

55-17
Navajo Settle

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

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

Plaintiff,

vs.

C-75-184
ROZIER E. SANCHEZ
District Judge, *pro tempore*

SAN JUAN RIVER BASIN
ADJUDICATION

THE UNITED STATES OF AMERICA,
et al.,

Defendants.

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

COMES NOW San Juan Water Commission ("SJWC"), by and through its counsel of record, Taylor & McCaleb, P.A., and hereby files its Response to the "Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation" (the "Motion") filed by the United States of America, the State of New Mexico and the Navajo Nation (collectively the "Settling Parties"). For the reasons stated below, SJWC objects to the two-step *inter se* process proposed by the Settling Parties. SJWC also proposes a minor modification to the proposed "Notice of Expedited *Inter Se* Proceeding to Adjudicate the Water Rights of the Navajo Nation" (the "Notice").

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Sheehan, Sheehan, & Stalzner, P.A.

1. **The *Inter Se* Process Should Address All Navajo Nation Water Rights.**

SJWC agrees with the Settling Parties that it is timely for this Court to order an expedited *inter se* proceeding concerning Navajo Nation water rights and to adopt procedural standards that will guide the *inter se* proceeding. However, SJWC opposes the two-step *inter se* process anticipated by the Settling Parties. As noted in the “Memorandum in Support of Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation” (the “Memorandum”) (at 3), the Settling Parties seek to exclude from this first *inter se* process “existing and historic Navajo uses not supplied from the San Juan River.” Such water rights are to be considered only after a hydrographic survey of these “supplemental” uses is completed, after which the Settling Parties intend to file a motion for entry of a supplemental decree.

New Mexico Rule of Appellate Procedure 1-071.2(B) addresses expedited *inter se* proceedings and states that such a proceeding is one “in which a water rights claim is resolved in a stream system adjudication suit . . . both as between the plaintiff and the defendant and as among the defendant and other water rights claimants.” SJWC believes this rule anticipates *inter se* resolution of an *entire* water rights claim—not piecemeal resolution of a claimant’s water rights. Adjudicating the Navajo Nation’s water rights in two separate stages will be unfair to other water rights claimants in the San Juan River Basin. How are they supposed to determine whether they support or oppose the Navajo Nation’s claim when they do not know the full extent of the claim? Further, the proposed two-step *inter se* process will increase the time and expense of litigation for all parties involved because they will have to prepare for two *inter se* hearings—

one for the “existing and historic Navajo uses not supplied from the San Juan River,” and one for all other water rights addressed in the Northwestern New Mexico Rural Water Projects Act, Title X, Subtitle B of the Omnibus Public Land Management Act of 2009, Public Law 111-11 (the “Settlement Act”).

SJWC’s position is supported by the only precedent in this case—the expedited *inter se* process that resulted in the “Partial Final Judgment and Decree of the Water Rights of the Jicarilla Apache Tribe” (Feb. 24, 1999) (the “Jicarilla *inter se*”). The Jicarilla *inter se* addressed both the negotiated water rights settlement concerning “reserved water rights for future use” and the “reserved water rights for historic and existing” water uses identified in a hydrographic survey prepared by the United States. In the Jicarilla *inter se*, this Court did not address the reserved water rights for future use established in the negotiated settlement first and then proceed to consider the reserved water rights for historic and existing uses, as the Settling Parties are proposing here.

The Settling Parties have not explained the need for a two-step *inter se* process, other than to refer to decree deadlines set out in the Settlement Act. However, Congress did not unilaterally impose the two-step *inter se* process and corresponding deadlines. Rather, the Settling Parties established the two-step process in their negotiated San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement (Apr. 19, 2005) (the “Settlement Agreement”), and they have the power to change the process. Other San Juan River Basin water rights claimants should not be bound to this process simply because the Settling Parties negotiated it and asked Congress to approve it. SJWC believes the two-step *inter se* process will

unnecessarily burden both this Court and other water rights claimants with an unduly lengthy and expensive proceeding. All Navajo Nation water rights should be addressed at one time.

A single *inter se* process addressing all Navajo Nation water rights will be more efficient than the two-step process proposed by the Settling Parties. A single *inter se* process also will be fairer to other water rights claimants because they are entitled to know the full extent of the Navajo Nation's water rights claims before participating in an *inter se*. Rule 1-071.2 authorizes an *inter se* process in which a claimant's "water rights claim is resolved," not a process where only part of a claim is resolved. Finally, the appropriate procedure for an expedited *inter se* to resolve the water rights claim of an Indian nation was established by this Court in the Jicarilla *inter se*, which addressed both (1) the negotiated settlement of reserved rights for future uses and (2) historic and existing uses identified in a hydrographic survey in the very same proceeding.

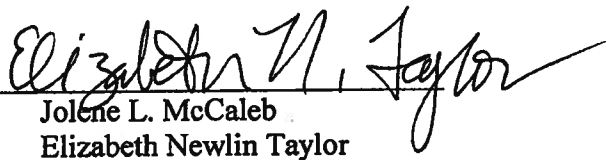
The Settlement Act does envision a two-step *inter se* process, with a partial final decree on the Navajo Nation's reserved water rights for future uses being entered by December 31, 2013, and a supplemental partial final decree on the Navajo Nation's reserved water rights for existing and historic uses being entered by December 31, 2016, after a hydrographic survey of such uses is completed. However, the Settlement Act also states that all deadlines may be extended if the Settling Parties agree that an extension is reasonably necessary. Public Law 111-11, Sec. 10701(e)(1)(B). This Court should therefore require, and the Settling Parties should agree, that the deadline for entry of a partial final decree be extended—if necessary—to allow for completion of the hydrographic survey of historic and existing water uses and an *inter se* covering all Navajo Nation water rights.

2. The Notice Should State That It Was Prepared by the Settling Parties.

The proposed Notice contains (at 2-3) a "Summary of the Proposed Partial Final Judgment and Decree" (the "Summary"). The Summary addresses the Animas-La Plata Project and states that the Project has a 1956 priority date. SJWC disagrees with the statement of the priority date. Because the Notice will come from this Court, SJWC does not want other water rights claimants to misinterpret the Notice as a final court determination concerning the priority date for the Animas-La Plata Project or any other issue discussed in the Summary prepared by the Settling Parties. SJWC therefore proposes that the following statement be inserted at the beginning of the Summary: "This Summary was prepared by the Navajo Nation and does not reflect any decision by the Court on any matter contained herein."

Respectfully submitted,

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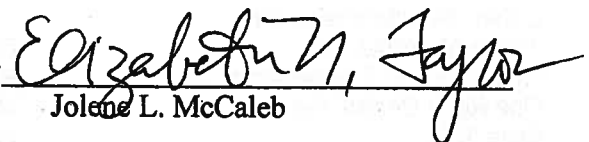
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SAN JUAN RIVER BASIN
ADJUDICATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of San Juan Water Commission's Response to Joint Motion for Order Governing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation, along with a copy of this Certificate of Service, was mailed this 17th day of September, 2009, by regular mail, to all counsel of record identified on the attached list.

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