

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 DEC -2 PM 3:23

STATE OF NEW MEXICO ex rel.
State Engineer,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

No. CV 75-184
SAN JUAN RIVER
ADJUDICATION SUIT

v.

THE JICARILLA APACHE TRIBE and the
NAVAJO NATION,
Defendant-Intervenors.

Claims of the Navajo Nation
Case No.: AB-07-1

NOTICE OF APPEAL

SUMMARY

1. Name of party filing the present document: **Gary L. Horner**
2. Title of the present document: **NOTICE OF APPEAL.**
3. Descriptive summary of the relief sought: **This document represents Mr. Horner's Notice of Appeal of the present matter to the New Mexico Court of Appeals.**
- 4: Number of pages of the present document: **5, plus 140 pages of attachments**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), pursuant to NMRA 12-201 and 12-202, and hereby serves notice of appeal regarding: the ORDER GRANTING THE SETTLEMENT MOTION FOR ENTRY OF PARTIAL FINAL DECREES DESCRIBING THE WATER RIGHTS OF THE NAVAJO NATION, which was entered in the present matter on August 16, 2013; and 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, which were both entered in the present matter on

Notice of Appeal

November 1, 2013. A copy of each of said documents is attached hereto and incorporated herein by reference.

In accordance with NMRA 12-202, I state:

1. The party taking the subject appeal is Defendant, Gary L. Horner, Esq.,
2. The Parties against whom the subject appeal will be taken are: the Plaintiff, STATE OF NEW MEXICO ex rel. State Engineer; the Defendant, UNITED STATES OF AMERICA; and the Defendant, NAVAJO NATION.
3. Appellate counsel for Defendant, Gary L. Horner, will be Gary L. Horner, whose address is listed below.
4. I understand that, pursuant to §34-5-8(A)(1) and NMRA 12-102 (B), the subject appeal will be taken to the New Mexico Court of Appeals.

Respectfully, submitted by:



GARY L. HORNER, Esq., *In Propria Persona*
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December 2, 2012

Date

CERTIFICATE OF SERVICE

I hereby certify, in accordance with NMRA Rule 12-202 (E)(3), that a true copy of the foregoing NOTICE OF APPEAL was mailed by first-class postage, or delivered, to the following individuals this 2nd day of December, 2013:

Appellate Court
New Mexico Court of Appeals
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Santa Fe, NM 87504-2008
(505) 827-4925

(505) 827-4946 (Fax)

Trial Judge

Presiding Judge James J. Wechsler

103 South Oliver Drive
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(505) 334-6151

Court Monitor

Loressa Bachert

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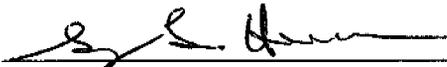
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PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

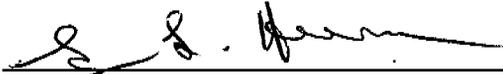
I HEREBY CERTIFY - in accordance with the ORDER MANDATING ALTERNATIVE METHOD FOR SERVICE OF ORDERS, MOTIONS, NOTICES AND OTHER COURT PAPERS, entered in the present matter on September 28, 2011 by the Honorable James Wechsler, Presiding Judge - that a true copy of the foregoing was served on the parties and Claimants in the present matter, by attaching a copy of said document to an email sent to the following email list server(s) maintained by the Court, this 2nd day of December, 2013:

wnavajointerse@nmcourts.gov

Further, pursuant to the Court's CORRECTED ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBER 6, 2012 DISCOVERY CONFERENCE, entered in the present matter on November 19, 2012, that a true copy of the foregoing document was emailed to the following individuals, this 2nd day of December, 2013.

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GARY L. HORNER

1 L. Horner, and Robert E. Oxford (collectively, the Non-Settling Parties) filed dispositive motions
2 and supporting memoranda.¹ Responses and replies were filed May 10 and 24, 2013.² The
3 Court heard arguments June 11 and 12, 2013 in Aztec, NM.

4 Being fully advised in the premises, the Court hereby finds that there is no need for an
5 evidentiary hearing, that the Settlement Motion should be granted, that the dispositive motions
6 should be denied, and that the Proposed Partial Final Judgment and Decree of the Water Rights
7 of the Navajo Nation and the Proposed Supplemental Partial Final Judgment and Decree of the
8 Water Rights of the Navajo Nation³ should be entered.

9 **BACKGROUND**

10 **Settlement Agreement and Proposed Decrees**

11 Following years of negotiation, the Settling Parties reached a settlement agreement
12 intended to satisfy all of the Navajo Nation's water rights claims in the San Juan River Basin (the
13 Basin). The Settlement Agreement was signed in 2005, and, in 2009, Congress enacted the
14 Northwestern New Mexico Rural Water Projects Act (Pub. L. No. 111-11, Title X, Subtitle B
15 123 Stat 991) (codified in scattered sections of 43 U.S.C.) (the Settlement Act), affirming many
16 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."

1 Agreement to conform it to the legislation, and the final Settlement Agreement was signed
2 December 2010.⁴

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

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

17 ***Inter se* Proceeding**

18 The proceeding to resolve the water rights claims of the Navajo Nation is a
19 subproceeding within the Basin adjudication, which encompasses all water rights within the
20 Basin. After full briefing and oral argument, the Court determined that adjudicating the Navajo
21 Nation's claims in an expedited *inter se* proceeding would promote judicial efficiency and the
22 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.

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

8 **Legal Standard**

9 Following full briefing and oral argument, the Court determined that the legal standard
10 for approval of the Settlement Agreement and the Proposed Decrees must be whether the
11 Settlement Agreement is "fair, adequate and reasonable." *Amended Order Establishing the*
12 *Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof* (April
13 19, 2012). To evaluate the Settlement Agreement and the Proposed Decrees, the Court
14 established four elements of proof: (a) the Settlement Agreement is the product of good faith,
15 arms-length negotiations; (b) the provisions contained in the Settlement Agreement and the
16 Proposed Decrees will reduce or eliminate impacts on junior water rights; (c) there is a
17 reasonable basis to conclude that the Settlement Agreement provides for less than the potential
18 claims that could be secured at trial; and (d) the Settlement Agreement is consistent with public
19 policy and applicable law. The Settling Parties have the initial burden of producing *prima facie*
20 evidence to support the Settlement Agreement. The burden of rebutting the Settling Parties'
21 evidence then shifts to the Non-Settling Parties. The Settling Parties retain the burden of
22 persuasion by a preponderance of the evidence. Should the Court not approve the Proposed
23 Decrees, the adjudication of the Navajo Nation's water rights would be set for a full trial.

1 **Discovery**

2 The Order (1) Granting Settling Parties' Motion to Extend Certain Deadlines and (2)
3 *Setting Schedule Governing Discovery and Remaining Proceedings* entered February 3, 2012⁵
4 set out an expedited discovery and hearing schedule that, *inter alia*, included an electronic
5 repository for access to discovery documents. The Settling Parties also established regional
6 records repositories for inspection of government records. Under the terms of the Settlement
7 Agreement and the Settlement Act, the adjudication court is to enter a final decree determining
8 the Navajo Nation's water rights by December 31, 2013. In order to meet this deadline,
9 discovery schedules were streamlined but carefully crafted to permit discovery for all the parties.
10 Discovery commenced on April 2, 2012 and ended March 31, 2013.

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

18 **QUANTIFICATION OF INDIAN WATER RIGHTS**

19 Federal reserved Indian rights were originally recognized by the United States Supreme
20 Court in *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207 (1908). *Winters* establishes that a
21 federal reservation of land impliedly reserves waters for the purpose of the reservation and
22 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.

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

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

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

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

14 One of the questions before this Court is how to evaluate the proposed quantification of
15 water rights that the Navajo Nation could have proven at trial. As discussed, the quantity of the
16 water right depends on the purpose of the reservation. In early cases, courts found that
17 agriculture was the sole purpose of Indian reservations. *See* Barbara A. Cosens, *The Measure of*
18 *Indian Water Rights: The Arizona Homeland Standard, Gila River Adjudication*, 42 Nat.
19 *Resources J.*, 835, 836 (2002).⁶ In many of these cases, the courts quantified agricultural use
20 based on practicably irrigable acreage (PIA). PIA therefore is the most developed measure of
21 *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).

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

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

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

1 of *Reserved Water Rights*, 31 Nat. Resources J. 549, n40 (1991) (quoting the February 22, 1981
2 Special Master's Report at 90, adopted in pertinent part in *Arizona v. California*; 460 U.S. 605,
3 103 S.Ct. 1382 (1983)); see also, *Washington v. Washington Fishing Vessel*, 443 U.S. 658, 685-
4 686, 99 S. Ct. 3055, 3074 (1979) (citing *Arizona I* as a case in which the Supreme Court
5 "ordered a trial judge or special master, in his discretion, to devise some apportionment that
6 assured that the Indians' reasonable livelihood needs would be met").

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

1 reserved only the amount of water necessary to fulfill the purpose of the reservation, no more. . .
2 without [which] the purposes of the reservation would be entirely defeated.”); *Gila River V*, 35
3 P.3d at 76 (“it seems clear to us that each of the Indian reservations in question was created as a
4 ‘permanent home and abiding place’ for the Indian people, as explained in *Winters*, 207 U.S. at
5 565, 28 S.Ct. at 208”).

6 RELEVANCE OF WATER SUPPLY TO THIS PROCEEDING

7 The Non-Settling Parties have objected to the Proposed Decrees based on assertions that
8 the available water supply of the Basin is inadequate to satisfy the Navajo Nation’s claims and to
9 protect the Non-Settling Parties’ own water rights in the Basin. *Community Ditch Defendants’*
10 *Answer, Objections and Counterclaim by Community Ditch Defendant-Counterclaimants*
11 (October 19, 2012) (*Community Ditch Defs. Answer, Objections, and Counter-cl.*), pp. 25-26
12 ¶¶ 113-120; *Community Ditch Motion for Partial Summary Judgment Concerning Availability of*
13 *Water and Impacts on Other Water Users* (April 15, 2013) (*Community Ditch Defs. Mot. For*
14 *P.S.J. Concerning Availability of Water*); *Gary L. Horner’s Memorandum in Support of Gary L.*
15 *Horner’s Motion For Summary Judgment: That is, the “Settlement Motion of the United States,*
16 *Navajo Nation, and the State of New Mexico for Entry of Partial Final Decrees” Should Be*
17 *Denied* (April 15, 2013) (*Horner Mem. in Supp. of Mot. for Sum. J.*), pp. 61-67 ¶¶ 282-298. In
18 support of these objections, the Non-Settling Parties rely on numerous federal statutes, compacts,
19 contracts, and studies, a comprehensive list of which is included in Mr. Horner’s Table of
20 Authorities, *Horner Mot. Summ. J.*, pp. viii-xii, and Table of Authorities, pp. v-vi, *Gary L.*
21 *Horner’s Response to the State of New Mexico’s Memorandum in Support of Settlement Motion*
22 *for Entry of Partial Final Decrees* filed May 10, 2013 (*Horner Resp. to State Mem.*).

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

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

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

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

9 **STANDARD FOR ANALYZING DISPOSITIVE MOTIONS**

10 The Court considers the dispositive motions to be similar to motions for summary
11 judgment and analyzes them for compliance with the substantive requirements of Rule 1-056
12 NMRA. "Summary judgment is appropriate where there are no genuine issues of material fact
13 and the movant is entitled to judgment as a matter of law." *Self v. United Parcel Serv., Inc.*,
14 1998-NMSC-046, ¶ 6, 126 N.M. 396, 970 P.2d 582. The party moving for summary judgment
15 has the burden of establishing a *prima facie* showing for summary judgment by presenting "such
16 evidence as is sufficient in law to raise a presumption of fact or establish the fact in question
17 unless rebutted." *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 10, 148 N.M. 713, 242 P.3d
18 280; *see Galvan v. City of Albuquerque*, 85 N.M. 42, 44-45, 508 P.2d 1339, 1341-42 (holding
19 that affidavits must present facts admissible in evidence and explain their conclusions).

20 "Once the moving party has met this burden, 'the burden shifts to the non-movant to
21 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

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

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

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

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

1 were involved in the negotiations: John W. Leeper, Ph.D, P.E., Civil Engineer for the Navajo
2 Nation Department of Water Resources from 1995-2011 (Attachments to *Joint Memorandum of*
3 *the Navajo Nation and the United States in Support of the Settlement Motion* (April 17, 2013)
4 (Attachs. to Joint Mem.), Attach. A, Ex. 1, p. 1; Aff. ¶ 3); Christopher Banet, M.S., Bureau of
5 Indian Affairs Trust Resources and Protection Manager for Water Resources in the Southwest
6 Regional Office (Attachs. to Joint Mem., Attach. B, Ex. 1, p.6); and John J. Whipple, M.S.,
7 Basin Manager for the Colorado/San Juan Basin for the State (*State of New Mexico's*
8 *Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees* (April 15,
9 2013) (*St. of NM Mem. in Supp. of Settle. Mot.*), Whipple April 15, 2013 Aff. ¶¶ 1, 6).

10 **The Settling Parties' *Prima Facie* Showing**

11 The Settling Parties' affidavits include the following information.

12 1) Initial Settlement Negotiations Between Parties

13 The President of the Navajo Nation and the Governor of the State of New Mexico entered
14 a Memorandum of Agreement on July 23, 1997 that initiated negotiations of the Navajo Nation's
15 claims in the Basin. Leeper Aff. ¶¶ 6-8. The parties' positions differed. The Navajo Nation
16 sought "a quantity of water to ensure that the Navajo Reservation could be sustained as a
17 permanent homeland for the Navajo People[,]" completion of NIIP, which is "a large agricultural
18 infrastructure development project with the potential to be a cornerstone of Navajo economic
19 development and self-sufficiency[,]" and construction of NGWSP, "which would bring San Juan
20 water to Navajo and non-Navajo communities lacking adequate access to clean water." *Id.* at ¶¶
21 10, 12. The State was concerned about protecting "existing uses of non-Navajo water users in
22 the San Juan River Basin to the extent possible." Whipple April 15, 2013 Aff. ¶ 26.

1 From the technical data available, the parties recognized that “a settlement would only be
2 possible if the Navajo Nation did not demand significantly more water than its current and
3 historic uses, including the congressionally-authorized water use for NIIP.” Leeper Aff. ¶ 13. In
4 2000, the Secretary of the Department of Interior appointed an assessment team comprised of
5 members of federal agencies “to evaluate the disparities in the positions of the parties and the
6 potential impact of the Navajo claim.” *Id.* at ¶ 14; Banet Aff. ¶ 3. The Navajo Nation and the
7 State entered into a second memorandum of agreement concerning continued negotiations in
8 2001, and the Secretary designated the federal assessment team as the federal negotiations team
9 in 2002. Leeper Aff. ¶¶ 15-16. Through “deliberative facilitated negotiations that addressed a
10 wide range of complex issues and disciplines[,]” the parties developed a draft settlement
11 agreement that was released to the public in December 2003. *Id.* at ¶ 21.

12 2) Public Meetings

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

- 17 a) The dedication, from the water supply for NIIP, of 12,000 acre-feet per year (“afy”)
18 to be released from Navajo Reservoir before the Navajo Nation placed calls on the
19 upstream water users;
- 20 b) the authorization of minimum releases from Navajo Reservoir of 225 cubic feet per
21 second (“cfs”) when there is at least one million acre-feet in storage;
- 22 c) a reduction of the diversion rates for the two BIA irrigation projects on the Navajo
23 Reservation that make use of direct diversions from the San Juan River, the Hogback-
24 Cudeii Irrigation Project . . . and the Fruitland-Cambridge Irrigation Project . . . to
25 reduce demands on the river during the late summer months;
- 26 d) the authorization of appropriations for the rehabilitation of Navajo and non-Navajo
27 ditches to further reduce the demands on the river;

- 1 e) a limitation on the Navajo Nation's ability to challenge the rights that were
2 adjudicated in the 1948 Echo Ditch Decree;
- 3 f) the establishment of a normal diversion requirement for the San Juan Chama Project
4 at 135,000 afy, even though San Juan Chama diversions have historically averaged
5 less than 110,000 afy; and
- 6 g) a limitation of the total diversion requirement for the rights associated with NIIP
7 when the use of such rights is changed from irrigation to other authorized uses.

8 Leeper Aff. ¶ 23.

9 3) Finalizing the Settlement Agreement

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

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

19 **The Non-Settling Parties' Arguments**

20 The Community Ditch Defendants and Mr. Horner filed responses concerning Element
21 One of the legal standard, and Mr. Robert Oxford filed an affidavit on May 10, 2013. The
22 Community Ditch Defendants presented evidence through the affidavit of Jim Rogers. Jim
23 Rogers is a farmer, rancher, and chair of the Jewett Valley Water Users Association. Rogers
24 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 1) Public Involvement and Public Interest

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

9 However, the Settling Parties had the sole obligation to negotiate the Settlement
10 Agreement among themselves. The purpose of this element of the legal standard that the
11 Settlement Agreement be the product of good faith, arms-length negotiations is to ensure that the
12 settlement is reasonable and was reached without collusion or self-dealing. *See Smoot v.*
13 *Physicians Life Ins. Co.*, 2004-NMCA-027, ¶ 13, 135 N.M. 265, 87 P.3d 545 (stating that “good
14 faith and fair dealing requires only that neither party injure the rights of the other party to receive
15 the benefit of their agreement”); *Rivera-Platte v. First Colony Life Ins. Co.*, 2007-NMCA-158,
16 ¶55, 143 N.M. 158, 173 P.3d 765 (noting that arms-length negotiations were maintained through
17 mediation between the potential parties to avoid collusion or undue pressure).

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

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

6 2) Consideration

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

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

1 The Navajo Nation is also authorized to receive \$870 million from the federal
2 government and \$50 million from the State for development of NGWSP. Settlement Act, §§
3 10609(a)(1), 10602(d)(1)(D). Additionally, the State avoids the risk of a larger claim in court,
4 and certain claims in the settlement provide for administration in accordance with a junior
5 priority date. Whipple April 15, 2013 Aff. ¶¶ 27, 35.

6 **Conclusion**

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

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

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

18 **The Settling Parties' *Prima Facie* Showing**

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

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

22 a. The Act of June 13, 1962, Pub. L. No. 87-483, 76 Stat. 96, 96-102 (current version at
23 43 U.S.C §§ 620, 620a, 620d, 620f) (1962 NIIP Act) authorizes a diversion of 508,000 afy; there

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

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

11 2) Subordination of Priorities

12 Although a reasonable basis exists for a federal reserved rights claim with a priority
13 date of June 1, 1868, the date of the original reservation, reserved rights for NIIP, NGWSP, and
14 the ALP Project will be fulfilled under priority dates junior to most users within the Basin.
15 Leeper Aff. ¶ 19. The Proposed Decree subordinates the priority dates for diversions for NIIP
16 and NGWSP to June 17, 1955 for water originating above Navajo Dam and to December 16,
17 1968 for inflow originating below Navajo Reservoir. Proposed Decree, ¶5(b). Whipple April
18 15, 2013 Aff. ¶¶ 35-36, Leeper Aff. ¶¶ 60-62. Diversions for the ALP Project will be
19 administered with a priority date of May 1, 1956 instead of a reserved priority date of 1868.
20 Whipple April 15, 2013 Aff. ¶ 35; Proposed Decree ¶ 5(c). The United States and the Navajo
21 Nation assert that “virtually all” of the non-Navajo water users in the Basin hold rights that are
22 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.”

1 3) Other Mitigating Provisions

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

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

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

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

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

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

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

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

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

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

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

3 4) Overall Reduction of Potential Rights

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

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

15 **The Non-Settling Parties' Arguments**

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

18 1) Water Supply

19 As previously discussed in connection with the relevance of water supply in this
20 proceeding, the Non-Settling Parties express concern that an adequate supply of water is not
21 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.

1 in the Basin. The Court has explained that water supply is not relevant to an adjudication
2 proceeding. Although water supply is a trigger for some mitigating provisions of the Settlement
3 Agreement and the Proposed Decrees, it is not relevant to whether these provisions actually
4 operate to reduce or eliminate impacts to other users in the Basin. *See Romero*, 2010-NMSC-
5 035 at ¶ 11 (“In addition to requiring reasonable inferences, New Mexico law requires that the
6 alleged facts at issue be material to survive summary judgment.”).

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

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

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

1 3) Top Water Bank

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

12 4) Independent Administration of Direct Flow Rights and Storage Rights

13 Both Mr. Horner and Mr. Oxford challenge paragraph 9.1 of the Settlement Agreement
14 because it provides for independent administration of storage rights in Navajo Reservoir and
15 direct flow rights in the river. *Horner Mem. in Supp. of Mot. for Summ. J.*, pp. 169-184; *Robert*
16 *E. Oxford’s Dispositive Motion for Summary Judgment* (April 12, 2013) pp. 1-2. They contend
17 that such independent administration results in the practical, and illegal, effect of fulfilling junior
18 storage rights when water is unavailable for senior direct flow rights. To support their argument,
19 Mr. Horner and Mr. Oxford cite *City of Raton v. Vermejo Conservancy District*, 101 N.M. 95,
20 678 P.2d 1170 (1984), and *State ex rel. Reynolds v. Luna Irrigation Company*, 80 N.M. 515, 458
21 P.2d 590 (1969).

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

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

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

17 549 F.2d 128, 132-33 (9th Cir. 1977). A right to project storage water is appropriately
18 administered independently from a right to natural direct surface flow in order to achieve the
19 purposes of the project. Moreover, a storage right does not entitle the user to direct flow rights;
20 likewise, a right to direct flow does not entitle a user to storage water. In this proceeding, federal
21 law is unambiguous that a contract with the Secretary of the Interior is required to obtain a right
22 to use water stored in Navajo Reservoir. 1962 NIIP Act § 11(a).

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

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

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

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

20 Mr. Horner and Mr. Oxford also point to *Luna Irrigation Co.* to support their contention
21 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.

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

10 **Conclusion**

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

17 **THIRD ELEMENT: IS THERE A REASONABLE BASIS TO CONCLUDE THAT THE** 18 **SETTLEMENT AGREEMENT AND THE PROPOSED DECREES PROVIDE FOR** 19 **LESS THAN THE POTENTIAL CLAIMS THAT COULD BE SECURED AT TRIAL?**

20 **The Settling Parties’ *Prima Facie* Showing**

21 1) Future Needs

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

1 a series of technical reports. The United States claims a total of 920,745 afy diversion and
2 591,401 afy depletion. Statement of Claims, p. 23. These amounts include historic and existing
3 water uses and future uses.

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

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

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

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

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

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

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

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

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

19 2) Historic Uses

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

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

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

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

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

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

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

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

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

1 3) Priority Dates

2 Element Three requires a comparison between the Settlement Agreement and the
3 Statement of Claims. The priority dates associated with the water rights described in the
4 Settlement Agreement are described above in connection with Element Two (the June 1, 1868
5 priority is the date of the second treaty with the United States). At trial, the United States would
6 claim a potential priority of “time immemorial” for Navajo Nation water rights associated with
7 all Navajo Reservation lands within the Basin and a priority of 1849 for lands taken into trust by
8 the United States after the 1849 Treaty. *See Navajo Tribe of Indians v. United States of America*,
9 23 In. Cl. Comm. 244, 251 (1970) (lands throughout the San Juan River Basin are the aboriginal
10 territory of the Navajo Nation); *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664
11 (1905) (holding that the treaty was not a grant of rights to the Indians, but a grant from them);
12 *Lewis*, 116 N.M. at 197, 203, 861 P.2d at 238, 244 (stating that an Indian tribe occupying its
13 aboriginal territory is entitled to a water right priority for lands held in trust from at least the first
14 peace treaty). *Joint Memorandum of the Navajo Nation and the United States in Support of the*

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).

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

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

6 **The Non-Settling Parties' Arguments**

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

9 1) DCMI

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

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

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

8 Additionally, Mr. Rogers' opinion that the Navajo population is falling is unsupported by
9 any facts that would explain his opinion. Rule 11-701 NMRA permits a lay witness to testify in
10 the form of an opinion that is rationally based on the witness' perception, provided that the
11 opinion is not based on scientific, technical, or other specialized knowledge that would be the
12 subject of an expert's opinion under Rule 11-702 NMRA. Thus, to the extent that Mr. Rogers
13 expresses opinions in his affidavit based on his own perception, he is allowed to do so under
14 Rule 11-701. His testimony in the form of an opinion, however, must be rationally based on his
15 perception, and he has offered no facts that would support his opinion regarding the current
16 Navajo population. *See Santa Fe Trail Ranch II v. Board of County Comm'rs*, 1998-NMCA-
17 099, ¶ 15, 125 N.M. 360, 961 P.2d 785 (holding that an "affidavit without any explanation of the
18 underlying factual basis for its conclusions does not serve to create a material issue of fact");
19 *Waterfall Community Water Users Ass'n*, 2009-NMCA-101, ¶ 23, 147 N.M. 20, 216 P.3d 270
20 (holding that unsupported and conclusory statements by an operator of domestic water system
21 about the source and discharge pattern of water related to a community water system "are neither
22 competent nor admissible and are therefore insufficient to defeat summary judgment").

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

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

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

16 2) NIIP

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

1 economically feasible. Rogers April 15, 2013 Aff. ¶¶ 4-5.¹² As stated in paragraphs 3 through 5
2 of his affidavit:

3 (3) As part of my business I follow what is happening at NIIP-
4 NAPI, including its financial performance and the problems in
5 irrigating that terrain. To the best of my knowledge and
6 experience, NIIP-NAPI has never been able to make a profit for
7 any period of years, taking into account all the costs necessary to
8 operate NIIP-NAPI. I have followed the feed-lot operations since
9 inception, and note that they have never been competitive in that
10 market place.

11 (4) From my observations, the primary problems are the cost of
12 building, maintaining and repairing the hundreds of miles of canals
13 and pipelines needed to transport water so far from the San Juan
14 River, and the cost of pumping water uphill. A secondary problem
15 is that the terrain at NIIP is more exposed to the wind, meaning
16 higher evaporation rates. I operate sprinklers on a portion of my
17 farm, and when the wind blows, the sprinklers must be run longer,
18 resulting in much higher production costs.

19 (5) The community ditches down in the valley operate by gravity
20 flow from the San Juan River, so they do not have the additional
21 costs necessary to operate that NIIP-NAPI does. Based upon my
22 own observations of NIIP-NAPI over many years, it is not an
23 economically viable irrigation project. The lands occupied by
24 NIIP are not suitable for sustained irrigation at reasonable cost.

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

32 [T]he affidavit appears to be based on consultation with land-use
33 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.

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

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

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

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

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

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

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

15 | With respect to the motion to strike, Mr. Rogers' stated perceptions are incomplete for
16 | the purpose of the opinions he forms; that is, although he has perceived certain aspects that relate
17 | to PIA, he has not observed other aspects that are essential links to the opinions he expresses.
18 | The affidavit is therefore insufficient to demonstrate that his opinions are either personally based
19 | or rationally based on his stated perceptions. *See State v. Johnson*, 121 N.M. 77, 80, 908 P.2d
20 | 770, 773 (Ct. App. 1995) (noting the need for a lay opinion to be based on personal knowledge);
21 | Rule 11-701(A) (requiring a lay witness opinion to be "rationally based on the witness's
22 | perception"). To the extent that Mr. Rogers assumes, but does not state, other necessary facts, he
23 | is basing his opinions on technical knowledge. As stated above, the Community Ditch

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

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

7 3) Existing Irrigation

8 The Community Ditch Defendants dispute the conclusions from Technical Report G, p.
9 12, that the Hogback-Cudei and Fruitland-Cambridge irrigation projects have in the past irrigated
10 13,029 acres. From the corner of his property and his location close to the Hogback and
11 Fruitland projects, Mr. Rogers has observed those irrigation efforts in the past and concludes that
12 the number of acres is less than claimed because of "tough irrigation issues" including the lack of
13 adequate water delivery infrastructure. "Consequently, their crops died and individual farming
14 failed." Rogers May 10, 2013 Aff. ¶ 25. Mr. Rogers concludes that "[c]ertainly they have never
15 irrigated all the acreage claimed by the settling parties." *Id.* These observations are factually
16 unsupported opinion testimony. While Mr. Rogers' conclusion is based on his personal
17 perceptions, it is also based on several unspoken assumptions: that the tough irrigation issues he
18 observed precluded any successful irrigation or that the project acreage he has seen represents
19 the entirety of the projects. Mr. Rogers' observations do not raise a genuine issue of material
20 fact. *See Santa Fe Trail Ranch II*, 1998-NMCA-099 ¶ 15 (holding that an affidavit that does not
21 explain the underlying facts that form the basis for its conclusion does not create a material issue
22 of fact).

1 4) Future Irrigation

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

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

11 5) Future Industrial Uses

12 The Community Ditch Defendants object to the water claimed for the power plant use
13 proposed in the Statement of Claims, but offer no factual basis for their objections. *Community*
14 *Ditch Defs. Answer, Objections, and Counter-cl.*, p. 34-35 ¶¶ 161 – 163. The Community Ditch
15 Defendants instead simply adopt arguments included in the *State of New Mexico's Answer to*
16 *Restatement of the Claim of the Ute Mountain Ute Tribe* filed in this adjudication February 28,
17 2008. The Court does not consider this argument to be properly raised for the purpose of the
18 dispositive motions.

19 6) Navajo Reservation Boundaries

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

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

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

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

1 **Conclusion**

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

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

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

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

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

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

5 **The Settling Parties' *Prima Facie* Showing**

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

8 1) Settlements in General

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

16 2) Indian Water Rights Settlements

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

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

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

4 | 3) Indian Water Rights

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

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

21 | 4) Congressional Public Policy Objectives

22 | The Settling Parties cite *United States v. Lexington-Fayette Urban Cnty. Gov't*, 591 F.3d
23 | 484 (6th Cir. 2010), in support of their assertion that the Court must consider relevant

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

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

16 **The Non-Settling Parties’ Arguments**

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

19 1) Public Involvement

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

1 did not intend to negotiate with, or seek input from, the community ditches. Rogers May 10,
2 2013 Aff. ¶ 3. Mr. Horner similarly asserts that the settlement “was negotiated in secret, and the
3 after-the-fact comments from the public were largely disregarded.” *Horner Resp. to State Mem.*,
4 p. 12. Mr. Horner also states that the State was not committed to the protection of the public
5 interest in negotiating the settlement because third parties would suffer the adverse effects of the
6 State’s actions. *Horner Mem. in Supp. of Mot. for Sum. J.*, pp. 80-82; *Horner Resp. to State*
7 *Mem.*, pp. 13-15. Mr. Oxford argues that the community ditches were never satisfied that the
8 agreement was fair. Oxford Aff. ¶ 11.

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

19 2) Water Supply

20 The Community Ditch Defendants and Mr. Horner state that there is not an adequate
21 water supply to fulfill the established water rights of both the Navajo Nation and non-Navajo
22 users in the Basin. *Community Ditch Defs. Answer, Objections, and Counter-cl.*, pp. 25-26,
23 ¶¶ 113-120; *Community Ditch Defs. Mot. For P.S.J. Concerning Availability of Water*; Rogers

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

10 First, as previously discussed, the Court does not consider water supply. Although water
11 shortages will always carry the potential to affect water users, available supply is not a factor
12 considered in the determination of the elements of a water right within an adjudication. Supply
13 is considered when administrative actions are taken. *Cf. Bounds* No. 32,713 & 32,717, slip op. at
14 ¶ 31 (holding that appropriation for domestic wells, like other rights, are subject to
15 administration by the State Engineer and stating that "all water rights. . . are inherently
16 conditional"); *See, e.g., Tri-State*, 2012-NMSC-039, ¶ 45 ("A junior water rights holder cannot
17 complain of deprivation when its water is curtailed to serve others more senior in the system
18 Such are the demands of our state's system of prior appropriation.")

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

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

6 While the 1962 NIIP Act and the Settlement Act specifically required a hydrologic
7 analysis for congressional review, neither law conferred jurisdiction on this Court to review the
8 2007 Hydrologic Determination, a report written by a federal agency. Indeed, the Settlement
9 Agreement specifically states that “nothing in this Settlement Agreement . . . confers jurisdiction
10 on the court in the Stream Adjudication to . . . conduct judicial review of federal agency action.”
11 Settlement Agreement, App. 3, Waivers and Releases, ¶ 7.3.2. This Court lacks the authority to
12 review the 2007 Hydrologic Determination, a Bureau of Reclamation action intended for federal
13 use that Congress has already accepted.

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

21 3) Application of the *Winters* Doctrine

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

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

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

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

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

3 The Non-Settling Parties misapply the *Winters* doctrine. As previously stated, *Winters*
4 rights specifically include quantification of future use. *Arizona I*, 373 U.S. at 600, 83 S.Ct. at
5 1498 (approving special master’s quantification of PIA, because it considers present and future
6 needs). Because PIA involves future use of water, it is not limited by the beneficial use
7 requirements that apply under state law. Also, PIA is not the only measure of *Winters* rights. *See*
8 *Gila River V*, 35 P.3d at 79-80 (concluding that a homeland purpose should consider actual and
9 proposed uses, history, culture, geography, topography, natural resources, economic base, and
10 present and future population). Although Indian water rights are not limited to state law’s
11 reliance on past and present beneficial use, Indian water rights are not inconsistent with the
12 principles of beneficial use because they are grounded in the economically feasible use of the
13 land. *Lewis*, 116 N.M. at 206, 861 P.2d at 247 (stating that PIA is arable land that can be
14 feasibly irrigated at a reasonable cost). *Gila River V*, 35 P.3d at 81 (2001) (stating that, for
15 homeland purpose, “development projects need to be achievable from a practical standpoint . . .
16 [and] projects must be economically sound”). Consequently, Indian water rights are not limited
17 to past and current beneficial use and they include future economically feasible use.

18 When courts have applied a “primary purposes” analysis to Indian reserved rights, they
19 have interpreted such purposes broadly. *See Adair*, 723 F.2d at 1414 (concluding that the
20 primary purposes of the Klamath tribe included both an agrarian homeland and instream water
21 rights for fishing). The purpose of the Navajo Reservation is a permanent homeland. The
22 Community Ditch Defendants’ minimal needs analysis is incorrect as a matter of law.

1 4) Waiver of Winters Rights

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

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

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

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

17 5) Water Rights Created by the 1962 NIIP Act

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

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

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

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

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

23 1962 NIIP Act § 13(c).

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

1 6) Congressional Authorization Through Reclamation Project Law

2 Mr. Horner and the Community Ditch Defendants make additional arguments that Bureau
3 of Reclamation projects in general cannot authorize water rights. First, Mr. Horner and the
4 Community Ditch Defendants argue that Congress did not authorize water rights for the Navajo
5 Nation, because the 1962 NIIP Act is subject to the Reclamation Act of 1902, 43 U.S.C. §§ 372,
6 383 (2006), which in turn subjects all Reclamation projects to state water law and beneficial use.
7 *Horner Br. In Supp. of Horner Mot. for a Determination*, pp.49-63; *Horner Mem. in Supp. of*
8 *Mot. for Sum. J.*, pp.157-158; *Community Ditch Defs. Mot. for P.S.J. on NIIP*, pp. 4-7. Mr.
9 Horner points in particular to the following passage from the Reclamation Act of 1902:

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

22 43 U.S.C. §§ 372, 383

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

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

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

5 Third, in a related argument, Mr. Horner and the Community Ditch Defendants claim that
6 the Office of the State Engineer permits for these projects are invalid and therefore do not
7 authorize water rights. Mr. Horner and the Community Ditch Defendants assert that the United
8 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,
9 72-5-21, and 72-5-31, all of which govern applications for water rights permits. *Horner Br. In*
10 *Supp. of Horner Mot. for a Determination*, pp. 67-114; *Horner Mem. in Supp. of Mot. for Sum.*
11 *J.*, pp. 30-31, ¶¶ 153-157, pp. 36-37, ¶¶ 175-176, pp. 40-51, ¶¶ 193-239, pp. 57-58, ¶¶ 266-269,
12 p. 155-169; *Community Ditch Defendants’ Motion and Memo for Partial Summary Judgment*
13 *Concerning Applications for Permits from the State Engineer* (April 15, 2013) (*Community*
14 *Ditch Defs. Mot. and Mem. for P.S.J. Concerning Application for Permits*). Mr. Horner also
15 specifically challenges OSE File No. 758, OSE File No. 2472, OSE File No. 2807, and OSE File
16 No. 2883 for various reasons. *Horner Mem. in Supp. of Mot. for Sum. J.* pp. 19-21, ¶¶ 107-110,
17 pp. 37-38, ¶¶ 177-182, pp. 39-40, ¶¶ 187-193, p. 53, ¶¶ 251-253, *Horner Br. In Supp. of Horner*
18 *Mot. for a Determination*, pp. 75-107.

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

1 The water rights in question are federally authorized. With the 1962 NIIP Act, Congress
2 expressed its intent to provide 508,000 afy for NIIP. Although Section 8 of the Reclamation Act
3 of 1902 mandates application of state law and beneficial use, Congress may override Section 8
4 by providing a specific directive. *See California v. U.S.*, 438 U.S. 645, 672, 98 S.Ct. at 2999
5 (concluding that state law is inapplicable when it conflicts with a congressional directive and
6 upholding *Arizona I* to the extent that the Court found that the “unique size and multistate scope
7 of the Project” was evidence of a congressional directive for the Secretary to determine the
8 division of water contracts between states); *see also Arizona I*, 373 U.S. at 565, 83 S. Ct. at 1480
9 (concluding that Congress made a “statutory apportionment” of water to each of the states when
10 it divided water between states and gave the Secretary of the Interior authority to contract for the
11 delivery of that water). Federal law governs these water rights because project water would not
12 exist “but for the fact that it has been developed by the United States.” *See Israel*, 549 F.2d at
13 132-33 (stating that a later amendment to extend a prohibition on allocating project water for
14 excess land did not violate due process, because the water was distributed according to project
15 provisions).

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

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

12 7) Settlement Agreement as a Compact

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

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

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

6 In contrast, the Settlement Agreement was entered into pursuant to governing law. The
7 Legislature has specifically granted the Court jurisdiction to adjudicate water rights. NMSA
8 1978, § 72-4-17 (1965) (“The court in which any suit involving the adjudication of water rights
9 may be properly brought shall have exclusive jurisdiction to hear and determine all questions
10 necessary for the adjudication of all water rights within the stream system involved; . . .”). The
11 Proposed Decrees fully describe the extent of the rights of the Navajo Nation and describe
12 numerous provisions that set forth how the rights will be administered in the future. The
13 Community Ditch Defendants do not explain, and it is not apparent, how the Settlement
14 Agreement or the Proposed Decrees operate as the enactment of a new state law or amend an
15 existing state law.

16 8) San Juan Water Commission v. D’Antonio

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

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

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

6 B Square Ranch argues that the Non-Settling Parties have also been denied due process in
7 this proceeding because the time frames set forth in the Court's scheduling orders did not
8 provide adequate time for the Non-Settling Parties to complete discovery and prepare dispositive
9 motions. *Defendants B Square Ranch, LLC et al.'s Consolidated Response to Memorandum of*
10 *the Navajo Nation and the United States in Support of the Settlement Motion and to State of New*
11 *Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Decrees*, filed May
12 10, 2013. B Square Ranch states that it continues to need additional time for discovery and
13 dispositive motions and supports its request with the affidavit of Mr. Tommy Bolack. Mr.
14 Bolack is a member of B Square Ranch, LLC and a partner in Bolack Minerals Company.
15 Bolack Aff. ¶ 3, filed May 10, 2013. *See* Rule 1-056(F) ("Should it appear from the affidavits of
16 a party opposing the motion that he cannot for reasons stated present by affidavit facts essential
17 to justify his position, the court may refuse the application for judgment or may order a
18 continuance to permit affidavits to be obtained or deposition to be taken or discovery to be had
19 or may make such other order as is just.").

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

1 order that extended the deadline for the close of discovery from February 1, 2013 to March 1,
2 2013.¹⁴ In the November 6, 2012 order granting in part the motions to extend deadlines, the
3 Court emphasized that the *inter se* proceedings were controlled by the congressionally-
4 established deadline of December 31, 2013, and the proceeding schedule was designed to meet
5 this deadline. In order to expeditiously resolve possible disputes related to discovery, the Court
6 also entered an order on November 19, 2012 that (1) set dates for both the Settling Parties and
7 the Non-Settling Parties to identify their expert witnesses; (2) described a specific procedure for
8 promptly notifying the Court of discovery disputes; and (3) described a procedure for
9 immediately notifying the Court of disputes occurring during a deposition.¹⁵

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

19 The Court determined that these developments created circumstances that warranted an
20 extension of time in order to accommodate further limited discovery, in particular (1) to allow
21 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

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

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

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

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

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

9 **Conclusion**

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

13
14 **CONCLUSION**

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

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

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

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

12 **IT IS THEREFORE ORDERED** that

- 13 1) the Settling Parties' Settlement Motion filed January 3, 2011 is granted;
- 14 2) the following motions of the Non-Settling Parties are denied:
- 15 a. *Gary L. Horner's Motion for the Determination of the Applicable Standard for the*
16 *Determination of Federal Reserved Water Rights*, filed November 8, 2012
 - 17 b. *Community Ditch Motion to Compel Plaintiffs to Respond to Request for Admission*
18 *Concerning Water Units of Measurement*, filed April 1, 2013
 - 19 c. *Robert E. Oxford's Dispositive Motion for Summary Judgment*, filed April 12, 2013
 - 20 d. *Gary L. Horner's Motion for a Determination That Federal Law, Permits, or*
21 *Contracts Do Not Define the Extent of the Water Rights for The Navajo Nation*, filed
22 April 15, 2013
 - 23 e. *Gary L. Horner's Motion For Summary Judgment: That is, the "Settlement Motion of*
24 *the United States, Navajo Nation, and the State of New Mexico for Entry of Partial*
25 *Final Decrees"* should be denied, filed April 15, 2013
 - 26 f. *Community Ditch Motion for Partial Summary Judgment Concerning Availability of*
27 *Water and Impacts on Other Water Users*, filed April 15, 2013
 - 28 g. *Community Ditch Defendants' Motion for Partial Summary Judgment Concerning the*
29 *Minimum Needs of the Navajo Reservation in New Mexico*, filed April 15, 2013
 - 30 h. *Community Ditch Defendants' Motion for Partial Summary Judgment Concerning*
31 *Applications for Permits From The State Engineer*, filed April 15, 2013

- 1 i. *Motion for Partial Summary Judgment Concerning NIIP*, filed April 15, 2013 by the
2 Community Ditch Defendants
3 j. *Conditional Motion to Dismiss for Lack of Jurisdiction and Failure to Join*
4 *Indispensable Parties*, filed April 15, 2013 by the Community Ditch Defendants
5 k. *Defendants B Square Ranch LLC et al.'s Motion That Settling Party Navajo Nation*
6 *Waived and Relinquished its Winter[s] Rights*, filed April 15, 2013;¹⁶
- 7 3) the Court will enter the Proposed Decrees; and
- 8 4) within five days of the entry of this Order, the Settling Parties shall submit a copy of
9 the Partial Final Judgment and Decree of the Water Rights of the Navajo Nation and
10 the Supplemental Partial Final Judgment and Decree of the Water Rights of the
11 Navajo Nation in final format for entry by the Court.

12 
13 James J. Wechsler
14 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.

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 NOV -1 AM 6:50

1 STATE OF NEW MEXICO
2 SAN JUAN COUNTY
3 THE ELEVENTH JUDICIAL DISTRICT COURT

4
5 STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,

6
7 **Plaintiff,**

8
9 **vs.**

10
11 THE UNITED STATES OF AMERICA, *et al.*,

12
13 **Defendants,**

14
15 THE JICARILLA APACHE TRIBE AND THE
16 NAVAJO NATION,

17
18 **Defendant-Intervenors.**

CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

Claims of the Navajo Nation
Case No. AB-07-1

19
20 **PARTIAL FINAL JUDGMENT AND DECREE**
21 **OF THE WATER RIGHTS OF THE**
22 **NAVAJO NATION**
23

24
25 THIS CASE is a general adjudication filed pursuant to NMSA 1978, Sections 72-4-13
26 through -19 of the surface and underground water rights within the San Juan River Basin in New
27 Mexico as authorized by 43 U.S.C. Section 666. The rights of the Navajo Nation to divert, impound,
28 or use the surface waters within the San Juan River Basin, including the San Juan River and its
29 tributaries, and the underground waters underlying the surface drainage of the San Juan River Basin
30 in New Mexico, are decreed herein.

31 This matter comes before the Court on the Settlement Motion of United States, Navajo
32 Nation and State of New Mexico for the Entry of Partial Final Decrees, filed January 3, 2011. The
33 Court finds that the proposed Partial Final Judgment and Decree ("Decree") is the product of a
34 negotiated settlement by the aforesaid parties. Notice of the deadline for filing and serving

1 objections to the water rights described in this Decree was served on the parties to this case and
2 potential water right claimants pursuant to the expedited *inter se* procedures adopted by the Court.
3 The Court, having considered the parties' motion, the objections thereto, the evidence in support
4 thereof, and for good cause shown:

5 ENTERED the *Order Granting the Settlement Motion for Entry of Partial Final Decrees*
6 *Describing the Water Rights of the Navajo Nation* on August 16, 2013; and

7 FINDS that there is no just reason for delay in accordance with Rule 1-054(B) NMRA and
8 directs the entry of this Decree adjudicating the water rights of the Navajo Nation within the San
9 Juan River Basin.

10 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

11 **1. JURISDICTION.**

12 The Court has jurisdiction over the subject matter and the parties in this case.

13 **2. RESERVED RIGHTS TO THE USE OF WATER.**

14 The Navajo Nation's reserved rights, which are held in trust by the United States on behalf of
15 the Navajo Nation, are described in paragraphs 3, 7(a), 8 and 10 of this Decree. These reserved
16 rights have a priority date of June 1, 1868 and are not subject to abandonment, forfeiture or loss for
17 non-use.

18 **3. RESERVED RIGHTS FOR SPECIFIED SURFACE WATER DIVERSIONS.**

19 The Navajo Nation has the right, subject to the limitations set forth in paragraph 5 of this
20 Decree, to divert the waters of the San Juan River Basin in New Mexico, with a priority date of June
21 1, 1868, in quantities for the following uses not to exceed:

1 (a) NAVAJO INDIAN IRRIGATION PROJECT, an average diversion of 508,000
2 acre-feet per year, or the quantity of water necessary to supply an average depletion of
3 270,000 acre-feet per year from the San Juan River, whichever is less, of surface water from
4 the San Juan River at the location of Navajo Reservoir during any period of ten consecutive
5 years for irrigation of 110,630 acres of land on the Navajo Indian Irrigation Project generally
6 located as described in Plate 1 of the Bureau of Indian Affairs' Biological Assessment for the
7 Navajo Indian Irrigation Project dated June 11, 1999, and for other purposes as authorized by
8 section 10402 of the Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367)
9 and subparagraph 5(e) of this Decree, with a maximum diversion flow rate of 1,800 cubic
10 feet per second; provided, however, that the quantities of diversion and depletion in any one
11 year shall not exceed the aforesaid ten-year average quantities, respectively, by more than 15
12 percent;

13 (b) NAVAJO-GALLUP WATER SUPPLY PROJECT, a diversion of 22,650 acre-
14 feet, or the quantity of water necessary to supply a depletion of 20,780 acre-feet from the San
15 Juan River, whichever is less, of surface water from Navajo Reservoir and the San Juan
16 River, in combination, in any one year at the points of diversion and for the purposes of the
17 Navajo-Gallup Water Supply Project as authorized by section 10603 of the Northwestern
18 New Mexico Rural Water Projects Act (123 Stat. 1367) for municipal, industrial, commercial
19 and domestic uses, including residential outdoor uses such as yard and stock watering, on
20 lands in New Mexico that are held by the United States in trust for the Navajo Nation or
21 members of the Navajo Nation or held in fee ownership by the Navajo Nation, with a
22 maximum diversion flow rate of 41 cubic feet per second;

1 (c) ANIMAS-LA PLATA PROJECT, a diversion of 4,680 acre-feet, or the quantity
2 of water necessary to supply a depletion of 2,340 acre-feet from the San Juan River stream
3 system, whichever is less, of surface water from the Animas River in any one year at the
4 points of diversion for supplying water to the Navajo Nation Municipal Pipeline and for
5 purposes of the Animas-La Plata Project as authorized by the Colorado Ute Settlement Act
6 Amendments of 2000 (114 Stat. 2763A-258) for municipal, industrial, commercial and
7 domestic uses, including residential outdoor uses such as yard and stock watering, on lands
8 in New Mexico that are held by the United States in trust for the Navajo Nation or members
9 of the Navajo Nation or held in fee ownership by the Navajo Nation, with a maximum
10 diversion flow rate of 12.9 cubic feet per second;

11 (d) MUNICIPAL AND DOMESTIC USES, a diversion of 2,600 acre-feet, or the
12 quantity of water necessary to supply a depletion of 1,300 acre-feet from the San Juan River,
13 whichever is less, of surface water from the direct flow of the San Juan River in any one year
14 at locations below the confluence of the San Juan and La Plata rivers for municipal,
15 industrial, commercial and domestic purposes, including residential outdoor uses such as
16 yard and stock watering, on lands in New Mexico that are held by the United States in trust
17 for the Navajo Nation or members of the Navajo Nation or held in fee ownership by the
18 Navajo Nation, with a maximum diversion flow rate of 5.0 cubic feet per second, provided
19 that a permit is obtained from the New Mexico State Engineer if diversion of this water is to
20 be made off lands held in trust by the United States for the Navajo Nation or lands held in fee
21 by the Navajo Nation;

22 (e) HOGBACK-CUDEI IRRIGATION PROJECT, a diversion of 48,550 acre-feet,

1 or the quantity of water necessary to supply a depletion of 21,280 acre-feet from the San Juan
2 River, whichever is less, of surface water from the direct flow of the San Juan River in any
3 one year at the diversion dam for the Hogback-Cudei Irrigation Project for irrigation of 8,830
4 acres of land on the project generally located along the north and south sides of the San Juan
5 River in the vicinity of the community of Shiprock, New Mexico, and between the diversion
6 dam for the project and Four Corners, as described by the Bureau of Indian Affairs' Crop
7 Utilization Study for the Hogback and Cudei irrigation projects dated September 1993, with
8 a maximum diversion flow rate of 221 cubic feet per second, including any diversions from
9 an alternate point of diversion at the historic Cudei ditch diversion heading; and

10 (f) FRUITLAND-CAMBRIDGE IRRIGATION PROJECT, a diversion of 18,180
11 acre-feet, or the quantity of water necessary to supply a depletion of 7,970 acre-feet from the
12 San Juan River, whichever is less, of surface water from the direct flow of the San Juan
13 River in any one year at the diversion dam for the Fruitland-Cambridge Irrigation Project for
14 irrigation of 3,335 acres of land on the project generally located along the south side of the
15 San Juan River in the vicinity of the community of Fruitland, New Mexico, and between the
16 City of Farmington and the diversion dam for the Hogback-Cudei Irrigation Project, as
17 described by the Bureau of Indian Affairs' Crop Utilization Study for the Fruitland Irrigation
18 Project dated September 1993, with a maximum diversion flow rate of 100 cubic feet per
19 second, including any diversions from an alternate point of diversion at the historic
20 Cambridge ditch diversion heading.

21 The term "depletion" refers to the depletion caused by a particular use of water allowing for any
22 depletion incident to the use.

1 **4. SUPPLEMENTAL CARRIAGE WATER.**

2 The Navajo Nation may divert the direct flow of the San Juan River to supplement diversions
3 to provide additional carriage water for uses under the rights specified by subparagraphs 3(b) through
4 3(f) at such times and places that the New Mexico State Engineer determines there is direct flow
5 available for such diversion without impairment to water rights in New Mexico, including uses under
6 paragraph 8.0 of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement
7 Agreement (Settlement Agreement), signed by the State of New Mexico, the Navajo Nation, and the
8 Secretary of the Interior on December 17, 2010. The Navajo Nation's diversions under this
9 paragraph:

10 (a) do not constitute water rights or consumptive use rights;

11 (b) may be made only to the extent that such additional amounts of carriage water are
12 necessary to fully develop the depletion amounts for the uses specified under subparagraphs
13 3(b) through 3(f);

14 (c) may not be made to result in a depletion for any one use under subparagraphs 3(b)
15 through 3(f) that exceeds the Navajo Nation's depletion rights described for that use;

16 (d) may not be made to result in farm deliveries exceeding the farm delivery
17 requirement for the Fruitland-Cambridge and Hogback-Cudei irrigation projects described in
18 subparagraph 5(g); and

19 (e) may be made only to the extent that the additional carriage water is returned to
20 the San Juan River.

21 Any reduction in flow otherwise available for diversion by the Navajo Nation under this paragraph
22 shall not be cause to deny approval of applications to transfer water rights in the San Juan River

1 Basin in New Mexico, or to deny the allocation and use of water pursuant to paragraph 8.0 of the
2 Settlement Agreement.

3 **5. CONDITIONS.**

4 The Navajo Nation has the right to divert, impound or use the water rights described in
5 paragraph 3; provided, that:

6 (a) The Navajo Nation shall not assert or exercise the reserved rights described in
7 subparagraphs 3(a), 3(b) and 3(c) so long as the rights of the Navajo Nation to the delivery of
8 535,330 acre-feet of water per year for uses in New Mexico under the terms of the
9 Reclamation Contract No. 10-WC-40-384 (the Settlement Contract) between the Secretary of
10 the Interior and the Navajo Nation, authorized and approved by the United States Congress in
11 section 10701 of the Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367),
12 are not irretrievably lost; provided, however, that nothing herein is intended to confer
13 jurisdiction on this Court over any action to enforce or challenge the Settlement Contract or
14 over any action for breach thereof, or to be in conflict with section 11 of the Act of June 13,
15 1962 (76 Stat. 96). The Navajo Nation may assert or exercise the reserved rights described in
16 subparagraphs 3(a), 3(b) or 3(c) if and only if the Navajo Nation's respective rights to divert
17 water under the Settlement Contract are irretrievably lost. The temporary loss of the use of
18 part or all of the Navajo Nation's right to divert water under the Settlement Contract,
19 including, but not limited to, loss resulting from a judicial determination that a particular use
20 is speculative or constitutes waste and loss because a particular use is denied or prohibited by
21 applicable law, shall not constitute irretrievable loss. Also, forbearance or reduction of
22 Navajo Nation uses pursuant to the provisions of this Decree or the Settlement Agreement

1 shall not constitute irretrievable loss.

2 (b) The Navajo Nation's rights pursuant to the Settlement Contract for the uses
3 described in subparagraphs 3(a) and 3(b) are based on, and shall be fulfilled or serviced by
4 the Secretary of the Interior under, New Mexico State Engineer File No. 2849 with a priority
5 date of June 17, 1955, for water originating in the drainage of the San Juan River above
6 Navajo Dam, and File No. 3215 with a priority date of December 16, 1968, for inflow to the
7 San Juan River arising below Navajo Dam. The Navajo Nation's contract rights for the uses
8 described in subparagraphs 3(a) and 3(b) are subject to the sharing of shortages as provided
9 in section 11 of the Act of June 13, 1962 (76 Stat. 96), and section 10402 of the
10 Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367). The Navajo Nation
11 shall not have the right to recoup the quantities of water not delivered under the Settlement
12 Contract due to shortages. The right under subparagraph 3(a) to divert water for the Navajo
13 Indian Irrigation Project during any period of ten consecutive years shall be reduced by the
14 amounts of any shortages allocated to the normal diversion requirement for the Project
15 during said period of ten consecutive years.

16 (c) The Navajo Nation's rights pursuant to the Settlement Contract for the uses
17 specified in subparagraph 3(c) are based on, and shall be fulfilled or serviced by the Secretary
18 of the Interior under, New Mexico State Engineer File No. 2883 with a priority date of May
19 1, 1956, for water from the Animas River, and are subject to Article I of the Animas-La Plata
20 Project Compact approved by subsection 501(c) of the Colorado River Basin Project Act (82
21 Stat. 898), and the Settlement Contract approved by subsection 10604(a)(2)(A)(i) of the
22 Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367).

1 (d) The Navajo Nation has the right to fill and refill re-regulation storage reservoirs
2 on the Navajo Indian Irrigation Project distribution system as follows:

3 (1) The Navajo Nation may fill and refill as often as water is available under
4 the rights described in subparagraphs 3(a) and 3(b):

5 (i) Cutter Reservoir, with an active storage capacity of 1,793 acre-
6 feet; and

7 (ii) Gallegos Reservoir, with an active storage capacity of 8,455 acre-
8 feet, substantially as described in the May 1995 Gallegos Reservoir Needs
9 and Cost Assessment prepared for the United States Bureau of Indian Affairs
10 and the Bureau of Reclamation, or suitable storage alternatives to Gallegos
11 Reservoir of equal or lesser combined capacity.

12 (2) Cutter Dam and Reservoir and Gallegos Dam and Reservoir are Navajo
13 Indian Irrigation Project facilities, and may be used also to regulate deliveries of
14 water under the Navajo-Gallup Water Supply Project authorized by Part III of the
15 Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367).

16 (3) Water diverted from Navajo Reservoir into storage in Cutter Reservoir or
17 Gallegos Reservoir, or suitable storage alternatives, for purposes of the Navajo Indian
18 Irrigation Project or for Navajo Nation uses under the Navajo-Gallup Water Supply
19 Project, and associated depletions caused by reservoir evaporation or seepage losses,
20 shall be accounted within the Navajo Nation's rights to divert and deplete water for
21 the Navajo Indian Irrigation Project described in subparagraph 3(a) or for purposes of
22 the Navajo-Gallup Water Supply Project described in subparagraph 3(b),

1 respectively.

2 (4) The re-regulating reservoirs may retain and store water originating in the
3 physical drainages above Cutter and Gallegos dams, or suitable storage alternatives,
4 for use on the Navajo Indian Irrigation Project and the Navajo-Gallup Water Supply
5 Project; provided, that the quantities of any such water retained and stored in Cutter
6 Reservoir or Gallegos Reservoir, and the associated depletions of water, for Navajo
7 Nation uses shall be accounted within the Navajo Nation's rights to divert and
8 deplete water for the Navajo Indian Irrigation Project described in subparagraph 3(a)
9 or for purposes of the Navajo-Gallup Water Supply Project described in
10 subparagraph 3(b), respectively, and that such retention and storage of water shall be
11 fulfilled or serviced by the Secretary of the Interior through the Settlement Contract
12 as water is available under New Mexico State Engineer File No. 3215 with a priority
13 date of December 16, 1968.

14 (5) The Navajo Nation's rights to store water in Cutter Reservoir and
15 Gallegos Reservoir, or suitable storage alternatives, are not separable from the rights
16 described in subparagraphs 3(a) and 3(b) or from the Navajo Indian Irrigation Project
17 facilities.

18 (6) Sediment storage capacity may be provided in Gallegos Reservoir, or
19 suitable storage alternatives; provided, that the reservoir, or suitable alternative, is
20 operated each year to maintain no more than 8,455 acre-feet of active conservation
21 storage after consideration of the amount of sediment accumulated in the reservoir
22 since completion of Gallegos Dam, or suitable alternative.

1 (c) The Navajo Nation's water rights, described in subparagraph 3(a), which are to be
2 serviced under the Settlement Contract as described in subparagraphs (a) and (b) of this
3 paragraph, may be used for non-irrigation purposes or transferred to other places of use
4 consistent with the provisions of subsection 10402(a) of the Northwestern New Mexico
5 Rural Water Projects Act (123 Stat. 1367), paragraph 17 of this Decree and the following
6 conditions:

7 (1) The Navajo Nation, without approval of the New Mexico State Engineer
8 or the Court, may change the purpose or place of use of any portion of the rights
9 described in subparagraph 3(a); provided, that:

10 (i) notice is provided of any proposed change in purpose or place of
11 use consistent with paragraph 18;

12 (ii) such changes do not involve transfers of places of use to locations
13 outside the State of New Mexico, or to lands that are not held by the United
14 States in trust for the Navajo Nation or its members as of the date of entry of
15 this Decree, unless such lands are subsequently declared by the Secretary of
16 the Interior to be held in trust by the United States for the Navajo Nation
17 pursuant to section 3 of the Act of June 13, 1962 (76 Stat. 96), as amended by
18 the Act of September 25, 1970 (84 Stat. 867);

19 (iii) the point of diversion is not changed;

20 (iv) the depletion quantities specified in subparagraph 3(a) are not
21 exceeded as a result of the changes;

22 (v) the average annual diversion during any period of ten consecutive

1 years for all uses made under the rights provided in subparagraph 3(a),
2 including uses provided under the alternate water source provisions of
3 subparagraph 9.2 of the Settlement Agreement, in the aggregate does not
4 exceed 353,000 acre-feet per year;

5 (vi) the total diversion for all uses made under the rights provided in
6 subparagraph 3(a), including uses provided under the alternate water source
7 provisions of subparagraph 9.2 of the Settlement Agreement, in the aggregate
8 does not exceed 405,950 acre-feet in any one year; and

9 (vii) no showing is made to and accepted by the Court pursuant to
10 subparagraph 5(e)(2) that a change would or does impair other water rights in
11 the San Juan River Basin in New Mexico.

12 Any change pursuant to this subsection in the purpose or place of use of a portion of
13 the rights described in subparagraph 3(a) that would result in the total annual
14 diversion or depletion amounts in the aggregate for all uses made under the rights
15 described in subparagraph 3(a) exceeding the historic aggregate diversion or
16 depletion amounts, respectively, under said rights shall not be presumed to impair
17 other water rights solely because of the increase in annual use amounts.

18 (2) The Navajo Nation shall provide an administrative process for receiving
19 from Navajo and non-Navajo water users protests of changes in purpose or place of
20 use proposed to be made pursuant to subparagraph 5(e)(1), and for reviewing and
21 considering protests and impairment issues that may arise from such changes. The
22 administrative process shall include consultation with the New Mexico State

1 Engineer on proposed changes. The Navajo Nation shall not exercise its authority
2 under subparagraph 5(e)(1) to implement a proposed change in purpose or place of
3 use until the Navajo Nation has consulted with the State Engineer and completed the
4 Navajo Nation's administrative process for the proposed change. Appeals of Navajo
5 Nation decisions or actions made pursuant to the administrative process may be
6 reviewed by the Court.

7 (3) The uses of water to make the depletions and diversions described in
8 subparagraphs 3(d), 3(e) and 3(f) that are supplied under the Settlement Contract
9 pursuant to the alternate water source provisions of subparagraph 9.2 of the
10 Settlement Agreement, and that are accounted under the rights described in
11 subparagraph 3(a) of this Decree for the Navajo Indian Irrigation Project in
12 accordance with said provisions, are hereby approved by the Court.

13 (4) The Navajo Nation may divert more than an average of 353,000 acre-feet
14 per year during any period of ten consecutive years, or more than 405,950 acre-feet in
15 any one year, for the aggregate of all uses under the rights provided in subparagraph
16 3(a), including uses provided under the alternate water source provisions of
17 subparagraph 9.2 of the Settlement Agreement, only pursuant to application with the
18 New Mexico State Engineer and subject to non-impairment of other water rights in
19 New Mexico in accordance with state law, unless the rights provided in subparagraph
20 3(a) are used solely for irrigation purposes on the Navajo Indian Irrigation Project
21 and to implement subparagraph 9.2 of the Settlement Agreement.

22 (f) If the Navajo Nation in any period of ten consecutive years inadvertently diverts

1 or depletes water in excess of the ten-year average limitations described in subparagraph
2 3(a), the Navajo Nation, in the year following the subject period, shall forego the diversion
3 and use under subparagraph 3(a) of amounts of water that are equal to the quantities of
4 excess diversion and depletion, respectively, for the subject period. If the Navajo Nation in
5 any year inadvertently diverts or depletes water in excess of the maximum allowable annual
6 quantities described in subparagraphs 3(a), 3(b) or 3(c), the Navajo Nation in the following
7 year shall forego the diversion and use under the applicable subparagraphs of amounts of
8 water that are equal to the quantities of excess diversion and depletion.

9 (g) The Navajo Nation's rights to divert water for irrigation uses under
10 subparagraphs 3(e) and 3(f) shall be subject to the maximum allowable annual diversion
11 quantities specified in the subparagraphs only if the New Mexico State Engineer or the Court
12 enforces annual diversion quantity limits on non-Navajo Nation irrigation diversions from
13 the San Juan River below Navajo Dam and the Animas River in accordance with such
14 quantities as may be adjudicated by the Court, but shall at all times be subject to:

15 (1) supplying the annual depletion quantities specified in subparagraphs 3(e)
16 and 3(f), respectively; and

17 (2) supplying a farm delivery requirement of 3.3 acre-feet per acre per year
18 for irrigation uses under the Hogback-Cudei and Fruitland-Cambridge irrigation
19 projects.

20 Those portions of the annual diversion and depletion quantities specified in subparagraphs
21 3(e) and 3(f) that are transferred to non-irrigation uses shall be administered and managed in
22 the same manner as other direct flow diversions for non-irrigation uses in the San Juan River

1 Basin in New Mexico.

2 (h) The Navajo Nation's right for the Fruitland-Cambridge Irrigation Project under
3 subparagraph 3(f) to divert at a maximum diversion flow rate of 100 cubic feet per second
4 shall not be fully exercised if the Court determines that rehabilitation and maintenance of the
5 Project has resulted in a lesser flow rate being needed to supply the peak demand of the
6 Project; provided, that the Navajo Nation shall not be required solely by virtue of the
7 rehabilitation and maintenance to forego exercise of said maximum diversion flow rate right
8 for the Project to less than 83.4 cubic feet per second. Reductions in diversions by the
9 Project below 83.4 cubic feet per second at times may be required, however, if current
10 beneficial uses require less water.

11 (i) The Navajo Nation's rights to divert and deplete water for irrigation uses under
12 subparagraphs 3(e) and 3(f) may be increased using the approach or methodology that the
13 Court adopts to determine irrigation water right amounts and diversion rates in this case if
14 application of the approach or methodology adopted would result in annual diversion and
15 depletion quantities that exceed those described herein or in an annual farm delivery
16 requirement for the Hogback-Cudei and Fruitland-Cambridge irrigation projects that exceeds
17 the amount described in subparagraph 5(g). The Navajo Nation's rights under subparagraphs
18 3(e) and 3(f), the diversion rates described in subparagraph 5(h), and the farm delivery
19 requirement described in subparagraph 5(g), shall not be recomputed if the approach or
20 methodology adopted by the Court relies on, or results in, annual per acre farm delivery
21 requirements and diversion and depletion quantities, and maximum per acre ditch diversion
22 rates, for irrigation uses that are consistent with those given in the report of Hydrographic

1 Survey approved by the decree entered April 8, 1948, by the First Judicial District Court of
2 New Mexico within and for San Juan County in the matter of *The Echo Ditch Company, et*
3 *al., v. The McDermott Ditch Company, et al.*, Cause No. 01690 (Echo Ditch Decree), for
4 those irrigation rights previously adjudicated by the Echo Ditch Decree.

5 (j) The Navajo Nation has the right under the water rights described in paragraphs 3,
6 7 and 8 to re-use tail water and waste water as follows:

7 (1) The Navajo Nation may collect tail water from an irrigation use for re-use
8 under the associated water right; provided, that the re-use is measured and the
9 depletion of water associated with the re-use is accounted against the depletion
10 quantity for the water right. For purposes of this Decree, tail water shall include:

11 (i) any water collected that has not left Navajo Nation control and
12 reached the underlying ground water table or discharged into a non-
13 constructed or natural surface drainage channel; and

14 (ii) any water that through percolation from irrigation has reached the
15 underlying ground water table and is pumped for the express purpose of
16 maintaining the water table at a sufficient distance below the root zone to
17 prevent subirrigation or waterlog damage to fields that otherwise would result
18 from the initial irrigation use.

19 (2) The Navajo Nation may collect waste water from a non-irrigation use for
20 re-use under the associated water right; provided, that the re-use is measured and the
21 depletion of water associated with the re-use is accounted against the depletion
22 quantity for the water right. For purposes of this Decree, waste water shall include

1 any water collected that has not left Navajo Nation control and reached the
2 underlying ground water table or discharged into a natural surface drainage channel.

3 (3) Re-use of water by the Navajo Nation shall not increase the depletion
4 rights or the diversion rights of the Navajo Nation.

5 **6. DIVERSIONS FOR NAVAJO-GALLUP PROJECT USES IN ARIZONA.**

6 The Navajo Nation may contract with the United States to divert up to 6,411 acre-feet in any
7 one year of surface water from the San Juan River in New Mexico for uses on Navajo lands,
8 including lands held by the United States in trust for the Navajo Nation or members of the Navajo
9 Nation and lands held in fee ownership by the Navajo Nation, within the State of Arizona solely for
10 purposes of the Navajo-Gallup Water Supply Project as authorized by section 10603 of the
11 Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367), with a maximum diversion
12 flow rate of 12 cubic feet per second; provided, that the water delivery contract between the Navajo
13 Nation and the United States is executed to provide such a contract right for the diversion of water in
14 New Mexico for delivery to uses in Arizona consistent with section 10603 of the Act. The diversion
15 of water in New Mexico for Navajo-Gallup Water Supply Project uses in Arizona shall be serviced
16 under New Mexico State Engineer File Nos. 2849 and 3215, and shall be administered consistent
17 with the provisions of the Upper Colorado River Basin Compact (63 Stat. 31, chapter 48) and the
18 Northwestern New Mexico Rural Water Projects Act. Also, the diversion of water in New Mexico
19 for Project uses in Arizona shall continue only so long as the water delivery contract remains in
20 effect, shall not be transferable to other uses, including uses in New Mexico, and shall not be leased
21 or otherwise subcontracted to third parties. The contract right for the diversion of water in New
22 Mexico for delivery to uses in Arizona shall not include carry-over storage in Navajo Reservoir from

1 year to year.

2 **7. GROUND WATER RIGHTS.**

3 The Navajo Nation has the right to divert, pump or withdraw, and to consumptively use,
4 ground water on Navajo lands in New Mexico, including lands held by the United States in trust for
5 the Navajo Nation and lands held in fee ownership by the Navajo Nation, within the physical
6 drainage of the San Juan River and its tributaries and in addition to rights to divert ground water for
7 uses described by paragraphs 8, 9 and 10, subject to the following conditions:

8 (a) The Navajo Nation has a reserved right, with a priority date of June 1, 1868, to
9 divert up to 2,000 acre-feet of ground water in any one year for beneficial use, including for
10 municipal, industrial, commercial, domestic, agricultural and other purposes, on lands in
11 New Mexico that are held by the United States in trust for the Navajo Nation, or on other
12 lands if approved by the New Mexico State Engineer or the Court; except, that the Navajo
13 Nation also may use ground water diverted pursuant to this subparagraph on lands that are
14 held by the United States in trust for members of the Navajo Nation.

15 (b) The Navajo Nation has the right to divert ground water for municipal, industrial,
16 commercial, domestic or agricultural uses, in addition to the rights described in subparagraph
17 (a) of this paragraph and any ground water uses described by paragraphs 8, 9 and 10, subject
18 to the following conditions:

19 (1) The Navajo Nation has the right to make additional diversions of ground
20 water in the San Juan River Basin in New Mexico on lands held by the United States
21 in trust for the Navajo Nation as of the date of entry of this Decree and such rights
22 shall be held in trust by the United States on behalf of the Navajo Nation, provided

1 that:

2 (i) The Navajo Nation shall give notice of intent to drill or pump
3 wells to effectuate such additional diversions of ground water by publication
4 in a newspaper of general circulation within the San Juan River Basin in New
5 Mexico once per week for three consecutive weeks and by letter to the New
6 Mexico State Engineer, both such forms of notice to be completed at least 30
7 days prior to drilling new wells or to increasing pumping from existing wells,
8 and to specify the proposed purpose and place of use, point of diversion,
9 annual diversion and depletion amounts, and sources of ground water;

10 (ii) the priority dates of the additional diversions of ground water
11 under subparagraph 7(b)(1) shall be the respective dates of notice to the State
12 Engineer; except, that replacement wells shall retain the priority dates
13 associated with the wells replaced; and

14 (iii) such diversions of ground water are subject to the other
15 provisions of paragraph 7, except for subparagraphs 7(a) and 7(b)(2).

16 The Navajo Nation shall provide an administrative process for receiving from Navajo
17 and non-Navajo water users protests of additional diversions of ground water
18 proposed to be made pursuant to this subparagraph, and for reviewing and
19 considering protests and impairment issues that may arise from such additional
20 diversions. The administrative process shall include the Navajo Nation consulting
21 with the New Mexico State Engineer on proposed diversions, any necessary
22 replacement water plans that may be required as per subparagraph 7(c), and

1 impairment issues. The Navajo Nation shall not exercise its authority under this
2 subparagraph to approve or implement a proposed additional diversion of ground
3 water until it has consulted with the State Engineer and completed the administrative
4 process for the proposed diversion. The Court shall have jurisdiction to review and
5 resolve disputes, if any, between the Navajo Nation, the New Mexico State Engineer
6 or other parties to this case regarding whether additional ground water diversions
7 allowed by the Navajo Nation comply with the criteria stated in this paragraph.

8 (2) The Navajo Nation may appropriate ground water under state law for
9 additional diversions of ground water in the San Juan River Basin in New Mexico on
10 lands not held by the United States in trust for the Navajo Nation as of the date of
11 entry of this Decree.

12 (3) The additional diversions of ground water under subparagraph 7(b) shall
13 not impair the exercise of other surface water and ground water rights either within
14 the physical drainage of the San Juan River Basin or in other drainage basins.

15 (4) The additional diversions of ground water under subparagraph 7(b) may
16 supply uses on lands in New Mexico that are held by the United States in trust for the
17 Navajo Nation or members of the Navajo Nation or held in fee ownership by the
18 Navajo Nation, or on other lands if transferred in accordance with the provisions of
19 paragraph 17; except, that diversions of ground water in the San Juan River Basin in
20 New Mexico may be delivered for domestic and sanitary uses in the San Juan River
21 Basin in Arizona in accordance with the provisions of subparagraph 7(g).

22 (5) No additional diversions of ground water under subparagraph 7(b) shall

1 be made until a model of ground water flow for the physical area of the San Juan
2 River Basin in New Mexico, plus any pertinent adjoining areas, has been approved by
3 the New Mexico State Engineer or the Court to determine impacts of existing ground
4 water rights and new diversions of ground water on flow of the San Juan River for
5 the purpose of conjunctively administering surface and ground water sources. Once a
6 model is approved, a proposed additional diversion of ground water is subject to New
7 Mexico State Engineer approval of a replacement plan to offset the depletions of
8 streamflow attributable to the additional diversion, if such a plan is required pursuant
9 to subparagraph 7(c).

10 (c) The Navajo Nation each year shall offset the cumulative reduction in the flow of
11 the San Juan River during the year that is caused by all diversions and uses of ground water
12 by the Navajo Nation under the rights described in subparagraphs (a) and (b) of this
13 paragraph in the aggregate, and that is in excess of 2,000 acre-feet per year of cumulative
14 reduction, in accordance with a replacement water plan approved by the New Mexico State
15 Engineer. The replacement water plan shall specify and schedule how the Navajo Nation
16 will satisfy this offset requirement annually by forbearing use of specific surface water rights
17 to flows of the San Juan River stream system that are described by paragraph 3 in a total
18 amount of depletion equal to the amount of cumulative flow reduction for each year that is in
19 excess of 2,000 acre-feet per year, and in such a manner as to offset the river flow impacts at
20 the locations of impact. In addition, if the offset requirement necessitates a transfer or
21 dedication of Navajo Nation rights under the Settlement Contract to below Navajo Dam, the
22 State Engineer may determine conditions for dam releases to effectuate the transfer or

1 dedication. Such conditions may include exceptions for periods when replacement water, in
2 the State Engineer's judgment, is not needed to avoid impairment to other water rights or
3 interstate compact delivery requirements.

4 (d) Diversions and uses of ground water in New Mexico on lands that are held by the
5 United States in trust for the Navajo Nation, or held in fee ownership by the Navajo Nation,
6 by agencies of the United States, including the Bureau of Indian Affairs and Indian Health
7 Service, for municipal, industrial, commercial and domestic purposes for the benefit of the
8 Navajo Nation or its members shall be included within and accounted against the Navajo
9 Nation's rights to divert and use ground water under subparagraphs (a) and (b) of this
10 paragraph.

11 (e) Diversions and uses of ground water underlying the area of the Navajo Indian
12 Irrigation Project shall be included within and accounted against the Navajo Nation's rights
13 to divert and use ground water under subparagraphs (a) and (b) of this paragraph; except, that
14 any re-use of irrigation tail water that through percolation from irrigation of Project lands had
15 reached the underlying ground water table and is pumped for the purpose of maintaining the
16 water table at a sufficient distance below the root zone to prevent waterlog damage to Project
17 fields that otherwise would result from the irrigation use may be included within the Navajo
18 Nation's rights under subparagraph 5(j)(1) to re-use tail water so long as the depletion of
19 water associated with the re-use is accounted against the depletion quantity for the Project
20 described in subparagraph 3(a).

21 (f) The Navajo Nation may use ground water diverted or withdrawn from within the
22 San Juan River Basin in New Mexico in areas of the State of New Mexico located outside

1 the physical drainage of the San Juan River and its tributaries; provided, that such diversion
2 and use shall:

3 (1) be accounted against the rights of the Navajo Nation to divert ground
4 water described in subparagraphs 7(a) and 7(b); and

5 (2) comply with the other provisions of paragraph 7.

6 (g) The Navajo Nation may divert or withdraw ground water from the San Juan
7 River Basin in New Mexico for use in the San Juan River Basin in Arizona, and may use in
8 the San Juan River Basin in New Mexico ground water withdrawn from the San Juan River
9 Basin in Arizona, for domestic and sanitary purposes on lands that are held by the United
10 States in trust for the Navajo Nation or members of the Navajo Nation or held in fee
11 ownership by the Navajo Nation; provided, that:

12 (1) the depletion of the flow of the Colorado River at Lee Ferry resulting
13 from such uses made in the State of New Mexico is a part of the consumptive use
14 apportionment made to the State of New Mexico by Article III of the Upper Colorado
15 River Basin Compact, and the depletion of the flow of the Colorado River at Lee
16 Ferry resulting from such uses made in the State of Arizona is a part of the
17 consumptive use apportionment made to the State of Arizona by Article III of the
18 Upper Colorado River Basin Compact;

19 (2) such uses are not inconsistent with the rights of the Navajo Nation, or of
20 the United States as trustee for the Navajo Nation, to make such diversions and uses
21 of water within the State of Arizona;

22 (3) the total of such diversions made within the State of New Mexico and

1 delivered for uses in Arizona, plus the total of diversions made within the State of
2 Arizona and delivered for such uses in New Mexico, pursuant to subparagraph 7(g)
3 does not exceed 400 acre-feet in the aggregate;

4 (4) such diversions and uses within the State of New Mexico shall be
5 accounted against, and otherwise comply with, the rights of the Navajo Nation to
6 divert and use ground water described in subparagraphs 7(a) and 7(b); and

7 (5) the rights of the Navajo Nation to make such diversions and uses shall not
8 be leased, exchanged or otherwise transferred for use by other parties or for other
9 purposes.

10 (h) The Court retains jurisdiction to review any matter arising from the provisions of
11 paragraph 7: except, that another court may have competent jurisdiction over issues of
12 impairment to water rights in basins other than the San Juan River Basin or in other states.

13 **8. HYDROGRAPHIC SURVEY – RESERVED RIGHTS.**

14 The Navajo Nation has reserved rights for historic and existing water uses on lands in the San
15 Juan River Basin in New Mexico that are held in trust by the United States on behalf of the Navajo
16 Nation, which rights have a priority date of June 1, 1868; except, that historic and existing uses that
17 are included within the supplemental carriage water provisions described in paragraph 4 are not
18 reserved rights. The reserved rights for historic and existing irrigation uses and related purposes on
19 the Navajo Indian Irrigation Project, the Hogback-Cudei Irrigation Project and the Fruitland-
20 Cambridge Irrigation Project are included in the reserved right amounts specified by subparagraphs
21 3(a), 3(e) and 3(f), respectively. Reserved rights for historic, existing and future municipal,
22 industrial, commercial and domestic uses, including residential agricultural uses such as yard and

1 stock watering, are included in the reserved right amounts specified by subparagraphs 3(b), 3(c), 3(d)
2 and 7(a). Pursuant to paragraph 20 of this Decree and paragraph 4.0 of the Settlement Agreement,
3 the Navajo Nation and the United States, acting in its capacity as Trustee for the Navajo Nation,
4 petitioned the Court for entry of the Supplemental Partial Final Judgment and Decree of the Water
5 Rights of the Navajo Nation ("Supplemental Decree") quantifying and adjudicating reserved rights of
6 the Navajo Nation for historic and existing uses that are not included in paragraph 3 or subparagraph
7 7(a), based on the United States Hydrographic Survey of Navajo Lands in the San Juan River Basin
8 in New Mexico dated December 2010 ("US Survey Report") as accepted by the State of New
9 Mexico. Entry of this Decree or the Supplemental Decree shall not be intended to prohibit changes
10 in the point of diversion or purpose or place of use of the Navajo Nation's reserved rights under
11 Federal law. Except as otherwise provided, the conditions under which the Navajo Nation may make
12 such changes are specified in paragraph 17, and are subject to the Court's continuing jurisdiction to
13 interpret and enforce this Decree as provided in paragraph 14.

14 **9. WATER RIGHTS ACQUIRED UNDER STATE LAW.**

15 The Navajo Nation has water rights acquired under New Mexico state law pursuant to
16 decreed rights or to permits or licenses issued by the New Mexico State Engineer, and for historic
17 and existing water uses on lands in the San Juan River Basin in New Mexico that are held in fee
18 ownership by the Navajo Nation, quantified and adjudicated in the Supplemental Decree. Such
19 rights exclude any rights to the use of water historically made by non-Navajo entities on Navajo
20 lands under permits issued by the New Mexico State Engineer that have not been acquired from said
21 entities by the Navajo Nation. Water rights for historic municipal, industrial, commercial or
22 domestic uses, except for *de minimis* uses under paragraph 10, that have been made on lands which

1 are held in fee ownership by the Navajo Nation and that have not been made pursuant to decreed
2 rights, or to permits or licenses issued by the New Mexico State Engineer, are included in the total
3 water right amounts specified by subparagraphs 3(b), 3(c), 3(d) and 7(a). Pursuant to paragraph 20
4 of this Decree the Navajo Nation may petition the Court for entry of a supplemental decree
5 quantifying and adjudicating additional water rights under state law, acquired after the entry of this
6 Decree and the Supplemental Decree. Entry of this Decree, the Supplemental Decree, or any
7 additional supplemental decrees shall not be intended to prohibit changes in the point of diversion or
8 purpose or place of use of the Navajo Nation's water rights under Federal and state law, nor shall
9 they be intended to limit in any way the right and ability of the Navajo Nation to acquire and transfer
10 additional water rights perfected under state law. Except as otherwise provided, the conditions under
11 which the Navajo Nation may make such changes are specified in paragraph 17, and are subject to
12 the Court's continuing jurisdiction to interpret and enforce this Decree as provided in paragraph 14.

13 **10. DE MINIMUS USES.**

14 The Navajo Nation shall have the right to allow individual members of the Navajo Nation to
15 divert and use surface water from springs and ground water in the San Juan River Basin in New
16 Mexico without regard to the limitations and quantities of water rights described in paragraphs 3
17 through 9 solely for residential domestic and stock tank uses, excluding irrigation uses and
18 stockponds, on Navajo lands, including lands held by the United States in trust for the Navajo Nation
19 and lands held in fee ownership by the Navajo Nation; provided, that such diversion and use of water
20 does not involve the diversion and use of water under the water rights described in paragraphs 3
21 through 9, the diversion or conveyance of water by the project facilities authorized by the
22 Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367) and preceding Acts of

1 Congress, or the diversion and delivery of water by public water supply systems. The right under
2 this paragraph to *de minimus* uses is a reserved right of the Navajo Nation.

3 **11. ALLOTTEES.**

4 Individual members of the Navajo Nation that have been allotted lands by the United States,
5 by public land orders or otherwise, within the San Juan River Basin in New Mexico may have claims
6 to reserved rights to the use of water. This Decree does not quantify the nature, extent or priority of
7 such rights; however, historic and existing water uses on such allotted lands shall be determined by
8 the US Survey Report as accepted by the State of New Mexico. To the extent that water rights are
9 adjudicated by the Court for such allotted lands that are in excess of the historic and existing water
10 uses on those lands as described in the US Survey Report, such water rights for allotted lands shall
11 be fulfilled or serviced by rights of the Navajo Nation quantified in this Decree, or the depletions of
12 flow of the San Juan River resulting from the use of water under such rights for allotted lands shall
13 be fully offset by a forbearance of use of rights of the Navajo Nation quantified in this Decree.
14 Nothing in this paragraph shall create a right of any Allottee to delivery of water by the Navajo
15 Nation.

16 **12. LIMITATIONS.**

17 The Navajo Nation is hereby enjoined from the diversion or depletion of the surface or
18 underground waters within the San Juan River Basin in New Mexico except in accordance with the
19 rights described in this Decree, the Supplemental Decree, or any additional supplemental decrees that
20 may be entered by the Court pursuant to paragraph 20, or either decreed rights or rights under New
21 Mexico State Engineer permits or licenses that are acquired after the date of entry of this Decree and
22 the Supplemental Decree. Beneficial use shall be the limit of the rights to use water adjudicated to

1 the Navajo Nation by this Decree. The Navajo Nation shall not be entitled to receive, nor shall the
2 United States or the State of New Mexico be required to deliver, nor shall non-Navajo water users be
3 required to curtail water uses to provide to the Navajo Nation, any water not then necessary for
4 beneficial use under the rights adjudicated herein or acquired hereafter. This Decree is binding upon
5 political subdivisions, utilities, agencies and other entities of the Navajo Nation and the United
6 States, and on successors and assigns.

7 **13. DISCLAIMERS.**

8 Except as explicitly provided herein, nothing in this Decree confers jurisdiction on the New
9 Mexico State Engineer to administer or regulate the use of federally reserved rights on lands held by
10 the United States in trust for the Navajo Nation or lands allotted by the United States to members of
11 the Navajo Nation. Because the description of the Navajo Nation's water rights adjudicated in this
12 Decree is based upon a negotiated settlement, the procedures and methods used to quantify and
13 describe the Navajo Nation's water rights in this Decree shall not be binding under the law of the
14 case doctrine upon any other water right claimant, the State of New Mexico or the United States in
15 the adjudication of other water rights in this case and should not be relied upon as precedent under
16 the *stare decisis* doctrine in any other water right adjudication suit. Nothing herein is intended to
17 adjudicate or encumber water rights under New Mexico State Engineer File Nos. 2847, 2848, 2849,
18 2873, 2883, 2917 or 3215, or under Permit No. 2847, 2849, 2873, 2917 combined, except for the
19 amounts and uses of water specifically adjudicated to the Navajo Nation in subparagraphs 3(a), 3(b)
20 and 3(c) of this Decree, subject to the limitations set forth in paragraph 5, and for the amount of
21 diversion to supply a water delivery contract between the Navajo Nation and the United States for
22 Navajo-Gallup Water Supply Project uses in Arizona adjudicated in paragraph 6.

1 **14. JURISDICTION AFTER ENTRY OF DECREE.**

2 This Decree is a final order under Rule 1-054(B) NMRA, and it may be modified only
3 pursuant to Rule 1-060(B) NMRA. This Court retains jurisdiction to interpret and enforce this
4 Decree. Subject to the provisions of this Decree, the State Engineer has authority under state law to
5 administer water rights within, and to supervise the apportionment, diversion and use of the waters
6 of, the San Juan River Basin in New Mexico, including by appointment of watermasters, according
7 to the orders and decrees of the Court in this adjudication suit and the licenses and permits issued by
8 the State Engineer in the Basin.

9 **15. METERING OF WATER USES.**

10 As part of the metering and monitoring of water uses in the San Juan River Basin in New
11 Mexico, the Navajo Nation shall be responsible for metering and monitoring its uses of water under
12 this Decree as follows:

13 (a) The Navajo Nation within two years from the date of entry of this Decree shall
14 cause to be installed and maintained flumes, gages, stage recorders, totalizing meters or other
15 flow measuring devices on all surface water and ground water diversions, including re-uses
16 under subparagraph 5(j) but excluding uses under rights that may be quantified and
17 adjudicated in the Supplemental Decree, which shall be governed by the terms thereof, and
18 additional supplemental decrees pursuant to paragraphs 8 and 9, within the physical drainage
19 of the San Juan River Basin in New Mexico; except, that diversions may be estimated using
20 technically sound methodologies where actual measurement of uses is not practical for
21 technical or economic reasons. The Navajo Nation also shall cause to be installed and
22 maintained remote sensing equipment on surface water diversion gages for ditch diversions

1 under its rights from the San Juan River, including Navajo Reservoir. The Navajo Nation
2 shall be responsible for rating all gages and for collecting the data necessary to accurately
3 account diversions in the San Juan River Basin in New Mexico for administration by the
4 State Engineer of this Decree.

5 (b) The Navajo Nation within two years from the date of entry of this Decree shall
6 cause to be installed and maintained storage or water surface gages at all re-regulation
7 storage reservoirs on the Navajo Indian Irrigation Project. In addition, the Navajo Nation
8 shall cause to be installed and maintained recording or remote sensing equipment on
9 reservoir storage gages at all re-regulation storage reservoirs on the Navajo Indian Irrigation
10 Project, and shall maintain such records of inflows to and releases from reservoir storage, as
11 may be necessary to determine reservoir losses and the storage of tributary inflows to the
12 reservoirs under subparagraph 5(d)(4). The Navajo Nation shall be responsible for updating
13 and maintaining current elevation-area-capacity data for the reservoirs.

14 (c) The New Mexico State Engineer shall be granted access to diversion data, and
15 shall be allowed to inspect flow and storage measurement facilities and gages upon
16 reasonable request to the Navajo Nation, as may be necessary for the State Engineer to
17 administer the diversion and use of water from the San Juan River stream system.

18 (d) The Navajo Nation beginning the year following the date of entry of this Decree
19 shall during June or July each year conduct a field inventory of irrigated acreage on the
20 Navajo Indian Irrigation Project, the Hogback-Cudei Irrigation Project and the Fruitland-
21 Cambridge Irrigation Project, and shall provide the results of the inventory to the New
22 Mexico State Engineer within two weeks of completion of the inventory. The Navajo Nation

1 shall allow the State Engineer to participate, in cooperation with the Navajo Nation, in
2 conducting the acreage inventory. Aerial photographs, satellite imagery or other records or
3 documentation may be used in conjunction with field surveys to determine or verify lands
4 irrigated in a particular year.

5 (e) Depletions for the uses described in subparagraphs 3(b), 3(c) and 3(d) shall be
6 computed as diversion less measured return flow. The Navajo Nation shall be responsible
7 for measuring any return flows.

8 (f) The Navajo Nation shall meter farm deliveries for irrigation uses on the Hogback-
9 Cudei and Fruitland-Cambridge irrigation projects using technically sound methods if the
10 State Engineer or the Court requires the metering of farm deliveries on ditches diverting from
11 the San Juan River below Navajo Dam and from the Animas River for the State Engineer to
12 administer water rights in the San Juan River Basin in New Mexico.

13 **16. RECORDS OF WATER USE.**

14 The Navajo Nation shall within two years from the date of entry of this Decree, and annually
15 thereafter, prepare and maintain detailed and accurate records of the acreages of all Navajo lands,
16 including lands held by the United States in trust for the Navajo Nation and lands owned by the
17 Navajo Nation in fee, in the San Juan River Basin in New Mexico irrigated each year from the San
18 Juan River, its tributaries or underground water sources, and of the annual diversions and depletions
19 of water, including re-uses, for its uses in the San Juan River Basin in New Mexico from the San
20 Juan River, its tributaries and underground water sources, all stated separately as to each source of
21 water. The Navajo Nation shall prepare and submit to the Secretary of the Interior and the New
22 Mexico State Engineer on or before October 1 of each year a report of its records and calculations of

1 actual acreage irrigated and diversions and depletions, by a methodology acceptable to the State
2 Engineer, of San Juan River Basin waters for the previous calendar year. The records and
3 calculations shall be segregated by each use specified in paragraphs 3 through 10 of this Decree.
4 Diversions and depletions may be estimated using technically sound methodologies where actual
5 measurement of uses is not practical for technical or economic reasons. The reports of the Navajo
6 Nation prepared pursuant to this paragraph also shall include documentation as to which rights
7 adjudicated herein are being used, if any, to service or offset water uses by Allottees pursuant to the
8 provisions of paragraph 11 of this Decree and subparagraph 12.3.2 of the Settlement Agreement.

9 **17. ADMINISTRATION.**

10 The Navajo Nation shall have authority to administer the Navajo Nation's diversion and use
11 of water under the rights adjudicated by this Decree as follows:

12 (a) The Navajo Nation shall within two years from the date of entry of this Decree
13 cause to be installed and maintained headgates on all surface water diversions from the San
14 Juan River stream system in New Mexico; except, that no headgate will be required for a
15 diversion from a tributary to the San Juan River so long as the Navajo Nation and the State
16 Engineer agree that there will not be sufficient benefit to justify the cost of a headgate. The
17 State Engineer shall be allowed to inspect diversion headgates upon reasonable request to the
18 Navajo Nation.

19 (b) The Navajo Nation shall have jurisdiction, authority and responsibility to
20 measure, distribute, administer and regulate the use of water under the water rights that are
21 adjudicated to the Navajo Nation by this Decree beginning at the points of diversion, subject
22 to the provisions of this Decree and the Settlement Agreement. The New Mexico State

1 Engineer shall have authority, in cooperation with the Navajo Nation, to monitor the Navajo
2 Nation's uses of water from the San Juan River stream system for compliance with this
3 Decree. The Court retains jurisdiction to review and resolve disputes, if any, between the
4 Navajo Nation, the State Engineer or other parties to this case regarding whether the Navajo
5 Nation is properly regulating use of water in compliance with the rights adjudicated by this
6 Decree, the Supplemental Decree, or supplemental decrees that may be entered by the Court
7 pursuant to paragraph 20, or with any rights acquired after the date of entry of this Decree
8 and the Supplemental Decree, or in compliance with applicable conditions of a water rights
9 transfer made in accordance with this Decree.

10 (c) The Navajo Nation shall have authority to change the purpose and place of use of
11 its reserved rights described by paragraphs 3, 7(a) and 8 and its ground water rights described
12 by subparagraph 7(b)(1) on lands held by the United States in trust for the Navajo Nation in
13 New Mexico, subject to the conditions and limitations of subsection 10603(h) of the
14 Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367) and subparagraphs
15 5(d)(5), 5(e), 7(c) and 7(g) of this Decree; provided, that:

16 (1) notice is given of any proposed change in purpose or place of use
17 consistent with paragraph 18;

18 (2) such changes do not involve transfers of places of use to locations outside
19 the State of New Mexico, or to lands that are not held by the United States in trust for
20 the Navajo Nation or its members as of the date of entry of this Decree, unless such
21 lands are subsequently declared by the Secretary of the Interior to be held in trust by
22 the United States for the Navajo Nation pursuant to section 3 of the Act of June 13,

1 1962 (76 Stat. 96), as amended by the Act of September 25, 1970 (84 Stat. 867);

2 (3) the source of water supply is not changed;

3 (4) the point of diversion is not changed if the diversion is from the San Juan
4 River or the Animas River;

5 (5) the diversion and depletion quantities specified in paragraphs 3, 7(a) and
6 8 for the subject reserved right are not exceeded as a result of such changes; and

7 (6) such changes would not impair other water rights.

8 The Navajo Nation shall provide an administrative process for receiving from Navajo and
9 non-Navajo water users protests of changes in purpose or place of use proposed to be made
10 pursuant to this subparagraph, and for reviewing and considering protests and impairment
11 issues that may arise from such changes. The administrative process shall include the Navajo
12 Nation consulting with the New Mexico State Engineer on proposed changes and potential
13 impairment. The Navajo Nation shall not exercise its authority under this subparagraph to
14 implement a proposed change in purpose or place of use until it has consulted with the State
15 Engineer and completed the administrative process for the proposed change. The Court
16 retains jurisdiction to review and resolve disputes, if any, between the Navajo Nation, the
17 New Mexico State Engineer or other parties to this case regarding whether changes allowed
18 by the Navajo Nation in the purpose and place of use of its reserved rights comply with the
19 above stated criteria. Other transfers of reserved rights or ground water rights adjudicated by
20 this Decree, including transfers that involve a change in the point of diversion on the San
21 Juan River, the Animas River or to a location off lands that are held by the United States in
22 trust for the Navajo Nation, or that involve a change in the place of use to a location off lands

1 that are held by the United States in trust for the Navajo Nation or its members, may be made
2 pursuant to application with the New Mexico State Engineer and in accordance with state
3 law.

4 (d) The following standards of review shall be recognized by the Court in its review
5 of any Navajo Nation decisions or actions made pursuant to subparagraphs 5(e), 7(b)(1) or
6 17(c), such that the Court may reverse a Navajo Nation decision only if:

7 (1) the Navajo Nation acted fraudulently, arbitrarily or capriciously;

8 (2) the decision of the Navajo Nation is not supported by substantial evidence
9 based on the whole record on appeal;

10 (3) the action of the Navajo Nation was outside the scope of its authority
11 under the Decree; or

12 (4) the action of the Navajo Nation was otherwise not in accordance with this
13 Decree or applicable law.

14 (e) The Navajo Nation may acquire, and may subsequently change the point of
15 diversion and purpose and place of use of, water rights that are not included in this Decree in
16 accordance with state law; provided, that such rights retain the priority date and other
17 elements of the decreed, licensed or permitted right so acquired. The New Mexico State
18 Engineer shall retain jurisdiction to administer and regulate the use and transfer of water
19 rights that are acquired under state law, including the rights adjudicated under subparagraph
20 7(b)(2) and rights adjudicated by the Supplemental Decree pursuant to paragraph 9 of this
21 Decree.

22 (f) The Navajo Nation shall have authority to administer and regulate the leasing and

1 contracting of the Navajo Nation's water rights adjudicated by this Decree; provided, that:

2 (1) any change in the purpose and place of use or a change in the point of
3 diversion of any of the Navajo Nation's water rights shall comply with the provisions
4 of paragraph 17;

5 (2) the provisions of section 10701(c) of the Northwestern New Mexico
6 Rural Water Projects Act (123 Stat. 1367) shall apply to any subcontract between the
7 Navajo Nation and a third party of the Navajo Nation's rights to the delivery of water
8 under the Settlement Contract between the United States and the Navajo Nation
9 referred to in subparagraph 5(a), including the requirement that the Secretary of the
10 Interior must approve such subcontracts;

11 (3) the provisions of section 10701(d) of the Northwestern New Mexico
12 Rural Water Projects Act (123 Stat. 1367) shall apply to leases, contracts or other
13 agreements that the Navajo Nation may enter to provide water for use by other parties
14 under the Navajo Nation's water rights that are not subject to the Settlement
15 Contract; and

16 (4) the development and use of ground water by the Navajo Nation shall
17 comply with the provisions of paragraph 7.

18 The non-use of the Navajo Nation's reserved rights by a leasee or contractor to the Navajo
19 Nation shall in no event result in a forfeiture, abandonment, relinquishment or other loss of
20 all or any part of the reserved rights described in paragraphs 3, 7(a), 8 and 10 of this Decree.

21 (g) The Navajo Nation's water rights adjudicated herein shall not be leased,
22 contracted, exchanged, forborne or otherwise transferred for use directly or indirectly outside

1 the boundaries of the State of New Mexico without the consent of the State of New Mexico,
2 acting through the New Mexico Interstate Stream Commission, and unless in compliance
3 with applicable law. The Navajo Nation, consistent with the Settlement Agreement and
4 section 10603(d) of the Northwestern New Mexico Rural Water Projects Act (123 Stat.
5 1367), may forbear use of a portion of its rights described in subparagraphs 3(a) or 3(b) as
6 necessary to allow Navajo Nation municipal and domestic uses to be made in Arizona under
7 the Navajo-Gallup Water Supply Project during years that the Secretary of the Interior
8 pursuant to section 10402 of the Act allocates a shortage in the Navajo Reservoir water
9 supply to the Navajo Nation's uses in Arizona under the Project. Except as provided in this
10 paragraph, nothing in this Decree shall be construed to establish, address, prejudice, or
11 prevent any party from litigating, whether or to what extent any law or compact does or does
12 not permit, govern, or apply to the lease, contract, exchange, forbearance or transfer of the
13 Navajo Nation's water rights for use directly or indirectly in an area outside the State of New
14 Mexico.

15 h) The Navajo Nation shall have the jurisdiction, authority and responsibility to
16 adjust its headgates and other diversion works to ensure that its diversions of water comply
17 with the Navajo Nation's rights to divert as adjudicated by this Decree, the Supplemental
18 Decree, or any supplemental decrees that may be entered by the Court pursuant to paragraph
19 20. During times when the Secretary of the Interior has determined and allocated shortages
20 pursuant to subsection 11(a) of the Act of June 13, 1962 (76 Stat. 96), and section 10402 of
21 the Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367), or times when a
22 priority call on the San Juan River or its tributaries is in effect or would have been in effect

1 but for the provisions of subparagraph 9.2 of the Settlement Agreement, the New Mexico
2 State Engineer shall have authority, in cooperation with the Navajo Nation, to monitor the
3 Navajo Nation's diversion and use of water from the San Juan River stream system to ensure
4 that the waters are being beneficially used in compliance with this Decree, and shall have
5 authority to request the Navajo Nation to make any appropriate adjustments to its diversions
6 as necessary to comply with the provisions of this Decree and the proper administration of
7 diversions in the San Juan River Basin in New Mexico. The Navajo Nation shall maintain its
8 diversion, conveyance and storage facilities in good repair so as to prevent waste.

9 (i) The Navajo Nation shall drill, maintain and abandon ground water diversion wells
10 in a manner consistent with public health and safety and applicable laws and regulations.
11 The Navajo Nation shall require that well completion logs be prepared for all newly drilled
12 wells. Copies of well completion reports and well drilling logs shall be provided to the New
13 Mexico State Engineer on a quarterly basis.

14 (j) The Navajo Nation shall construct and maintain, and breach if necessary, storage
15 dams and reservoirs in a manner consistent with public health and safety and applicable laws
16 and regulations. The Navajo Nation shall require that as built drawings be prepared for all
17 newly constructed or rehabilitated dams; except, that dams that are 10 feet or less in height as
18 measured from the downstream toe to the dam crest and dams that impound 10 acre-feet or
19 less of water as measured by the volume of water stored at the spillway crest are exempt from
20 such requirement for purposes of this Decree. Copies of as built drawings for dams, and
21 copies of dam inspection reports on both newly constructed dams and existing dams, shall be
22 provided to the New Mexico State Engineer on an annual basis.

1 **18. NOTICE.**

2 In addition to any notice provisions under applicable law, at least 30 days prior to any change
3 in the place or purpose of use or point of diversion in the exercise of the water rights identified
4 herein, the Navajo Nation, acting through the Department of Water Resources, shall complete notice
5 of such change by publication in a newspaper of general circulation within the San Juan River Basin
6 in New Mexico once per week for three consecutive weeks and by letter to the New Mexico State
7 Engineer; except, that *de minimus* uses described in paragraph 10 are exempt from this notice
8 requirement, and emergency replacement wells and emergency transfers for domestic and sanitary
9 purposes may be made with less than 30 days notice. Both such forms of notice shall specify the
10 proposed purpose and place of use, point of diversion, diversion rate, annual diversion and depletion
11 amounts, and source of water. Uses of water to make the depletions and diversions described in
12 subparagraphs 3(d), 3(e) and 3(f) that are supplied under the Settlement Contract pursuant to the
13 alternate water source provisions of subparagraph 9.2 of the Settlement Agreement, and that are
14 accounted under the rights described in subparagraph 3(a) for the Navajo Indian Irrigation Project,
15 also shall be exempt from this notice requirement. Any use of water for non-irrigation purposes
16 under the rights associated with the Navajo Indian Irrigation Project is subject to the notice
17 provisions of this paragraph notwithstanding the authorized uses of Project water specified at section
18 10402(a) of the Northwestern New Mexico Rural Water Projects Act (123 Stat. 1367); except, that
19 no such notice shall be required to implement the alternate water source provisions of subparagraph
20 9.2 of the Settlement Agreement to make the depletions and diversions described in subparagraphs
21 3(d), 3(e) and 3(f) regardless of whether part or all of the irrigation rights for the Hogback-Cudei and
22 Fruitland-Cambridge irrigation projects have been transferred to non-irrigation uses.

1 **19. SAN JUAN-CHAMA PROJECT.**

2 Nothing in this Decree shall be construed to prohibit the Navajo Nation from acquiring the
3 use of water diverted to the Rio Grande Basin via the San Juan-Chama Project authorized by the Act
4 of June 13, 1962 (76 Stat. 96); provided, that the acquisition of such water:

5 (a) is made by subcontract with existing contractors of said Project or by reallocation
6 of Project water and subsequent contract with the Secretary of the Interior, subject to
7 approval of the New Mexico Interstate Stream Commission; and

8 (b) does not result in an increase in the amount of water required to be diverted by
9 the Project from the San Juan River Basin.

10 Nothing in this paragraph shall be construed to abrogate the Secretary of the Interior's obligations
11 under existing water delivery and repayment contracts for the San Juan-Chama Project or under
12 existing reservations or allocations of Project water.

13 **20. SUPPLEMENTAL DECREES.**

14 The Navajo Nation and the United States, acting in its capacity as Trustee for the Navajo
15 Nation, may petition this Court for supplemental decrees to adjudicate rights pursuant to:

16 (a) appropriations it may make or rights it may acquire after entry of this Decree; or

17 (b) rights that may derive from additional allocations of water made to the Navajo

18 Nation pursuant to paragraph 8.0 of the Settlement Agreement.

19 The Navajo Nation also may petition this Court to re-adjudicate the priority date for the reserved
20 rights described in paragraphs 3, 7(a), 8 and 10 if the Court adjudicates a priority date earlier than

21 June 1, 1868, to another party in this case.

1 **21. INCORPORATION OF SETTLEMENT AGREEMENT.**

2 The terms and conditions of the San Juan River Basin in New Mexico Navajo Nation Water
3 Rights Settlement Agreement, signed by the State of New Mexico, the Navajo Nation, and the
4 Secretary of the Interior on December 17, 2010, excluding Appendices 1 and 2 thereto, are
5 incorporated as though fully set forth herein. By this Decree, the Court takes no action and makes no
6 determination to approve or disapprove the Northwestern New Mexico Rural Water Projects Act
7 (123 Stat. 1367) or the Settlement Contract. Any amendments to the Settlement Agreement made
8 pursuant to subparagraph 14.7 of that agreement and subsequent to entry of this Decree shall be
9 binding as between the parties to the Settlement Agreement, but shall not be binding on other parties
10 unless approved by the Court.

11 **22. REVOCABILITY.**

12 Notwithstanding the provisions of paragraph 14, this Decree may be revoked by the Court if
13 the Settlement Agreement is terminated or upon a showing by the Navajo Nation that the conditions
14 set forth at section 10701(e)(1) of the Northwestern New Mexico Rural Water Projects Act (123
15 Stat.1367) have not been substantially satisfied. If this Decree is revoked, the parties shall not be
16 bound by it or the Settlement Agreement, including any agreements of the Navajo Nation or the
17 United States relating to the settlement of claims provided pursuant to this Decree, the Settlement
18 Agreement or the Northwestern New Mexico Rural Water Projects Act, and the Navajo Nation may
19 petition the Court to proceed with the determination of its rights in this case. Nothing in this
20 paragraph prohibits the Navajo Nation from seeking other remedies for performance or relief to
21 accomplish the purposes of the Settlement Agreement and the Act. The Navajo Nation's right to
22 present to the Court cause to revoke this Decree and the Supplemental Decree under this paragraph

1 shall expire on December 31, 2025, unless the deadlines set forth in paragraph 5.2 of the Settlement
2 Agreement are extended. in which case, this right shall expire one year following the date of the last
3 deadline, including extensions pursuant to paragraph 5.2.2 of the Settlement Agreement.

4
5 **IT IS SO ORDERED.**

6
7 
8 James J. Wechsler
9 Presiding Judge

DISTRICT COURT
SAN JUAN COUNTY NM
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1
2 STATE OF NEW MEXICO
3 SAN JUAN COUNTY
4 THE ELEVENTH JUDICIAL DISTRICT COURT

5
6 STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,
7
8 Plaintiff,

CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

9
10 vs.

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

11
12 THE UNITED STATES OF AMERICA, *et al.*,

13
14 Defendants,

Claims of the Navajo Nation
Case No. AB-07-1

15
16 THE JICARILLA APACHE TRIBE AND THE
17 NAVAJO NATION,

18
19 Defendant-Intervenors.
20
21

22 SUPPLEMENTAL PARTIAL FINAL JUDGMENT AND DECREE
23 OF THE WATER RIGHTS OF THE
24 NAVAJO NATION
25
26

27 THIS CASE is a general adjudication filed pursuant to NMSA 1978, Sections 72-4-13
28 through -19 of the surface and underground water rights within the San Juan River Basin in New
29 Mexico consistent with 43 U.S.C. Section 666.

30 This matter comes before the Court on the Settlement Motion of United States, Navajo
31 Nation and State of New Mexico for the Entry of Partial Final Decrees, filed January 3, 2011. The
32 Court finds that the Supplemental Partial Final Judgment and Decree of the Water Rights of the
33 Navajo Nation ("Supplemental Decree") is the product of a negotiated settlement by the aforesaid
34 parties. Notice of the deadline for filing and serving objections to the water rights described in this
35 decree was served on the parties to this case and potential water right claimants pursuant to the
36 expedited *inter se* procedures adopted by the Court. The Court, having considered the parties'

1 motion, the United States' Hydrographic Survey of Navajo Lands in the San Juan River Basin in
2 New Mexico dated December 2010 that identifies, among other things, water uses for which water
3 rights are to be adjudicated in this decree ("US Survey"), the water rights described in this decree,
4 the objections thereto, the evidence in support thereof, and for good cause shown:

5 ENTERED the *Order Granting the Settlement Motion for Entry of Partial Final Decrees*
6 *Describing the Water Rights of the Navajo Nation* on August 16, 2013; and

7 FINDS FURTHER that the Partial Final Judgment and Decree of the Water Rights of the
8 Navajo Nation ("Decree"), entered concurrently with this Supplemental Decree, provides for this
9 supplemental decree to further describe rights for uses determined by survey as per paragraphs 8 and
10 9 of the Decree, and directs the entry of this decree adjudicating water rights of the Navajo Nation
11 within the San Juan River Basin.

12 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

13
14 **1. JURISDICTION.**

15 The Court has jurisdiction over the subject matter and the parties in this case.

16 **2. SUPPLEMENT TO PARTIAL FINAL JUDGMENT AND DECREE.**

17 This Supplemental Decree is entered contemporaneously with the Decree.

18
19 **3. RESERVED RIGHTS.**

20 The Navajo Nation has reserved rights, which are held in trust by the United States on behalf
21 of the Navajo Nation, for historic and existing water uses on lands in the San Juan River Basin in
22 New Mexico. Reserved rights are not subject to abandonment, forfeiture or loss for non-use. The

1 reserved rights described in this paragraph have a priority date of June 1, 1868. The reserved rights
2 for historic and existing irrigation uses and related purposes on the Navajo Indian Irrigation Project,
3 the Hogback-Cudei Irrigation Project and the Fruitland-Cambridge Irrigation Project are included in
4 the reserved right amounts specified by subparagraphs 3(a), 3(e) and 3(f), respectively, of the Decree.

5 Reserved rights for historic, existing and future municipal, industrial, commercial and domestic
6 uses, including residential agricultural uses such as yard and stock watering, are included in the
7 reserved right amounts specified by subparagraphs 3(b), 3(c), 3(d) and 7(a) of the Decree. The total
8 annual quantities of water to which the Navajo Nation has a reserved right for historic and existing
9 uses and which are not included in paragraph 3 or subparagraph 7(a) of the Decree shall not exceed
10 an annual diversion of 26,872 acre-feet or an annual depletion at the places of use of 11,061 acre-feet
11 for uses other than reservoir storage described in subparagraphs 3.A.1 and 3.B.2 below, or a net
12 evaporation from stock ponds and irrigation reservoirs of 11,309 acre-feet. The term "depletion"
13 refers to the depletion caused by a particular use of water including any depletion incident to the use.

14 The reserved water rights described below are subject to the conditions of use set forth in
15 paragraph 5 of this Supplemental Decree and constitute the rights described in paragraph 8 of the
16 Decree. The following descriptions are not intended to prohibit changes in the point of diversion or
17 purpose or place of use of the Navajo Nation's reserved rights under Federal law. The conditions
18 under which the Navajo Nation may make such changes are specified in paragraph 12 of this
19 Supplemental Decree, and are subject to the Court's continuing jurisdiction to interpret and enforce
20 this Supplemental Decree as provided in paragraph 14 of the Decree and paragraph 9 of this
21 Supplemental Decree.

22 A. LIVESTOCK WATER USE

1 1. STOCK PONDS

2 The Navajo Nation has the following rights to fill and refill stock ponds on lands held by the
3 United States in trust on behalf of the Navajo Nation that are supplied from water sources other than
4 the San Juan River:

5 (a) STOCK PONDS IN DRAINAGES TRIBUTARY TO THE SAN JUAN
6 RIVER ABOVE THE CHACO RIVER CONFLUENCE, storage of water at up to 193 stock
7 ponds identified by the US Survey from existing surface, spring, or ground water sources at
8 each identified location, with a total combined maximum annual net evaporation depletion of
9 956 acre-feet based on a total combined volume of 628 acre-feet;

10 (b) STOCK PONDS IN THE CHACO RIVER DRAINAGE, storage of water at
11 up to 803 stock ponds identified by the US Survey, excluding stock ponds at locations
12 labeled P-0039, P-0042, P-0257, P-1823 and P-5072, from existing surface, spring, or ground
13 water sources at each identified location, with a total combined maximum annual net
14 evaporation depletion of 6,446 acre-feet based on a total combined storage volume of 3,378
15 acre-feet;

16 (c) STOCK PONDS IN DRAINAGES TRIBUTARY TO THE SAN JUAN
17 RIVER BETWEEN THE CHACO RIVER CONFLUENCE AND FOUR CORNERS,
18 storage of water at up to 98 stock ponds identified by the US Survey from existing surface,
19 spring, or ground water sources at each identified location, with a total combined maximum
20 annual net evaporation depletion of 487 acre-feet based on a total combined storage volume
21 of 264 acre-feet; and

22 (d) STOCK PONDS IN THE CHINLE WASH DRAINAGE, storage of water at

1 up to 36 stock ponds identified by the US Survey, excluding the stock pond at the location
2 labeled P-1092, from existing surface, spring, or ground water sources at each identified
3 location, with a total combined maximum annual net evaporation depletion of 556 acre-feet
4 based on a total combined storage volume of 365 acre-feet.

5 The locations and sources for each stock pond are described by Appendix B maps and
6 Appendix M, table M-3, of the US Survey; except, that this Supplemental Decree does not recognize
7 rights for the Navajo Nation to use water from sources other than the San Juan River to fill and refill
8 ponds at locations labeled P-5346 and P-5350 in the US Survey. The Navajo Nation may store water
9 up to the full capacity of any of the stock ponds referenced in subparagraphs (a) through (d).

10 2. STOCK USE

11 The Navajo Nation has the right to divert from existing water sources on lands held by the
12 United States in trust on behalf of the Navajo Nation a total combined maximum annual amount of
13 482 acre-feet, or an annual depletion by stock watering use from all stock watering sources at the
14 places of use of 482 acre-feet, based on livestock use for 40,900 animal units. Locations of existing
15 stock wells and springs are described by Appendix B maps and Appendix M, table M-1 and table M-
16 2, respectively, of the US Survey. This right includes all stock water consumption and incidental
17 depletions from the stock wells on Navajo Nation trust lands listed in table M-1 of the US Survey,
18 the springs on Navajo Nation trust lands listed in table M-2 of the US Survey, the stock ponds on
19 Navajo Nation trust lands that the Navajo Nation has the right to fill pursuant to subparagraph 3.A.1
20 of this Supplemental Decree, the irrigation wells on Navajo Nation trust lands listed in table F-1 of
21 the US Survey, the springs on Navajo Nation trust lands listed in table F-2 of the US Survey, the
22 irrigation reservoirs on Navajo Nation trust lands that the Navajo Nation has the right to fill pursuant

1 to subparagraph 3.B.2 of this Supplemental Decree, the irrigation ditches on Navajo Nation trust
2 lands that are associated with tributary irrigation rights described by subparagraph 3.B.1 of this
3 Supplemental Decree, and the lakes, streams or other existing water sources on Navajo Nation trust
4 lands within the San Juan River Basin in New Mexico. The foregoing diversion and associated
5 depletion amounts do not include diversions made for livestock uses under the Navajo Nation's
6 water rights pursuant to the Decree, or diversions made to fill and refill the stock ponds described by
7 subparagraph 3.A.1 of this Supplemental Decree or the irrigation reservoirs described by
8 subparagraph 3.B.2 of this Supplemental Decree.

9 B. IRRIGATION WATER USE

10 1. IRRIGATION DIVERSION AND DEPLETION

11 The Navajo Nation has the following rights to divert the waters of the San Juan River Basin
12 in New Mexico for irrigation uses:

13 (a) IRRIGATION PROJECT USES IN THE CHACO RIVER DRAINAGE:

14 The total combined amount of diversion by the Navajo Nation from tributaries to the
15 San Juan River or from ground water sources within the Chaco River drainage under the
16 following irrigation rights shall not exceed a total combined annual diversion of 23,635 acre-
17 feet per year, or a total combined annual depletion at the places of use of 9,032 acre-feet per
18 year, on any or all of the 7,337.3 acres of land within the irrigation projects described below.

19 (1) SANOSTEE PROJECT, an annual diversion of 2,725 acre-feet, or an
20 annual depletion at the place of use of 1,121 acre-feet, of surface water from Sanostee
21 Wash at the diversion works for the project based upon irrigation of 581 acres
22 within 1,286.9 acres of land that constitute the project area as described by the US

1 Survey;

2 (2) TOCITO PROJECT, an annual diversion of 783 acre-feet, or an
3 annual depletion at the place of use of 284 acre-feet, of surface water from Tocito
4 Wash at the diversion works for the project based upon irrigation of 148 acres within
5 231.4 acres of land that constitute the project area as described by the US Survey;

6 (3) TOCITO SPRINGS PROJECT, an annual diversion of 105 acre-feet,
7 or an annual depletion at the place of use of 59 acre-feet, of water from Tocito
8 Springs at the diversion works for the project based upon irrigation of 30 acres within
9 46.5 acres of land that constitute the project area as described by the US Survey;

10 (4) TOH AL SISSY PROJECT, an annual diversion of 792 acre-feet, or
11 an annual depletion at the place of use of 388 acre-feet, of surface water from
12 Sanostee Wash at the diversion works for the project based upon irrigation of 197
13 acres within 276.2 acres of land that constitute the project area as described by the
14 US Survey;

15 (5) TOCITO LAKE PROJECT, an annual diversion of 143 acre-feet, or
16 an annual depletion at the place of use of 53 acre-feet, of surface water from a
17 tributary to Tocito Wash at the diversion works for the project based upon irrigation
18 of 38 acres within 42.9 acres of land that constitute the project area as described by
19 the US Survey;

20 (6) PORCUPINE CANYON PROJECT, an annual diversion of 10 acre-
21 feet, or an annual depletion at the place of use of 6 acre-feet, of surface water from
22 Porcupine Canyon at the diversion works for the project based upon irrigation of 3.3

1 acres within 4.3 acres of land that constitute the project area as described by the US
2 Survey;

3 (7) STINKING WATER PROJECT, an annual diversion of 156 acre-feet,
4 or an annual depletion at the place of use of 76 acre-feet, of surface water from a
5 tributary to Pena Blanca Arroyo at the diversion works for the project based upon
6 irrigation of 40 acres within 43.8 acres of land that constitute the project area as
7 described by the US Survey;

8 (8) SHEEP DIP RESERVOIR PROJECT, an annual diversion of 152
9 acre-feet, or an annual depletion at the place of use of 76 acre-feet, of surface water
10 from To-bilhask-idi Wash or Tse-yaa-tohi Wash at the diversion works for the
11 project based upon irrigation of 40 acres within 70.2 acres of land that constitute the
12 project area as described by the US Survey;

13 (9) RED ROCK CANYON PROJECTS, an annual diversion of 616 acre-
14 feet, or an annual depletion at the place of use of 300 acre-feet, of surface water from
15 Tse-nas-chii Wash or Tse-yaa-tohi Wash at the diversion works for the projects based
16 upon irrigation of 158 acres within 229.5 acres of land that constitute the project
17 areas as described by the US Survey;

18 (10) TOADLENA AND TOADLENA NE PROJECTS, a total annual
19 diversion of 1,180 acre-feet, or a total annual depletion at the place of use of 412
20 acre-feet, of surface water from To-dil-hil Wash at the diversion works for the
21 projects for irrigation of 222.6 acres of land that constitute the project areas as
22 described by the US Survey;

1 (11) SAND SPRINGS PROJECT, an annual diversion of 15 acre-feet, or
2 an annual depletion at the place of use of 9 acre-feet, of ground water at the diversion
3 works for the project based upon irrigation of 4.6 acres within 6.4 acres of land that
4 constitute the project area as described by the US Survey;

5 (12) UPPER CAPTAIN TOM AND LOWER CAPTAIN TOM
6 PROJECTS, a total annual diversion of 6,275 acre-feet to be measured below Captain
7 Tom Reservoir, or a total annual depletion at the place of use of 2,250 acre-feet, of
8 surface water from Captain Tom Wash or To-dil-hil Wash at the diversion works for
9 the projects based upon irrigation of 1,184 acres within 2,008.8 acres of land that
10 constitute the project areas as described by the US Survey;

11 (13) GREY MESA AND TWO GREY HILLS PROJECTS, a total annual
12 diversion of 3,758 acre-feet, or a total annual depletion at the place of use of 1,305
13 acre-feet, of surface water from Captain Tom Wash or its tributaries at the diversion
14 works for the projects based upon irrigation of 709 acres within 878.3 acres of land
15 that constitute the project areas as described by the US Survey;

16 (14) SHEEP SPRINGS PROJECT, an annual diversion of 971 acre-feet, or
17 an annual depletion at the place of use of 396 acre-feet, of surface water from Tuntsa
18 Wash at the diversion works for the project for irrigation of 216.3 acres of land that
19 constitute the project area as described by the US Survey;

20 (15) NASCHITTI NORTHERN PROJECT, an annual diversion of 682
21 acre-feet, or an annual depletion at the place of use of 243 acre-feet, of surface water
22 from a tributary to Coyote Wash at the diversion works for the project for irrigation

1 of 136.3 acres of land that constitute the project area as described by the US Survey;

2 (16) NASCHITTI DROLET PROJECT, an annual diversion of 402 acre-
3 feet, or an annual depletion at the place of use of 191 acre-feet, of surface water from
4 Naschitti Wash at the diversion works for the project for irrigation of 108.6 acres of
5 land that constitute the project area as described by the US Survey;

6 (17) NASCHITTI SOUTHERN PROJECT, an annual diversion of 123
7 acre-feet, or an annual depletion at the place of use of 58 acre-feet, of surface water
8 from a tributary to Naschitti Wash at the diversion works for the project based upon
9 irrigation of 33 acres within 142.4 acres of land that constitute the project area as
10 described by the US Survey;

11 (18) LONG LAKE PROJECT, an annual diversion of 158 acre-feet, or an
12 annual depletion at the place of use of 53 acre-feet, of surface water from Naschitti
13 Wash in any one year at the diversion works for the project based upon irrigation of
14 30 acres within 43.0 acres of land that constitute the project area as described by the
15 US Survey;

16 (19) CHOISKA (RED WILLOW) PROJECT, an annual diversion of 3,975
17 acre-feet measured below Chuska Lake, or an annual depletion at the place of use of
18 1,418 acre-feet, of surface water from Red Willow Wash or its tributaries at the
19 diversion works for the project based upon irrigation of 750 acres within 965.6 acres
20 of land that constitute the project area as described by the US Survey;

21 (20) WELL 14 MILE PROJECT, an annual diversion of 211 acre-feet, or
22 an annual depletion at the place of use of 110 acre-feet, of ground water at the well

1 for the project based upon irrigation of 59 acres within 110.0 acres of land that
2 constitute the project area as described by the US Survey;

3 (21) WELL 14A-79 PROJECT, an annual diversion of 118 acre-feet, or an
4 annual depletion at the place of use of 62 acre-feet, of ground water at the well for the
5 project based upon irrigation of 34 acres within 79.9 acres of land that constitute the
6 project area as described by the US Survey;

7 (22) WHITE ROCK PROJECT, an annual diversion of 69 acre-feet, or an
8 annual depletion at the place of use of 36 acre-feet, of ground water from the well for
9 the project based upon irrigation of 20 acres within 41.5 acres of land that constitute
10 the project area as described by the US Survey;

11 (23) LAKE VALLEY PROJECT, an annual diversion of 116 acre-feet, or
12 an annual depletion at the place of use of 70 acre-feet, of surface water from Kim-
13 me-ni-oli Wash at the diversion works for the project based upon irrigation of 40
14 acres within 75.0 acres of land that constitute the project area as described by the US
15 Survey;

16 (24) STANDING ROCK PROJECT, an annual diversion of 47 acre-feet,
17 or an annual depletion at the place of use of 27 acre-feet of surface water from
18 Standing Rock Wash at the diversion works for the project based upon irrigation of
19 15 acres within 36.4 acres of land that constitute the project area as described by the
20 US Survey;

21 (25) CROWNPOINT SCHOOL PROJECT, an annual diversion of 53 acre-
22 feet, or an annual depletion at the place of use of 32 acre-feet, of ground water from

1 the well for the project based upon irrigation of 18 acres within 34.5 acres of land
2 that constitute the project area as described by the US Survey;

3 (b) IRRIGATION PROJECT USES IN THE SAN JUAN RIVER DRAINAGE BELOW
4 THE CHACO RIVER CONFLUENCE AND FOUR CORNERS:

5 The total combined amount of diversion by the Navajo Nation from tributaries to the
6 San Juan River within the San Juan River drainage between the Chaco River confluence and
7 Four Corners under the following irrigation rights shall not exceed a total combined annual
8 diversion of 322 acre-feet per year, or a total combined annual depletion at the places of use
9 of 157 acre-feet per year, on any or all of the 84.3 acres of land within the irrigation projects
10 described below.

11 (1) BECLABITO PROJECT, an annual diversion of 185 acre-feet, or an
12 annual depletion at the place of use of 93 acre-feet, of surface water from Shoe Game
13 Wash at the diversion works for the project for irrigation of 44.4 acres of land that
14 constitute the project area as described by the US Survey;

15 (2) RED WASH PROJECT, an annual diversion of 137 acre-feet, or an
16 annual depletion at the place of use of 64 acre-feet, of surface water from Red Wash
17 at the diversion works for the project based upon irrigation of 30 acres within 39.9
18 acres of land that constitute the project area as described by the US Survey;

19 (c) IRRIGATION PROJECT USES IN THE CHINLE WASH DRAINAGE:

20 The total combined amount of diversion by the Navajo Nation from tributaries to the
21 San Juan River within the Chinle Wash drainage under the following irrigation rights shall
22 not exceed a total combined annual diversion of 910 acre-feet per year, or a total combined

1 annual depletion at the places of use of 477 acre-feet per year, on any or all of the 597.6 acres
2 of land within the irrigation projects described below.

3 (1) WHISKEY CREEK PROJECT, an annual diversion of 101 acre-feet,
4 or an annual depletion at the place of use of 51 acre-feet, of surface water from Little
5 Whiskey Creek at the diversion works for the project based upon irrigation of 36.9
6 acres of land that constitute the project area as described by the US Survey;

7 (2) CRYSTAL, LOWER CRYSTAL AND COYOTE WASH
8 PROJECTS, an annual diversion of 809 acre-feet, or an annual depletion at the place
9 of use of 426 acre-feet, of surface water from Crystal Creek or its tributaries at the
10 diversion works for the projects based upon irrigation of 286 acres within 560.7 acres
11 of land that constitute the project areas as described by the US Survey;

12 (d) MISCELLANEOUS IRRIGATION USES IN THE CHACO RIVER AND CHINLE
13 WASH DRAINAGES:

14 The total combined amount of diversion by the Navajo Nation from tributaries to the
15 San Juan River or from ground water sources within the San Juan River Basin under the
16 following irrigation rights shall not exceed a total combined annual diversion of 1,523 acre-
17 feet per year, or a total combined annual depletion at the places of use of 913 acre-feet per
18 year, on any or all of the 1,384.6 acres of land within the irrigation areas described below.

19 (1) MISCELLANEOUS SURFACE WATER IRRIGATION USES IN
20 THE CHACO RIVER DRAINAGE, a total combined diversion of 1,407 acre-feet, or
21 a total combined depletion at the places of use of 843 acre-feet, of surface water from
22 streams or springs at the places of use at the diversion works based on irrigation of

1 477 acres within 1,299.2 acres of land in the drainage identified by the US Survey as
2 tributary non-project irrigation uses irrigated by diversions or springs, with the
3 springs developed for irrigation identified in Appendix F, table F-2, of the US
4 Survey;

5 (2) MISCELLANEOUS GROUND WATER IRRIGATION USES IN
6 THE CHACO RIVER DRAINAGE, a total combined diversion of 105 acre-feet, or a
7 total combined depletion at the places of use of 64 acre-feet, of ground water from
8 sources at the places of use based on irrigation of 34 acres within 54.8 acres of land
9 in the drainage identified by the US Survey as tributary non-project irrigation uses
10 irrigated by wells;

11 (3) MISCELLANEOUS SURFACE WATER IRRIGATION USES IN
12 THE CHINLE WASH DRAINAGE, a total combined diversion of 11 acre-feet, or a
13 total combined annual depletion at the places of use of 7 acre-feet, of surface water
14 from streams or springs local to the places of use at the diversion works based on
15 irrigation of 5 acres within 30.6 acres of land in the drainage identified by the US
16 Survey as tributary non-project irrigation uses irrigated by diversions or springs, with
17 the springs developed for irrigation identified in Appendix F, table F-2, of the US
18 Survey.

19 The foregoing annual depletion amounts in subparagraphs 3.B.1(a) through 3.B.1(d) above
20 include the depletion at the places of use caused by the irrigation use of water and any depletion
21 incident to the use. The depletions resulting from the storage of water in irrigation reservoirs are
22 included in subparagraph 3.B.2 below and are excluded from the foregoing depletion amounts. The

1 farm delivery requirements associated with the Navajo Nation's rights to divert water for the
2 foregoing irrigation uses are: 3.00 acre-feet per acre per year for uses within the Chaco River
3 drainage described by subparagraphs 3.B.1(a), 3.B.1(d)(1) and 3.B.1(d)(2); 3.65 acre-feet per acre
4 per year for uses within the San Juan River drainage between the Chaco River confluence and Four
5 Corners described by subparagraph 3.B.1(b); and 2.55 acre-feet per acre per year for uses within the
6 Chinle Wash drainage described by subparagraphs 3.B.1(c) and 3.B.1(d)(3).

7 The lands with irrigation water rights described by subparagraphs 3.B.1(a) through 3.B.1(d)
8 are shown in Appendix E, maps E-13 through E-64, and tabulated in Appendix I, table I-1, and
9 Appendix J, table J-1, of the US Survey. The use of surface water under the irrigation rights
10 described in these subparagraphs may be supplemented with existing local diversions from wells
11 identified in Appendix F, table F-1, of the US Survey; provided, that the total combined annual
12 amount of diversion from surface water and supplemental ground water to supply irrigation uses
13 does not cause the diversion or depletion limits described herein to be exceeded. However, the
14 Navajo Nation's diversions for the irrigation water uses described in subparagraphs 3.B.1(a) through
15 3.B.1(d) shall be subject to the annual diversion quantities specified therein only if the New Mexico
16 State Engineer or the Court enforces annual diversion quantity limits on non-Navajo Nation
17 irrigation diversions in the San Juan River Basin in New Mexico.

18 Notwithstanding provisions in subparagraph 12(b), the respective diversion and depletion
19 rights for the projects within each drainage area described in the respective subparagraphs 3.B.1(a)
20 through 3.B.1(c) may be exercised within any of the irrigation project areas described within each
21 drainage from the existing sources of supply for the projects; provided, that in no event shall the
22 acres irrigated within any irrigation project exceed that project's total project area. Notwithstanding

1 the provisions of subparagraph 17(c)(3) of the Decree, the Navajo Nation may change the source of
2 supply and place or purpose of use from irrigation of up to 300 acres from the project areas identified
3 in subparagraphs 3.B.1(a) through 3.B.1(c) to irrigation or livestock water uses on lands held in trust
4 by the United States for the Navajo Nation within the San Juan River Basin in New Mexico from any
5 water source other than from the San Juan River, the Animas River or the La Plata River, provided
6 that any such change shall otherwise comply with the provisions of subparagraph 17(c) of the
7 Decree. Also, notwithstanding the provisions of subparagraph 17(c)(3) of the Decree, the diversion
8 and depletion rights for the miscellaneous irrigation uses described in subparagraph 3.B.1(d) may be
9 exercised for irrigation or livestock water uses on lands held in trust by the United States for the
10 Navajo Nation within the San Juan River Basin in New Mexico from any source of supply on those
11 lands other than from the San Juan River, the Animas River or the La Plata River, provided that any
12 change in the points of diversion or places of use of the irrigation rights described in subparagraph
13 3.B.1(d) shall otherwise comply with the provisions of paragraph 17(c) of the Decree and shall not
14 cause the total combined uses under subparagraph 3.B.1(d) to exceed a total combined annual
15 diversion of 1,523 acre-feet per year, or a total combined annual depletion at the places of use of 913
16 acre-feet per year.

17
18 2. IRRIGATION RESERVOIR STORAGE

19 The Navajo Nation has the following rights to fill and refill irrigation reservoirs on lands held
20 by the United States in trust on behalf of the Navajo Nation that are supplied from water sources
21 other than the San Juan River:

22 (a) IRRIGATION RESERVOIRS IN THE CHACO RIVER DRAINAGE, storage

1 of water at up to 78 irrigation reservoirs, including 73 irrigation reservoirs identified by the
2 US Survey and the reservoirs designated therein as stock ponds at the locations labeled P-
3 0039, P-0042, P-0257, P-1823 and P-5072, from existing surface water, spring, or ground
4 water sources at each identified location, not to exceed a total combined maximum annual
5 net evaporation depletion of 2,691 acre-feet based on a total combined storage volume of
6 6,196 acre-feet;

7 (b) IRRIGATION RESERVOIRS IN DRAINAGES TRIBUTARY TO THE SAN
8 JUAN RIVER BETWEEN THE CHACO RIVER CONFLUENCE AND FOUR CORNERS,
9 storage of water at up to 4 irrigation reservoirs identified by the US Survey from existing
10 surface water, spring, or ground water sources at each identified location, not to exceed a
11 total combined maximum annual net evaporation depletion of 51 acre-feet based on a total
12 combined storage volume of 25 acre-feet; and

13 (c) IRRIGATION RESERVOIRS IN THE CHINLE WASH DRAINAGE,
14 storage of water at up to 7 irrigation reservoirs, including 6 irrigation reservoirs identified by
15 the US Survey and the reservoir designated therein as a stock pond at the location labeled P-
16 1092, from existing surface water, spring, or ground water sources at each identified location,
17 not to exceed a total combined maximum annual net evaporation depletion of 122 acre-feet
18 based on a total combined storage volume of 87 acre-feet.

19 The locations and sources for each irrigation reservoir are described by Appendix B maps and
20 Appendix F, table F-3, or Appendix M, table M-3, of the US Survey. Water stored in these irrigation
21 reservoirs may be used for stock watering purposes in addition to irrigation. The Navajo Nation may
22 store water up to the full capacity of any of the irrigation reservoirs referenced in subparagraphs

1 3.B.2(a) through 3.B.2(c).

2 **4. WATER RIGHTS ACQUIRED UNDER STATE LAW.**

3 The Navajo Nation has water rights acquired under New Mexico state law pursuant to
4 decreed rights or to permits or licenses issued by the New Mexico State Engineer, and for historic
5 and existing water uses on lands in the San Juan River Basin in New Mexico that are held in fee
6 ownership by the Nation. Such rights are described in this Supplemental Decree, and exclude rights
7 to the use of water historically made by non-Navajo entities on Navajo lands under permits issued by
8 the New Mexico State Engineer that have not been acquired from said entities by the Navajo Nation.

9 Water rights for historic municipal, industrial, commercial or domestic uses, except for *de minimus*
10 uses under paragraph 10 of the Decree, that have been made on lands which are held in fee
11 ownership by the Navajo Nation and that have not been made pursuant to decreed rights, or to
12 permits or licenses issued by the New Mexico State Engineer, are included in the total water right
13 amounts specified by subparagraphs 3(b), 3(c), 3(d) and 7(a) of the Decree. The total annual
14 quantities of water to which the Navajo Nation has a water right under state law as described by this
15 Supplemental Decree shall not exceed an annual diversion of 2,197 acre-feet or an annual depletion
16 at the places of use of 1,371 acre-feet for uses other than reservoir storage described in subparagraph
17 4.A.1 below, or a net evaporation from stock ponds of 1,404 acre-feet. The term "depletion" refers
18 to the depletion caused by a particular use of water including any depletion incident to the use.

19 These water rights and the priority dates are described below and constitute rights described
20 in paragraph 9 of the Decree. The following descriptions are not intended to prohibit changes in the
21 point of diversion or purpose or place of use of the Navajo Nation's water rights under Federal and
22 state law, nor are they intended to limit in any way the right and ability of the Navajo Nation to

1 acquire and transfer additional water rights perfected under state law. The conditions under which
2 the Navajo Nation may make such changes are specified in paragraph 12 of this Supplemental
3 Decree and are subject to the Court's continuing jurisdiction to interpret and enforce this
4 Supplemental Decree as provided in paragraph 14 of the Decree and paragraph 9 of this
5 Supplemental Decree.

6 A. LIVESTOCK WATER USE

7 1. STOCK PONDS

8 The Navajo Nation has the following rights with a priority date of January 1, 1935, to fill and
9 refill stock ponds on lands held by the Navajo Nation in fee that are supplied from water sources
10 other than the San Juan River:

11 (a) STOCK PONDS IN DRAINAGES TRIBUTARY TO THE SAN JUAN
12 RIVER ABOVE THE CHACO RIVER CONFLUENCE: storage of water at up to 53 stock
13 ponds identified by the US Survey from existing surface, spring, or ground water sources at
14 each identified location, with a total combined maximum annual net evaporation depletion of
15 216 acre-feet based on a total combined volume of 143 acre-feet; and

16 (b) STOCK PONDS IN THE CHACO RIVER DRAINAGE, storage of water at
17 up to 248 stock ponds identified by the US Survey from existing surface, spring, or ground
18 water sources at each identified location, with a total combined maximum annual net
19 evaporation depletion of 1,188 acre-feet based on a total combined volume of 601 acre-feet.

20 The locations and sources for each stock pond are described by Appendix B maps and
21 Appendix M, table M-3, of the US Survey. The Navajo Nation may store water up to the full
22 capacity of any of the stock ponds referenced in subparagraphs (a) through (b).

1 2. STOCK USE

2 The Navajo Nation has the right with a priority date of January 1, 1935, to divert from
3 existing water sources on lands held by the Navajo Nation in fee a total combined annual amount of
4 35 acre-feet, or an annual depletion by stock watering use from all stock watering sources at the
5 places of use of 35 acre-feet, based on livestock use for 3,000 animal units. Locations of existing
6 stock wells and springs are described by Appendix B maps and Appendix M, table M-1 and table M-
7 2, respectively, of the US Survey. This right includes all stock water consumption and incidental
8 depletions from the stock wells on Navajo Nation fee lands listed in table M-1 of the US Survey, the
9 stock springs on Navajo Nation trust lands listed in table M-2 of the US Survey, the stock ponds on
10 Navajo Nation fee lands that the Navajo Nation has the right to fill pursuant to subparagraph 4.A.1 of
11 this Supplemental Decree, the irrigation well on Navajo Nation fee lands listed in table F-1 of the
12 US Survey, the irrigation spring on Navajo Nation fee lands listed in table F-2 of the US Survey,
13 irrigation ditches on Navajo Nation fee lands that are associated with tributary irrigation use rights
14 described by subparagraph 4.B of this Supplemental Decree, and the lakes, streams or other existing
15 water sources on Navajo Nation fee lands within the San Juan River Basin in New Mexico. The
16 foregoing diversion and associated depletion amounts do not include diversions made for livestock
17 uses under the Navajo Nation's water rights pursuant to the Decree, or diversions made to fill and
18 refill the stock ponds described by subparagraph 4.A.1 of this Supplemental Decree.

19 B. IRRIGATION WATER USE

20 The Navajo Nation has the following rights to divert the waters of the San Juan River Basin
21 in New Mexico for irrigation uses not to exceed:

- 22 (1) I.K. WESTBROOK-INDIAN CREEK PROJECT, with a priority date of

1 March 3, 1934:

2 (a) an annual diversion of 386 acre-feet, or an annual depletion at the
3 place of use of 232 acre-feet, of surface water from Seven Lakes Wash by the
4 spreading of floodwaters as available at spreader dams on the project for irrigation of
5 140.9 acres of land held by the United States in trust on behalf of the Navajo Nation
6 within the project area described at page 376 of the Judgment in *The Echo Ditch*
7 *Company, et al., v. The McDermott Ditch Company, et al.*, New Mexico District
8 Court, San Juan County, Cause No. 01690 (Echo Ditch Decree), and Map Sheets 85-
9 87 of the 1938 San Juan River Hydrographic Survey prepared by the Office of the
10 State Engineer, such rights being reserved rights which are held in trust by the United
11 States on behalf of the Navajo Nation; and

12 (b) an annual diversion of 1,576 acre-feet, or an annual depletion at the
13 place of use of 949 acre-feet, of surface water from Seven Lakes Wash by the
14 spreading of floodwaters as available at spreader dams on the project for irrigation of
15 575.2 acres of land held by the Navajo Nation in fee within the project area described
16 at page 376 of the Echo Ditch Decree, and Map Sheets 85-87 of the 1938 San Juan
17 River Hydrographic Survey prepared by the Office of the State Engineer; and

18 (2) I.K. WESTBROOK-KIN KLIZHIN WASH PROJECT, with a priority date of
19 July 27, 1931, an annual diversion of 114 acre-feet, or an annual depletion at the place of use
20 of 68 acre-feet, of surface water from Kin Klizhin Wash by the spreading of floodwaters as
21 available at spreader dams on the project for irrigation of 40.5 acres of land held by the
22 United States in trust on behalf of the Navajo Nation within the portion of the project area

1 described at Map Sheets 85-87 of the 1938 San Juan River Hydrographic Survey prepared by
2 the Office of the State Engineer, such rights being reserved rights which are held in trust by
3 the United States on behalf of the Navajo Nation.

4 The foregoing annual depletion amounts in subparagraphs 4.B(1) and 4.B(2) include the
5 depletions at the places of use caused by the irrigation use of water and any depletion incident to the
6 use. The farm delivery requirement associated with the Navajo Nation's rights to divert water for the
7 foregoing irrigation uses is 2.80 acre-feet per acre per year. The lands with irrigation water rights
8 described by subparagraphs 4.B(1) and 4.B(2) are shown in Appendix E, maps E-32, E-40 and E-48,
9 and tabulated in Appendix I, table I-1, of the US Survey.

10 Based upon total combined irrigation of 756.6 acres as described above, the total combined
11 amount of diversion by the Navajo Nation from tributaries to the San Juan River within the Chaco
12 River drainage for irrigation uses pursuant to rights acquired under state law shall not exceed a total
13 combined annual diversion of 2,076 acre-feet , or a total combined annual depletion at the places of
14 use of 1,250 acre-feet; except, that the Navajo Nation's diversions for the irrigation water uses
15 described in subparagraph 4.B shall be subject to the annual diversion quantities specified therein
16 only if the New Mexico State Engineer or the Court enforces annual diversion quantity limits on
17 non-Navajo Nation irrigation diversions in the San Juan River Basin in New Mexico.

18 C. INDUSTRIAL AND DOMESTIC WATER USE

19 The Navajo Nation has the right pursuant to State Engineer File Nos. SJ-43, SJ-44 and SJ-58
20 to divert and deplete ground water in the NE ¼ of Section 9, Township 19N, Range 17W, N.M.P.M,
21 for industrial and domestic uses with a priority date of March 1953 in a total combined maximum
22 annual amount of 86 acre-feet.

1 **5. DEPLETION LIMITS.**

2 (a) The use of water by the Navajo Nation pursuant to the water rights described
3 in paragraphs 3 and 4, not including subparagraphs 3.A.2 and 4.A.2, shall not exceed an
4 average annual total combined depletion during any period of ten consecutive years at the
5 places of use of 8,355 acre-feet, of which no more than 199 acre-feet of depletion per year
6 may occur in the San Juan River drainage above the Chaco River confluence, no more than
7 7,576 acre-feet per year may occur in the Chaco River drainage, no more than 175 acre-feet
8 per year may occur in the San Juan River drainage below the Chaco River confluence, and no
9 more than 405 acre-feet per year may occur in the Chinle Wash drainage.

10 (b) The use of water by the Navajo Nation pursuant to the water rights described
11 in paragraphs 3 and 4 shall not exceed an average annual total combined depletion during any
12 period of ten consecutive years of flow of the San Juan River of 1,819 acre-feet. This
13 depletion limit may be adjusted to reflect any change in methodology adopted by the State
14 Engineer for calculating depletion effects on the flow of the San Juan River from the use of
15 water pursuant to the water rights described in paragraphs 3 and 4; provided, that the average
16 annual total combined depletion limit on the flow of the San Juan River shall not be reduced
17 below 1,819 acre-feet or increased to an amount that is greater than 50 percent of the average
18 annual total combined depletion limit described in subparagraph 5(a).

19 (c) The Navajo Nation's rights to divert and deplete water for irrigation uses
20 under subparagraphs 3.B.1 and 4.B may be recalculated if the technical methodology adopted
21 by the Court to determine irrigation water requirements for non-Navajo water rights differs
22 from the methodology utilized for the Echo Ditch Decree and would result in greater annual

1 diversion and depletion quantities or annual farm delivery requirements for the Navajo
2 Nation's water rights than those decreed herein. In that event, the State of New Mexico, the
3 Navajo Nation and the United States shall prepare and submit to the Court a proposed
4 addendum to this Supplemental Decree setting forth:

5 (1) the revised diversion and depletion amounts and farm delivery requirements
6 for the Navajo Nation's irrigation rights under subparagraphs 3.B.1 and 4.B, recalculated in a
7 manner consistent with the methodology adopted by the Court; and

8 (2) the State Engineer's revision of annual depletion limits for subparagraphs 5(a)
9 and 5(b) recalculated based on the revised diversion and depletion amounts and farm delivery
10 requirements.

11 **6. ALLOTTEES.**

12 Individual members of the Navajo Nation that have been allotted lands by the United States
13 within the San Juan River Basin in New Mexico may have claims to reserved rights to the use of
14 water. This decree does not quantify the nature, extent or priority of such rights. To the extent that
15 water rights are adjudicated by the Court for such allotted lands in excess of historic and existing
16 water uses on those lands as of the date of entry of this Supplemental Decree, such water rights for
17 allotted lands shall be fulfilled or serviced by rights of the Navajo Nation quantified in the Decree or
18 in this Supplemental Decree, or the depletions of flow of the San Juan River resulting from the use
19 of water under such rights for allotted lands shall be fully offset by a forbearance of use of rights of
20 the Navajo Nation quantified in the Decree or in this Supplemental Decree. Nothing in this
21 paragraph shall create a right of any Allottee to delivery of water by the Navajo Nation.

22 **7. LIMITATIONS.**

1 The Navajo Nation is hereby enjoined from the diversion or depletion of the surface or
2 underground waters within the San Juan River Basin in New Mexico except in accordance with the
3 rights described in the Decree and this Supplemental Decree (“the Decrees”), rights in any
4 supplemental orders or decrees adjudicating water rights acquired by the Navajo Nation after entry of
5 the Decrees, or rights under New Mexico State Engineer permits or licenses that are acquired after
6 the date of entry of this Supplemental Decree; except, that to the extent the Navajo Nation prior to
7 entry of this Supplemental Decree has acquired state-based water rights supplied by non-Navajo
8 Nation ditches diverting water from the San Juan River or Animas River, which rights are claimed
9 by the Navajo Nation but are not specifically described by the Decrees, those water right claims will
10 be adjudicated at the time all rights served by these ditches are adjudicated. Beneficial use shall be
11 the limit of the rights to use water adjudicated to the Navajo Nation by this Supplemental Decree.
12 The Navajo Nation shall not be entitled to receive, nor shall the United States or the State of New
13 Mexico be required to deliver, nor shall non-Navajo Nation water users be required to curtail water
14 uses to provide to the Navajo Nation, any water not then necessary for beneficial use under the rights
15 adjudicated herein or acquired hereafter.

16 This Supplemental Decree shall not be construed to prohibit the Navajo Nation or its
17 members from engaging in the traditional agricultural practices of planting crops across the active
18 channel of ephemeral streams in the San Juan River Basin so long as these practices do not divert
19 and control water. These agricultural practices do not constitute the basis for a water right and may
20 continue without administration by the State of New Mexico.

21 This Supplemental Decree is binding upon political subdivisions, utilities, agencies and other
22 entities of the Navajo Nation and the United States, and on successors and assigns.

1 **8. DISCLAIMERS.**

2 Except as explicitly provided herein, nothing in this Supplemental Decree confers jurisdiction
3 on the New Mexico State Engineer to administer or regulate the use of federally reserved rights on
4 lands held in trust by the United States on behalf of the Navajo Nation or lands allotted by the United
5 States to members of the Navajo Nation. Because the description of the Navajo Nation's water rights
6 adjudicated in this Supplemental Decree is based upon a negotiated settlement, the procedures and
7 methods used to quantify and describe the Navajo Nation's water rights in this Supplemental Decree
8 shall not be binding under the law of the case doctrine upon any other water right claimant, the State
9 of New Mexico, or the United States in the adjudication of other water rights in this case and should
10 not be relied upon as precedent under the *stare decisis* doctrine in any other water right adjudication
11 suit.

12 **9. JURISDICTION AFTER ENTRY OF DECREE.**

13 This Supplemental Decree is a final order under Rule 1-054(B) NMRA, and it may be
14 modified only pursuant to Rule 1-060(B) NMRA. This Court retains jurisdiction to interpret and
15 enforce this Supplemental Decree. Subject to the provisions of the Decree and this Supplemental
16 Decree, the State Engineer has authority under state law to administer water rights within, and to
17 supervise the apportionment, diversion and use of the surface and underground waters of, the San
18 Juan River Basin in New Mexico, including by appointment of watermasters, according to the orders
19 and decrees of the Court in the Stream Adjudication and the licenses and permits issued by the State
20 Engineer in the Basin.

21 **10. METERING OF WATER USES.**

22 As part of the metering and monitoring of water uses in the San Juan River Basin in New

1 Mexico, the Navajo Nation shall be responsible for metering and monitoring its uses of water under
2 this Supplemental Decree as follows:

3 (a) The Navajo Nation within two years from the date of entry of this
4 Supplemental Decree shall cause to be installed and maintained flumes, gages, stage
5 recorders, totalizing meters or other flow measuring devices on surface water and ground
6 water diversions within the physical drainage of the San Juan River Basin in New Mexico
7 made pursuant to the rights adjudicated by this Supplemental Decree: except, that diversions
8 may be estimated using technically sound methodologies where actual measurement of uses
9 is not practical for technical or economic reasons. The Navajo Nation shall be responsible
10 for rating all gages and for collecting the data necessary to reasonably account diversions and
11 depletions in the San Juan River Basin in New Mexico for administration by the State
12 Engineer of this Supplemental Decree.

13 (b) The Navajo Nation within two years from the date of entry of this
14 Supplemental Decree shall cause to be installed and maintained staff gages at Whiskey Lake,
15 Chuska Lake, Long Lake and Captain Tom Reservoir, and shall thereafter make observations
16 of the lake levels in these reservoirs each year near the beginning, middle and end of the
17 irrigation season. The Navajo Nation also shall maintain elevation, area and capacity data for
18 these reservoirs for the purpose of measuring the amounts of water in storage based on the
19 observed lake levels. The amounts of water in storage at other reservoirs may be estimated
20 using technically sound methodologies where actual measurement of storage is not practical
21 for technical or economic reasons.

22 (c) The New Mexico State Engineer shall be granted access to diversion and

1 storage data, and shall be allowed to inspect flow and storage measurement facilities and
2 gages upon reasonable request to the Navajo Nation, as may be necessary for the State
3 Engineer to administer the diversion and use of water from the San Juan River stream
4 system.

5 (d) The Navajo Nation beginning the year following the date of entry of this
6 Supplemental Decree shall during June or July each year conduct a field inventory of
7 irrigated acreage on Navajo lands in the San Juan River Basin in New Mexico for the
8 irrigation uses made pursuant to this Supplemental Decree, and shall provide the results of
9 the inventory to the New Mexico State Engineer within two weeks of completion of the
10 inventory. The Navajo Nation shall allow the State Engineer to participate, in cooperation
11 with the Navajo Nation, in conducting the acreage inventory. The Navajo Nation may use
12 technically sound methodologies to estimate acreage and crops irrigated on lands that are the
13 subject of this Supplemental Decree and that are not practical to field check every year for
14 economic reasons. Aerial photographs, satellite imagery, or other records or documentation
15 may be used in conjunction with field surveys to determine or verify lands irrigated in a
16 particular year.

17 (e) The Navajo Nation shall meter or estimate farm deliveries for irrigation uses
18 under the rights decreed herein using technically sound methods if the State Engineer or the
19 Court determines such information to be necessary for the State Engineer to administer water
20 rights in the San Juan River Basin in New Mexico.

21 **11. RECORDS OF WATER USE.**

22 The Navajo Nation shall within two years from the date of entry of this Supplemental Decree,

1 and annually thereafter, prepare and maintain detailed and accurate records of acres irrigated each
2 year and the annual diversions and depletions of water on all Navajo Nation lands , including lands
3 held in trust by the United States on behalf of the Navajo Nation and lands owned by the Navajo
4 Nation in fee, in the San Juan River Basin in New Mexico from San Juan River tributaries or
5 underground water sources pursuant to this Supplemental Decree, all stated separately as to each
6 source of water as necessary to allow for administration of this Supplemental Decree. The Navajo
7 Nation shall prepare and submit to the Secretary of the Interior and the New Mexico State Engineer
8 on or before October 1 of each year a report of its records and calculations of actual acreage irrigated
9 and diversions and depletions, by a methodology acceptable to the State Engineer, of San Juan River
10 Basin waters for the previous calendar year. In addition, the Navajo Nation's annual report shall
11 include, to the extent that it is available, information regarding stock ponds and irrigation reservoirs
12 that were capable of storing water during the previous calendar year stated separately by the San Juan
13 River drainage above the Chaco River confluence, the Chaco River drainage, the San Juan River
14 drainage between the Chaco River confluence and Four Corners, and the Chinle Wash drainage. The
15 records and calculations shall be segregated by each use specified in paragraphs 3 and 4 of this
16 Supplemental Decree. Diversions and depletions for livestock water uses pursuant to subparagraphs
17 3.A and 4.A, and for other water uses to be reported under this paragraph, may be estimated using
18 technically sound methodologies acceptable to the State Engineer where actual measurement of uses
19 is not practical for technical or economic reasons. The reports of the Navajo Nation prepared
20 pursuant to this paragraph also shall include documentation as to which rights adjudicated by the
21 Decree or by this Supplemental Decree are being used, if any, to offset depletions in excess of the
22 depletions limits described in subparagraphs 5(a) and 5(b) pursuant to water replacement plans

1 described in subparagraphs 12(d) or 12(e) of this Supplemental Decree.

2 **12. ADMINISTRATION.**

3 The authority of the Navajo Nation to administer the Nation's diversion, storage and use of
4 water under the rights adjudicated by this Supplemental Decree shall be as specified by paragraph 17
5 of the Decree. In addition to any otherwise applicable requirements, any change of place or purpose
6 of use or point of diversion of the uses described in paragraphs 3 and 4 of this Supplemental Decree
7 shall be subject to the following requirements:

8 (a) Any change of place of use or point of diversion of the stock uses described in
9 subparagraph 3.A.1 of this Supplemental Decree shall:

10 (1) be limited to within 1,000 feet of the original place of use or point of
11 diversion, respectively, as described in the US Survey;

12 (2) not relocate a storage dam or diversion to a point below the
13 confluence of the original water course with another water course;

14 (3) not be subject to the notice provisions of subparagraph 17(c)(1) of the
15 Decree;

16 (4) not be subject to paragraph 18 of the Decree;

17 (5) not be subject to paragraph 13 of this Supplemental Decree; and

18 (6) not be subject to the requirement that the Navajo Nation in its
19 administrative process described in paragraph 17(c) of the Decree consult with the
20 New Mexico State Engineer on proposed changes and potential impairment.

21 The Navajo Nation each year shall make a report to the State Engineer identifying changes of
22 place of use or points of diversion for stock uses. In addition, the purpose of use of stock

1 uses described in subparagraph 3.A.1 of this Supplemental Decree shall not be changed; and
2 any change in point of diversion or place of use shall not result in any increase in depletion
3 over and above the quantity of historic average annual depletion at the move-from location,
4 and shall be supplied from the same tributary water course or ground water source.

5 (b) Except as otherwise provided in subparagraph 3.B, any change of place or
6 purpose of use or point of diversion of the irrigation uses described in subparagraph 3.B of
7 this Supplemental Decree shall:

8 (1) comply with the provisions of paragraph 17(c) of the Decree;

9 (2) not result in any increase in depletion over and above the quantity of
10 historic average annual depletion at the move-from location; and

11 (3) be supplied from the same tributary water course or ground water
12 source.

13 (c) Any change of place or purpose of use or point of diversion of the uses
14 described in paragraph 4 of this Supplemental Decree shall comply with the provisions of
15 paragraph 17(e) of the Decree.

16 (d) If the average annual total combined at-site depletion in any of the drainages
17 identified in subparagraph 5(a) of this Supplemental Decree, excluding stock uses described in
18 subparagraphs 3.A.2 and 4.A.2 of this Supplemental Decree, exceeds in any period of ten
19 consecutive years the respective depletion limit for that drainage described by subparagraph
20 5(a), the Navajo Nation may offset any excess depletion for the drainage in accordance with a
21 replacement water plan approved by the New Mexico State Engineer. The replacement water
22 plan shall specify and schedule how the Navajo Nation will satisfy this offset requirement

1 annually by forbearing use of specific surface water rights in an amount equal to the amount
2 of excess at-site depletions. Such replacement plan shall only be required when the State
3 Engineer determines water is needed to meet the State of New Mexico's interstate compact
4 obligations or when the State Engineer determines a replacement plan is necessary to protect
5 existing water uses in New Mexico.

6 (c) If the average annual total combined depletion of San Juan River flow
7 exceeds in any period of ten consecutive years the depletion limit described by
8 subparagraph 5(b) of this Supplemental Decree, the Navajo Nation may offset any excess
9 river flow depletion impact at the locations of impact in accordance with a replacement
10 water plan approved by the New Mexico State Engineer. The replacement water plan
11 shall specify and schedule how the Navajo Nation will satisfy this offset requirement
12 annually by forbearing use of specific surface water rights in an amount necessary to
13 offset the excess river flow depletions. Such replacement plan shall only be required
14 when the State Engineer determines water is needed to meet the State of New Mexico's
15 interstate compact obligations or when the State Engineer determines a replacement plan
16 is necessary to protect existing water uses in New Mexico.

17
18 **13. NOTICE.**

19 In addition to any notice provisions under applicable law, at least 30 days prior to any change
20 in the place or purpose of use or point of diversion in the exercise of the water rights identified
21 herein, the Navajo Nation, acting through its Department of Water Resources, shall complete notice
22 of such change by publication in a newspaper of general circulation within the San Juan River Basin

1 in New Mexico once per week for three consecutive weeks and by letter to the New Mexico State
2 Engineer; except, that emergency replacement wells and emergency transfers for domestic and
3 sanitary purposes may be made with less than 30 days notice. Both such forms of notice shall
4 specify the proposed purpose and place of use, point of diversion, diversion rate, annual diversion
5 and depletion amounts, and source of water.

6 **IT IS SO ORDERED.**

7 
8 James J. Weensler
9 Presiding Judge