STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,	**CV-75-184**
Plaintiff,	**HON. JAMES J. WECHSLER PRESIDING JUDGE**
v.	**SAN JUAN RIVER ADJUDICATION**
THE UNITED STATES OF AMERICA, *et al.*,	**Claims of Navajo Nation Case No: AB-07-1**
Defendants.	

ORDER GRANTING THE SETTLEMENT MOTION FOR ENTRY OF PARTIAL FINAL DECREES DESCRIBING THE WATER RIGHTS OF THE NAVAJO NATION

THIS MATTER is before the Court in the proceeding to determine whether the Settlement Agreement concerning the water rights of the Navajo Nation reached by the United States of America, the State of New Mexico, and the Navajo Nation (the Settling Parties) should be approved. This Order resolves the dispositive motions of the parties.

The Settling Parties filed the *Settlement Motion of United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees* (the Settlement Motion) on January 3, 2011. The amended scheduling order of the Court required the Settling Parties to file their memoranda in support of this motion on April 15, 2013 and also required parties who object to the Settlement Agreement and who wished to file dispositive motions and supporting memoranda to file their motions on that date. The Settling Parties filed their memoranda, and Community Ditch Defendants, Defendants B Square Ranch LLC, et al. (B Square Ranch), Gary

L. Horner, and Robert E. Oxford (collectively, the Non-Settling Parties) filed dispositive motions and supporting memoranda.[1] Responses and replies were filed May 10 and 24, 2013.[2] The Court heard arguments June 11 and 12, 2013 in Aztec, NM.

Being fully advised in the premises, the Court hereby finds that there is no need for an evidentiary hearing, that the Settlement Motion should be granted, that the dispositive motions should be denied, and that the Proposed Partial Final Judgment and Decree of the Water Rights of the Navajo Nation and the Proposed Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation[3] should be entered.

BACKGROUND

Settlement Agreement and Proposed Decrees

Following years of negotiation, the Settling Parties reached a settlement agreement intended to satisfy all of the Navajo Nation's water rights claims in the San Juan River Basin (the Basin). The Settlement Agreement was signed in 2005, and, in 2009, Congress enacted the Northwestern New Mexico Rural Water Projects Act (Pub. L. No. 111-11, Title X, Subtitle B 123 Stat 991) (codified in scattered sections of 43 U.S.C.) (the Settlement Act), affirming many of the settlement provisions. Additional negotiations were held to revise the Settlement

[1] As of the date of this Order, several objectors have withdrawn from the *inter se* proceedings. On February 12, 2013, the San Juan Water Commission and State of New Mexico gave notice of a settlement agreement; on March 20, 2013, the La Plata Valley Acequia Association and the State of New Mexico gave notice of a pending settlement agreement; on May 3, 2013, the city of Aztec and the city of Bloomfield filed a Notice of Settlement Agreement with the State and withdrawal from *inter se* proceedings; and on June 11, 2013, ConocoPhillips and El Paso Natural Gas Co. filed a notice of withdrawal.

[2] The Ute Mountain Ute Tribe, BHP Navajo Coal Company and Enterprise Field Services, LLC, the Albuquerque Bernalillo County Water Utility Authority and City of Española, and the Jicarilla Apache Nation filed briefs in support of the Settlement Agreement and/or briefs in opposition to the Non-Settling Parties' motions.

[3] The Court refers to the Proposed Partial Final Judgment and Decree as "the Proposed Decree," the Proposed Supplemental Partial Final Judgment and Decree as "the Proposed Supplemental Decree," and the two decrees together as "the Proposed Decrees."

Agreement to conform it to the legislation, and the final Settlement Agreement was signed December 2010.[4]

In 2003, prior to the finalization of the Settlement Agreement, the negotiating parties initiated a public comment process with the release of draft settlement documents and held a number of public meetings and presentations to receive comments, some of which were incorporated into subsequent drafts.

Under the terms of the Settlement Agreement, all of the water rights of the Navajo Nation within the San Juan River Basin would be finally adjudicated by entry of the Proposed Decree and the Proposed Supplemental Decree. The Settling Parties submitted the Proposed Decree in January 2011 and the Proposed Supplemental Decree in January 2012. The Proposed Decree describes water rights associated with the Navajo Indian Irrigation Project (NIIP), Fruitland-Cambridge Irrigation Project, Hogback-Cudei Irrigation Project, Navajo-Gallup Water Supply Project (NGWSP), Animas-La Plata (ALP) Project, San Juan River municipal and industrial uses, and reserved groundwater up to 2,000 acre-feet per year (afy). The Proposed Supplemental Decree describes additional rights based on historic and existing stock, irrigation, and recreational uses.

***Inter se* Proceeding**

The proceeding to resolve the water rights claims of the Navajo Nation is a subproceeding within the Basin adjudication, which encompasses all water rights within the Basin. After full briefing and oral argument, the Court determined that adjudicating the Navajo Nation's claims in an expedited *inter se* proceeding would promote judicial efficiency and the expeditious completion of this adjudication. Accordingly, pursuant to Rule 1-071.2 NMRA, all

[4] The State of New Mexico signed on December 10, 2010; the United States and Navajo Nation signed on December 17, 2010.

claimants have had the opportunity to participate in the resolution of the Navajo Nation's claims. *See Order Establishing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (August 19, 2010) (outlining the notice procedure determined to be fair and reasonably calculated to apprise potential claimants of the *inter se* proceeding and their opportunity to participate in the proceedings); *see also, Order Approving Final Forms of Notice of Navajo Inter Se and Notices of Intent to Participate in Navajo Inter Se and Setting Deadlines for Service and Filing of Notices* (March 16, 2011).

Legal Standard

Following full briefing and oral argument, the Court determined that the legal standard for approval of the Settlement Agreement and the Proposed Decrees must be whether the Settlement Agreement is "fair, adequate and reasonable." *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof* (April 19, 2012). To evaluate the Settlement Agreement and the Proposed Decrees, the Court established four elements of proof: (a) the Settlement Agreement is the product of good faith, arms-length negotiations; (b) the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights; (c) there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial; and (d) the Settlement Agreement is consistent with public policy and applicable law. The Settling Parties have the initial burden of producing *prima facie* evidence to support the Settlement Agreement. The burden of rebutting the Settling Parties' evidence then shifts to the Non-Settling Parties. The Settling Parties retain the burden of persuasion by a preponderance of the evidence. Should the Court not approve the Proposed Decrees, the adjudication of the Navajo Nation's water rights would be set for a full trial.

Discovery

The *Order (1) Granting Settling Parties' Motion to Extend Certain Deadlines and (2) Setting Schedule Governing Discovery and Remaining Proceedings* entered February 3, 2012[5] set out an expedited discovery and hearing schedule that, *inter alia*, included an electronic repository for access to discovery documents. The Settling Parties also established regional records repositories for inspection of government records. Under the terms of the Settlement Agreement and the Settlement Act, the adjudication court is to enter a final decree determining the Navajo Nation's water rights by December 31, 2013. In order to meet this deadline, discovery schedules were streamlined but carefully crafted to permit discovery for all the parties. Discovery commenced on April 2, 2012 and ended March 31, 2013.

The Non-Settling Parties principally conducted discovery by propounding interrogatories upon the Settling Parties and requesting production of documents. In its April 11, 2013 motion to extend deadlines, B Square Ranch also described three visits to the Farmington NIIP office to review and copy documents. *See Defendant B Square Ranch LLC et al.'s Motion for Extension of Time to Close Discovery and Extend Deadlines* (April 11, 2013), pp. 3-4. As of the close of discovery, the Navajo Nation's expert Lionel Haskie was the only witness deposed by a non-Settling Party, the Community Ditch Defendants.

QUANTIFICATION OF INDIAN WATER RIGHTS

Federal reserved Indian rights were originally recognized by the United States Supreme Court in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908). *Winters* establishes that a federal reservation of land impliedly reserves waters for the purpose of the reservation and exempts them from state laws (*Winters* doctrine). *Id.* at 576-577. Although federal law applies

[5] As amended August 7, 2012, November 6, 2012, and March 15, 2013.

to federal reserved rights, such rights may nevertheless be adjudicated in state courts through the McCarran Amendment. 43 U.S.C. § 666 (2006); *see Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 570, 103 S. Ct. 3201, 3215 (1983) (holding that "state adjudications are adequate to quantify the rights" of the Indian tribes at issue). Unlike water rights priorities under state law, which are based on first use, federal reserved rights carry a priority from the date of the reservation. *See State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 640, 545 P.2d 1014, 1018 (1976) (holding that the United States could be joined as a party, because it held water rights in trust for the tribe since the creation of the reservation). The priority date also extends to boundaries subsequently defined or expanded. *See State ex rel. Martinez v. Lewis*, 116 N.M. 194, 203, 861 P.2d 235, 244 (Ct. App. 1993) (holding that the priority date for water rights was the date of the promise to create a reservation rather than the dates of later executive orders that established the reservation boundaries); *U.S. v. Walker River Irr. Dist.*, 104 F.2d 334, 338-40 (9th Cir. 1939) (recognizing the creation of the Walker River Indian Reservation as taking place in 1859 despite an 1874 executive order setting the lands apart).

Tribes can also claim a time immemorial priority date for aboriginal claims to historic use. *See U.S. v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983) (granting a time immemorial priority date for the Klamath Tribe's instream fishing water rights); *Winters*, 207 U.S. at 576 ("The reservation was a part of a very much larger tract which the Indians had the right to occupy and use, and which was adequate for [their] habits and wants . . . . The Indians had command of the lands and the waters, command of all their beneficial use, whether kept for hunting, 'and grazing roving herds of stock,' or turned to agriculture and the arts of civilization.") (citation omitted).

The quantity of federal reserved rights is also determined by federal law. Whereas state rights are based on the amount of water put to beneficial use, federal reserved rights are defined

by the amount of water necessary to fulfill the purpose of the reservation. *See Winters*, 207 U.S. at 576, 28 S. Ct. at 211 (1908) (holding that the United States implicitly reserved water when it created an Indian reservation, because it was "the policy of the government, [and the] desire of the Indians . . . to become a pastoral people" and the land was "valueless" without irrigation); *U.S. v. New Mexico*, 438 U.S. 696, 702, 98 S Ct. 3012, 3015 (1978) (concluding that federal reservation of public land implies reservation of water rights, and stating that "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water"); *Adair*, 723 F.2d at 1410 (stating that "[n]either *Cappaert* [*v. U.S.*, 426 U.S. 128, 96 S.Ct. 2062 (1976),] nor *New Mexico* requires us to choose between these activities or to identify a single essential purpose," and instead determining that the purpose of the reservation included water use for both fishing and agriculture)

One of the questions before this Court is how to evaluate the proposed quantification of water rights that the Navajo Nation could have proven at trial. As discussed, the quantity of the water right depends on the purpose of the reservation. In early cases, courts found that agriculture was the sole purpose of Indian reservations. *See* Barbara A. Cosens, *The Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 Nat. Resources J, 835, 836 (2002).[6] In many of these cases, the courts quantified agricultural use based on practicably irrigable acreage (PIA). PIA therefore is the most developed measure of *Winters* rights. *See In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. &*

[6] Cases awarding water specifically based on agricultural purpose include *Winters*, 207 U.S. at 576 (1908); *Arizona v. California*, 373 U.S. 546, 600, 83 S.Ct. 1468, 1498 (1963) (*Arizona I*); and *In Re Gen. Adjudication of All Rights to Use of Water in the Big Horn River Sys.*, 753 P.2d 76, 96 (Wyo. 1988), aff'd mem. sub. nom., 492 U.S. 406 (1989).

Source, 35 P.3d 68, 79 (2001) (*Gila River V*) ("the most likely reason for PIA's endurance is that 'no satisfactory substitute has emerged'") (quoting A. Dan Tarlock, *One River, Three Sovereigns: Indian and Interstate Water Rights*, 22 Land & Water L. Rev. 631, 659 (1987)). PIA is arable land that can be feasibly irrigated at a reasonable cost. *Lewis*, 116 N.M. at 206, 861 P.2d at 247. PIA is intended to measure future and present needs. *See Arizona v. California*, 373 U.S. 546, 600, 83 S.Ct. 1468, 1498 (1963) (*Arizona I*) (basing determination of quantity of water for reserved rights on special master's conclusion that such rights include future needs).

Arizona I involved five Indian tribes asserting rights to the Colorado River. 373 U.S. at 595. Arizona argued that "the amount of water reserved should be measured by the reasonably foreseeable needs of the Indians living on the reservation rather than by the number of irrigable acres." *Id.* at 596. The special master determined otherwise, and the Court agreed that the size and needs of the future Indian population "[could] only be guessed." *Id.* at 601. The Court affirmed the special master's conclusion that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." *Id.* Although the Non-Settling Parties have argued that the Supreme Court thereby found that PIA is the only proper measure of the amount of Indian reserved rights, this Court does not agree.

The Supreme Court in *Arizona I* was not articulating an exclusive standard. Rather, it was acting upon the special master's findings in that case. Consequently, the Supreme Court determined that "the only feasible and fair way" to measure reserved rights "for the reservations" in that case was PIA. *Id.* at 601. A later special master in the *Arizona v. California* line of cases, in a report adopted in pertinent part by the Supreme Court, noted that "the initial Court did not necessarily adopt . . . [PIA] as the universal measurement of Indian reserved water rights." *See* Martha C. Franks, *The Uses of the Practicably Irrigable Acreage Standard in the Quantification*

of Reserved Water Rights, 31 Nat. Resources J. 549, n40 (1991) (quoting the February 22, 1981 Special Master's Report at 90, adopted in pertinent part in *Arizona v. California*; 460 U.S. 605, 103 S.Ct. 1382 (1983)); *see also, Washington v. Washington Fishing Vessel*, 443 U.S. 658, 685-686, 99 S. Ct. 3055, 3074 (1979) (citing *Arizona I* as a case in which the Supreme Court "ordered a trial judge or special master, in his discretion, to devise some apportionment that assured that the Indians' reasonable livelihood needs would be met").

Lower courts have since tailored means to quantify reserved water rights for other reservations. Some courts quantify Indian reserved water rights based on a "homeland purpose." *Gila River V*, 35 P.3d at 78; *New Mexico ex rel. Reynolds v. Lewis*, Nos. 20294 and 22600, Final Judgment ¶¶ 15-17 (Chaves County Dist. Ct. July 11, 1989) (determining the water rights of the Mescalero Apache Tribe). Courts that use a homeland purpose reject sole reliance on PIA because PIA quantifies rights based on reservation geography rather than the tribe's needs. *Gila River V*, 35 P.3d at 78. A homeland purpose quantifies rights "to the extent . . . required to develop, preserve, produce, or sustain food and other economic resources of the reservation, whether those were new uses for the tribes or represented the continuation of aboriginal ways of life." Felix S. Cohen's Handbook of Federal Indian Law, § 19 at 1223-1224 (Nell Jessup Newton ed., 2012). A homeland purpose considers actual and proposed uses, history, culture, geography, topography, natural resources, economic base, and present and future population. *Gila River V*, 35 P.3d at 79-80. This Court acknowledges that a homeland purpose is a reasonable basis for the implementation of the Congressional purpose in creating a sustainable reservation for the Navajo Nation. To the extent that there is a distinction between primary and secondary purposes of federal reservations, the creation of a homeland is the primary purpose of an Indian reservation. *See U.S. v New Mexico*, 438 U.S. at 700, 98 S.Ct. at 1314 ("Congress

reserved only the amount of water necessary to fulfill the purpose of the reservation, no more. . . without [which] the purposes of the reservation would be entirely defeated."); *Gila River V*, 35 P.3d at 76 ("it seems clear to us that each of the Indian reservations in question was created as a 'permanent home and abiding place' for the Indian people, as explained in *Winters*. 207 U.S. at 565, 28 S.Ct. at 208").

RELEVANCE OF WATER SUPPLY TO THIS PROCEEDING

The Non-Settling Parties have objected to the Proposed Decrees based on assertions that the available water supply of the Basin is inadequate to satisfy the Navajo Nation's claims and to protect the Non-Settling Parties' own water rights in the Basin. *Community Ditch Defendants' Answer, Objections and Counterclaim by Community Ditch Defendant-Counterclaimants* (October 19, 2012) (*Community Ditch Defs. Answer, Objections, and Counter-cl.*), pp. 25-26 ¶¶ 113-120; *Community Ditch Motion for Partial Summary Judgment Concerning Availability of Water and Impacts on Other Water Users* (April 15, 2013) (*Community Ditch Defs. Mot. For P.S.J. Concerning Availability of Water*); *Gary L. Horner's Memorandum in Support of Gary L. Horner's Motion For Summary Judgment: That is, the "Settlement Motion of the United States, Navajo Nation, and the State of New Mexico for Entry of Partial Final Decrees" Should Be Denied* (April 15, 2013) (*Horner Mem. in Supp. of Mot. for Sum. J.*), pp. 61-67 ¶¶ 282-298. In support of these objections, the Non-Settling Parties rely on numerous federal statutes, compacts, contracts, and studies, a comprehensive list of which is included in Mr. Horner's Table of Authorities, *Horner Mot. Summ. J.*, pp. viii-xii, and Table of Authorities, pp. v-vi, *Gary L. Horner's Response to the State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees* filed May 10, 2013 (*Horner Resp. to State Mem*).

Although water supply is essential to the effective use of water rights, it is not an issue in a proceeding to adjudicate rights. In New Mexico, the purpose of a water rights adjudication is to determine the rights to use the waters of a stream system. NMSA 1978, § 72-4-15 (1907). In an adjudication, the court declares the water rights of each claimant, including "the priority, purpose, periods and place of use, and as to water used for irrigation," with exceptions, "the specific tracts of land to which it shall be appurtenant . . . ." NMSA 1978, § 72-4-19 (1907). Water supply is not a factor.

As a matter of general practice in stream adjudications, the court determines water rights of each claimant individually, either as a result of settlements or through litigation. Then, all parties have the opportunity to address the claims of other users in an *inter se* proceeding. *See State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 196, 344 P.2d 943, 947 (1959) (holding that a bifurcated proceeding to first address individual claims, and subsequently conduct an inter se proceeding, complies with statutory requirements); *State ex rel. Pecos Valley Artesian Conservancy District*, 99 N.M. 699, 701, 663 P.2d 358, 361 (1983) (holding that the two-phase adjudication procedure adopted by the trial court did not violate the appellant's due process rights). In this proceeding, these two stages of the adjudication of the water rights of the Navajo Nation have been consolidated by court order based on Rule 1-071.2, which permits such consolidation if it is efficient and expeditious. Yet, even though all potential claimants are made parties to an expedited *inter se* proceeding, it remains a proceeding to determine the water rights of an individual claimant. As with the determination of any claimant's rights, the water supply in the Basin is not a consideration.

Rather, water supply is a consideration in the administration of water rights. The State Engineer has the authority to restrict the use of water rights that have been adjudicated when the

supply is insufficient to enable all water users to fulfill their rights. *See Bounds v. State ex. rel D'Antonio*, No. 32,713 & 32,717, slip op. at ¶ 31 (N.M. Sup. Ct. July 25, 2013) (stating that a water right is conditioned on the availability of water to satisfy that right); *Tri-State Generation and Transmission Ass'n., Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 20, 289 P.3d 1232 (2012) (affirming the State Engineer's authority to promulgate water administration provisions). Because an analysis of the water supply of the Basin is not relevant to the legal standard by which the Settlement Agreement is to be evaluated, the Court will not address objections concerning water supply.

STANDARD FOR ANALYZING DISPOSITIVE MOTIONS

The Court considers the dispositive motions to be similar to motions for summary judgment and analyzes them for compliance with the substantive requirements of Rule 1-056 NMRA. "Summary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*, 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. The party moving for summary judgment has the burden of establishing a *prima facie* showing for summary judgment by presenting "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d 280; *see Galvan v. City of Albuquerque*, 85 N.M. 42, 44-45, 508 P.2d 1339, 1341-42 (holding that affidavits must present facts admissible in evidence and explain their conclusions).

"Once the moving party has met this burden, 'the burden shifts to the non-movant to demonstrate the existence of specific evidentiary facts which would require trial on the merits.'" *City of Rio Rancho v. Amrep SW, Inc.*, 2011-NMSC-037, ¶ 14, 150 N.M. 428, 260 P.3d 414

(citation omitted). "When a motion for summary judgment is made and supported . . . an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Rule 1-056(E) NMRA. *See Zamora v. Creamland Dairies, Inc.*, 106 N.M. 628, 632, 747 P.2d 923, 927 (Ct. App. 1987) (determining that an affidavit setting forth numerous facts supporting the statements made, met the requirements of Rule 1-056(E)); *Pedigo v. Valley Mobile Homes, Inc.*, 97 N.M. 795, 798, 643 P.2d 1247, 1250 (Ct. App. 1982) (holding that opinion testimony in an affidavit must be based upon factually-supported personal knowledge to rise above the level of self-serving speculation). Certain of the Non-Settling Parties argue that the Settling Parties' memoranda in support of their motion for entry of the decrees do not comply with Rule 1-056 requirements in various ways. In considering the dispositive motions, the Court is concerned with whether the parties have presented proper support for their positions in the form of legal analysis and/or competent evidence. The Court will therefore address the substance of the dispositive motions and will not address objections directed to the technical, as opposed to the substantive, requirements of Rule 1-056.

The Court now turns to the elements of the legal standard.

FIRST ELEMENT: IS THE SETTLEMENT AGREEMENT THE PRODUCT OF GOOD FAITH, ARMS-LENGTH NEGOTIATIONS?

Element One of the legal standard requires the Settling Parties to demonstrate that the Settlement Agreement was the product of good faith, arms-length negotiations. The Settlement Agreement could not be fair or reasonable if the negotiating parties were acting collusively or self-dealing. In support of their position that the Settlement Agreement is the product of good faith, arms-length negotiations, the Settling Parties submitted the affidavits of individuals who

were involved in the negotiations: John W. Leeper, Ph.D, P.E., Civil Engineer for the Navajo Nation Department of Water Resources from 1995-2011 (Attachments to *Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion* (April 17, 2013) (Attachs. to Joint Mem.), Attach. A, Ex. 1, p. 1; Aff. ¶ 3); Christopher Banet, M.S., Bureau of Indian Affairs Trust Resources and Protection Manager for Water Resources in the Southwest Regional Office (Attachs. to Joint Mem., Attach. B, Ex. 1, p.6); and John J. Whipple, M.S., Basin Manager for the Colorado/San Juan Basin for the State (*State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees* (April 15, 2013) (*St. of NM Mem. in Supp. of Settle. Mot.*), Whipple April 15, 2013 Aff. ¶¶ 1, 6).

The Settling Parties' *Prima Facie* Showing

The Settling Parties' affidavits include the following information.

1) Initial Settlement Negotiations Between Parties

The President of the Navajo Nation and the Governor of the State of New Mexico entered a Memorandum of Agreement on July 23, 1997 that initiated negotiations of the Navajo Nation's claims in the Basin. Leeper Aff. ¶¶ 6-8. The parties' positions differed. The Navajo Nation sought "a quantity of water to ensure that the Navajo Reservation could be sustained as a permanent homeland for the Navajo People[,]" completion of NIIP, which is "a large agricultural infrastructure development project with the potential to be a cornerstone of Navajo economic development and self-sufficiency[,]" and construction of NGWSP, "which would bring San Juan water to Navajo and non-Navajo communities lacking adequate access to clean water." *Id.* at ¶¶ 10, 12. The State was concerned about protecting "existing uses of non-Navajo water users in the San Juan River Basin to the extent possible." Whipple April 15, 2013 Aff. ¶ 26.

From the technical data available, the parties recognized that "a settlement would only be possible if the Navajo Nation did not demand significantly more water than its current and historic uses, including the congressionally-authorized water use for NIIP." Leeper Aff. ¶ 13. In 2000, the Secretary of the Department of Interior appointed an assessment team comprised of members of federal agencies "to evaluate the disparities in the positions of the parties and the potential impact of the Navajo claim." *Id.* at ¶ 14; Banet Aff. ¶ 3. The Navajo Nation and the State entered into a second memorandum of agreement concerning continued negotiations in 2001, and the Secretary designated the federal assessment team as the federal negotiations team in 2002. Leeper Aff. ¶¶ 15-16. Through "deliberative facilitated negotiations that addressed a wide range of complex issues and disciplines[,]" the parties developed a draft settlement agreement that was released to the public in December 2003. *Id.* at ¶ 21.

2) Public Meetings

The parties then conducted a series of public meetings, and the State received "many written public comments." Whipple April 15, 2013 Aff. ¶ 45. As a result of these comments, the parties conducted further negotiations and developed new provisions to the agreement that included:

a) The dedication, from the water supply for NIIP, of 12,000 acre-feet per year ("afy") to be released from Navajo Reservoir before the Navajo Nation placed calls on the upstream water users;

b) the authorization of minimum releases from Navajo Reservoir of 225 cubic feet per second ("cfs") when there is at least one million acre-feet in storage;

c) a reduction of the diversion rates for the two BIA irrigation projects on the Navajo Reservation that make use of direct diversions from the San Juan River, the Hogback-Cudeii Irrigation Project . . . and the Fruitland-Cambridge Irrigation Project . . . to reduce demands on the river during the late summer months;

d) the authorization of appropriations for the rehabilitation of Navajo and non-Navajo ditches to further reduce the demands on the river;

e) a limitation on the Navajo Nation's ability to challenge the rights that were adjudicated in the 1948 Echo Ditch Decree;

f) the establishment of a normal diversion requirement for the San Juan Chama Project at 135,000 afy, even though San Juan Chama diversions have historically averaged less than 110,000 afy; and

g) a limitation of the total diversion requirement for the rights associated with NIIP when the use of such rights is changed from irrigation to other authorized uses.

Leeper Aff.¶ 23.

3) Finalizing the Settlement Agreement

The Navajo Nation and the State of New Mexico entered into the Settlement Agreement on April 19, 2005. *Id.* at ¶ 28. Subsequent negotiations were then held at the congressional level involving settlement terms and congressional approval and funding. *Id.* at ¶¶ 24-32. After public hearings, Congress passed the Settlement Act, and it was signed into law by the President. *Id.* at ¶ 33. It contains authorized funding in the amount of $870 million for NGWSP. Settlement Act, § 10609(a)(1) (2009). The Settling Parties thereafter conformed the Settlement Agreement to the Settlement Act. Banet Aff. ¶ 7.

The Settling Parties' affidavits establish a *prima facie* showing that the Settlement Agreement is the product of good faith, arms-length negotiations.

The Non-Settling Parties' Arguments

The Community Ditch Defendants and Mr. Horner filed responses concerning Element One of the legal standard, and Mr. Robert Oxford filed an affidavit on May 10, 2013. The Community Ditch Defendants presented evidence through the affidavit of Jim Rogers. Jim Rogers is a farmer, rancher, and chair of the Jewett Valley Water Users Association. Rogers May 10, 2013 Aff. ¶ 1.[7] Mr. Oxford is a water consultant in the Basin. Oxford Aff. ¶ 5.

[7] Verified on June 5, 2013. *Verification of Affidavit of Jim Rogers Filed May 10, 2013 Concerning Cross Motions for Summary Judgment.*

1) Public Involvement and Public Interest

Mr. Rogers disputes the affidavit of Mr. Whipple as to the involvement of the community ditches in the settlement negotiations. Rogers May 10, 2013 Aff. ¶ 3. He asserts that the Settling Parties did not intend to negotiate with, or seek input from, the community ditches. *Id.* Mr. Horner similarly asserts that the settlement "was negotiated in secret, and the after-the-fact comments from the public were largely disregarded." *Horner Response to the State*, p. 12. Mr. Oxford also asserts that the community ditches were never satisfied that the agreement was fair. Oxford Aff. ¶ 11.

However, the Settling Parties had the sole obligation to negotiate the Settlement Agreement among themselves. The purpose of this element of the legal standard that the Settlement Agreement be the product of good faith, arms-length negotiations is to ensure that the settlement is reasonable and was reached without collusion or self-dealing. *See Smoot v. Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 13, 135 N.M. 265, 87 P.3d 545 (stating that "good faith and fair dealing requires only that neither party injure the rights of the other party to receive the benefit of their agreement"); *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158, ¶55, 143 N.M. 158, 173 P.3d 765 (noting that arms-length negotiations were maintained through mediation between the potential parties to avoid collusion or undue pressure).

Neither Mr. Rogers' affidavit nor Mr. Horner's response raises facts implicating collusion or self-dealing. Public involvement may be appropriate as a matter of addressing public interest, but it is not necessary for the element of good faith and arms-length negotiations. *See United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991) (stating that the court must ensure that a consent decree was not "against the public interest," illegal, or a product of collusion).

Mr. Horner states that the State was not committed to the protection of the public interest in negotiating the settlement because third parties would suffer the adverse effects of the State's actions. *Horner Mem. in Supp. of Mot. for Sum. J.*, pp. 80-82; *Horner Resp. to State Mem.*, pp. 13-15. However, Mr. Horner did not support his argument that the State did not act in good faith with any factual basis.

2) Consideration

Mr. Horner also argues that there was no consideration for the Settlement Agreement. He asserts that the Navajo Nation would receive over 600,000 afy in water rights with an 1868 priority date and "nearly one billion dollars" for NGWSP. *Horner Mem. in Supp. of Mot. for Sum. J.*, p. 192. Mr. Horner further contends that the Settling Parties could not prove the quantity of water rights included in the Settlement Agreement, let alone those asserted in the United States' Statement of Claims (Statement of Claims). *Id.* at 192-193. The Court does not agree.

The Navajo Nation has waived significant claims to water rights. As discussed previously, Indian water rights are based on federal, not state, law. *San Carlos Apache Tribe of Arizona*, 463 U.S. at 570, 103 S. Ct. at 3215. In Element Two, discussed below, the Court determines that the Settling Parties have made a *prima facie* showing that the Settlement Agreement and the Proposed Decrees contain provisions that at least reduce impacts on junior water rights. Many of these provisions resulted from concessions described by the settling parties' affidavits cited above. In Element Three, discussed below, the Court determines that the Settling Parties have made a *prima facie* showing that the Settlement Agreement and the Proposed Decrees provide for less than the potential claims that could be proven at trial with a potential priority date of 1868 or time immemorial.

The Navajo Nation is also authorized to receive $870 million from the federal government and $50 million from the State for development of NGWSP. Settlement Act, §§ 10609(a)(1), 10602(d)(1)(D). Additionally, the State avoids the risk of a larger claim in court, and certain claims in the settlement provide for administration in accordance with a junior priority date. Whipple April 15, 2013 Aff. ¶¶ 27, 35.

Conclusion

There is no genuine issue of material fact remaining for trial with respect to the Element One of the legal standard.

SECOND ELEMENT: DO THE PROVISIONS OF THE PROPOSED DECREES REDUCE OR ELIMINATE IMPACTS ON JUNIOR WATER RIGHTS?

Element Two of the legal standard requires that the Settling Parties prove that the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights. Provisions that mitigate the effects of the Proposed Decrees would indicate the fairness and reasonableness of the settlement. In order to meet their burdens of production and persuasion to demonstrate this element, the Settling Parties submitted the affidavits of Dr. Leeper, Mr. Whipple, and William Fogleman, a Geographic Information Systems (GIS) professional with 20 years' experience.

The Settling Parties' *Prima Facie* Showing

The Settling Parties' affidavits describe the following provisions in support of their position that the Proposed Decrees reduce or eliminate impacts on junior water users.

1) Limitations on the Quantity and Exercise of NIIP Water Rights

a. The Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96, 96-102 (current version at 43 U.S.C §§ 620, 620a, 620d, 620f) (1962 NIIP Act) authorizes a diversion of 508,000 afy; there

is currently no depletion limitation that applies to NIIP. Whipple April 15, 2013 Aff. ¶¶ 28-30. The Proposed Decree, however, limits diversions for NIIP to a 10-year average of 353,000 afy if any portion of the right is used for a purpose other than irrigation. Proposed Decree, ¶ 5(e); Whipple April 15, 2013 Aff. ¶ 30. Further, total depletion rights are limited to a 10-year average of 270,000 afy. Proposed Decree, ¶ 3(a); Whipple April 15, 2013 Aff. ¶ 29.

b. The Proposed Decrees provide that the water for NIIP will be supplied entirely from storage water in Navajo Reservoir. Proposed Decree ¶ 5(b). Since most claimants who divert surface water for irrigation purposes hold direct flow rights, or rights to surface water that has not been put into storage, designating the source of water for NIIP to reservoir storage rights significantly minimizes the effect upon direct flow users.[8] Leeper Aff. ¶¶ 62-64.

2) Subordination of Priorities

Although a reasonable basis exists for a federal reserved rights claim with a priority date of June 1, 1868, the date of the original reservation, reserved rights for NIIP, NGWSP, and the ALP Project will be fulfilled under priority dates junior to most users within the Basin. Leeper Aff. ¶ 19. The Proposed Decree subordinates the priority dates for diversions for NIIP and NGWSP to June 17, 1955 for water originating above Navajo Dam and to December 16, 1968 for inflow originating below Navajo Reservoir. Proposed Decree, ¶5(b). Whipple April 15, 2013 Aff. ¶¶ 35-36, Leeper Aff. ¶¶ 60-62. Diversions for the ALP Project will be administered with a priority date of May 1, 1956 instead of a reserved priority date of 1868. Whipple April 15, 2013 Aff. ¶ 35; Proposed Decree ¶ 5(c). The United States and the Navajo Nation assert that "virtually all" of the non-Navajo water users in the Basin hold rights that are senior to June 17, 1955. Leeper Aff. ¶ 19.

[8] As stated in ¶ 63 of the April 17, 2013 affidavit of Dr. Leeper: "Water is stored in the reservoirs in the spring when the snowmelt creates a large flow in the river system. Water is not retained in the reservoirs during times when the flows in the rivers are inadequate to serve the more senior water users."

3) Other Mitigating Provisions

a. The combined acreage associated with the Hogback and Fruitland irrigation projects is limited to 12,165 acres, less than half of the 26,000 acres authorized in the Congressional Record for the 1962 NIIP Act. 85th Congress, 2d Session, Senate Report No. 2198; App. 1 ¶¶ 3 (e) and (f). The maximum instantaneous diversion rate proposed for the Hogback Project is 221 cfs, and the maximum instantaneous diversion rate proposed for the Fruitland Project is 100 cfs, for a combined flow rate limited to a total of 321 cfs, also far below the historic maximum of 524 to 1,209 cfs. *Id*; Leeper Aff. ¶ 71; Whipple April 15 Aff. ¶¶ 31-34.

b. The Settlement Agreement reduces the frequency of potential priority calls by the Navajo Nation to assert its senior direct flow rights for the Hogback and Fruitland irrigation projects and for municipal use at Shiprock. Whipple April 15, 2013 Aff. ¶¶ 61-63. Under the Settlement Agreement, the Navajo Nation must first utilize up to 12,000 afy of stored water from Navajo Reservoir, provided that at least one million acre feet is stored in the reservoir. Settlement Agreement ¶ 9.1; Leeper Aff. ¶¶ 63,73.

c. The Settlement Act has authorized over $23 million to rehabilitate both Navajo and non-Navajo ditches, improving conveyance efficiency and reducing project diversion demands. Settlement Act, § 10609 (c)(1); Leeper Aff. ¶ 72.

d. The Settlement Act permits the creation and operation of a "top water bank," allowing direct flow users to store water in Navajo Reservoir for later use. Leeper Aff. ¶ 82. Without the top water bank, direct flow users are limited to utilizing water when the direct flows are available. *Id.*; Settlement Act § 10401(b)(2)(a).

e. The Settlement Act clarifies that the normal annual diversion for the San Juan-Chama Project for purposes of shortage sharing will be 135,000 afy. Settlement Act, § 10402(b).

Project diversions are normally expected to be approximately 105,000 afy. This provision therefore protects the San Juan-Chama Project by including a buffer of approximately 30,000 afy, thereby lowering the likelihood of Project shortages. Leeper Aff. ¶ 79.

f. The Navajo Nation and the United States have also agreed not to transfer water beyond New Mexico boundaries without first consulting with, and obtaining consent from, the State. Proposed Decree, ¶ 17(g).

g. Groundwater depletions by the Navajo Nation have been limited to 2,000 afy. Additional groundwater withdrawals in excess of 2,000 afy are permissible after completion of an impairment analysis and will receive a priority as of the date the Navajo Nation notifies the State Engineer of the withdrawal. Whipple April 15, 2013 Aff. ¶ 37. Proposed Decree ¶ 7. The effect of groundwater use on the San Juan River flow cannot exceed 2,000 afy. If groundwater pumping results in depletions in the flow of the San Juan River that exceed 2,000 afy, the Proposed Decree requires that the Navajo Nation offset any depletion in excess of 2,000 afy by refraining from surface diversion. *Id.* Additional uses of groundwater are permissible only if the Navajo Nation, in consultation with the State Engineer, determines that they will not impair other users. Whipple April 15, 2013 Aff. ¶¶ 37-38, Proposed Decree ¶ 7(b)(1)(iii).

h. The Navajo Nation has agreed not to challenge the water rights described in the 1948 Echo Ditch Decree, protecting water users who have secured water rights under the Echo Ditch Decree from the threat of litigation. Settlement Agreement, ¶ 9.6.1. Whipple April 15, 2013 Aff. ¶¶ 58-59.

i. Members of the Navajo Nation who own allotments that are held in trust by the United States may assert water rights claims in the future. In order to minimize the potential effect of the exercise of these rights, such rights will be fulfilled by the water rights of the

Navajo Nation, as described in the Proposed Decrees. Settlement Agreement, ¶ 12; Proposed Decree, ¶ 11; Proposed Supplemental Decree, ¶ 6.

4) Overall Reduction of Potential Rights

As later discussed in connection with Element Three, the Settling Parties have met their initial burden of presenting sufficient technical evidence to support a reasonable basis to conclude that the Settlement Agreement and the Proposed Decrees describe a less extensive water right than could be secured at trial. The Statement of Claims, supported by numerous technical reports, establishes a reasonable basis for a potential claim for a total diversion of 920,745 afy and a total corresponding depletion of 591,401 afy.[9] The Proposed Decrees, in contrast, limit total diversions to 635,729 afy, and total depletions to 334,542 afy. These limitations result in less diversion and consumptive use of water by the Navajo Nation in the Basin and ultimately reduce impacts on junior water users. Leeper Aff. ¶¶ 37-59.

The Court determines that the Settling Parties' affidavits establish a *prima facie* showing for this element.

The Non-Settling Parties' Arguments

The Community Ditch Defendants, again through the affidavit of Mr. Rogers, Mr. Horner, and Mr. Oxford have raised objections concerning Element Two.

1) Water Supply

As previously discussed in connection with the relevance of water supply in this proceeding, the Non-Settling Parties express concern that an adequate supply of water is not available to fulfill both the water rights of the Navajo Nation and the rights of other water users

[9] These figures are from the April 15, 2013 *Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion* at 32. Note: on April 16, 2012, the United States filed an Errata Notice - Concerning the United States' Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation. The Errata Notice lists relatively minor corrections to the United States Statement of Claims and supporting technical reports which are unnecessary to note in this Order.

in the Basin. The Court has explained that water supply is not relevant to an adjudication proceeding. Although water supply is a trigger for some mitigating provisions of the Settlement Agreement and the Proposed Decrees, it is not relevant to whether these provisions actually operate to reduce or eliminate impacts to other users in the Basin. *See Romero*, 2010-NMSC-035 at ¶ 11 ("In addition to requiring reasonable inferences, New Mexico law requires that the alleged facts at issue be material to survive summary judgment.").

2) Mitigation When Reservoir Storage is Below One Million Acre-Feet

Mr. Rogers expresses the concern that neither the release of 225 cfs under Section 9.1 of the Settlement Agreement, nor the proposed alternate water supply of 12,000 acre-feet under Section 9.2 of the Settlement Agreement, provides meaningful relief to non-Navajo water users when conditions are particularly dry, because the provisions are conditioned upon storage in Navajo Reservoir exceeding one million acre-feet. Mr. Rogers also states "[a]dditionally, 225 cfs . . . is not nearly enough flow to meet irrigation needs during the peak irrigation season, plus all the other needs." Rogers May 10, 2013 Aff. ¶ 11. Mr. Rogers appears to interpret Element Two to require that provisions contained in the Settlement Agreement and the Proposed Decrees eliminate entirely any effect of the exercise of the associated water rights. The Court does not agree.

While these provisions may only mitigate the impacts of a severe drought to a minimal extent, the relevant inquiry for this proceeding is whether the provisions of the Settlement Agreement and the Proposed Decrees "reduce or eliminate" impacts to other users in the Basin. Mr. Rogers' observation that the provisions do not entirely remove any effect on others does not successfully rebut the Settling Parties' showing that the provisions reduce potential effects, particularly when considered in connection with other mitigating factors.

3) Top Water Bank

Mr. Rogers asserts that the "top water bank" referred to in Section 10401(b) of the Settlement Act, and in paragraph 9.2.6(2) of the Settlement Agreement, "does not exist" because the Settlement Act only authorizes, but does not require, the Secretary of the Interior to approve a top water bank. Rogers May 10, 2013 Aff. ¶ 17. Section 10401(b)(2)(a) states, "[t]he Secretary of the Interior may create and operate within the available capacity of Navajo Reservoir a top water bank." The Court, however, considers the top water bank to constitute a tool designed for the sole purpose of benefiting non-Navajo users. Mr. Rogers' observation that the creation of a top water bank is not mandatory does not rebut its potentially mitigating effect. The absence of a top water bank does not defeat, or even affect, the operation of other mitigating provisions.

4) Independent Administration of Direct Flow Rights and Storage Rights

Both Mr. Horner and Mr. Oxford challenge paragraph 9.1 of the Settlement Agreement because it provides for independent administration of storage rights in Navajo Reservoir and direct flow rights in the river. *Horner Mem. in Supp. of Mot. for Summ. J.*, pp. 169-184; *Robert E. Oxford's Dispositive Motion for Summary Judgment* (April 12. 2013) pp. 1-2. They contend that such independent administration results in the practical, and illegal, effect of fulfilling junior storage rights when water is unavailable for senior direct flow rights. To support their argument, Mr. Horner and Mr. Oxford cite *City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 678 P.2d 1170 (1984), and *State ex rel. Reynolds v. Luna Irrigation Company*, 80 N.M. 515, 458 P.2d 590 (1969).

Mr. Horner and Mr. Oxford premise their argument that the independent administration is illegal upon their assumption that direct flow users are entitled to storage water in Navajo

Reservoir. Contrary to their assertions, the law recognizes the distinction between direct flow and storage water associated with a project. This difference was described in *Israel v. Morton*:

> A distinction must be recognized between the nature of nonproject water, such as natural-flow water, and project water, and between the manner in which rights to use of such waters are obtained. Right to use of natural-flow water is obtained in accordance with state law. In most western states it is obtained by appropriation putting the water to beneficial use upon lands. Once the rights are obtained they vest, until abandoned, as appurtenances of the land upon which the water has been put to use. Project water, on the other hand, would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix.

549 F.2d 128, 132-33 (9th Cir. 1977). A right to project storage water is appropriately administered independently from a right to natural direct surface flow in order to achieve the purposes of the project. Moreover, a storage right does not entitle the user to direct flow rights; likewise, a right to direct flow does not entitle a user to storage water. In this proceeding, federal law is unambiguous that a contract with the Secretary of the Interior is required to obtain a right to use water stored in Navajo Reservoir. 1962 NIIP Act § 11(a).

Mr. Oxford and Mr. Horner correctly observe that the independent administration of direct flow and storage rights can result in releases to fulfill junior storage rights when no water is available to fulfill senior direct flow rights. This potential outcome, however, does not violate the doctrine of prior appropriation or impermissibly elevate storage rights over direct flow rights, as they contend. The distinction at issue can be analogized to the respective administration and availability of surface water rights and groundwater rights. A right to divert surface water is

independent of a right to divert groundwater, and a surface water right does not necessarily entitle the user to groundwater when surface water is not available.[10]

The Court does not agree with Mr. Horner that *City of Raton* apples to this proceeding. At issue in *City of Raton* were the storage rights of the City of Raton and Vermejo Conservancy District, as determined in a 1935 adjudication decree, and whether the city had to release water from storage for the district. Based on its interpretation of the 1935 decree, our Supreme Court held that the City of Raton had to release water once it reached the limitations of its own adjudicated rights. *City of Raton*, 101 N.M. at 103, 678 P.2d at 1178. The case does not prohibit storage of water under an authorized storage and release project, nor does it require release of storage rights to direct flow users.

City of Raton also addressed whether the district was required to apply to the State Engineer to approve a change in the method of storage that occurred after the Bureau of Reclamation rehabilitated the local dam and diversion system. *Id.* at 99, 678 P.2d at 1174. In determining that NMSA, 1978 Section 72-9-4 (1941) provided an exception to the statutory requirements for change of use found in Section 72-5-24, our Supreme Court emphasized the special status of Reclamation projects. "The legislature's distinction between federal reclamation projects and other areas of water use in this state is not at all unreasonable or arbitrary. It recognizes the federal interest in projects intended to conserve or preserve water availability." *City of Raton*, 101 N.M. at 99-100, 678 P.2d at 1174-1175.

Mr. Horner and Mr. Oxford also point to *Luna Irrigation Co.* to support their contention that water stored in reservoirs cannot legally be characterized as "storage water" that is

[10] Surface water is defined in NMSA 1978, Section 72-1-1 (1941) and includes "[a]ll natural waters flowing in streams and water courses[.]" Groundwater, or underground water, is defined in NMSA 1978, Section 72-12-1 (2003) and includes "underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries[.]" The statutes defining the application process for groundwater, NMSA 1978, Section 72-5-1(1941), and surface water, NMSA 1978, Section 72-12-3 (2001), differ in order to address technical specifications applicable to the respective diversion.

unavailable to downstream users without storage rights, because storage water loses any protected status upon entering a public stream. The holding of *Luna Irrigation Co.*, however, is more narrow, addressing whether water characterized as "private" in Arizona maintains its private character once entering New Mexico. Our Supreme Court determined that, upon entering New Mexico, the waters become public waters of the state for purposes of adjudication. 80 N.M. at 516, 678 P.2d at 591 ("We conclude that natural waters flowing in streams and watercourses in New Mexico are public waters subject to adjudication."). Again, this case contains no support for the arguments of Mr. Horner and Mr. Oxford that water in Navajo Reservoir is stored illegally and must be released for users with direct flow rights.

Conclusion

There is no genuine issue of material fact concerning whether provisions of the Settlement Agreement and the Proposed Decrees reduce or eliminate impacts on junior water users. The Non-Settling Parties have not rebutted the Settling Parties' *prima facie* showing. The Court also considers it significant that, in addition to the various provisions that are designed to directly reduce impacts, the Proposed Decrees subordinate the priority of portions of the Navajo Nation's water right to senior direct flows and thereby reduce impacts to junior users.

THIRD ELEMENT: IS THERE A REASONABLE BASIS TO CONCLUDE THAT THE SETTLEMENT AGREEMENT AND THE PROPOSED DECREES PROVIDE FOR LESS THAN THE POTENTIAL CLAIMS THAT COULD BE SECURED AT TRIAL?

The Settling Parties' *Prima Facie* Showing

1) Future Needs

To show that there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial, the United States relies on the Hydrographic Survey filed December 10, 2010 and the Statement of Claims supported by

a series of technical reports. The United States claims a total of 920,745 afy diversion and 591,401 afy depletion. Statement of Claims, p. 23. These amounts include historic and existing water uses and future uses.

The United States' evidentiary support for amounts claimed for future uses follows; descriptions of the data sources and methodologies are taken directly from the reports cited.

a. The water rights claim for future irrigation uses is based on four technical reports produced by the United States' experts. Report J, *Navajo San Juan Pre-Feasibility Irrigation Suitability Land Classification*, pp. 1, 22-23, identifies 63,069 arable acres as having the potential for "sustained, productive irrigation" from surface water and 3,736 from groundwater. The authors of Report J developed land classification specifications for the soils and climate of the Basin and used those specifications, along with surface water supply analyses and groundwater availability studies, to identify the acreages.

Report L, *Economic Analysis of Practicably Irrigable Acreage, Trust Lands, San Juan Basin*, pp. 4-5, identifies 50,213 acres that could be economically and feasibly irrigated using both surface and groundwater.

Report N, *Navajo San Juan River Basin Practicably Irrigable Acreage Study*, p. 31, determines that 1,238.5 acres can be technically, economically, and feasibly irrigated using groundwater. The feasibility analysis considers crop suitability based on soil test results and existing crop production in the region, crop budgets, representative crop mixes, access to markets, and potential effects on market prices given the increased agricultural production.

Report K, *Water-Resource Assessment to Support the BIA's Groundwater PIA Claim on Behalf of the Navajo Nation in the San Juan River Basin*, uses the San Juan Basin Groundwater

Flow Model to determine water production capabilities of the potential wells necessary to support the future irrigation claims.

b. Future population requirements include uses for domestic, commercial, municipal, and light industrial (DCMI) needs and are based on Report B, *Future Navajo Nation Population and Domestic, Commercial, Municipal & Light Industrial (DCMI) Water Need Estimates in the San Juan River Basin.* Report B, pp. 2-9, 4-1, uses population projections and per capita use coefficients to determine that for a population of 203,935 in the year 2110, 36,575 afy will be sufficient to satisfy DCMI claims.

c. For future industrial water use claims, Report D, *Future Large Industrial Water Claims On Navajo Nation in the San Juan River Basin*, p. 5, concludes that fifteen commercial and industrial projects would be economically viable. For each project, Report D uses a screening analysis that considers the availability of resources, the Navajo Nation's competitive advantage, potential financing options, expected financial viability, long-term economic impacts, projected market demand and trends, applicable laws and regulations, and potential environmental concerns.

d. Future livestock water requirements are estimated in Report F, *Future Livestock Capacity.* The potential grazing capacity was derived from regional soil surveys, forage production data, and animal consumption data.

2) Historic Uses

a. Historically irrigated acreage requirements are supported by three technical reports. Report G, *Navajo San Juan Main Stem and NIIP Historically Irrigated Acreage*, pp. 11-13, identifies 13,029.73 acres of irrigated acreage in the Fruitland-Cambridge and Hogback-Cudei projects and individual irrigation initiatives on trust lands. That acreage requires 137,936.5 afy

diversion and 34,930.4 afy depletion. Report G additionally identifies the existing 78,336.4 irrigated NIIP acreage on trust lands that requires 259,575.90 afy diversion and 197,439.2 afy depletion. Report G relies on aerial photography spanning seventy-four years, Navajo Agricultural Projects Industries (NAPI) and GIS data, systems design charts, and other government data to identify the reported acreage. The water requirements were determined by using historic crop mix data and a calculated consumptive irrigation requirement (CIR) for the period 1980-2009. Report G, p. 2-3.

Using historical irrigated acreage crop mix data and weather data, Report H, *Navajo San Juan Tributary Consumptive Irrigation Requirement*, calculates the CIR for irrigated lands and tributary parcels on trust lands and addresses the differences between the methodologies used in the Hydrographic Survey Report and the Statement of Claims.

Report I, *Inventory of Navajo Lands within the San Juan River Basin in New Mexico Irrigated by Groundwater and Tributaries of the San Juan River*, relies on photo analysis and historical and GIS records to locate and map irrigated fields and provide an inventory of the United States' claims for uses included within the "[o]ther" category, historic tributary irrigation projects, and miscellaneous tributary irrigation.

b. Large industrial uses are described in Report C, *Past and Present Large Navajo Industrial Water Use in San Juan Basin*, which surveys the existing and historic NAPI feed enterprise and industrial park, oil wells, mines, reclamation projects, the Toadlena Fish Hatchery, and uranium mill. Report C, p. 2-2, finds that 47,981 afy diversion and 38,592 afy depletion are required for these uses. The water requirements are derived from reports published by the State Engineer, United States Department of Energy reports, published papers, and communications with persons familiar with the existing projects.

c. Livestock water requirements are outlined in Report E, *Navajo San Juan Livestock Water Requirements.* The report inventories the 2009 livestock water requirements and finds a total claim of 485.9 afy diversion and 303.7 afy depletion. Report E, p. 4. Report findings are based on data from the Navajo Land Department grazing districts and the Bureau of Indian Affairs; Navajo Natural Resource Agency managers and others provided water consumption rates. Report E, pp. 1-2.

d. Water sources for all uses are identified by Report O, *San Juan Stream System Navajo Water Use Report on Impoundments, Wells, and Springs.* This report documents water sources used to meet historic and existing DCMI, irrigation, livestock, and heavy industrial uses. The report identifies these water structures using GIS data from a variety of federal agencies, digital photography, field verifications, and interviews with local residents. Report O, p. 2.

Each report author has executed an affidavit attesting to the truth and accuracy of his or her work.[11]

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[11] See Attachs. to Joint Mem., Attachs. B through K:

1. Christopher Banet, the Trust Resources and Protection Manager in the United States Bureau of Indian Affairs, Southwest Regional Office, coordinated technical reports and contributed portions of Report I (Inventory of Navajo Lands) about estimating historical crop mixtures, depletions, conveyance efficiencies, and diversion requirements;

2. William Fogleman, with 20 years' experience as a Geographic Information Systems (GIS) professional, prepared Report A (Navajo Trust Lands Map for the San Juan Surface Water Basin);

3. Gretchen Greene, Ph.D., an economist at ENVIRON International Corporation specializing in natural resource economics, demography, socioeconomic analysis, and forecasting, prepared Report B (Future Navajo Population and DCMI);

4. Travis Greenwalt, a senior economist with Cardno ENTRIX was the project manager, lead economist, and author for Report C (Past and Present Large Navajo Industrial Water Use) and researcher and author of Report L (Economic Analysis of Practicably Irrigable Acreage);

5. Edward Lucero is a BIA regional rangeland management specialist and used soil mapping data to determine the potential grazing capacity reported in Report F;

6. Aaron M. Beutler, a licensed field engineer with Keller Bliesner Engineering consulting company, identified historically irrigated lands and determined the water requirements for those lands, was the principal author of Report E (Livestock Water Requirements), Report G (Navajo San Juan Main Stem and NIIP), calculated CIR

3) Priority Dates

Element Three requires a comparison between the Settlement Agreement and the Statement of Claims. The priority dates associated with the water rights described in the Settlement Agreement are described above in connection with Element Two (the June 1, 1868 priority is the date of the second treaty with the United States). At trial, the United States would claim a potential priority of "time immemorial" for Navajo Nation water rights associated with all Navajo Reservation lands within the Basin and a priority of 1849 for lands taken into trust by the United States after the 1849 Treaty. *See Navajo Tribe of Indians v. United States of America,* 23 In. Cl. Comm. 244, 251 (1970) (lands throughout the San Juan River Basin are the aboriginal territory of the Navajo Nation); *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664 (1905) (holding that the treaty was not a grant of rights to the Indians, but a grant from them); *Lewis*, 116 N.M. at 197, 203, 861 P.2d at 238, 244 (stating that an Indian tribe occupying its aboriginal territory is entitled to a water right priority for lands held in trust from at least the first peace treaty). *Joint Memorandum of the Navajo Nation and the United States in Support of the*

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requirements for tributary parcels (Report H), and identified future practicably irrigable acreage using surface and groundwater (Reports M and N);

7. Eileen Camilli, Ph.D., a consulting anthropologist and photoanalyst of 20th century cultivation and irrigation by Native American peoples; identified past and present irrigation associated with tributary irrigation on trust lands (Report I);

8. Clifford R. Landers, a certified professional soil scientist and soil classifier and licensed professional geoscientist, conducted the reconnaissance classification of arable trust lands (Report J);

9. Dean Anthony Zimmerman, the Hydrology Section Supervisor, BIA Southwest Regional Office, evaluated the groundwater resources of the Reservation to estimate the acreage for future practicably irrigable acreage projections (Report N); and

10. Aaron S. Bliesner, a land use planner and project coordinator with Keller-Bliesner Engineering, LLC with experience in landscape analysis, computer aided drafting and design and GIS, inventoried springs, wells and impoundments (Report O).

Settlement Motion (April 15, 2013) (*Joint Mem. of Navajo Nation and U.S. in Supp. of Settle. Mot.*) at pp. 46-48.

The Court finds that the Settling Parties have presented a *prima facie* showing that the water rights described in the Settlement Agreement are less than the United States could secure at trial.

The Non-Settling Parties' Arguments

In their dispositive motions and responses, the Non-Settling Parties raise the following arguments to rebut the Settling Parties' *prima facie* showing.

1) DCMI

The Community Ditch Defendants argue that the DCMI claims are erroneous because the population projections are not based on the 2010 United States Census, the 2010 Census Bureau data overestimates the population of Navajo tribal members, and the Navajo Nation population living on the Navajo Reservation is shrinking rather than growing. Attached to the *Community Ditch Defendants' Motion for Partial Summary Judgment Concerning the Minimum Needs of the Navajo Reservation in New Mexico* filed April 15, 2013 (*Community Ditch Defs. Mot. for P.S.J. Concerning Minimum Needs*) is Exhibit 1, a two-page U.S. Census Bureau Chart for 2010, listing, *inter alia*, population figures for the Navajo Reservation and Off-Reservation Trust land for Arizona, New Mexico and Utah, the Navajo Nation Reservation, and the Navajo Nation Off-Reservation Trust land. The Community Ditch Defendants state that according to the 2010 Census Bureau Chart, the total number of Native Americans living on the Navajo Reservation in New Mexico is 43,127; but because that number includes Native Americans who are not members of the Navajo Nation, the total number of Navajo Nation members was less

than 42,127 in 2010. *Community Ditch Defs. Mot. For P.S.J. Concerning Minimum Needs*, p. 2 ¶¶ 1-2.

With regard to the assertion that the Navajo population is falling, Mr. Rogers relies on personal observations and the 2010 Census Bureau Chart. Rogers May 10, 2013 Aff. ¶ 24. The U.S. Census Bureau Chart, however, does not provide a basis for this observation because the chart simply shows total population figures and housing units. The chart does not compare populations from different years.

Additionally, Mr. Rogers' opinion that the Navajo population is falling is unsupported by any facts that would explain his opinion. Rule 11-701 NMRA permits a lay witness to testify in the form of an opinion that is rationally based on the witness' perception, provided that the opinion is not based on scientific, technical, or other specialized knowledge that would be the subject of an expert's opinion under Rule 11-702 NMRA. Thus, to the extent that Mr. Rogers expresses opinions in his affidavit based on his own perception, he is allowed to do so under Rule 11-701. His testimony in the form of an opinion, however, must be rationally based on his perception, and he has offered no facts that would support his opinion regarding the current Navajo population. *See Santa Fe Trail Ranch II v. Board of County Comm'rs,* 1998-NMCA-099, ¶ 15, 125 N.M. 360, 961 P.2d 785 (holding that an "affidavit without any explanation of the underlying factual basis for its conclusions does not serve to create a material issue of fact"); *Waterfall Community Water Users Ass'n*, 2009-NMCA-101, ¶ 23, 147 N.M. 20, 216 P.3d 270 (holding that unsupported and conclusory statements by an operator of domestic water system about the source and discharge pattern of water related to a community water system "are neither competent nor admissible and are therefore insufficient to defeat summary judgment").

Consequently, Mr. Rogers' opinion concerning the Navajo population is insufficient to defeat summary judgment.

Mr. Rogers further contends that the population estimates from Report B are inflated and that the 2010 U.S. Census Bureau data were not used in Report B as the basis for future population estimates. Rogers May 10, 2013 Aff. ¶ 24. His opinions that Report B's future population estimates are flawed are also unsupported by facts explaining the bases of those opinions. Further, because the Community Ditch Defendants did not identify Mr. Rogers as an expert witness and do not offer his affidavit as that of an expert witness, Mr. Rogers' opinions are not permitted under Rule 11-702.

Finally, even if the Court were to find that the United States failed to make a *prima facie* showing with respect to the entire claim for DCMI water rights, the amount of water, 36,575 afy, is only four percent of the total diversion and six percent of the total depletion claimed in the Statement of Claims. And, subtracting the DCMI claim from the Statement of Claims (920,745 afy minus 36,575 afy is 884,170 afy) results in potential claims far greater than those claimed in the Settlement Agreement (635,729 afy).

2) NIIP

Mr. Rogers disputes the water rights claims for future irrigation and relies on observation and experience to conclude that, even at the present time, NIIP and the associated feed lot have never made a profit for any period of years. His own experience indicates that the infrastructure costs for canals and pipelines, pumping costs, and higher production costs associated with higher evaporation rates leads him to the conclusion that, even at the present time, NIIP is not

economically feasible. Rogers April 15, 2013 Aff. ¶¶ 4-5.[12] As stated in paragraphs 3 through 5 of his affidavit:

> (3) As part of my business I follow what is happening at NIIP-NAPI, including its financial performance and the problems in irrigating that terrain. To the best of my knowledge and experience, NIIP-NAPI has never been able to make a profit for any period of years, taking into account all the costs necessary to operate NIIP-NAPI. I have followed the feed-lot operations since inception, and note that they have never been competitive in that market place.
>
> (4) From my observations, the primary problems are the cost of building, maintaining and repairing the hundreds of miles of canals and pipelines needed to transport water so far from the San Juan River, and the cost of pumping water uphill. A secondary problem is that the terrain at NIIP is more exposed to the wind, meaning higher evaporation rates. I operate sprinklers on a portion of my farm, and when the wind blows, the sprinklers must be run longer, resulting in much higher production costs.
>
> (5) The community ditches down in the valley operate by gravity flow from the San Juan River, so they do not have the additional costs necessary to operate that NIIP-NAPI does. Based upon my own observations of NIIP-NAPI over many years, it is not an economically viable irrigation project. The lands occupied by NIIP are not suitable for sustained irrigation at reasonable cost.

Mr. Rogers' opinions concerning the profitability of NIIP, the costs of transporting water to NIIP, average wind speeds and the associated effect on evaporation at the NIIP sites, and the ultimate economic viability of the project appear to be based upon technical data, but are not supported by facts in the record or the opinions of experts. In *Santa Fe Trail Ranch II,* the Court of Appeals considered the issue of damages resulting from a county-enacted moratorium. 1998-NMCA-099, ¶ 15. The plaintiff submitted an affidavit stating that it "ha[d] been effectively forced to leave its . . . property economically idle." The court held that

> [T]he affidavit appears to be based on consultation with land-use experts, but does not explain who they are, what they considered,

[12] Verified on June 5, 2013. *Verification of Affidavit of Jim Rogers*, filed April 15, 2013.

> or what their opinions are, and the affidavit also appears to admit that agricultural use of the property is possible, but denies that it is "economically viable." In our view, this self-serving affidavit without any explanation of the underlying factual basis for its conclusions does not serve to create a material issue of fact that "all reasonable beneficial use" of the property has been deprived by the County's actions.

Id. Mr. Rogers' opinions are similar to the conclusory statements in the affidavit described in *Santa Fe Trail Ranch II* that the Court of Appeals determined were not competent to create a material issue of fact. Mr. Rogers' factually unsupported conclusions concerning the economic feasibility of NIIP are likewise insufficient. *See also In Re Waterfall Community Water Users Ass'n*, 2009-NMCA-101, ¶ 23 (holding that unsupported and conclusory statements were not competent or admissible and were not sufficient to defeat summary judgment).

Further, costs are only one element that the Court analyzes when determining economic feasibility. PIA quantification involves an analysis of (1) arability: soil scientists determine the largest area of arable land that can reasonably be considered for an irrigation project; (2) engineering feasibility of irrigating the land: engineers develop an irrigation system based on the available water supply and the arable land base; and (3) economic viability (reasonable cost): economists evaluate the crop patterns, yields, pricing, and net returns for crops that the irrigation project might support. *Lewis*, 116 N.M. at 206, 861 P.2d at 247; *Fort Mojave Indian Tribe v. United States*, 32 Fed. Cl. 29, 35 (1994). In concluding that NIIP is not economically viable, Mr. Rogers has addressed only limited aspects of certain costs and has not considered other economic factors such as crop pricing and return aspects of the NIIP operation. These factors are essential to assess the economic viability of NIIP.

The State filed a motion to strike paragraphs 3-5 of Mr. Rogers' April 15, 2013 affidavit, arguing that this portion of the affidavit is either not based on personal knowledge or not

admissible as lay testimony under Rule 11-701. *State's Motion to Strike Affidavit of Jim Rogers* (July 1, 2013). The Community Ditch Defendants responded, contending that Mr. Rogers properly testifies "about facts, not opinions" that "are based upon his own personal observations and experience . . . ." *July 5, 2013 Response*, p. 5.

Rule 11-701 permits a lay witness to testify in the form of an opinion that is rationally based on the witness' perception, provided that the opinion is not based on scientific, technical, or other specialized knowledge that would be the subject of an expert's opinion under Rule 11-702. Thus, to the extent that Mr. Rogers expresses opinions in his affidavit based on his own perception, he is allowed to do so under Rule 11-701.

As discussed, the affidavit relies on unsupported factual assertions for its conclusions. In addition, Mr. Rogers did not address many of the facts necessary to form an opinion concerning the economic feasibility of NIIP for a PIA analysis such as arability, engineering feasibility, and other aspects of reasonable costs. On these grounds, the Court does not consider the affidavit to raise any genuine issue of material fact.

With respect to the motion to strike, Mr. Rogers' stated perceptions are incomplete for the purpose of the opinions he forms; that is, although he has perceived certain aspects that relate to PIA, he has not observed other aspects that are essential links to the opinions he expresses. The affidavit is therefore insufficient to demonstrate that his opinions are either personally based or rationally based on his stated perceptions. *See State v. Johnson*, 121 N.M. 77, 80, 908 P.2d 770, 773 (Ct. App. 1995) (noting the need for a lay opinion to be based on personal knowledge); Rule 11-701(A) (requiring a lay witness opinion to be "rationally based on the witness's perception"). To the extent that Mr. Rogers assumes, but does not state, other necessary facts, he is basing his opinions on technical knowledge. As stated above, the Community Ditch

Defendants did not identify Mr. Rogers as an expert witness and do not offer his affidavit as that of an expert witness. The Court therefore grants the motion to strike as to the opinions stated in paragraph 5 of the affidavit.

Mr. Horner's similar objection regarding the economic infeasibility of NIIP in his *Motion for Summary Judgment*, filed April 15, 2013, p. 14 ¶¶ 61-64, is also an unsupported assertion that does not create the existence of a genuine issue of material fact.

3) Existing Irrigation

The Community Ditch Defendants dispute the conclusions from Technical Report G, p. 12, that the Hogback-Cudei and Fruitland-Cambridge irrigation projects have in the past irrigated 13,029 acres. From the corner of his property and his location close to the Hogback and Fruitland projects, Mr. Rogers has observed those irrigation efforts in the past and concludes that the number of acres is less than claimed because of "tough irrigation issues" including the lack of adequate water delivery infrastructure. "Consequently, their crops died and individual farming failed." Rogers May 10, 2013 Aff. ¶ 25. Mr. Rogers concludes that "[c]ertainly they have never irrigated all the acreage claimed by the settling parties." *Id.* These observations are factually unsupported opinion testimony. While Mr. Rogers' conclusion is based on his personal perceptions, it is also based on several unspoken assumptions: that the tough irrigation issues he observed precluded any successful irrigation or that the project acreage he has seen represents the entirety of the projects. Mr. Rogers' observations do not raise a genuine issue of material fact. *See Santa Fe Trail Ranch II*, 1998-NMCA-099 ¶ 15 (holding that an affidavit that does not explain the underlying facts that form the basis for its conclusion does not create a material issue of fact).

4) Future Irrigation

Mr. Rogers disputes Dr. Leeper's statements regarding the United States' claims for future economically feasible acreage (Leeper Aff. ¶¶ 53-59). Mr. Rogers states that based on his knowledge of the Basin, no additional feasible irrigable acreage exists. Rogers May 10, 2013 Aff. ¶ 21.

In paragraph 56, Dr. Leeper describes briefly the future irrigation claim (excluding NIIP) and how the federal PIA analysis was developed. As discussed above, Mr. Rogers' conclusion is insufficient to raise a genuine issue of material fact because he does not address other factors that are necessary to conclude that land cannot be irrigated on a sustained basis at a reasonable cost. Such a conclusion is inappropriate for a lay witness under Rule 11-701.

5) Future Industrial Uses

The Community Ditch Defendants object to the water claimed for the power plant use proposed in the Statement of Claims, but offer no factual basis for their objections. *Community Ditch Defs. Answer, Objections, and Counter-cl.*, p. 34-35 ¶¶ 161 – 163. The Community Ditch Defendants instead simply adopt arguments included in the *State of New Mexico's Answer to Restatement of the Claim of the Ute Mountain Ute Tribe* filed in this adjudication February 28, 2008. The Court does not consider this argument to be properly raised for the purpose of the dispositive motions.

6) Navajo Reservation Boundaries

Based on his examination of a document published by the Navajo Times, *Anatomy of the Navajo Indian Reservation: How It Grew*, J. Lee Correll and Alfred Dehiya (Navajo Times Publishing Co., 1978), Mr. Horner contends that the boundaries of the Navajo Reservation described in Exhibits G and H of the *Notice of Settling Parties' Revisions to Previously*

Submitted Exhibits, filed December 15, 2009, capture land beyond the true boundary of the reservation. "[I]t appears that said Exhibits G and H show an area that the Settling Parties consider to be Navajo Lands that vastly exceeds the current boundaries of the Navajo Reservation, and certainly vastly exceeds the boundaries of the Navajo Reservation as it was originally created in 1868." *Horner Mem. in Supp. of Mot. for Sum. J.*, p. 144. Mr. Horner ultimately concludes that the Navajo Nation is not entitled to reserved water rights on lands outside the Reservation boundary described in the Navajo Times document.

The technical basis for the Reservation boundaries depicted on the map of Navajo trust lands is described in Exhibit A of the United States' technical reports, *Development of a Navajo Lands Map for San Juan Surface Water Basin.* The report describes the various sources of information from which the maps were created, including title records and land status records from the Bureau of Indian Affairs and the Bureau of Land Management. Ex. A, pp. 3-4, 8. Consistent with Rule 1-056, the content of the technical report was verified in an affidavit by its author, William Fogleman. Attachs.to Joint Mem., Att. C, ¶ 8.

Mr. Horner does not attack the United States' technical basis for the determination of the Reservation boundaries, but instead relies on an independent source of information to raise a disputed issue of fact regarding the geographic extent of the Reservation. Mr. Horner has not stated any personal knowledge of the basis for the contents of the Navajo Times document and has offered no affidavit authenticating the document. The document therefore fails to meet the requirements of Rule 1-056. *See Rivera v. Trujillo*, 1999-NMCA-129, ¶ 114, 128 N.M. 106, 990 P.2d 219 (excluding accident report because "[p]laintiffs failed to verify. . . by affidavit or otherwise."). Mr. Horner's use of the Navajo Times document constitutes inadmissible hearsay.

Conclusion

The Court finds that the Non-Settling Parties do not rebut the Settling Parties' *prima facie* showing regarding Element Three. In addition, the Court acknowledges that the total amount of water in the Settlement Agreement is less than the Navajo Nation's currently, federally authorized rights to water pursuant to the 1962 NIIP Act and the long-established Hogback-Cudei and Fruitland-Cambridge irrigation projects.[13]

In assessing whether there is a reasonable basis on which to find that the Settlement Agreement provides for less than could be secured at trial, the Court further notes that water rights priority, another important element of rights that could be secured at trial, is also a relevant factor because a senior priority entitles the user to a greater right to water in the event of curtailment. If the issue were to proceed to trial, the Settling Parties' *prima facie* showing that has not been rebutted demonstrates that the rights secured would have a priority date senior to most of the rights of the other users in the Basin. This senior priority would be for the direct flows of the river. The Settlement Agreement subordinates this senior priority by fulfilling the rights for NIIP, NGWSP, and the ALP Project under priority dates junior to most other users. As discussed in connection with Element Two, the Settlement Agreement and the Proposed Decrees also include other provisions that reduce the impact of the Navajo Nation's water rights on other users. By subordinating priority and employing other mitigating provisions, the Settlement Agreement and the Proposed Decrees reduce the Navajo Nation's rights to water in relation to other users were compared to the rights likely to be secured at trial.

For all the reasons set forth above, the Court determines that there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial.

[13] Leeper Aff. ¶¶ 48-55; Whipple Aff. ¶¶ 16-19.

FOURTH ELEMENT: ARE THE PROPOSED DECREES CONSISTENT WITH PUBLIC POLICY AND APPLICABLE LAW?

Element Four of the legal standard addresses whether the Settlement Agreement and the Proposed Decrees are consistent with public policy and applicable law.

The Settling Parties' *Prima Facie* Showing

In support of their position that the Settlement Agreement and the Proposed Decrees are consistent with public policy and applicable law, the Settling Parties assert the following.

1) Settlements in General

The Settling Parties cite *Ratzlaff v. Seven Bar Flying Service Inc.*, 98 N.M. 159, 163, 646 P.2d 586, 590 (Ct. App. 1982) to assert that New Mexico courts favor amicable settlement as long as the settlements are fair, without fraud and misrepresentation, and supported by consideration. *St. of NM Mem. in Supp. of Settle. Mot.*, p. 44. They further argue that in this proceeding, by virtue of the settlement, the State and other water users specifically avoid the risk of a larger water rights claim being brought in the future. *St. of NM Mem. in Supp. of Settle. Mot.*, p. 5; Whipple April 15, 2013 Aff. ¶¶ 27, 35.

2) Indian Water Rights Settlements

The Settling Parties argue that federal public policy supports Indian water rights settlements specifically. Pursuant to administrative procedure, the United States settles Indian water rights claims whenever possible to fulfill its trust responsibility to Indian tribes. *Joint Mem. of Navajo Nation and U.S. in Supp. of Settle. Mot.*, p. 65; *See Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 FR 9223-01.

The Settling Parties also note that the Settlement Agreement provides increased certainty by including specific provisions for administration of the water rights after they are adjudicated.

St. of NM Mem. in Supp. of Settle. Mot., pp. 21-24. According to their *prima facie* showing under Element Two, administrative provisions encompass conditions that reduce or eliminate impacts on non-Navajo users in the Basin.

3) Indian Water Rights

The Settling Parties contend that the Settlement Agreement removes the potential for larger *Winters* rights claims with an earlier priority date. Statement of Claims, pp. 5-7, 23. According to the Settling Parties, (a) the Navajo Nation's aboriginal uses could receive a time immemorial right, *see Adair*, 723 F.2d at 1414 (granting a time immemorial priority date for the Klamath Tribe's instream fishing water rights); Statement of Claims, p. 7; and (b) the Navajo Nation could also claim a priority date pursuant to the Navajo Treaty of 1849 or its 1868 priority date, *see Lewis*, 116 N.M. at 197, 861 P.2d at 238 (holding that the priority date for water rights was the date of the promise to create a reservation); *St. of NM Mem in Supp. of Settle. Mot.*, p. 30.

The Settling Parties further state that their technical assessments establish (a) a potential PIA claim for future practicably irrigable acreage, Statement of Claims, pp. 19-20; *see St. of NM Mem. in Supp. of Settle. Mot.*, p. 4 (noting that the Navajo Nation forgoes PIA claims for NGWSP); *Arizona I*, 373 U.S. 600 (establishing the practicably irrigable acreage measurement); and (b) DCMI, livestock, historic uses, and spring use claims that are grounded in the homeland purpose case law, Statement of Claims, p. 23; *see Gila V*, 35 P.3d at 75 (applying the homeland purpose to all of the Gila River Indian Reservation).

4) Congressional Public Policy Objectives

The Settling Parties cite *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d 484 (6th Cir. 2010), in support of their assertion that the Court must consider relevant

congressional acts when evaluating settlements. There, the Sixth Circuit determined in that case that the trial court could not reject a consent decree for a Clean Water Act civil enforcement action based on the argument that the civil penalty was "too high" because Congress had approved civil penalties as part of the Clean Water Act. *Id.* at 491. The Settling Parties contend that the Court "'must consider whether [the Settlement Agreement and the Proposed Decrees] are consistent with the public objectives sought to be obtained by Congress.'" *Joint Mem. of Navajo Nation and U.S. in Supp. of Settle. Mot.*, pp.10-11 (citing *Lexington-Fayette* 591 F.3d at 491). The Settling Parties note that the Settlement Agreement is consistent with the Settlement Act. *Joint Mem. of Navajo Nation and U.S. in Supp. of Settle. Mot.*, pp. 10-11, 66-67. The Settling Parties also argue that the Settlement Agreement is consistent with the federal water rights authorizations in the 1962 NIIP Act. Leeper Aff. ¶ 13. *See* 1962 NIIP Act, § 2.

As demonstrated by the provisions in the Settlement Agreement and the Proposed Decrees, the cited legal authority, and the Court's conclusions with respect to the first three elements, the Settling Parties have established a *prima facie* showing that the settlement is consistent with public policy and applicable law.

The Non-Settling Parties' Arguments

To support their position that the Settlement Agreement should be rejected, Mr. Horner, the Community Ditch Defendants, Mr. Oxford, and B Square Ranch assert the following.

1) Public Involvement

Mr. Horner, the Community Ditch Defendants, and Mr. Oxford argue that the Settling Parties failed to engage the public and consider feedback in a forthright and meaningful way. *Horner Resp. to State Mem.*, pp. 9-12; Rogers May 10, 2013 Aff. ¶¶ 3-6; Oxford Aff. ¶ 11. The Community Ditch Defendants, through the affidavit of Mr. Rogers, argue that the Settling Parties

did not intend to negotiate with, or seek input from, the community ditches. Rogers May 10, 2013 Aff. ¶ 3. Mr. Horner similarly asserts that the settlement "was negotiated in secret, and the after-the-fact comments from the public were largely disregarded." *Horner Resp. to State Mem.*, p. 12. Mr. Horner also states that the State was not committed to the protection of the public interest in negotiating the settlement because third parties would suffer the adverse effects of the State's actions. *Horner Mem. in Supp. of Mot. for Sum. J.*, pp. 80-82; *Horner Resp. to State Mem.*, pp. 13-15. Mr. Oxford argues that the community ditches were never satisfied that the agreement was fair. Oxford Aff. ¶ 11.

Public participation may certainly enhance the settlement negotiation process. *See United States v. Akzo Coatings*, 949 F.2d 1409, 1425, 1432 (6th Cir. 1991) (balancing congressional mandate to consider public interest with congressional delegation of decision-making authority to a government agency and determining that agency response to public comments was sufficient). None of the Non-Settling Parties, however, has cited an authority mandating public involvement prior to finalizing settlement agreements or inclusion of all potential claimants during the negotiation process. Moreover, as discussed in Element Two, the Settling Parties have provided a *prima facie* showing that the Settlement Agreement and the Proposed Decrees include significant mitigating factors to reduce the impacts on junior users. These mitigating factors indicate that the State considered the public interest.

2) Water Supply

The Community Ditch Defendants and Mr. Horner state that there is not an adequate water supply to fulfill the established water rights of both the Navajo Nation and non-Navajo users in the Basin. *Community Ditch Defs. Answer, Objections, and Counter-cl.*, pp. 25-26, ¶¶ 113-120; *Community Ditch Defs. Mot. For P.S.J. Concerning Availability of Water*; Rogers

May 10, 2013 Aff. ¶¶ 7,10; *Horner Mem. in Supp. of Mot. for Sum. J.*, p. 61-67, ¶¶ 282-298. In support of these objections, the Non-Settling Parties rely on numerous federal statutes, compacts, contracts, and studies, a comprehensive list of which is included in Mr. Horner's Table of Authorities, pp. viii- xii, and *Horner Resp. to State Mem.*, pp. v - vi. Mr. Horner and the Community Ditch Defendants specifically argue that the 2007 Hydrologic Determination is erroneous. Rogers May 10, 2013 Aff. ¶¶ 7-10; *Horner Mem. in Supp. of Mot. for Sum. J.*, pp. 63-65, ¶¶ 287-292. Finally, the Community Ditch Defendants argue that Congress required the Court to determine whether sufficient supply exists. *Mot. For P.S.J. Concerning Availability of Water*, pp. 1-2. The Court does not agree for three reasons.

First, as previously discussed, the Court does not consider water supply. Although water shortages will always carry the potential to affect water users, available supply is not a factor considered in the determination of the elements of a water right within an adjudication. Supply is considered when administrative actions are taken. *Cf. Bounds* No. 32,713 & 32,717, slip op. at ¶ 31 (holding that appropriation for domestic wells, like other rights, are subject to administration by the State Engineer and stating that "all water rights. . . are inherently conditional"); *See, e.g., Tri-State*, 2012-NMSC-039, ¶ 45 ("A junior water rights holder cannot complain of deprivation when its water is curtailed to serve others more senior in the system . . . . Such are the demands of our state's system of prior appropriation.")

Second, the 2007 Hydrologic Determination is a study that was prepared by the Bureau of Reclamation. Its purpose was to inform Congress about the sufficiency of water to fulfill the settlement. *See* 1962 NIIP Act § 11(a) (requiring Congress to approve hydrologic study prior to authorizing new contracts). Prior to approving the Settlement Agreement, Congress "recognized that the Hydrologic Determination necessary to support approval of the Contract has been

completed." Settlement Act, § 10604. The 2007 Hydrologic Determination projects that "sufficient water is reasonably likely to be available from Navajo Reservoir water supply through at least 2060" to satisfy NGWSP and NIIP. 2007 Hydrologic Determination, Ex. C to the *United States' Objections to Discovery Regarding the Bureau of Reclamation's Hydrologic Determinations and Motion for Protective Order* (June 15, 2012), p. 7.

While the 1962 NIIP Act and the Settlement Act specifically required a hydrologic analysis for congressional review, neither law conferred jurisdiction on this Court to review the 2007 Hydrologic Determination, a report written by a federal agency. Indeed, the Settlement Agreement specifically states that "nothing in this Settlement Agreement . . . confers jurisdiction on the court in the Stream Adjudication to. . . conduct judicial review of federal agency action." Settlement Agreement, App. 3, Waivers and Releases, ¶ 7.3.2. This Court lacks the authority to review the 2007 Hydrologic Determination, a Bureau of Reclamation action intended for federal use that Congress has already accepted.

Third, contrary to the Non-Settling Parties' assertions, the Settlement Agreement itself does not rely on the study. Although the Settling Parties may have referred to the 2007 Hydrologic Determination prior to entering an agreement, the Settlement Agreement references the study only once, and it does so in a manner that is not central to the substance of the agreement. *See* Settlement Agreement, ¶ 8.2 (providing that additional rights may be available to the Navajo Nation if there is more water available to the State than predicted in the 2007 Hydrologic Determination).

3) Application of the *Winters* Doctrine

Mr. Horner, Mr. Oxford, and the Community Ditch Defendants challenge the Statement of Claims based on their interpretation of the *Winters* doctrine. Mr. Horner and Mr. Oxford

assert that *Winters* rights do not, or should not, include quantification for future use. *Horner Mem. in Supp. of Mot. for Sum. J.*, pp. 110-112, 114; *Gary L. Horner's Response to the Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion* (May 10, 2013), pp. 42-43; Oxford Aff. ¶¶ 7, 10, 13. The Community Ditch Defendants implicitly assert the same, to the extent that they argue that the Navajo Nation's water rights should be based on beneficial use. *Motion for Partial Summary Judgment Concerning NIIP* (filed by Community Ditch Defendants, April 15, 2013) (*Community Ditch Defs. Mot. for P.S.J. on NIIP*), pp. 4-7. As summarized by the Community Ditch Defendants, "PIA simply carries out the concept of beneficial use as applied to agricultural irrigation." *Community Ditch Defs. Mot. for P.S.J. on NIIP*, p. 4.

Mr. Horner and the Community Ditch Defendants also assert that *Winters* rights are only available for lands that were part of the reservation at the time of designation. *Horner Mem. in Supp. of Mot. for Sum. J.*, p. 14, ¶ 69, p. 17, ¶¶ 91-97; p.28-29, ¶¶ 142-148; Rogers May 10 2013 Aff. ¶ 20; *Community Ditch Defs.' Mot. for P.S.J. on NIIP*, p. 7.

Finally, Mr. Horner and the Community Ditch Defendants argue that quantification of *Winters* rights are limited to the minimal needs of the tribe. *Horner Mem. in Supp. of Mot. for Sum. J.*, pp. 131-135; *Community Ditch Defs.' Mot. for P.S.J. Concerning Minimum Needs*; *Reply on Partial Summary Judgment Motion No 2 - Minimum Needs* (May 24, 2013). Quoting *New Mexico*, 438 U.S. at 696, 98 S.Ct. at 3015, the Community Ditch Defendants argue that "Congress reserved only the amount of water necessary to fulfill the purpose of the reservation, no more . . . without [which] the purposes of the reservation would be entirely defeated." *Community Ditch Defs.' Mot. for P.S.J. Concerning Minimum Needs*; *Reply on Partial Summary Judgment Motion No 2 - Minimum Needs*, pp. 3-4. The Community Ditch Defendants assert that

such needs should be calculated in relation to the "minimal amount of water needed . . . to live in New Mexico." *Id.*, p. 2, ¶¶ 5-6.

The Non-Settling Parties misapply the *Winters* doctrine. As previously stated, *Winters* rights specifically include quantification of future use. *Arizona I*, 373 U.S. at 600, 83 S.Ct. at 1498 (approving special master's quantification of PIA, because it considers present and future needs). Because PIA involves future use of water, it is not limited by the beneficial use requirements that apply under state law. Also, PIA is not the only measure of *Winters* rights. *See Gila River V*, 35 P.3d at 79-80 (concluding that a homeland purpose should consider actual and proposed uses, history, culture, geography, topography, natural resources, economic base, and present and future population). Although Indian water rights are not limited to state law's reliance on past and present beneficial use, Indian water rights are not inconsistent with the principles of beneficial use because they are grounded in the economically feasible use of the land. *Lewis*, 116 N.M. at 206, 861 P.2d at 247 (stating that PIA is arable land that can be feasibly irrigated at a reasonable cost). *Gila River V*, 35 P.3d at 81 (2001) (stating that, for homeland purpose, "development projects need to be achievable from a practical standpoint . . . [and] projects must be economically sound"). Consequently, Indian water rights are not limited to past and current beneficial use and they include future economically feasible use.

When courts have applied a "primary purposes" analysis to Indian reserved rights, they have interpreted such purposes broadly. *See Adair*, 723 F2.d at 1414 (concluding that the primary purposes of the Klamath tribe included both an agrarian homeland and instream water rights for fishing). The purpose of the Navajo Reservation is a permanent homeland. The Community Ditch Defendants' minimal needs analysis is incorrect as a matter of law.

4) Waiver of *Winters* Rights

B Square Ranch asserts that the Navajo Nation waived its *Winters* rights in exchange for NIIP water rights during the consideration of the 1962 NIIP Act. *Defendants B Square Ranch LLC et al.'s Motion that Settling Party Navajo Nation Waived and Relinquished Its Winter[s] Rights When Navajo Indian Irrigation Project was Built* (April 15, 2013) (*B Square Ranch Waiver Mot.*). B Square Ranch submitted a partial hearing transcript including statements of the Navajo Nation Chairman to the United States House of Representatives Subcommittee on Irrigation and Regulation. Chairman Paul Jones stated that the Navajo Nation "relinquished its rights under the Winters doctrine for the water necessary to irrigate the Navajo Indian irrigation project . . . ." *B Square Ranch Waiver Mot.*, Ex. A, p. 4. B Square Ranch also included a Tribal Resolution, passed March 2, 1964, authorizing the Chairman to execute a contract that includes a statement that "the Navajo Tribe hereby waives any claims it may have to project waters . . . through application of the principles of the case of Winters vs. United States (207 U.S. 564) and agrees to the apportionment and distribution of available project water as provided in this contract." *Id.*, Ex. C, pp. 1-6. B Square Ranch argues that the Navajo Nation waived its rights through these actions. *Defendants B Square Ranch LLC et al.'s Consolidated Reply to Response by Navajo Nation and United States and to Consolidated Response by State of New Mexico in Opposition to Motion That Settling Party Navajo Nation Waived and Relinquished Its Winters Rights When Navajo Indian Irrigation Project Was Built* (May 24, 2013), pp. 8-9.

B Square Ranch's arguments fail as a matter of law. Because Congress holds Indian property rights in trust, only Congress may waive Indian property rights. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S.Ct. 772, 777 (1974). The Constitution grants Congress the power to "regulate Commerce with foreign Nations, and among several States, and

with the Indian Tribes." U.S. Const. art. I, § 8(3). As a result, "[o]nce the United States was organized and the Constitution adopted, these tribal rights to Indian lands became the exclusive province of the federal law. Indian title, recognized to be only a right of occupancy, [is] extinguishable only by the United States." *Oneida*, 414 U.S. at 667, 94 S.Ct. at 777. There is no language in the 1962 NIIP Act that waives the Navajo Nation's rights. Since Congress must relinquish the property rights it holds in trust for Indian tribes, no actions of the Navajo Nation could lawfully waive any *Winters* rights.

Although waiver is typically an issue of fact, such a determination may be made on summary judgment when the argument is based on law. *See Sanchez v. Santa Ana Golf Club, Inc.*, 2005-NMCA-003 ¶¶ 21-22, 136 N.M. 682, 104 P.3d 548 (finding no genuine issue of material fact existed as a matter of law for waiver of sovereign immunity even though the plaintiff alleged that the Indian corporation included a "sue or be sued clause" in its charter, committed to nondiscrimination in an employee handbook, voluntarily participated in a workers compensation program, and waived immunity in past dealings, because these facts, even if true, were insufficient to establish waiver). As a matter of law, the facts B Square Ranch has presented do not create a waiver.

5) Water Rights Created by the 1962 NIIP Act

Mr. Horner and the Community Ditch Defendants also challenge the State's argument that NIIP is based on federally authorized use. Mr. Horner asserts that Section 13(c) of the 1962 NIIP Act specifically prohibits the creation of individual rights. Instead, he argues that the 1962 NIIP Act only authorizes the delivery of water. *Gary L. Horner's Brief in Support of Gary L. Horner's Motion for a Determination that Federal Law, Permits, or Contracts Do Not Define the Extent of the Water Rights for the Navajo Nation* (*Horner Br. In Supp. of Horner Mot. for a*

Determination), pp. 45-46; Community Ditch Defendants' *Reply on Partial Summary Judgment Motion No.1 – Permits* (May 24, 2013), p. 2; Community Ditch Defendants' *Reply in Support of Motion for Partial Summary Judgment #4 – NIIP*, pp. 6-7.

The Non-Settling Parties, however, take this section out of context. Section 11 governs individual rights to use the water. Section 11(a) states that no person has a right to use any water stored in Navajo Reservoir, "the use of which the United States is entitled under these projects" without a contract. 1962 NIIP Act, § 11(a).

Whereas contract use is discussed in Section 11, Section 13 discusses limitations with regard to the Colorado River Compact. Section 13(a) states that the use of water is subject to the Colorado River Compact. Within this context, the section referenced by the Non-Settling Parties, Section 13(c), clarifies that the project water does not change state claims pursuant to the Colorado River Compact. Under Section 13(c) of the 1962 NIIP Act,

> No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by this Act, and Congress does not, by its enactment, construe or interpret any provision of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, or the Mexican Water Treaty or subject the United States to, or approve or disapprove any interpretation of, said compacts, or statutes, or treaty, anything in this Act to the contrary notwithstanding.

1962 NIIP Act § 13(c).

The clarification of 13(c) was necessary because of ongoing litigation regarding the Colorado River Lower Basin. *See Arizona I*, 373 U.S. 546, 83 S.Ct. 1468 (adjudicating allocation of disputed rights created by the Boulder Canyon Project Act). While Section 13(c) addresses rights to use waters of the Colorado system, the Court does not interpret it to prohibit the creation of individual water rights within the limitation of the Colorado River Compact.

6) Congressional Authorization Through Reclamation Project Law

Mr. Horner and the Community Ditch Defendants make additional arguments that Bureau of Reclamation projects in general cannot authorize water rights. First, Mr. Horner and the Community Ditch Defendants argue that Congress did not authorize water rights for the Navajo Nation, because the 1962 NIIP Act is subject to the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383 (2006), which in turn subjects all Reclamation projects to state water law and beneficial use. *Horner Br. In Supp. of Horner Mot. for a Determination*, pp.49-63; *Horner Mem. in Supp. of Mot. for Sum. J.*, pp.157-158; *Community Ditch Defs. Mot. for P.S.J. on NIIP*, pp. 4-7. Mr. Horner points in particular to the following passage from the Reclamation Act of 1902:

> [n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. The right of the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

43 U.S.C. §§ 372, 383

According to the Non-Settling Parties, the Reclamation Act supersedes any directives in the 1962 NIIP Act that could be interpreted to establish water rights, because such establishment of water rights would violate the state law water rights acquisition process and the doctrine of beneficial use. *Horner Mem. in Supp. of Mot. for Sum. J.*, p. 158; *Community Ditch Defs. Mot. for P.S.J. on NIIP*, p. 7.

Second, Mr. Horner argues that the Bureau of Reclamation is authorized only to deliver water. Mr. Horner cites *Ickes v. Fox*, 300 U.S. 82, 95, 57 S. Ct. 412, 417, (1937), for the

proposition that pursuant to projects created under the Reclamation Act of 1902, the United States is "simply a carrier and distributor of the water." *Horner Br. In Supp. of Horner Mot. for a Determination*, pp. 26, 54, 57, 59. He concludes therefore that no contracts with the Bureau of Reclamation can establish water rights. *Id.* at pp. 63-65.

Third, in a related argument, Mr. Horner and the Community Ditch Defendants claim that the Office of the State Engineer permits for these projects are invalid and therefore do not authorize water rights. Mr. Horner and the Community Ditch Defendants assert that the United States failed to comply with NMSA 1978 §§ 72-5-1, 72-5-3, 72-5-4, 72-5-5.1, 72-5-6, 72-5-7, 72-5-21, and 72-5-31, all of which govern applications for water rights permits. *Horner Br. In Supp. of Horner Mot. for a Determination*, pp. 67-114; *Horner Mem. in Supp. of Mot. for Sum. J.*, pp. 30-31, ¶¶ 153-157, pp. 36-37, ¶¶ 175-176, pp. 40-51, ¶¶ 193-239, pp. 57-58, ¶¶ 266-269, p. 155-169; *Community Ditch Defendants' Motion and Memo for Partial Summary Judgment Concerning Applications for Permits from the State Engineer* (April 15, 2013) (*Community Ditch Defs. Mot. and Mem. for P.S.J. Concerning Application for Permits*). Mr. Horner also specifically challenges OSE File No. 758, OSE File No. 2472, OSE File No. 2807, and OSE File No. 2883 for various reasons. *Horner Mem. in Supp. of Mot. for Sum. J.* pp. 19-21, ¶¶ 107-110, pp. 37-38, ¶¶ 177-182, pp. 39-40, ¶¶ 187-193, p. 53, ¶¶ 251-253, *Horner Br. In Supp. of Horner Mot. for a Determination*, pp. 75-107.

The Court does not agree with the arguments that 1) NIIP does not hold federally authorized water rights because Congress did not authorize rights through the 1962 NIIP Act, and 2) the Bureau of Reclamation cannot authorize rights both because it only delivers water and because the permits it holds are invalid.

The water rights in question are federally authorized. With the 1962 NIIP Act, Congress expressed its intent to provide 508,000 afy for NIIP. Although Section 8 of the Reclamation Act of 1902 mandates application of state law and beneficial use, Congress may override Section 8 by providing a specific directive. *See California v. U.S.*, 438 U.S. 645, 672, 98 S.Ct. at 2999 (concluding that state law is inapplicable when it conflicts with a congressional directive and upholding *Arizona I* to the extent that the Court found that the "unique size and multistate scope of the Project" was evidence of a congressional directive for the Secretary to determine the division of water contracts between states); *see also Arizona I*, 373 U.S. at 565, 83 S. Ct. at 1480 (concluding that Congress made a "statutory apportionment" of water to each of the states when it divided water between states and gave the Secretary of the Interior authority to contract for the delivery of that water). Federal law governs these water rights because project water would not exist "but for the fact that is has been developed by the United States." *See Israel*, 549 F.2d at 132-33 (stating that a later amendment to extend a prohibition on allocating project water for excess land did not violate due process, because the water was distributed according to project provisions).

In the 1962 NIIP Act, Congress directed the Bureau of Reclamation to "construct, operate, and maintain the Navajo Indian irrigation project for the primary purpose of furnishing irrigation water . . . said project to have an average annual diversion of five hundred and eight thousand acre-feet of water . . . . " § 2. The 1962 NIIP Act additionally provides that only contractors with the Department of Interior have the right to use project water. § 11(a). Congress thereby provided a clear directive to supply water to the Navajo Nation by directing a specific amount of water for a specific use.

The Settling Parties have presented a reasonable basis from which to conclude that the potential claim to the 508,000 afy could be proven at trial either through a PIA analysis or by a legal claim that the 508,000 afy was authorized by Congress in the 1962 NIIP Act. The United States and the Navajo Nation have already set forth their claims based on the *Winters* doctrine. Statement of Claims, p. 5. The Court therefore does not need to determine whether the Bureau of Reclamation holds valid permits for delivery or whether contracts could also create federally authorized rights. *See Arizona I*, 373 U.S. at 588, 83 S.Ct. at 1492 ("What other things the States are free to do can be decided when the occasion arises. But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place."); *Jicarilla*, 657 F.2d at 1145 (voiding a contract but not invalidating congressional authorization of water use).

7) Settlement Agreement as a Compact

Citing *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995), the Community Ditch Defendants contend that the Settlement Agreement is the Settling Parties' attempt to circumvent the law by entering into a compact with an Indian tribe without a statute passed by the Legislature. According to the Community Ditch Defendants, the Court must reject the Proposed Decrees because the Settlement Agreement has not been ratified by the Legislature and signed into law by the Governor. *Community Ditch Defs.' Answer, Objections, and Counter-cl.*, p. 18 ¶¶ 72-73. The Court disagrees.

The compact and revenue sharing agreements entered into by the Governor of New Mexico and the governors of numerous pueblos and the presidents of two tribes at issue in *Johnson* are distinct from the Settlement Agreement. In determining that legislative authority was required to enter into the gaming compacts, our Supreme Court concluded that the gaming

compacts at issue "would operate as the enactment of new laws and the amendment of existing law." *Johnson*, 120 N.M. 568 at 572, 904 P.2d at 21 (*citing State ex rel. Stephan v. Finney*, 251 Kan. 559, 583, 836 P.2d 1169, 1185 (Kan. 1992)). Our Supreme Court stated, "[w]e have no doubt that the compact with Pojoaque Pueblo does not execute existing New Mexico statutory or case law, but that it is instead an attempt to create new law.")

In contrast, the Settlement Agreement was entered into pursuant to governing law. The Legislature has specifically granted the Court jurisdiction to adjudicate water rights. NMSA 1978, § 72-4-17 (1965) ("The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved; . . . "). The Proposed Decrees fully describe the extent of the rights of the Navajo Nation and describe numerous provisions that set forth how the rights will be administered in the future. The Community Ditch Defendants do not explain, and it is not apparent, how the Settlement Agreement or the Proposed Decrees operate as the enactment of a new state law or amend an existing state law.

8) San Juan Water Commission v. D'Antonio

Mr. Oxford asserts that Section 8.1 of the Settlement Agreement has been negated by the August 16, 2011 court order granting the San Juan Water Commission's motion for summary judgment in *San Juan Water Commission v. D'Antonio*, D-116-CV-2008-1699. Section 8.1 allocates half of the water from OSE File No. 2883 (the ALP Project) to the Navajo Nation and reserves the remainder to the San Juan Water Commission. *See Robert E. Oxford's Second Set of Answers to the U.S. Government's Discovery Request* (December 14, 2012), R.F.P. No. 6.

The Court's August 16, 2011 order, however, concerned an application for water rights filed with the Office of the State Engineer by the San Juan Water Commission and did not address any provisions of the Settlement Agreement.

9) The Effect of the Court's Scheduling Orders on the Non-Settling Parties' Due Process Rights

B Square Ranch argues that the Non-Settling Parties have also been denied due process in this proceeding because the time frames set forth in the Court's scheduling orders did not provide adequate time for the Non-Settling Parties to complete discovery and prepare dispositive motions. *Defendants B Square Ranch, LLC et al.'s Consolidated Response to Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion and to State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Decrees*, filed May 10, 2013. B Square Ranch states that it continues to need additional time for discovery and dispositive motions and supports its request with the affidavit of Mr. Tommy Bolack. Mr. Bolack is a member of B Square Ranch, LLC and a partner in Bolack Minerals Company. Bolack Aff. ¶ 3, filed May 10, 2013. *See* Rule 1-056(F) ("Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his position, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had or may make such other order as is just.").

B Square Ranch's arguments concerning the discovery schedule were first made on September 20, 2012, when B Square Ranch joined other parties' motions to extend the scheduled deadlines by 180 days. Following a hearing on the matter on October 25, 2012, this Court determined that the requested extension of 180 days was inappropriate at that stage of discovery but that an extension was nevertheless warranted and entered its second amended scheduling

order that extended the deadline for the close of discovery from February 1, 2013 to March 1, 2013.[14] In the November 6, 2012 order granting in part the motions to extend deadlines, the Court emphasized that the *inter se* proceedings were controlled by the congressionally-established deadline of December 31, 2013, and the proceeding schedule was designed to meet this deadline. In order to expeditiously resolve possible disputes related to discovery, the Court also entered an order on November 19, 2012 that (1) set dates for both the Settling Parties and the Non-Settling Parties to identify their expert witnesses; (2) described a specific procedure for promptly notifying the Court of discovery disputes; and (3) described a procedure for immediately notifying the Court of disputes occurring during a deposition.[15]

B Square Ranch renewed its requests for another extension of time to close discovery and extend deadlines in two motions filed in March and April, 2013. In the March 6, 2013 motion for an extension, B Square Ranch raised two grounds: (1) Defendant San Juan Water Commission's (SJWC) February 12, 2013 notice of settlement and subsequent withdrawal of its participation in depositions; and (2) the February 13, 2013 notice of Defendants ConocoPhillips Company and Burlington Resources and Oil and Gas Company LP and El Paso Natural Gas (EPNG), which indicated their engagement in settlement negotiations with the Settling Parties and the withdrawal of their participation in depositions. SJWC and ConocoPhillips and EPNG had noticed depositions of witnesses identified by the Settling Parties.

The Court determined that these developments created circumstances that warranted an extension of time in order to accommodate further limited discovery, in particular (1) to allow the remaining Non-Settling Parties to take the depositions previously noticed by SJWC and

[14] Order Denying in Part and Granting in Part the Motions to Extend Deadlines, entered November 6, 2012; Second Amended Order Setting Schedule Governing Discovery on the Non-Settling Parties and Remaining Proceedings, entered November 6, 2012.

[15] Corrected Order Summarizing Discovery Activities Discussed at the November 6, 2012 Discovery Conference

ConocoPhillips and EPNG of Mr. Whipple, designated as a fact and expert witness by the State, Dr. Leeper, a Rule 1-30(B)(6) NMRA witness designated by the Navajo Nation, and Mr. Banet, an expert witness designated by the United States, and (2) to permit an extended period to access the Settling Parties' document repositories. The Community Ditch Defendants were also granted an extension to depose Lionel Haskie, a Rule 1-30(B)(6) witness designated by the Navajo Nation, prior to the close of discovery. This third amended order extending discovery deadlines for thirty days was entered on March 15, 2013.

In its subsequent April 11, 2013 motion for an extension, B Square Ranch outlined the discovery activities undertaken by the Non-Settling Parties during the previous month. Other than the deposition of Lionel Haskie on March 26, 2013, the depositions of the identified experts were not taken. B Square Ranch's motion did not describe any new facts or circumstances, or explain any obstacles to performing discovery, that warranted granting another extension of time. The Court denied the motion on April 15, 2013.

B Square Ranch's arguments in its consolidated response closely mirror the arguments raised in its April 11, 2013 motion, and similarly fail to explain with any specificity why the extended deadlines in the third amended scheduling order were inadequate to allow the Non-Settling Parties to perform the requisite discovery. Mr. Bolack's affidavit states that B Square Ranch is unable to comply with court orders and complete the tasks of discovery, but does not state with any specificity the basis for B Square Ranch's need for additional time. According to B Square Ranch, "[n]o matter how many times the Court establishes a shorter discovery deadline than requested by Defendants B Square Ranch, LLC et al. and other Non-Settling Parties, the fact remains that the Non-Settling Parties have not completed discovery in the above-styled

action and they are being prejudiced and being unfairly treated." *B Square Ranch Consolidated Response*, p. 7.

In its consolidated response, B Square Ranch makes general assertions that more time was, and is, needed to complete discovery without describing the circumstances necessitating another extension. Particularly in light of its failure to depose the settling parties' experts, B Square Ranch's assertions are insufficient to support claims that the discovery deadlines resulted in a denial of its due process rights and that additional time is needed. The Court denies the request of B Square Ranch for an additional extension of time.

Conclusion

The Non-Settling Parties have not raised any genuine issues of material fact to challenge the Settling Parties' *prima facie* showing that the Settlement Agreement is consistent with public policy and applicable law.

CONCLUSION

Under the legal standard for review of the Settlement Agreement and the Proposed Decrees, the Settling Parties bear the burden of establishing by a preponderance of the evidence that the Settlement Agreement and the Proposed Decrees are "fair, adequate, and reasonable, and consistent with the public interest and applicable law." The Court established four elements of proof by which it would ascertain whether the Settling Parties met the legal standard.

The parties have filed dispositive motions that address the issues of this proceeding. The Court has considered all the motions in the context of the four elements of the legal standard. Specifically, it has considered, as to each element of the Settling Parties burden, whether the Settling Parties have presented a *prima facie* showing and whether the Non-Settling Parties have,

either in response to the Settling Parties' motion or in their own dispositive motions, rebutted the *prima facie* showing of the Settling Parties. The Court has applied the substantive standards of Rule 1-056 and the requirements of Rule 1-056(E) as to the submission of affidavits. With respect to each element, the Settling Parties have made a *prima facie* showing, which the Non-Settling Parties have not rebutted in a manner that either raises a genuine issue of material fact or that precludes judgment as a matter of law.

The Court therefore finds and concludes that (1) the Court has jurisdiction over the parties and the subject matter of the proceeding, (2) the Settling Parties have met their burden of proving that the Settlement Agreement and the Proposed Decrees are fair, adequate, and reasonable, and consistent with the public interest and applicable law, and (3) the Proposed Decrees should be entered.

IT IS THEREFORE ORDERED that

1) the Settling Parties' Settlement Motion filed January 3, 2011 is granted;

2) the following motions of the Non-Settling Parties are denied:

a. *Gary L. Horner's Motion for the Determination of the Applicable Standard for the Determination of Federal Reserved Water Rights*, filed November 8, 2012
b. *Community Ditch Motion to Compel Plaintiffs to Respond to Request for Admission Concerning Water Units of Measurement*, filed April 1, 2013
c. *Robert E. Oxford's Dispositive Motion for Summary Judgment*, filed April 12, 2013
d. *Gary L. Horner's Motion for a Determination That Federal Law, Permits, or Contracts Do Not Define the Extent of the Water Rights for The Navajo Nation*, filed April 15, 2013
e. *Gary L. Horner's Motion For Summary Judgment: That is, the "Settlement Motion of the United States, Navajo Nation, and the State of New Mexico for Entry of Partial Final Decrees" should be denied*, filed April 15, 2013
f. *Community Ditch Motion for Partial Summary Judgment Concerning Availability of Water and Impacts on Other Water Users*, filed April 15, 2013
g. *Community Ditch Defendants' Motion for Partial Summary Judgment Concerning the Minimum Needs of the Navajo Reservation in New Mexico*, filed April 15, 2013
h. *Community Ditch Defendants' Motion for Partial Summary Judgment Concerning Applications for Permits From The State Engineer*, filed April 15, 2013

i. *Motion for Partial Summary Judgment Concerning NIIP*, filed April 15, 2013 by the Community Ditch Defendants

j. *Conditional Motion to Dismiss for Lack of Jurisdiction and Failure to Join Indispensable Parties*, filed April 15, 2013 by the Community Ditch Defendants

k. *Defendants B Square Ranch LLC et al.'s Motion That Settling Party Navajo Nation Waived and Relinquished its Winter*[s] *Rights*, filed April 15, 2013;[16]

3) the Court will enter the Proposed Decrees; and

4) within five days of the entry of this Order, the Settling Parties shall submit a copy of the Partial Final Judgment and Decree of the Water Rights of the Navajo Nation and the Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation in final format for entry by the Court.

James J. Wechsler
Presiding Judge

[16] If the Court has not specifically addressed any of the Non-Settling Parties' arguments, the Court concludes that they either do not raise a genuine issue of material fact or do not justify relief as a matter of law.