San Juan River Basin. The following is a list of times, dates and locations of the meetings:

| <u>Date:</u> | <u>Time:</u> | <u>Location:</u> |
|--------------|--------------|------------------|
| _____ | _____ | Farmington |
| _____ | _____ | Shiprock |
| _____ | _____ | Aztec |
| _____ | _____ | Bloomfield |
| _____ | _____ | Crownpoint |

For further information:

Copies of the proposed Navajo Decree, and the Settlement Agreement and the Settlement Act which serve as the basis for the description of the Navajo Nation's rights in the proposed decree, are available for you to review at the following locations:

Eleventh Judicial District Court
103 South Oliver Drive
Aztec, NM 87410

Office of the State Engineer
100 South Oliver Drive
Aztec, NM 87410

Bureau of Indian Affairs
Eastern Navajo Agency
Office of Real Estate Services
P. O. Box 328
(Federal Building 2002)
Crownpoint, NM 87313

Bureau of Indian Affairs
Shiprock Agency
P. O. Box 966
(Highway 491, building is behind
First National Bank Building)
Shiprock, NM 87420

These documents are also available for review at the Eleventh Judicial District Court's website (look under Navajo Settlement):

<http://sjrba.11thjdc.com/>

These documents are also available for review at the State Engineer's website at:

http://www.ose.state.nm.us/legal_ose_proposed_settlements_sj.html

Information explaining the Navajo Decree Proceeding and how to file an Objection may be obtained from the Joe M. Stell Water Ombudsman Program at the Utton Transboundary Center of the University of New Mexico School of Law. You may call the toll-free Water Adjudication Helpline at 1-866-822-6134 (press 1). Leave your name, phone number, and question. They will attempt to call you back by the next business day. Additional information may be found at the Center's website at:

http://uttoncenter.unm.edu/ombudsman_3.html

Witness the hand and seal of the Eleventh Judicial District Court for the State of New Mexico
this _____ day of _____, 20__.

Weldon F. Neff
Court Executive Officer
Eleventh Judicial District Court
103 South Oliver Drive
Aztec, NM 87410

Exhibit C

Attorneys receiving draft Joint Motion for an Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation

| Attorney | Representing | email |
|------------------------|---|--|
| Mark Adams | | madams@rodey.com |
| Shenan R. Atcitty | Jicarilla Apache Nation | Shenan.atcitty@hklaw.com |
| Bidtah N. Becker | Navajo Nation | bidtahnbecker@navajo.org |
| Herb Becker | Jicarilla Apache Nation | herb.becker@jaaffiliates.com |
| Bradley S. Bridgewater | United States | Bradley.S.Bridgewater@usdoj.gov |
| Jay Burnham | City of Farmington | jburnham@fmtn.org |
| Richard Cole | Cities of Aztec, Bloomfield and Farmington | rbc@keleher-law.com |
| John Draper | El Paso Natural Gas | jdraper@montand.com |
| J.M. Durrett | San Juan County | ddouthit@sjcounty.net |
| Douglas A. Echols | San Juan County | dechols@sjcounty.net |
| Michael Garcia | City of Albuquerque | migarcia@cabq.gov |
| David W. Gehlert | United States | David.Gehlert@usdoj.gov |
| Guss Guarino | United States | Guss.Guarino@usdoj.gov |
| Gary Horner | Bloomfield Irrigation District Gary Horner | ghorner@zianet.com |
| Stephen G. Hughes | NM Commissioner of Public Lands | shughes@slo.state.nm.us |
| Tracy Hofmann | State of New Mexico | tracy.hofmann@state.nm.us |
| John F. Kennedy | Board of Education, Bloomfield Schools | jkennedy@cuddymccarthy.com |
| Dan Israel | Ute Mountain Ute Tribe | Adamatronics@comcast.net |
| Robert D. Kidd | City of Albuquerque | rkidd@cabq.gov |
| Todd M. Lopez | State of New Mexico | todd@nmfirm.com |
| Victor Marshall | San Juan Agricultural Water Users Association, and Hammond Conservancy District | victor@vrmarshall.com |
| Jolene McCaleb | San Juan Water Commission | jmccaleb@taylormccaleb.com |
| James Noble | Arizona Public Service Co. | jnoble@rcalaw.com |
| Maria O'Brien | BHP-Navajo Coal Company | mobrien@modrall.com |
| Stanley M. Pollack | Navajo Nation | spollack@navajo.org |
| Gary Risley | North Star Water Users, La Plata Valley Acequia Association | gary@risleylaw.net |
| Joseph F. Sawyer | San Juan County | jsawyer@sjcounty.net |
| Arienne Singer | State of New Mexico | arianne.singer@state.nm.us |
| Stephen Snyder | Special Master | Stephen.snyder1@comcast.net |

| | | |
|-------------------------|---------------------------------|--|
| L. William Staudenmaier | Arizona Public Service Co. | wstaudenmaier@rcalaw.com |
| John L. Sullivan | NM Commissioner of Public Lands | jsullivan@slo.state.nm.us |
| Elizabeth N. Taylor | San Juan Water Commission | etaylor@taylormccaleb.com |
| Michael J. Thomas | NM Commissioner of Public Lands | Mthomas@slo.state.nm.us |
| John W. Utton | State of New Mexico | jwu@ssslawfirm.com |
| Tim Vollmann | Ute Mountain Ute Tribe | tim_vollmann@hotmail.com |
| Jeffrey J. Wechsler | El Paso Natural Gas | jwechsler@montand.com |

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

| | | |
|-------------------------------------|---|------------------------------------|
| STATE OF NEW MEXICO, <i>ex rel.</i> |) | CV-75-184 |
| STATE ENGINEER, |) | ROZIER E. SANCHEZ |
| |) | District Judge, <i>pro tempore</i> |
| Plaintiff, |) | |
| |) | SAN JUAN RIVER BASIN |
| v. |) | ADJUDICATION |
| |) | |
| THE UNITED STATES OF AMERICA |) | |
| <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

**MEMORANDUM IN SUPPORT OF JOINT MOTION FOR
ORDER GOVERNING INITIAL PROCEDURES
FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE
OF THE WATER RIGHTS OF THE NAVAJO NATION**

The United States of America (“United States”), the State of New Mexico *ex rel.* State Engineer (“State”) and the Navajo Nation (“Navajo Nation”) (collectively “Settling Parties”) hereby submit this Memorandum in Support of Joint Motion for an Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation (“Joint Motion”). Pursuant to Provisional Rule 1-071.2(B) NMRA 2009, the Settling Parties request the Court to order designation of an expedited *inter se* proceeding (“Navajo Decree Proceeding”) that will result in a final order and judgment approving and entering the Partial Final Judgment and Decree of the Water Rights of the Navajo Nation (“Navajo Decree”) that will be binding on all persons and entities claiming water rights or claiming the use of water

in the San Juan River System and the San Juan River Underground Water Basin within the State of New Mexico ("San Juan River Basin"). A proposed form of order adopting the procedures proposed by this Joint Motion is attached as Exhibit A to the Joint Motion. A proposed form of Notice of Expedited *Inter Se* Proceeding to Adjudicate the Water Rights of the Navajo Nation ("Notice") is attached to the Joint Motion as Exhibit B.

I. INTRODUCTION

For more than seven years, the Settling Parties have actively pursued a negotiated settlement of the Navajo Nation's claims to the waters of the San Juan River Basin. On April 19, 2005, the State and the Navajo Nation signed the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement ("Settlement Agreement"). Earlier this year Congress enacted and the President signed into law on March 30, 2009, the Northwestern New Mexico Rural Water Projects Act ("Settlement Act"), Title X, Subtitle B of the Omnibus Public Land Management Act of 2009, Public Law 111-11. The Settlement Act authorizes and directs the Secretary of the Interior to execute the Settlement Agreement to the extent that it does not conflict with the Settlement Act.

The Settling Parties are in the process of making revisions to the Settlement Agreement to conform to the Settlement Act.^{1/} Although the Settlement Act sets a deadline of December 31,

^{1/} The Secretary of the Interior was not a party to the Settlement Agreement executed by the Navajo Nation and the State of New Mexico on April 19, 2005. Pursuant to Section 10804 of the Settlement Act, Congress authorized the Secretary to execute the Settlement Agreement. In order for the Secretary of the Interior to execute the Settlement Agreement, various modifications must be made in order for the agreement to conform to both the Settlement Act and to U.S. Department of the Interior requirements. These modifications do not significantly change the terms of the Settlement Agreement executed in 2005; nevertheless, each of the signatories will need authorization, after review of the modifications, in order to execute the revised Settlement Agreement.

2010 for execution of the revised Settlement Agreement, the Settling Parties anticipate that revisions will be completed and the Settling Parties will execute the revised Settlement Agreement before the statutory deadline. Within 90 days of executing the revised Settlement Agreement, the Settling Parties will file with the Court a Motion for Entry of the Partial Final Judgment and Decree ("Motion for Entry of the Navajo Decree") called for by the Settlement Agreement. The Settlement Act provides as a condition of settlement that entry of the Navajo Decree occur not later than December 31, 2013.

The Settlement Act also sets a deadline of December 31, 2016 for Entry of a Supplemental Partial Final Judgment and Decree ("Supplemental Decree") adjudicating certain limited existing and historic Navajo uses not supplied from the San Juan River. Under the Settlement Agreement the State and the United States will prepare a joint hydrographic survey of the supplemental Navajo uses, whose sources of supply are surface water diverted from tributaries to the San Juan River and groundwater withdrawn from the San Juan River Underground Water Basin. The Settling Parties are not requesting any action by the Court at this time with respect to these supplemental uses. Once the hydrographic survey is completed the Settling Parties will file a Motion for Entry of the Supplemental Decree.

In order to advance consideration by the Court of the issues that will be raised by the Motion for Entry of the Navajo Decree, the Settling Parties believe it is timely for the Settling Parties to request the Court to adopt procedures and standards that will guide the Navajo Decree Proceeding. The Settling Parties request that the Court enter an order designating the Navajo Decree Proceeding as an expedited *inter se* proceeding, setting initial procedures and establishing notice requirements and approval standards for entry of the Navajo Decree.

II. PROPOSED PROCEDURES AND STANDARDS

The Settling Parties propose the following process and standards govern the Navajo Decree Proceeding.

A. Designation of Expedited Inter Se Proceeding.

The Settling Parties request that the Court designate the Navajo Decree Proceeding as an expedited *inter se* proceeding pursuant to Provisional Rule 1-071.2(B) NMRA 2009. A short, concise description of the Navajo Nation water rights as proposed by the Settling Parties in the Navajo Decree is provided in the form of the proposed Notice attached to the Joint Motion as Exhibit B. An expedited *inter se* proceeding is necessary to comply with the Settlement Act's condition that entry of a final judgment and decree of water rights described in the Navajo Decree occur not later than December 31, 2013.

Designation of an expedited *inter se* proceeding will promote judicial efficiency and expeditious completion of the adjudication by facilitating settlement and final resolution of the largest and potentially most senior claim in the San Juan River Basin, providing certainty to other water users. Failure to proceed promptly will injure the Settling Parties by causing the Settling Parties to miss the Congressional deadline, thereby jeopardizing fulfillment of the settlement and delaying final determination of the Navajo Nation's water rights. In that event, the Settling Parties and all other parties would be required to litigate much larger Navajo water rights claims and would lose many of the settlement benefits that are intended to protect other water users in the basin.

As set forth in Section II(C) below, notice of the Navajo Decree Proceeding will be given as required by Provisional Rule 1-071.2(C). Pursuant to Rule 1-071.2(D), the Navajo Decree

Proceeding will result in a partial final judgment and decree adjudicating the water rights of the Navajo Nation in the San Juan River Basin that binds all water rights claimants who are given notice under Rule 1-071.2(C) regardless of whether they were served and joined as defendants, participated in, or received actual notice of the proceeding.

The Settling Parties request that the Court hold a hearing on October 7, 2009, the date of the next scheduled Status Conference, to consider and approve designation of the Navajo Decree Proceeding as an expedited *inter se* proceeding under the rule.

B. Filing of Motion for Entry of Partial Final Decree

Within 90 days of execution of the revised Settlement Agreement by the State, the United States and the Navajo Nation, the Settling Parties propose to file with the Court the Motion for Entry of the Navajo Decree. At the time of filing of the Motion for Entry of the Navajo Decree, the Settling Parties propose to provide an electronic copy of the motion, along with the proposed Navajo Decree and executed Settlement Agreement, in Portable Document Format ("PDF"), to the Clerk of Court for posting on the Court's website. The Settling Parties propose that no response or objection to the Motion for Entry of the Navajo Decree will be required until the Settling Parties have complied with the notice requirements described below and the Court has set a deadline for filing objections to the entry of the proposed Navajo Decree.

C. Form of Notice and Notice Procedures

In accordance with Provisional Rule 1-071.2(C), the Settling Parties propose to give notice to all claimants of water rights within the San Juan River Basin, whether or not they have been served and joined as defendants in this adjudication, notifying them of the Navajo Decree Proceeding and their right to file an objection to the proposed Navajo Decree by a date certain and to participate in the proceeding. Attached to the Joint Motion as Exhibit B is a proposed

form of written notice to be given by first class mail with proper postage to all known claimants in the San Juan River Basin whose names and addresses are reasonably ascertainable. Notice will be given to all unknown claimants in a manner reasonably calculated under the circumstances to apprise them of the proceeding, as specified *infra*.

The form of the proposed Notice provides: (1) a summary of the Navajo Decree Proceeding; (2) a summary of the proposed Navajo Decree; (3) an explanation of the rights and options of water rights claimants; (4) a statement that a water right claimant's failure to file a timely objection will preclude that water right claimant from later objecting to the Navajo Decree, even if the terms and conditions as approved by the Court ultimately vary from those originally proposed by the Motion for Entry of the Navajo Decree; (5) locations and resources available to provide additional information; (6) a deadline for filing objections to entry of the proposed Navajo Decree; and (7) the time, date and location of a mandatory pre-hearing scheduling conference to be held by the Court, required to be attended by the Settling Parties and all objectors.^{2/}

The Settling Parties request that the Court hold a hearing to consider and approve the form of proposed Notice on October 7, 2009, the date of the next scheduled Status Conference.

For purposes of the Navajo Decree Proceedings, the "Commencement Date" is that date upon which all of the following events have occurred: first, the Court approves the notice procedures; second, the Court approves the form of the Notice; third, the revised Settlement Agreement has been executed by the Settling Parties; and finally, the Settling Parties file the

^{2/} In order to limit the number of pages, the Settling Parties request that the Notice may be formatted with reduced margins, single-spaced lines and double-sided text.

Motion for Entry of the Navajo Decree. From the Commencement Date, the Settling Parties propose to give notice by completing the following activities:

1. Notice by Regular First Class Mail. Within 90 days after the Commencement Date, the Settling Parties propose to send the Notice by first class mail to all persons and entities claiming ownership of water rights within the San Juan River Basin identified from the following sources:
 - (a) existing hydrographic survey and court records for the adjudication;
 - (b) the respective public records of the San Juan, McKinley, Rio Arriba and Sandoval County Assessors;
 - (c) the public records of the State Engineer; and
 - (d) the respective public records of irrigation districts, acequias, water conservancy districts and other water associations or commissions.

2. Notice by Publication. Within 60 days after the Commencement Date, the Settling Parties propose to publish the approved Notice pursuant to NMSA 1978, Sec. 14-11-10 (2008) in Spanish and English, once a week for four (4) consecutive weeks in the *Navajo Times*, the *Gallup Independent*, the *Farmington Daily Times*, the *Rio Rancho Observer*, the *Rio Grande Sun* and the *Albuquerque Journal*. Publication will serve as notification to those water rights claimants who were not known to the Settling Parties and those whose addresses cannot reasonably be determined after exercise of reasonable diligence as described in paragraph II.C.1, above. Publication shall also notify claimants of the times and locations of the public meetings described in paragraph II.C.3, below. In

conjunction with the certification proposed by paragraph II.C.4, the Settling Parties will file with the Court affidavits of publication from the publishers, managers or agents of the aforementioned newspapers.

3. Public Meetings. Within 120 days after the Commencement Date, the Settling Parties propose to hold one public meeting, within each of the following locations, for a total of five public meetings: (1) the city of Farmington; (2) the Shiprock Chapter of the Navajo Nation; (3) the town of Aztec; (4) the town of Bloomfield; and, (5) the Crownpoint Chapter of the Navajo Nation. In addition to the notice of the public meetings to be provided pursuant to paragraph II.C.2, above, the Settling Parties propose to further publicize the public meetings by purchasing a quarter-page advertisement once a week for three consecutive weeks in the *Gallup Independent*, the *Farmington Daily Times* and the *Navajo Times*. The first advertisement shall occur not later than two weeks before the first public meeting. The advertisements shall describe the purpose of the public meetings and shall set forth the times, dates and locations of the five meetings. Furthermore, the Settling Parties propose to publicize the public meetings by purchasing 30-second radio advertisements at least three times a day on the day before and the day of each public meeting to be run on two radio stations broadcasting in the area of the public meeting.
4. Certification of Notice. Upon completion of the notice requirements described in paragraphs II.C.1, II.C.2 and II.C.3, the Settling Parties will file with the Court a certification describing the fulfillment of the provisions required by those paragraphs.

D. Deadline for Filing Objection

At the time the Court approves the Notice and grants the Joint Motion, the Settling Parties request that the Court set a deadline for filing objections to entry of the proposed Navajo Decree of not later than 150 days after the Commencement Date and that the deadline date be stated in the Notice. The Settling Parties request the Court to order that the filing of an objection will satisfy the requirement of Provisional Rule 1-071.2(C)(3) of the filing of a notice of intent to participate.

E. Mandatory Pre-Hearing Scheduling Conference

The Settling Parties request that the Court schedule a Mandatory Pre-Hearing Scheduling Conference to be set not later than 180 days after the Commencement Date. The purpose of the Mandatory Pre-Hearing Scheduling Conference will be to set a schedule to consider objections. Prior to the scheduling conference, the Settling Parties will submit to the Court a proposed scheduling order to hear objections that are timely filed. The Settling Parties will request that the Court dismiss the objection of any objector who fails to appear at the scheduling conference without good cause.

F. Standard of Review and Burden of Proof

The appropriate standard of review, as previously adopted by this Court, for approval of a water rights settlement is whether it is "fair, adequate, and reasonable, and consistent with the public interest and applicable law." (Order Granting Joint Motion for Entry of a Partial Final Judgment and Decree on the Water Rights of the Jicarilla Apache Tribe, Feb. 24, 1999). When the Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe ("Jicarilla Apache Decree") was presented to this Court for approval, many of the same parties that are currently active in the San Juan adjudication participated in the Jicarilla Apache Decree

proceeding. In approving the Jicarilla Apache Decree, the Court adopted a standard of review based upon the Court's finding that the partial final decree entered by the Court was "fair, adequate, and reasonable, and consistent with the public interest and applicable law." (Order Granting Joint Motion for Entry of a Partial Final Judgment and Decree on the Water Rights of the Jicarilla Apache Tribe, Feb. 24, 1999). Accordingly, the Settlement Parties urge that the Court apply the same standard of review to the proposed Navajo Decree proceedings as was applied to the Jicarilla Apache Decree proceedings.

The public policy and the law in New Mexico, as elsewhere, favors amicable settlements of claims "whenever feasible." *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 102 N.M. 28, 30, 690 P.2d 1022, 1024 (1984); *cf. Carson v. American Brands, Inc.*, 450 U.S. 79, 88 (1981) (recognizing that parties to litigation have a "right to compromise their dispute on mutually agreeable terms" which may include incorporation of their settlement into a judicial decree); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990) ("it is the policy of the law to encourage settlements"). The *Cannons* court observed that the general policy favoring settlements "has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement." *Id.* at 84. In the present case three sovereign governments have worked together to craft a settlement to eliminate the need for years of litigation which would be extremely costly for all of the parties to this case.

The decrees to be proposed by the Settling Parties are consent decrees intended to constitute a final judgment pursuant to Rule 1-054 NMRA 2009 as to all of the Navajo Nation's water rights claims in the San Juan River Basin. *See VTA, Inc. v. Airco, Inc.*, 597 F.2d 220, 223 (10th Cir. 1979) (for purposes of finality, underlying judgment by consent has same force and

effect as judgment rendered on the merits following trial).^{3/} Generally, in reviewing a consent decree, a court must ascertain that the settlement is fair, adequate, and reasonable and does not contravene the public interest:

Because the issuance of a consent decree places the power of the court behind the compromise struck by the parties, the district court must ensure that the agreement is not illegal, a product of collusion, or against the public interest. The court also has the duty to decide whether the decree is fair, adequate, and reasonable before it is approved.

United States v. Colorado, 937 F.2d 505, 509 (10th Cir. 1991); *cf. Ratzlaff v. Seven Bar Flying Service, Inc.*, 98 N.M. 159, 163, 646 P.2d 586, 590 (Ct. App. 1982) (“[T]he policy of our law is to favor amicable settlement of claims without litigation when the agreements are fairly secured, are without fraud, misrepresentation, or overreaching, and when they are supported by consideration.”) *cert. denied*, 98 N.M. 336 (1982); *see also United States v. Union Electric Co.*, 132 F.3d 422, 430 (8th Cir. 1997); *Sierra Club, Inc. v. Electronic Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990) (“Because of the unique aspects of settlements, a district court should enter a proposed consent judgment if the court decides that it is fair, reasonable and equitable and does not violate the law or public policy.”); *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980); *United States v. Oregon*, 699 F.Supp. 1456, 1461 (D. Or. 1988) (“When considering a consent decree that also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.”) This

^{3/} Because the relevant provisions of the New Mexico Rules are based upon, and substantially equivalent to, the Federal Rules of Civil Procedure, and because few published cases from New Mexico's courts have reviewed consent decrees, case law interpreting and applying the federal rules is also cited herein.

standard of review has been recognized by water law scholars as applying to water rights settlements generally, and to Indian water rights settlements specifically.^{4/}

In the Jicarilla Decree proceeding, this Court further required that any party objecting to proposed Jicarilla settlement "must state with particularity, what aspect or aspects of the proposed decree are objectionable and specifically how you will be harmed if the Court enters the decree as proposed." (Scheduling Order for Proceedings on Objections to the Entry of the Jicarilla Apache Tribe Partial Final Decree, Aug. 11, 1998).

Since this Court's approval of the Jicarilla Apache Decree, two other New Mexico courts have adopted substantially the same standard of review and burden of proof as adopted by this Court in the Jicarilla Apache Decree proceeding. Like the Jicarilla Apache Decree proceeding and like the proposed Navajo Decree Proceeding, the two other New Mexico cases involved entry by an adjudication court of partial final decrees pursuant to water rights settlements.

In the first case, *State of New Mexico v. Lewis, et al.*, 141 N.M. 1 (2007 NMCA 8), the New Mexico Court of Appeals upheld the Pecos adjudication court's summary judgment approving a partial final decree incorporating a settlement agreement between the State, the United States, Carlsbad Irrigation District ("CID") and two other irrigation districts of CID's water rights claims. The Court of Appeals affirmed that objectors to the settlement had failed to raise genuine issues of material fact that the settlement agreement unfairly and adversely affected

^{4/} See A. Dan Tarlock, *Adjudication of Water Rights*, in *Law of Water Rights and Resources* 1998, § 7.08[4], 7-28 (Environmental Law Series, No 10, 1998) ("An adjudication can be greatly facilitated by settlements among the parties. . . . Basically, the court must determine if the settlement was reached in good faith, all parties received due process, the terms are fair to the settling parties and do not prejudice other claimants.); see also Peter W. Sly, *Reserved Water Rights Settlement Manual* 186 (Island Press 1989) ("Once [an Indian water rights] settlement has been negotiated, what standard should the court apply in reviewing substantive objections by parties not involved in the negotiations? It is likely that courts will apply a "fair and reasonable" test to proposed consent decrees settling stream adjudications, to ensure that rights of third parties are protected.").

or unjustly harmed the water rights of non-settling parties. *Id.* at 18. Objectors “have not made a prima facie case that CID’s water rights or that individual water rights would be or have been adversely affected by the settlement agreement and decree.” *Id.* at 20.

In the second case, the U.S. District Court in the *Aamodt* case adopted a similar standard of review for approval of settlement of claims of the four Pueblos within the Pojoaque stream system, likewise in the context of an Indian water rights settlement. In particular, the *Aamodt* court made clear that objectors will carry the burden of proof in objecting to a settlement reached after extensive, good faith and arms-length negotiations: “once the court is satisfied that the decree was the product of good faith, arms-length negotiations, a negotiated decree is presumptively valid and the objecting party has a heavy burden of demonstrating that the decree is unreasonable.” *State v. Aamodt, et al.*, No. Civ. 66-06639 MV/LCS (Memorandum Opinion and Order, May 24, 2007 at 6, quoting *United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1999) (other citations omitted)).

By subsequent order, the *Aamodt* court set forth the following specific standards for objections to the proposed settlement:

The burden shall be on the objecting party to demonstrate that the rights proposed to be settled pursuant to the Settlement Agreement should not be quantified and administered as proposed in the Settlement Agreement. Objections shall be required to demonstrate that adoption and implementation of the Settlement Agreement is not fair, adequate, reasonable, is not in the public interest, or is not consistent with applicable law. Objections must include the following: (1) name and address of objector; (2) description of water rights claimed by objector; (3) statement of the specific legal and factual basis of the objection; and (4) how the objector will be injured or harmed by the Settlement Agreement in a legally cognizable way.

(Order Granting Motion of Settlement Parties to Establish Procedures for (1) Approval of Settlement Agreement, (2) Entry of Partial Final Decree, (3) Entry of Interim Administrative Order, and (4) Entry of Final Decree, Dec. 18, 2007).

The Navajo settlement finally settles and determines the water rights of the Navajo Nation in the San Juan River Basin. The Navajo Settlement Agreement was reached by the State of New Mexico, the Navajo Nation and the United States after years of intensive and active negotiations, conducted in good faith and at arms-length and culminating in approval by Congress of the Settlement Agreement and, imminently, execution of the revised Settlement Agreement by the three parties. In considering the Motion for Entry of the Navajo Decree, the Settling Parties request the Court to require that objectors demonstrate that adoption and implementation of the Navajo settlement is not fair, adequate, or reasonable; is not in the public interest; or is not consistent with applicable law.

III. Hydrographic Survey Report

Prior to passage of the Settlement Act, the Court ordered the United States to prepare a Hydrographic Survey Report describing historic and existing uses on all lands in the San Juan River Basin held on behalf of the Navajo Nation. *See* Order of August 20, 2004. This order was entered in anticipation of preparing for a water rights adjudication of the Navajo Nation's water rights and did not contemplate the possibility of proceeding in this adjudication pursuant to a settlement authorized by Congress.

As outlined above, in the coming months the Settling Parties will execute a Settlement Agreement that conforms to the Settlement Act that defines the rights authorized by the Settlement Act. Subsequently, the Settling Parties will file with the Court the Motion for Entry of the Navajo Decree. Then, the Settling Parties will pursue entry of the Navajo Decree based on those procedures outlined and approved by the Court. The timing of events moving forward will occur at a regular and relatively rapid pace.

The Hydrographic Survey Report contemplated five years ago is no longer necessary (either in design or timing) now that the Settlement Act has been enacted by Congress. The United States is now a Settling Party working in conjunction with the Navajo Nation and State of New Mexico to secure Entry of the Navajo Decree and the Entry of the Supplemental Decree. In order to implement the Settlement Agreement, the United States and State of New Mexico must work together to develop a hydrographic survey report of supplemental uses to be adjudicated by the Supplemental Decree. As described above, the Settlement Act set a deadline of December 31, 2016 for Entry of the Supplemental Decree. Furthermore, for the United States to continue to proceed with development of a Hydrographic Survey Report (as instructed by the August 20, 2004 Order) and development of a cooperative hydrographic survey report (as instructed by the Settlement Act) would be counterproductive to its efforts to obligation to pursue and secure Entry of the Navajo Decree and the Entry of the Supplemental Decree.

The Court's August 20, 2004 Order regarding the preparation and filing of a Hydrographic Survey Report should now be vacated.

WHEREFORE, the Settling Parties request the Court to grant the Joint Motion and to enter the proposed Order Governing Initial Procedures for Entry of the a Partial Final Decree and Judgment of the Navajo Nation's Water Rights.

Respectfully submitted this 2nd day of September, 2009.

NAVAJO NATION

Approved August 31, 2009

Stanley M. Pollack
Bidtah N. Becker
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Navajo Nation (AZ) 86515
(928) 871-7510

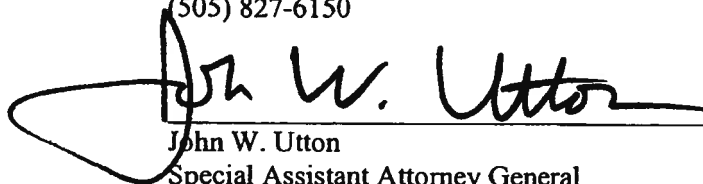
UNITED STATES OF AMERICA

Approved August 31, 2009

Guss Guarino
U.S. Department of Justice
Environment and Natural Resources Division
1961 Stout Street, 8th Floor
Denver, CO 80294
(303) 844-1343

STATE OF NEW MEXICO

DL Sanders
Arianne Singer
Tracy L. Hofmann
Special Assistant Attorneys 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 & Stelzner, P.A.
Post Office Box 271
Albuquerque, New Mexico 87103
(505) 247-0411

