SJ-17
Navajo Settle

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

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

Plaintiff,

v.

THE UNITED STATES OF AMERICA, et al.,

Defendants,

v.

THE JICARILLA APACHE TRIBE, and the NAVAJO NATION,

Defendant-Interveners.

Cause No.: CV-75-184
Honorable Rozier E. Sanchez

SAN JUAN RIVER BASIN ADJUDICATION

La Plata River Section

AZTEC'S AND BLOOMFIELD'S RESPONSE TO JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION

COMES NOW Aztec and Bloomfield, by and through their attorneys, Keleher & McLeod, P.A., and file their Response to Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation and state:

INTRODUCTION

On September 2, 2009, the United States of America, the State of New Mexico *ex rel.* State Engineer and the Navajo Nation (collectively "Settling Parties") submitted their Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment

and Decree of the Water Rights of the Navajo Nation ("Joint Motion"), as well as their 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"). (*See* Joint Mot.; *see* Mem. in Support.) As part of their Joint Motion, the Settling Parties request that the Court "enter an order designating the Navajo decree a [two-step] inter se proceeding" such that the Navajo decree would be entered without a hydrographic survey of existing and historic water usage of the Navajo Nation. (*See* Mem. in Support, 3.) The Settling Parties further request that the United States not be required to prepare a Hydrographic Survey Report describing historic and existing uses of water on all lands in the San Juan River Basin and that the Order entered by this Court on August 20, 2004 requiring the same be vacated. (*See id.*, 14-15.) Finally, the Settling Parties argue that the burden of proof should be placed on any objecting parties to demonstrate that the proposed settlement is not "fair, adequate, or reasonable; is not in the public interest; or is not consistent with applicable law." (*See id.*, 14.)

Aztec and Bloomfield object to the Settling Parties' Joint Motion because the proposed Order should not be designated as an *inter se* proceeding without completion of a Hydrographic Survey Report of existing and historic water usage of the Navajo Nation. Further, New Mexico law requires that the Settling Parties' proposed Order not be entered without a Hydrographic Survey Report being completed. Finally, the burden of proof is properly on the Settling Parties to demonstrate that adoption and implementation of the Navajo settlement is fair, adequate, and reasonable, and that it is in the public interest and is consistent with applicable law. Aztec and Bloomfield do not object at this time to the

substance of the proposed Navajo settlement because there is not enough information, due to the Settling Parties' failure to provide the requisite Hydrographic Survey Report.

ARGUMENT

1) **The Settling Parties' proposed Order should not be designated as an *inter se* proceeding without completion of a Hydrographic Survey Report of existing and historic water usage of the Navajo Nation.**

The Settling Parties request that their proposed Order be treated as an expedited *inter se* proceeding pursuant to Provisional Rule 1-071.2(B) NMRA but that "existing and historic uses not supplied from the San Juan River" be excluded from the *inter se* process. (*See* Mem. in Support, 3.) This would allow the United States to not complete the Hydrographic Survey Report as required by New Mexico law and this Court's Order of August 20, 2004 and should not be allowed. (*See* Supra, § 2.)

"An expedited *inter se* proceeding is a proceeding in which a water rights claim is resolved in a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978 both as between the plaintiff and the defendant and as among the defendant and other water rights claimants." Rule 1-071.2(B)(1) NMRA. "The court shall conduct a hearing to determine whether to conduct an expedited *inter se* proceeding, and may proceed if it finds that such a proceeding will promote judicial efficiency and expeditious completion of the adjudication. Among the factors the court shall consider are: (a) whether failure to proceed will injure the party asserting the claim; (b) whether proceeding will injure those parties opposing the claim; and (c) the expense and delay resulting from the failure to proceed." Rule 1-071.2(B)(3) NMRA. Further, "[t]he New Mexico Rules of Civil Procedure permit a court to order a separate trial of any claim or separate issue when separate trials will be conducive to expedition and economy." *S.E. Reynolds v. Pecos*

Valley, 99 N.M. 699, 700, 663 P.2d 358, 359 (1983). However, this should only occur "in furtherance of convenience or to avoid prejudice." Rule 1-042(B) NMRA. Additionally, "[w]aters cannot be apportioned according to conflicting decrees or decrees covering less than all claims." *El Paso & R. I. RY. Co. v. District Court of Fifth Judicial District Within and For Chaves County*, 36 N.M. 94, 100, 8 P.2d 1064, 1067 (1931).

Here, the Settling Parties' proposed *inter se* proceeding would not promote judicial efficiency and expeditious completion of the adjudication. Instead, it would injure any objecting parties because such parties do not have the benefit of a Hydrographic Survey Report.

Additionally, the Settling Parties only stated need for the two-step *inter se* process are the decree deadlines set out in the Settlement Act. However, the Settlement Act provides that all deadlines may be extended if the Settling Parties agree that an extension is reasonably necessary. Public law 111-11, § 10701(e)(1)(B). Further, the United States has been aware of its requirement to complete the Hydrographic Survey Report since this Court's Order of August 20, 2004, over five years ago. Thus, its argument that this two-step process is necessary for expediency is disingenuous because it is the United States' fault for not complying with the Order. Additionally, allowing a two-step process will not further convenience or avoid prejudice. Instead, allowing a two-step process makes it impossible for Aztec or Bloomfield to know whether to object to the substance of this proposed Order because it is unknown how much more water will be requested for existing and historic use. Thus, this Court should not designate the Navajo Decree Proceeding as a two-step *inter se* proceeding, but should instead require that the United States complete the Hydrographic Survey Report as ordered by the August 20, 2004 Order. *See El Paso &*

R.I.RY. Co., 36 N.M. at 100, 8 P.2d at 1067 ("A comprehensive adjudication of water rights is highly important in those states which recognize the principles of prior appropriation and of forfeiture for nonuse").

2) This Court should not enter the Settling Parties' proposed Order because New Mexico law requires entry of a Hydrographic Survey Report regarding the existing and historic water usage of the Navajo Nation.

The Settling Parties argue that the United States should not be required to prepare a Hydrographic Survey Report, prior to the Settling Parties' proposed settlement. This should not be allowed because a Hydrographic Survey Report is required by New Mexico law and by this Court's Order of August 20, 2004.

a. New Mexico law requires that the Settling Parties submit a Hydrographic Survey Report before this Court may enter the Settling Parties' proposed Order.

A settlement agreement may only be entered into where it complies with the laws of New Mexico. *State v. Lewis*, 2007-NMCA-008, ¶¶ 32, 36, 141 N.M. 1, 150 P.3d 375 (holding that a district court properly entered a partial final decree incorporating a settlement agreement concerning water rights of a project where the settlement agreement complied with New Mexico law). A decree concerning water rights cannot be entered concerning a water source until "hydrographic surveys thereon have been completed." *S.E. Reynolds v. Sharp*, 66 N.M. 192, 196, 344 P.2d 943, 945 (1959) (applying NMSA 1953, § 75-4-8, now NMSA 1978, § 72-4-19); *see* NMSA 1978, § 72-4-13 (New Mexico statutory law requires that the New Mexico State Engineer make a hydrographic survey of each source of water supply in New Mexico); *see* NMSA 1978, § 72-4-15 ("Upon the completion of the hydrographic survey of any stream system, the state engineer shall deliver a copy of so much thereof as may be necessary for the determination of all rights to

the use of the waters of such system together with all other data in his possession necessary for such determination, to the attorney general of the state ..."). Further, parties are allowed to engage in discovery. Rule 1-026 NMRA; *see* NMSA 1978, § 72-2-13(A) ("In matters pertaining to the public waters of this state which are pending before the state engineer for administrative action, a party may take the testimony, by deposition on oral examination or written interrogatories, of any person including a party and any personnel of the state engineer's office, except the state engineer or his designated hearing examiner, and may request that the pending matter be set for an administrative conference before the state engineer in the manner and for the purposes established for discovery and for pretrial conferences by the Rules of Civil Procedure for the district courts of New Mexico.").

Here, the Settling Parties' proposed Order fails to comply with the laws of New Mexico in that a Hydrographic Survey Report has not been completed. *See Pecos Valley Artesian Conservancy District*, 99 N.M. at 700, 663 P.2d at 359 ("The object of an adjudication suit is to determine all claims to the use of the water in a given stream system in order to facilitate the administration of unappropriated waters and to aid in the distribution of waters already appropriated."); *see Sharp*, 66 N.M. at 196, 344 P.2d at 945 (a decree concerning water rights cannot be entered concerning a water source until "hydrographic surveys thereon have been completed"). Thus, Aztec and Bloomfield object to the proposed Order insofar as the Settling Parties request that it be entered without a Hydrographic Survey.

Additionally, Aztec and Bloomfield object to the proposed Order without first being allowed to engage in discovery. *See* Rule 1-026 NMRA; *see* NMSA 1978, § 72-2-13(A). On September 17, 2004, this Court explicitly held that parties in this matter would

be allowed to conduct discovery at the time any parties requested the court to enter a Partial Final Judgment and Decree (See Order filed September 17, 2004, ¶ 3). This Order is binding on all parties. *In re Kleinsmith*, 2005-NMCA-136, ¶ 11, 138 N.M. 601, 124 P.3d 579. ("Generally, a party must obey an order issued by a court with subject matter and personal jurisdiction until the order is set aside"); *In re Eastburn*, 121 N.M. 531, 537, 914 P.2d 1028, 1034 (1996) ("an order entered by a court with proper jurisdiction must be obeyed even if the order is clearly incorrect"). Discovery is necessary because this Court has ordered that it is allowed and Aztec and Bloomfield need discovery in order to know if they object to the substance of the proposed Order and settlement. Aztec and Bloomfield desire to ask, for example, the following questions in discovery:

1) Has the Navajo Nation or the United States, pursuant to its trust obligations to the Navajo Nation or the State of New Mexico, prepared an analysis of the level of water rights that would be apportioned to the Navajo Nation pursuant to the practicable irrigable acreage of *Winters v. United States*, 207 U.S. 564 (1908)?

2) If the answer is yes, please provide a copy of the study and explanation of the assumptions made to arrive at the determination of water rights sufficient to irrigate all practicable irrigable acreage of the Navajo Nation. Please also explain in summary how much water would be available to the Navajo Nation pursuant to that analysis.

3) If a study of practicable irrigable acreage has been performed, what was the:

   a. Source of water;

b. Crops to be grown;

c. Ratio of specialty crops to basic crops;

d. Market analysis performed;

e. On-farm delivery costs;

f. Analysis of the effects of insects and disease;

g. Costs allocated to storage, transportation, carriage loss, and economics of scale related to drought;

h. Accounting system used to develop the cost benefit analysis;

i. Discount rate;

j. Final cost benefit ration; and

k. Accounting treatment of federal subsidies?

4) Is it the Navajo Nation's position, that with the enactment of the proposed Order, that a portion of the Navajo Nation's *Winters* rights remained unimpaired?

5) Please provide the actual acre-feet per year diversion and depletion of water for the Navajo Indian Irrigation Project, from the years of its implementation through the current year. Please also provide an estimate by year of the anticipated diversions and depletion for the current period, through completion of Navajo Indian Irrigation Project (December of 2015).

6) Please provide an estimate of how many acre-feet per year allocated under this settlement would not be available to the Navajo Nation if the settlement is not approved.

7) Is it the Navajo Nation's position under this settlement that it has the ability to change the purpose of use of any settlement waters allocated to uses other than irrigation purposes? If so, please explain.

8) Please provide an estimate of how many acre-feet per year of water allocated to the Navajo Nation under this settlement will not be subject to any requirement to share shortages in the Navajo Reservoir supply.

9) Does the proposed Order limit the Navajo Nation's use of water to the consumptive use required by modern water conservation technology (i.e., sprinkler irrigation), or is there an absolute right for the Navajo Nation to divert a certain amount of acre-feet of water per year?

10) Has the Navajo Nation, as part of the negotiations resulting in the adoption of the proposed Order, waived its right to any of its *Winters* rights in exchange for submittal of the proposed Order, and if so, by how much?

11) Please quantify under the settlement how much of the Navajo Nation's water rights will not be required to be used solely for irrigation purposes?

12) Does the settlement allow the Navajo Nation the ownership right in any water saved (including return flow) as a result of use of the sprinkler irrigation system? Is that water held by the Navajo Nation as a Winters water right?

13) Has any party to the proposed settlement prepared a 40-year water plan, pursuant to NMSA 1978, § 72-1-1, for the proposed municipal and

industrial uses? If the answer is yes, please provide a copy of that plan, even if in draft format.

14) Are all of the water rights subject to the settlement, except for those being allocated under the Navajo Indian Irrigation Project and the Animas La Plata Project, being appropriated pursuant to New Mexico law? Please explain.

15) Will the New Mexico State Engineer be required to approve the transfer of any of the water diverted as part of the Navajo-Gallup Water Supply project from the san Juan Basin to the Zuni Basin in New Mexico? Please explain, including what is the position of the New Mexico State Engineer on this issue?

Without the Hydrographic Survey Report and without the answers to Aztec and Bloomfield's desired Discovery requests, Aztec and Bloomfield are unable to make an informed decision as to whether the object to the substance of the proposed settlement. Further, New Mexico law requires a Hydrographic Survey Report. Thus, this Court should deny the Settling Parties' Joint Motion.

b. <u>This Court's Order of August 20, 2004 requires that the United States must file a Hydrographic Survey Report and the Settling Parties fail to show proper grounds for this Order to be vacated.</u>

"Generally, a party must obey an order issued by a court with subject matter and personal jurisdiction until the order is set aside." *In re Kleinsmith*, 2005-NMCA-136, ¶ 11,; *In re Eastburn*, 121 N.M. at 537, 914 P.2d at 1034 ("an order entered by a court with proper jurisdiction must be obeyed even if the order is clearly incorrect"). A district court has inherent authority to reconsider an interlocutory order. *Tabet Lumber Co. v. Romero*,

117 N.M. 429, 431, 872 P.2d 847, 849 (1994) (internal citations omitted). An interlocutory order is any order that is not a final order or judgment and that "leaves the case in the trial court for further proceedings." *Melnick v. State Farm Mut. Auto. Ins. Co.*, 106 N.M. 726, 727, 749 P.2d 1105, 1106 (1988). The burden of proof is on the party seeking to vacate an Order. *Carter v. Burn Constr. Co., Inc.*, 85 N.M. 27, 32, 508 P.2d 1324, 1329 (Ct. App. 1973) (the party alleging an affirmative fact has the burden of proof); *J.A. Silversmith, Inc. v. Marchiondo*, 75 N.M. 290, 294, 404 P.2d 122, 124 (1965) ("it is well settled that the party alleging the affirmative has the burden of proof"); *Pentecost v. Hudson*, 57 N.M. 7, 9, 252 P.2d 511, 512 (1953) ("We are thus confronted with the settled rule that he who affirms must prove, and when whole of evidence on issue involved leaves case in equipoise, party affirming must fail").

On August 20, 2004, this Court ordered that "on or before October 1, 2010, the United States shall file, and serve on counsel for the State of New Mexico, with notice to all counsel of record, a Hydrographic Survey Report describing historic and existing water uses..." (*See* Scheduling Order on Indian Water Rights Claims, 2.) The Settling Parties now request that this Order be vacated and incorrectly argue that "[t]his 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." (*See* Mem. in Support, 14.) However, this Order was entered on the United States' unopposed Motion for Entry of Scheduling Order on Indian Water Rights Claims, which stated that the Order "establishes a target date for submission of a Hydrographic Survey Report describing historic and existing water uses on lands of the Navajo Nation and Navajo allottees." (*See* Mot. for Entry of Scheduling Order on

Indian Water Rights Claims, ¶ 4.) The United States further stated that "preparation of this report, which entails extensive field work, will be necessary whether the currently proposed Navajo settlement succeeds or not. Accordingly, the United States urges the Court to establish the proposed deadline so that funding can be secured to begin the necessary HSR work promptly, and avoid potential future delays in this litigation." (*See id.*) Thus, this Order was not entered only in anticipation of adjudication but was instead entered in anticipation of a Navajo settlement and in order to avoid future delays. However, the Settling Parties now seek to cause delay by not complying with the August 20, 2004 Order.

The Settling Parties also argue that the August 20, 2004 Order be vacated because New Mexico and the United States are required by the Settlement Act to prepare a joint hydrographic survey by December 31, 2016. (*See* Mem. in Support, 15.) The Settling Parties further argue that "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. (*See id.*, 15.) However, the Settling Parties fail to address the United States' complete failure to complete the Hydrographic Survey Report as instructed by the August 20, 2004 Order, which occurred over five years ago and which the United States requested. Instead, Settling Parties attempt to allow the United States to not meet its requirements, which makes it impossible for Aztec or Bloomfield to know whether or not they should object to the substance of the proposed Order. Further, the Settling Parties incorrectly state that the United States and

New Mexico must complete a joint hydrographic survey by December 31, 2016. (*See id.*, 15.) However, the Settlement Act clearly states that all deadlines may be extended if the Settling Parties agree that an extension is reasonably necessary. Public Law 111-11, § 10701(e)(1)(B). This Court should therefore require that the United States complete the Hydrographic Survey Report as required by the August 20, 2004 Order. If this will cause delays for any other requirements of the Settlement Act, then the Settling Parties should agree to an extension of time as reasonably necessary.

3) **The Settling Parties have the burden of proof to demonstrate that adoption and implementation of the Navajo settlement is fair, adequate, and reasonable, and that it is in the public interest and is consistent with applicable law.**

New Mexico law favors settlements. *Ratzlaff v. Seven Bar Flying Service, Inc.*, 98 N.M. 159, 163, 646 P.2d 586, 590 (Ct. App. 1982). "[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." *Sierra Club, Inc. v. Elec. Controls Design, Inc.*, 909 F.2d 1350, 1355 (9th Cir. 1990); *U.S. v. State of Colorado*, 937 F.2d 505, 509 (10th Cir. 1991) ("The court also has the duty to decide whether the decree is fair, adequate, and reasonable before it is approved"); *U.S v. Union Elec. Co.*, 132 F.3d 422, 430 (8th Cir. 1997) ("The district court is required to review a proposed consent decree for fairness, reasonableness, and consistency with [statutory law]"); *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 525 (1986) (Parties may not enter into consent decrees that violate statutory law).

The burden of proof is on the parties offering the settlement to show that it is reasonable, fair, adequate, and complies with applicable law. *See Lewis*, 2007-NMCA-008, ¶ 65 (holding that a motion for summary judgment to declare a settlement agreement

valid was properly upheld where the settling parties made a prima facie case that the settlement was valid and the opposing parties failed to then set forth any issues of material fact to defeat the summary judgment); *see State of Utah v. Kennecott Corp.*, 801 F.Supp. 553, 567 (D. Utah 1992) (holding that a consent decree should not be allowed where the plaintiff settling party failed to develop a sufficient factual foundation to demonstrate that the remedial purposes of a federal statute could not be achieved). This is because any party alleging an affirmative fact has the burden of proof. *Carter*, 85 N.M. at 32, 508 P.2d at 1329; *J.A. Silversmith, Inc*, 75 N.M. at 294, 404 P.2d at 124 ("it is well settled that the party alleging the affirmative has the burden of proof"); *Pentecost*, 57 N.M. at 9, 252 P.2d at 512 ("We are thus confronted with the settled rule that he who affirms must prove, and when whole of evidence on issue involved leaves case in equipoise, party affirming must fail").

Here, the Settling Parties affirmatively propose that this Court enter their Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation. Aztec and Bloomfield agree that this Court should apply a standard that the proposed settlement is fair, reasonable and equitable and does not violate the law or public policy. However, the burden of proof should be on the Settling Parties as they are the parties affirmatively offering this proposed Order and affirmatively arguing that the United States should not be required to complete the Hydrographic Survey Report. *See Lewis*, 2007-NMCA-008, ¶ 65 (holding that a motion for summary judgment to declare a settlement agreement valid was properly upheld where the settling parties made a prima facie case that the settlement was valid and the opposing parties failed to then set forth any issues of material fact to defeat the summary judgment); *see State of Utah v. Kennecott*

Corp., 801 F.Supp. 553, 567 (D. Utah 1992) (holding that a consent decree should not be allowed where the plaintiff settling party failed to develop a sufficient factual foundation to demonstrate that the remedial purposes of a federal statute could not be achieved); *see Carter*, 85 N.M. at 32, 508 P.2d at 1329 (the party alleging an affirmative fact has the burden of proof); *J.A. Silversmith, Inc*, 75 N.M. at 294, 404 P.2d at 124 ("it is well settled that the party alleging the affirmative has the burden of proof"); *Pentecost*, 57 N.M. at 9, 252 P.2d at 512 ("We are thus confronted with the settled rule that he who affirms must prove, and when whole of evidence on issue involved leaves case in equipoise, party affirming must fail").

The Settling Parties incorrectly argue that the burden of proof should be on any objectors and cite to the Jicarilla Decree proceeding, *State of New Mexico v. Lewis*, 2007-NMCA-008, and *State v. Aamodt*, No. Civ. 66-06639. (*See* Mem. in Support, 12-13.) However, the Jicarilla Decree is "not binding under the law of the case doctrine upon any other water right claimant, the State or the Untied States in the adjudication of other water rights in this case and should not be relied upon as precedent under the State decision doctrine in any other water right adjudication." *See* Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe, ¶7. Further, the case law cited by the Settling Parties makes clear that the burden of proof is appropriately on the Settling Parties.

The Jicarilla Apache Decree was entered based on the Court's finding that the Decree was 'fair, adequate, and reasonable, and consistent with the public interest and applicable law.'" *See* 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, ¶ 3. This was

entered after the court "considered the motion and the United States' Hydrographic Survey Report [of past and existing usage] describing the water rights to be adjudicated in this decree, and the objections thereto." *See* Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe, Feb. 24, 1999. Here, the duty is on the United States to provide a Hydrographic Survey Report to the other parties. However, the United States has not yet done so and requests that it not be required to do so. Thus, unlike the Jicarilla Apache Decree, this Court is unable to consider any Hydrographic Survey Report, such that the burden of proof should remain on the Settling Parties.

The Settling Party's argument that they will file a Hydrographic Survey Report of current and existing water usage by December 31, 2016, pursuant to the Settlement Act (*see* Mem. In Support. 15) is not sufficient. Without the Hydrographic Survey Report, objecting parties are unable to determine whether they should object to the substance of the proposed settlement. It is also unfair to make any objecting parties wait until December 31, 2016 for a Hydrographic Survey Report of current and existing water usage because it would then be too late for the objecting parties to object to the substance of this proposed settlement.

The Settling Parties also rely on *Lewis*, 2007-NMCA-008, stating that "[t]he 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 or unjustly harmed the water rights of non-settling parties." (*See* Mem. in Support, 12-13.) However, in *Lewis*, the court applied a summary judgment standard of review, which required the settling parties first make a prima facie showing that the settlement was valid. 2007-

NMCA-008, ¶ 24. The burden then shifted to the objecting parties to raise any genuine issue of material fact as to harm. *Id.* at ¶ 72.

Finally, the Settling Parties rely on *Aamodt v. United States*. (*See* Mem. in Support, 12-13.) There, the court held that "[t]he burden will be on the objectors to prove that the settlement is not fair, adequate or reasonable." Mem. Opinion and Order, Case No. Civ. 66-06639. However, this was after the court was satisfied that the settlement agreement was the "product of good faith, arms-length negotiations." *Id.* at 6. Here, the Settling Parties have not shown that the proposed settlement is the product of good faith, but instead attempt to void the United States' requirement to prepare a Hydrographic Survey Report. Thus, unlike *Aamodt*, the Settling Parties affirmatively move this Court to excuse the United States from its requirements, which places the burden on them. However, they ask that the burden not be placed on them but instead be placed on any objecting parties. This would require an objecting party to prove that the settlement is not fair, adequate, or reasonable, or that it is not in the public interest or not consistent with applicable law, without the benefit of any Hydrographic Survey Report. Thus, this Court should find that the burden of proof is properly on the Settling Parties.

CONCLUSION

WHEREFORE, Aztec and Bloomfield request that this Court deny the Settling Parties' Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of for **Aztec's and Bloomfield's Response to Joint Motion for Order Governing Initial Procedures for Entry of Partial Final Judgment and Decree of the Water Rights of the Navajo Nation** was sent via U.S. Mail and via email on this 22nd day of October, 2009 to the following:

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