

SJ-17
Navajo Settle

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff,

v.

No. CV 75-184

UNITED STATES OF AMERICA, et al.,
Defendants.

SAN JUAN RIVER
ADJUDICATION SUIT

**THE BID AND GARY L. HORNER'S SUPPLEMENTAL 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**

COMES NOW the BLOOMFIELD IRRIGATION DISTRICT (hereinafter referred to as the "BID"), by and through its attorney Gary L. Horner, as well as Gary L. Horner *In Propria Persona* (hereinafter referred to in the first person – collectively referred to as "Objectors"), and hereby submits a supplemental 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, submitted September 2, 2009 ("Joint Motion") by the United States ("U.S."), the Office of the State Engineer ("OSE"), and the Navajo Nation ("Navajos") (collectively referred to herein as the "Movants").

On October 6, 2009, Objectors filed THE BID AND GARY L. HORNER'S 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 (hereinafter referred to as "Objectors' Initial Response") in the present matter. (Objector's Initial Response is hereby incorporated herein by reference in its entirety.)

*BID's Supplemental Response to Joint Motion
re Proposed Navajo Procedures*

Due to time constraints, Objectors were not able to address all of the issues it would like to address in Objectors' Initial Response. At the October 7, 2009 Status Conference in the present matter, Stephen Snyder, Special Master, set a deadline of October 22, 2009 for responding to the Joint Motion, including this Supplemental Response.

Accordingly, Objectors state:

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I. The implications of the Settlement Act with respect to this Court.

Pursuant to the ORDER OF REFERENCE TO SPECIAL MASTER OF JOINT MOTION CONCERNING PROCEDURES FOR APPROVAL OF NAVAJO DECREE, entered in the present matter on October 7, 2009, the Court stated:

“The Court, after consideration of the significance of the issues raised by 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, filed on September 2, 2009], FINDS AND CONCLUDES THAT exceptional circumstances exist warranting reference of the Motion to a Special Master pursuant to Rule 1-053 NMRA. Those circumstances include (a) the congressionally imposed December 31, 2013 deadline for entry of a final decree approving the proposed settlement”

In that regard, the Court appears particularly concerned with the implications on this Court of Public Law 111-11 which imposes a deadline in the present matter for entry of the proposed Navajo Decree of December 31, 2013. Accordingly, Objectors address the implications of said Public Law 111-11 with respect to this Court.

Public Law 111-11, 123 Stat. 991 et seq. (2009), is an Act by the 111th Congress entitled the “Omnibus Public Land Management Act of 2009,” that was signed into law on March 30, 2009. Said Law consists of more than 450 pages and is described as:

“An Act To designate certain land as components of the National Wilderness Preservation System, to authorize certain programs and activities in the Department of the Interior and the Department of Agriculture, and for other purposes.”

The portion of said law of interest in the present matter is Title X, Subtitle B, which is entitled the “Northwestern New Mexico Rural Water Projects Act” (§§ 10301 - 10704) (123 Stat. 1367 - 1405 (2009)) (hereinafter referred to as the “Settlement Act”).

Part I of the Settlement Act (§§ 10401-10403) (123 Stat. 1371 - 1375) is entitled “AMENDMENTS TO THE COLORADO RIVER STORAGE PROJECT ACT AND PUBLIC LAW 87-483”.

Part II of the Settlement Act (§ 10501) (123 Stat 1375 - 1379) is entitled

“RECLAMATION WATER SETTLEMENTS FUND”.

Part III of the Settlement Act (§§ 10601-10609) (123 Stat. 1379 - 1396) is entitled “NAVAJO-GALLUP WATER SUPPLY PROJECT”.

Part IV of the Settlement Act (§§ 10701-10704) (123 Stat. 1396 - 1405) is entitled “NAVAJO NATION WATER RIGHTS”.

A. The Settlement Act approves the Navajo Settlement, and thus the United States becomes a consenting party.

First, the Settlement Act provides for the approval of the Navajo Settlement by Congress, or the United States. Specifically, (Title X, Subtitle B, Part IV) § 10701 (a) [AGREEMENT¹] (123 Stat. 1396) provides:

“AGREEMENT APPROVAL.—

“(1) APPROVAL BY CONGRESS.—Except to the extent that any provision of the Agreement conflicts with this subtitle, Congress approves, ratifies, and confirms the Agreement (including any amendments to the Agreement that are executed to make the Agreement consistent with this subtitle).

“(2) EXECUTION BY SECRETARY.^[2]—The Secretary shall enter into the Agreement to the extent that the Agreement does not conflict with this subtitle”

Accordingly, pursuant to the Settlement Act, Congress approved the Navajo Settlement, and directed the Secretary of the Interior to enter into the Navajo Settlement. Upon execution by the Secretary, the United States will become a consenting party to the Navajo Settlement.

¹ § 10302 [DEFINITIONS] (123 Stat. 1368) defines AGREEMENT as:

“The term ‘Agreement’ means the agreement among the State of New Mexico, the Nation, and the United States setting forth a stipulated and binding agreement signed by the State of New Mexico and the Nation on April 19, 2005.”

Therefore, the term Agreement means the Navajo Settlement.

² § 10302 [DEFINITIONS] (123 Stat. 1370) defines SECRETARY as:

“The term ‘Secretary’ means the Secretary of the Interior, acting through the Commissioner of Reclamation or any other designee.”

Pursuant to said congressional approval, the United States agreed to be bound by the terms of the Navajo Settlement. However, pursuant to said congressional approval, Congress: did not determine the water rights of the Navajo Nation; did not bind third parties to the Navajo Settlement; did not impose by force of law the terms of the Navajo Settlement upon third parties; and did not impose upon this Court any particular duties, obligations or requirements (including any requirement to enter any decree by any deadline).

B. The Settlement Act's December 31, 2013 deadline for entry of the subject Navajo Decree does not bind this Court.

The Settlement Act does provide for several deadlines, including the deadline of December 31, 2013 for the entry of the subject Navajo Decree in the present matter. Specifically, (Title X, Subtitle B, Part IV) § 10701 (e) [NULLIFICATION] (123 Stat. 1400) provides for the following deadlines:

“(1) DEADLINES.—

“(A) IN GENERAL.—In carrying out this section, the following deadlines apply with respect to implementation of the Agreement:

“(i) AGREEMENT.—Not later than December 31, 2010, the Secretary shall execute the Agreement.

“(ii) CONTRACT.^[3]—Not later than December 31, 2010, the Secretary and the Nation^[4] shall execute the Contract.

³ § 10302 [DEFINITIONS] (123 Stat. 1368) defines CONTRACT as:

“The term ‘Contract’ means the contract between the United States and the Nation setting forth certain commitments, rights, and obligations of the United States and the Nation, as described in paragraph 6.0 of the Agreement.”

⁴ § 10302 [DEFINITIONS] (123 Stat. 1369) defines NATION as:

“The term ‘Nation’ means the Navajo Nation, a body politic and federally-recognized Indian nation as provided for in section 101(2) of the Federally Recognized Indian Tribe List of 1994 (25 U.S.C. 497a(2)), also known variously as the “Navajo Tribe,” the “Navajo Tribe of Arizona, New Mexico & Utah,” and the “Navajo Tribe of Indians” and other similar names, and includes all bands of Navajo Indians and chapters of the Navajo Nation.”

“(iii) PARTIAL FINAL DECREE.^[5]— Not later than December 31, 2013, the court in the stream adjudication^[6] shall have entered the Partial Final Decree described in paragraph 3.0 of the Agreement.^[7]

“(iv) FRUITLAND-CAMBRIDGE IRRIGATION PROJECT.— Not later than December 31, 2016, the rehabilitation construction of the Fruitland-Cambridge Irrigation Project authorized under section 10607(a)(1) shall be completed.

“(v) SUPPLEMENTAL PARTIAL FINAL DECREE.^[8]— Not later than December 31, 2016, the court in the stream adjudication shall enter the Supplemental Partial Final Decree described in subparagraph 4.0 of the Agreement.

“(vi) HOGBACK-CUDEI IRRIGATION PROJECT.—Not later than December 31, 2019, the rehabilitation construction of the Hogback-Cudei Irrigation Project authorized under section 10607(a)(2) shall be completed.

“(vii) TRUST FUND.^[9]—Not later than December 31, 2019, the United States shall make all deposits into the Trust Fund under section 10702.

“(viii) CONJUNCTIVE WELLS.—Not later than December 31, 2019, the funds authorized to be appropriated under section 10609(b)(1) for the conjunctive use wells authorized under section 10606(b) should be appropriated.

“(ix) NAVAJO-GALLUP WATER SUPPLY PROJECT.^[10]—Not later than December 31, 2024, the construction of all Project facilities shall be completed.” Emphasis added.

⁵ § 10302 [DEFINITIONS] (123 Stat. 1369) defines PARTIAL FINAL DECREE as:

“The term ‘Partial Final Decree’ means a final and binding judgment and decree entered by a court in the stream adjudication, setting forth the rights of the Nation to use and administer waters of the San Juan River Basin in New Mexico, as set forth in Appendix 1 of the Agreement.

⁶ § 10302 [DEFINITIONS] (123 Stat. 1370) defines STREAM ADJUDICATION as:

“The term ‘stream adjudication’ means the general stream adjudication that is the subject of *New Mexico v. United States, et al.*, No. 75–185 [sic] (11th Jud. Dist., San Juan County, New Mexico) (involving claims to waters of the San Juan River and the tributaries of that river).”

⁷ Paragraph 3.2.2 of the Navajo Settlement provides:

“To satisfy this Agreement, the Court in the San Juan River Adjudication must enter the Partial Final Decree in substantially the form of Appendix 1.”

⁸ § 10302 [DEFINITIONS] (123 Stat. 1370) defines SUPPLEMENTAL PARTIAL FINAL DECREE as:

“The term ‘Supplemental Partial Final Decree’ means a final and binding judgment and decree entered by a court in the stream adjudication, setting forth certain water rights of the Nation, as set forth in Appendix 2 of the Agreement.”

⁹ § 10302 [DEFINITIONS] (123 Stat. 1370) defines TRUST FUND as:

“The term ‘Trust Fund’ means the Navajo Nation Water Resources Development Trust Fund established by section 10702(a).”

¹⁰ § 10302 [DEFINITIONS] (123 Stat. 1370) defines NAVAJO-GALLUP WATER SUPPLY PROJECT; PROJECT as:

“The term ‘Navajo-Gallup Water Supply Project’ or ‘Project’ means the Navajo-Gallup Water Supply Project authorized under section 10602(a), as described as the preferred alternative in the Draft Impact Statement.”

It appears that this Court is concerned about the implications on this Court if the preceding deadlines are not met, in particular, the December 31, 2013 deadline for entry of the subject Navajo Decree. If such deadline(s) are not (to be) met, the Settlement Act provides two options. First, if it appears that a deadline is not going to be met, such deadline may be extended if the Settling Parties agree. In that regard, (Title X, Subtitle B, Part IV) § 10701 (e)(1)(B) (123 Stat. 1400-1401) provides:

“EXTENSION.—A deadline described in subparagraph (A) may be extended if the Nation, the United States (acting through the Secretary), and the State of New Mexico (acting through the New Mexico Interstate Stream Commission) agree that an extension is reasonably necessary.”

1. If the December 31, 2009 deadline is not met, the Navajo Nation may terminate the Navajo Settlement.

The second option available to the Navajo Nation if said deadlines are not met, is that the Navajo Nation may seek to terminate the Navajo Settlement altogether. In that regard, (Title X, Subtitle B, Part IV) § 10701 (e)(2) (123 Stat. 1401) provides:

“(2) REVOCABILITY OF AGREEMENT, CONTRACT AND AUTHORIZATIONS.—

“(A) PETITION.— If the Nation determines that a deadline described in paragraph (1)(A) is not substantially met, the Nation may submit to the court in the stream adjudication a petition to enter an order terminating the Agreement and Contract.

“(B) TERMINATION.—On issuance of an order to terminate the Agreement and Contract under subparagraph (A)—

“(i) the Trust Fund^[11] shall be terminated;

¹¹ § 10302 [DEFINITIONS] (123 Stat. 1369) defines TRUST FUND as:

“The term ‘Trust Fund’ means the Navajo Nation Water Resources Development Trust Fund established by section 10702(a).”

Section 10702 [TRUST FUND] (123 Stat. 1402 - 1404) provides:

“(a) ESTABLISHMENT.—There is established in the Treasury a fund to be known as the ‘Navajo Nation Water Resources Development Trust Fund’, consisting of—

“(1) such amounts as are appropriated to the Trust Fund under subsection (f); and

“(2) any interest earned on investment of amounts in the Trust Fund under subsection

“(ii) the balance of the Trust Fund shall be deposited in the general fund of the Treasury;

“(iii) the authorizations for construction and rehabilitation of water projects under this subtitle shall be revoked and any Federal activity related to that construction and rehabilitation shall be suspended; and

“(iv) this part and parts I and III shall be null and void.

“(3) CONDITIONS NOT CAUSING NULLIFICATION OF SETTLEMENT.—

“(A) IN GENERAL.—If a condition described in subparagraph (B) occurs, the Agreement and Contract shall not be nullified or terminated.

“(B) CONDITIONS.—The conditions referred to in subparagraph (A) are as follows:

“(i) A lack of right to divert at the capacities of conjunctive use wells constructed or rehabilitated under section 10606.

“(ii) A failure—

“(I) to determine or resolve an accounting of the use of water under this subtitle in the State of Arizona;

“(II) to obtain a necessary water right for the consumptive use of water in Arizona;

“(III) to contract for the delivery of water for use in Arizona;

or

“(IV) to construct and operate a lateral facility to deliver water to a community of the Nation in Arizona, under the Project.”

Emphasis added.

2. If the Navajo Nation terminates the Navajo Settlement, it may assert a much larger claim for water rights in the present matter.

Of significance here is the fact that pursuant to the Settlement Act and the Navajo

(d).

“(b) USE OF FUNDS.—The Nation may use amounts in the Trust Fund—

“(1) to investigate, construct, operate, maintain, or replace water project facilities, including facilities conveyed to the Nation under this subtitle and facilities owned by the United States for which the Nation is responsible for operation, maintenance, and replacement costs; and

“(2) to investigate, implement, or improve a water conservation measure (including a metering or monitoring activity) necessary for the Nation to make use of a water right of the Nation under the Agreement.

* * *

“(7) CONDITIONS.—Any amount authorized to be appropriated to the Trust Fund under subsection (f) shall not be available for expenditure or withdrawal—

“(A) before December 31, 2019; and

“(B) until the date on which the court in the stream adjudication has entered—

“(i) the Partial Final Decree; and

“(ii) the Supplemental Partial Final Decree.

“(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for deposit in the Trust Fund—

“(1) \$6,000,000 for each of fiscal years 2010 through 2014; and

“(2) \$4,000,000 for each of fiscal years 2015 through 2019.”

Settlement, the Navajo Nation is to execute a waiver and release of all other claims for water rights in the San Juan River Basin in New Mexico. Specifically, (Public Law 111-11, Title X, Subtitle B, Part IV) § 10703 [WAIVERS AND RELEASES] (123 Stat. 1403-1404) provides:

“(a) CLAIMS BY THE NATION AND THE UNITED STATES.— In return for recognition of the Nation’s water rights and other benefits, including but not limited to the commitments by other parties, as set forth in the Agreement and this subtitle, the Nation, on behalf of itself and members of the Nation (other than members in the capacity of the members as allottees), and the United States acting in its capacity as trustee for the Nation, shall execute a waiver and release of—

“(1) all claims for water rights in, or for waters of, the San Juan River Basin in the State of New Mexico that the Nation, or the United States as trustee for the Nation, asserted, or could have asserted, in any proceeding, including but not limited to the stream adjudication, up to and including the effective date described in subsection (e), except to the extent that such rights are recognized in the Agreement or this subtitle;

“(2) all claims for damages, losses, or injuries to water rights or claims of interference with, diversion, or taking of water (including but not limited to claims for injury to lands resulting from such damages, losses, injuries, interference with, diversion, or taking) in the San Juan River Basin in the State of New Mexico that accrued at any time up to and including the effective date described in subsection (e);

“(3) all claims of any damage, loss, or injury or for injunctive or other relief because of the condition of or changes in water quality related to, or arising out of, the exercise of water rights; and

“(4) all claims against the State of New Mexico, its agencies, or employees relating to the negotiation or the adoption of the Agreement.

“(b) CLAIMS BY THE NATION AGAINST THE UNITED STATES.— The Nation, on behalf of itself and its members (other than in the capacity of the members as allottees), shall execute a waiver and release of—

“(1) all claims against the United States, its agencies, or employees relating to claims for water rights in or waters of the San Juan River Basin in the State of New Mexico that the United States, acting in its capacity as trustee for the Nation, asserted, or could have asserted, in any proceeding, including but not limited to the stream adjudication;

“(2) all claims against the United States, its agencies, or employees relating to damages, losses, or injuries to water, water rights, land, or natural resources due to loss of water or water rights (including but not limited to damages, losses, or injuries to hunting, fishing, gathering, or cultural rights due to loss of water or water rights; claims relating to inference [sic] with, diversion, or taking of water or water rights; or claims relating to failure to protect, acquire, replace, or develop water or water rights) in the San Juan River Basin in the State of New Mexico that first accrued at any time up to and including the effective date described in subsection (e);

“(3) all claims against the United States, its agencies, or employees relating to the pending litigation of claims relating to the Nation’s water rights in the stream adjudication; and

“(4) all claims against the United States, its agencies, or employees relating to the negotiation, execution, or the adoption of the Agreement, the decrees, the Contract, or this subtitle.” Emphasis added.

Therefore, the sword that the Navajo Nation wields with respect to its potential ability to terminate the Navajo Settlement is that it may turn around and assert in the present matter a much larger claim for water rights. (It should be noted that to date, in the entire more than 30 year

history of the present matter, the Navajo Nation has not asserted any claim to water rights in the present matter.) Apparently, in the negotiation of the subject Navajo Settlement, the Navajo Nation was able to successfully leverage the assertion that it could claim and obtain the right to every drop of water in the San Juan River by virtue of a claim for federal reserved water rights, based upon the notion of Practically Irrigable Acreage (“PIA”), and the enormous size of the Navajo Reservation.

However, as set forth in GARY HORNER’S BRIEF REGARDING MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT (which was filed on August 13 , 2004 - hereinafter referred to as “Brief re Motion to Enjoin” - said Brief re Motion to Enjoin is hereby incorporated herein by reference in its entirety), PIA is simply not the law with respect to federal reserved water rights for Indian Tribes. Rather, as set forth in said Brief re Motion to Enjoin, the federal reserved water rights doctrine provides that when a particular Indian reservation was created, Congress impliedly reserved water rights only for the original, primary purpose for which the reservation was created, and then only enough water was reserved to supply the Indian’s minimal needs, and the purpose of such use cannot be changed. The concept of federal reserved water rights does not encompass the notion of water for future uses, or water for use off of the reservation. Water rights for additional or secondary purposes on such reservations must be acquired according to state law.

Therefore, the federal reserved water rights to which the Navajo Nation should be entitled would be some subset of existing uses. The notion of federal reserved water rights does not come close to supporting the decree to the Navajo Nation of as much as 400,000 afy in excess of current uses as set forth in the subject Navajo Settlement. Certainly, said notion of federal reserved water rights will not support a much larger claim or a claim to every drop of water from

the San Juan River. Therefore, the sword that the Navajo Nation wields when threatening to terminate the subject Navajo Settlement and assert a much larger claim to water in the present matter, is no sword at all - more like a toothpick.

3. If the Navajo Nation terminates the Navajo Settlement, it will lose the right to the Trust Fund and the Navajo-Gallup Water Supply Project.

However, if the Navajo Nation terminates the Navajo Settlement, it faces substantial risks. The Settlement Act (Public Law 111-11, Title X, Subtitle B, Part III [NAVAJO-GALLUP WATER SUPPLY PROJECT], §§ 10601-10609) (123 Stat. 1379-1396) provides for the funding and construction of the Navajo-Gallup Water Supply Project (“Project”). While the Navajo Settlement and proposed Navajo Decree address the water rights for the Project, neither address the funding or construction of the Project. However, if the Navajo Nation terminates the Navajo Settlement in accordance with the provisions of the Settlement Act, the funding and construction of the Project will be terminated (see § 10701 (e)(2)(B)(iv)).

Further, if the Navajo Nation terminates the Navajo Settlement: the Trust Fund will be terminated (see § 10701 (e)(2)(B)(i)); the congressional authorizations for construction and rehabilitation of water projects under the Settlement Act will be revoked (see § 10701 (e)(2)(B)(iii)); and the entire Part IV of the Settlement Act regarding Navajo Nation Water Rights will be null and void (see § 10701 (e)(2)(B)(iv)).

4. The Settlement Act does not bind this Court to enter the subject Navajo Decree.

But, back to the implications the subject December 31, 2013 deadline, or the Settlement Act generally, has on this Court. The Settlement Act does not preempt any law, and there are no

implications of the Supremacy Clause of the United States Constitution.

Congress has completely left to this Court the determination of the water rights of the Navajo Nation, as it must do according to federal law, that is, water rights for the federal government and Indian Tribes must be acquired by state law. (Please refer to Brief re Motion to Enjoin, pp. 58-60.) The Settlement Act makes no attempt to dictate the nature and extent of water rights to which the Navajo Nation may be entitled. Accordingly, the first sentence of the proposed Navajo Decree provides:

“THIS CASE is a general adjudication filed pursuant to NMSA Sections 72-4-13 through -19 of the surface and underground water rights within the San Juan River Basin in New Mexico as authorized by 43 U.S.C. Section 666.”

Said 43 U.S.C. Section 666, also known as the McCarran Amendment (1952), provides that:

“Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the state laws are inapplicable or that United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit. * * *” Emphasis added.

Therefore, the Settlement Act does not impose upon this Court requirements: to enter the subject Navajo Decree by said deadline; to determine the water rights of the Navajo Nation in conformity with the subject Navajo Decree; or to enter the subject Navajo Decree at all. In that regard, pursuant to the Settlement Act, Congress appears cognizant of, and in no manner in conflict with, this Court’s full authority and discretion to determine the water rights of the Navajo Nation.

Further, the failure to meet said deadline, or enter the subject Navajo Decree, does not

represent a significant threat to other water users. In fact, other water users will be significantly harmed by the entry of the subject Navajo Decree, and they will be in a much better position if the Navajo water rights are determined by hydrographic survey, as required by law.

C. If the Court does not enter the Navajo Decree as proposed, the Reclamation Water Settlements Fund will not be affected.

The Settlement Act (Public Law 111-11, Title X, Subtitle B, Part II, § 10501 [RECLAMATION WATER SETTLEMENTS FUND]) (123 Stat. 1375-1379) provides for a large Reclamation Water Settlements Fund to be used to implement settlement agreements approved by Congress. Neither the Navajo Settlement nor the proposed Navajo Decree address the subject Settlement Fund. Therefore, if this Court does not approve the Navajo Settlement, or does not enter the proposed Navajo Decree by the deadline set in the Settlement Act, or if the Navajo Nation terminates the Navajo Settlement in accordance with the provisions of the Settlement Act, said Settlement Fund will not be affected.

D. The Contracts provided for in the Settlement Act are not water rights and do not bind this Court with respect to the determination of water rights.

The Settlement Act authorizes certain contracts for the storage and delivery of water from facilities owned by the United States, such as the Navajo Reservoir (§§ 10402 and 10701), the Animas-La Plata Project (§ 10701), and the Navajo-Gallup Water Supply Project (see generally Part III). The Settlement Act sometimes specifies the capacity of such Projects to be allocated to the respective Project Participants or specifies the maximum quantity of water to be stored or delivered to specific Project Participants. But, of the utmost significance is the fact that such contract rights, or storage and delivery rights, are separate and distinct from water rights, or the

right to use water. Accordingly, the Settlement Act does not attempt to define or determine a water right for any individual or entity.

All water rights in the San Juan Basin in New Mexico must be determined by this Court. Once an individual or entity has acquired the right to use water, such individual or entity may enter into a contract with the United States, with respect to the use of the facilities of the United States for the storage and/or delivery of such water. The United States may have acquired the right to store certain water, but, the right to use such water (water right) is appurtenant to the land and belongs to the ultimate beneficial user, not the United States. Since the United States is not the beneficial user, the United States does not own the water right. So, while the United States can store and deliver the water, and enter into contracts to store and deliver water to others, the United States does not own the water or the water right itself, and therefore, cannot provide water to an individual or entity who has not acquired their own right to use such water from the state.

It must be clearly understood that an entity that contracts with the United States for the storage and delivery of water does not by virtue of such contract obtain the right to use such water. Such water right must be obtained in accordance with state law. While such concept appears to be reasonably straight forward and elemental, there are many parties to the present matter that appear to not understand, or refuse to acknowledge, such concepts; including the Office of the State Engineer, the Navajo Nation, the San Juan Water Commission, the Cities of Farmington, Aztec and Bloomfield, the City of Santa Fe, the City of Albuquerque, at least one major power plant, and quite possibly the United States itself. (Please see Brief re Motion to Enjoin, pp. 54-78.)

So, the provisions of the Settlement Act providing for contracts for the use of United

States' facilities do not represent determinations of water rights for the entities so contracting.

The following table represents a partial list of contracts with the United States for the storage and delivery of water in the San Juan Basin in New Mexico related to permits issued to the United States by the New Mexico State Engineer (such list is made from memory without detailed research of such contracts):

TABLE I
Contracts with the United States for Water from the San Juan Basin in New Mexico
(Acre-Feet per Year)

		Total	Navajo Portion
Navajo Reservoir			
Navajo Res. Evaporation (Not a contract - but a use)	28,800		
Navajo Nation (NIIP)	508,000		508,000
Hammond Conservancy District	23,000		
Jicarilla Apache Tribe			
San Juan Power Plant ¹²	16,000		
Western Refining	500		
Water Haulers Association	<u>200</u>		
Subtotal Jicarilla Subcontracts ¹³	<u>16,700</u>		
Subtotal Navajo Reservoir		576,500	
San Juan-Chama Project			
Middle Rio Grande Conservancy District	20,900		
Pojoaque Valley Irrigation District	1,030		
City of Albuquerque	48,200		

¹² Objectors understand that the San Juan Power Plant had a contract with the United States for approximately 16,000 afy, but that after the Jicarilla Apache Partial Final Decree was entered in the present matter, said contract was allowed to expire and said Power Plant was required to contract with the Jicarilla Apache Tribe for such amount.

¹³ Objectors understand that pursuant to the Jicarilla Apache Partial Final Decree entered in the present matter, the Jicarilla's obtained the right to 40,000 afy over and above existing uses; 32,000 afy of which is associated with the San Juan Basin. Objectors understand that the Jicarrillas have been leasing such water to others as indicated. Objectors further understand that the contract with the City of Gallup for 7,500 afy related to the Navajo Gallup-Water Supply Project, as indicated elsewhere in this Table, somehow also involves a lease from the Jicarilla Apache Tribe. So, if the Navajo-Gallup amounts for the City of Gallup (7,500 afy) and the Jicarilla contract (1,200 afy) are added to this amount, the Jicarilla total represented in this Table would be 25,400. Objectors understand that the Jicatillas have leased nearly all of their 32,000 afy San Juan Basin water rights, but, we do not know where the difference between the 32,000 and the 25,400 went.

City and County of Santa Fe		5,605	
City of Los Alamos		1,200	
Department of Energy		15	
Village of Los Lunas		400	
City of Taos		400	
Espanola		<u>1,800</u>	
Subtotal San Juan-Chama Project ¹⁴			79,550
Animas-La Plata Project	(Original)	(Downsized)	
Navajo Nation	?	4,680	4,680
La Plata Conservancy District	?	1,560	
San Juan Water Commission ¹⁵	<u>30,800</u>	<u>20,800</u>	
Subtotal Animas-La Plata Project	49,510		27,040
Navajo-Gallup Water Supply Project			
Navajo Nation - New Mexico		22,650	22,650
Navajo Nation - Arizona		6,411	6,411
City of Gallup (Jicarilla subcontract)		7,500	
Jicarilla Apache Tribe		<u>1,200</u>	
Subtotal Navajo-Gallup Water Supply Project			<u>37,760</u>
Total			<u>720,850</u> <u>541,741</u>

All of the above contracts represent contracts for the storage and/or delivery of water.

Although the above specified users may have contracts for the storage and delivery of the subject water from the United States, none of such users have ever obtained a license from the State Engineer, or otherwise had water rights with respect to such uses determined by the courts (with the possible exception of the Jicarilla Apache Tribe pursuant to the Jicarilla Partial Final Decree entered in the present matter). Accordingly, since said contractors never obtained the right to use such water in accordance with New Mexico law, all of such uses should be considered illegal uses of water.

¹⁴ Objectors understand that the San Juan-Chama Project diverts on average approximately 100,000 afy from the San Juan Basin. (The United States Permit is for 235,000 afy.) Objectors are not certain if certain San Juan-Chama contracts remain unaccounted for in the present Table, or if the San Juan-Chama Project simply regularly diverts more than it should.

¹⁵ The San Juan Water Commission is currently trying to convert the 10,000 afy amount of its ALP contract with the United States lost when the ALP was downsized (30,800 - 20,800 afy) into a water right pursuant to the matter currently before this Court entitled *San Juan Water Commission v. State Engineer*, D-1116-CV-2008-1699.

The point here is that the determination of water rights by this Court with respect to the water uses associated with such contracts is a very significant issue in the present matter; especially when it is considered that Movants consider that storage rights trump all other water rights regardless of priority, even though none of the above federal projects, or the above uses, were in existence prior to the 1960s.

II. Conclusion.

First, the subject Settlement Act does not attempt to define the water rights of the Navajo Nation. Rather, the Settlement Act leaves the determination of the water rights of the Navajo Nation within the San Juan Basin in New Mexico entirely to the discretion of this Court. However, as previously indicated, the subject Navajo Decree would give the Navajo Nation water rights with respect to hundreds of thousands of acre-feet per year above current existing uses. Accordingly, this Court should reject the subject Navajo Decree.

The Settlement Act provides that the subject Navajo Decree must be entered by December 31, 2013. If said Navajo Decree as proposed is to never be entered by this Court, the Settlement Act provides that the Navajo Nation may terminate the subject Navajo Settlement. However, if said Settlement is so terminated, the Settlement Act provides that the Navajo-Gallup Water Supply Project will not be built, and the large Navajo Trust Fund will be terminated. Accordingly, it appears that if this Court declines to enter the subject Navajo Decree, the risk to the Navajo Nation goes far beyond simply the loss of water rights in excess of current uses.

Therefore, this Court should probably expect enormous pressure from at least the Navajo Nation to enter the subject Navajo Decree as proposed. However, this Court should not be swayed by such pressure. By seeking water rights so far in excess of current uses, it appears that

the Navajo Nation fully intended to nearly eliminate all other private water rights in the Basin, and then to force such other water users to obtain any right to use water in the Basin through contracts with the Navajo Nation; and then only upon whatever terms the Navajo Nation should demand. (Further, if the Navajo Nation were to be successful marketing such excess water to water users out of state, existing water users within the San Juan Basin would be denied the right to use any water whatsoever within the Basin.) In that regard, the Navajo Nation displays an utter disregard and disdain for its neighbors.

The excessive amount of water rights sought by the Navajo Nation has no basis in any law, and is not based on need, but rather, greed. This Court should deny the subject Joint Motion, and reject the Navajo Settlement and proposed Navajo Decree. If the Navajo Nation wants to see the Navajo-Gallup Water Supply Project built, it should be required to find a way to sever the link between the Navajo Settlement and Decree and the Navajo-Gallup Water Supply Project.

The matter of the determination of the water rights of the Navajo Nation is now in the hands of this Court, and the Settlement Act has not infringed upon or limited the authority or discretion of this Court with respect to such matter.

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October 22, 2009

Date

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff,

v.

No. CIV 75-184

UNITED STATES OF AMERICA, et al.,
Defendants,

SAN JUAN RIVER
ADJUDICATION SUIT

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of:

1) THE BID AND GARY L. HORNER'S SUPPLEMENTAL 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.

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I HEREBY CERTIFY that a true copy of the above referenced document(s) was served by electronic transmission, by attaching such document, in .pdf format, to an email sent to the (ATTNY ELECT. SERVICE CV-75-184) list server, whose email address is wrattorney@11thjdc.com, this 22nd day of October, 2009.

I understand that said list server was established by the Eleventh Judicial District Court. The Court published the email address of the list server, as well as a list of the names of the individuals subscribed thereto, but did not publish the email addresses of the respective recipients. I further understand that said list server will forward said email with attachments to the following individuals (The following list of individuals was obtained from the subject list, published on the Court's website, dated August 20, 2009. Said list was downloaded October 19, 2009. Accordingly, said individuals have been removed from the preceding mailing list.):

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I understand that said list server was established by the Eleventh Judicial District Court.

The Court published the email address of the list server, as well as a list of the names of the individuals subscribed thereto, but did not publish the email addresses of the respective recipients. I further understand that said list server will forward said email with attachments to the approximately 89 individuals set forth on the subject list (as described above), which was published on the Court's website, dated September 9, 2009. Said list was downloaded October 19, 2009.

GARY L. HORNER