

DISTRICT COURT
SAN JUAN COUNTY NM

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

CV-75-184

Plaintiff,

HON. JAMES J. WECHSLER
PRESIDING JUDGE

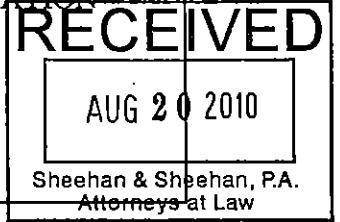
v.

SAN JUAN RIVER ADJUDICATION

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

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

Defendants.



**ORDER ESTABLISHING INITIAL PROCEDURES FOR ENTRY
OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE
WATER RIGHTS OF THE NAVAJO NATION**

On September 2, 2009, the United States of America ("United States"), the State of New Mexico *ex rel.* State Engineer ("State"), and the Navajo Nation (collectively, "Settling Parties") filed a Joint Motion for Order Governing Initial Procedures for Entry of Partial Final Judgment and Decree of the Water Rights of the Navajo Nation. The joint motion requests that the Court set forth the procedure for determining certain water rights of the Navajo Nation in accordance with the terms of the Settling Parties' Settlement Agreement.

After considering the report of the Special Master filed April 15, 2010, the objections to the report, and the supplemental briefing requested by the Court on May 27, 2010 regarding due process issues specific to the initial procedures to be applied in the Navajo *inter se* proceeding, the Court hereby determines that the Special Master's report establishes an efficient expedited *inter se* procedure that affords all claimants in the San Juan River Basin an opportunity to fully and fairly participate in the adjudication of the water rights of the Navajo Nation.

The Court therefore adopts the Special Master's analysis concluding that the procedures

stated in Rule 1-071.2 NMRA (approved provisionally on June 13, 2007 and currently in effect until June 8, 2011) will afford all claimants in the San Juan River Basin constitutionally adequate notice and a full and fair opportunity to participate in the Navajo *inter se* proceeding. The Court also incorporates herein the provisions of the Special Master's Proposed Order Directing the Commencement of an Expedited *Inter se* Proceeding for the Resolution of All Water Rights Claims of the Navajo Nation, with certain modifications. The Notice of Expedited *Inter se* Proceeding to Adjudicate the Water Rights of the Navajo Nation and Deadlines for Filing Notices of Intent to Participate, and attached Notice of Intent to Participate, will be finalized within ten working days of the submittal of all additional disclosures by the Settling Parties, as required by this order.

Background

On April 19, 2005, the Settling Parties signed a water rights settlement ("Settlement Agreement") resolving the claims of the Navajo Nation for use of San Juan River Basin water. The Settlement Agreement was presented to Congress during deliberation of the Northwestern New Mexico Rural Water Projects Act ("Settlement Act"), Title X, Subtitle B of the Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 (codified as amended in scattered sections of 43 U.S.C.). After the Settlement Act was signed into law on March 30, 2009, the Settling Parties requested that the Court establish an expedited procedure for adjudicating the water rights of the Navajo Nation in accordance with the Settlement Agreement and the Settlement Act.

Although a final version of the Settlement Agreement has not yet been filed with this Court, the Settling Parties have stated that they are revising the Settlement Agreement to conform to the Settlement Act. The Settling Parties have indicated that the revisions will not substantially alter the terms of the original agreement. Memorandum in Support of Joint Motion, Sept. 2, 2009, n.1.

After the responses to the Settling Parties' joint motion were filed, the Special Master conducted three hearings on the joint motion. These hearings facilitated an iterative revision and review process, allowing the parties to comment on the draft before the Special Master issued the final report.

Analysis by the Special Master

The Special Master analyzed the due process issues associated with notice and concluded that the notice procedures set forth in Rule 1-071.2 provide constitutionally sufficient due process because the procedures comply with the requirements set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The Special Master's other key conclusions are:

1. Courts maintain the authority to develop special procedures for unique situations, pursuant to Rule 1-016(C)(10) NMRA.
2. *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 197, 344 P.2d 943, 945-46 (1959), states that courts may implement a procedure of joining some claimants and adjudicating their rights before all claimants are formally joined to the adjudication.
3. Expedited *inter se* proceedings constitute an appropriate approach for ensuring the fair and efficient resolution of issues of basin-wide concern in adjudications.
4. Expedited *inter se* proceedings have been applied in several cases in New Mexico, in both state and federal court, including the water rights of the Jicarilla Apache Tribe in this adjudication (Partial Final Judgment and Decree filed February 4, 1999), the water rights of the Jicarilla Apache Tribe in the Rio Chama adjudication (*State v. Aragon*, No. CIV 7941 JC (D.N.M. Apr. 6, 1998), the water rights of the Acoma Pueblo and Laguna Pueblo in the Rio San Jose adjudication (*State ex rel. Office of State Eng'r v. Kerr-McGee Corp.*, Nos. CB-83-

190-CV & CV-83-220-CV (13th Jud. Dist. Court N.M. Dec. 9, 2004)); and the water rights of the Carlsbad Irrigation District in the Pecos River adjudication (*State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, 141 N.M. 1, 150 P.3d 375 (filed 2006)).

Objections to the Special Master's Report and Supplemental Briefing

Three parties filed objections to the Special Master's Report: Bloomfield Irrigation District and Gary Horner (together, "Horner") on April 29, 2010; San Juan Agricultural Water Users Association and Hammond Conservancy District (together, "Hammond") on April 30, 2010; and the Settling Parties, also on April 30, 2010. Although the Settling Parties objected to several characterizations in the Special Master's report, they agree generally with the report and specifically with the provisions of the Special Master's proposed order.

Many of Horner and Hammond's objections address the merits of the Settlement Agreement and will not be addressed here because they are irrelevant to the issue of the procedures to be used in determining the water rights of the Navajo Nation. The essence of Horner and Hammond's procedural concerns is that any deviation from adjudication procedures as traditionally applied in most New Mexico adjudications comprises a due process violation, particularly for claimants not yet formally joined to the case. In Horner and Hammond's view, the proposed Navajo *inter se* proceeding is an unconstitutional shortcut that will sidestep full and fair participation by claimants. Horner and Hammond further suggest that the only fair and legal way to proceed is for the State to conduct a hydrographic survey as specified in NMSA 1978, Sections 72-4-13 (1982) and 72-4-15 (1907) and that all claimants be joined pursuant to Rule 1-004 NMRA. Hammond and Horner also raise practical concerns about the content of the notice of the proceeding to be served on claimants. Hammond suggests that the form of notice be finalized only after the required additional disclosures

have been filed by the Settling Parties. Horner states that the proposed notice fails to sufficiently inform claimants of the scope and effect of the Navajo Settlement and that the proposed notice of intent to participate, a form that participating claimants must submit, imposes an unfair burden upon claimants.

On May 7, 2010, this Court conducted a hearing on the objections to the Special Master's report. The hearing focused upon due process concerns related to the Special Master's recommendation that all claimants in the basin receive notice of the Navajo *inter se* proceeding pursuant to Rule 1-071.2, rather than be formally joined as parties to the San Juan River Basin adjudication. Because the recommendation to proceed by serving notice rather than joining all parties is in large measure a calculation rooted in what is practical and reasonable under the circumstances, this Court requested that the parties provide supplemental briefing to further probe the practical implications of the two approaches. The Jicarilla Apache Nation, the San Juan Water Commission, BHP Navajo Coal, Horner, Hammond, and the Settling Parties filed supplemental briefs.

The Jicarilla Apache Nation, the Settling Parties, and BHP Navajo Coal support the Special Master's recommendation that all claimants in the San Juan River Basin receive notice of the Navajo *inter se* proceeding through the notice procedure describes by Rule 1-071.2. The Jicarilla Apache Nation referenced thirteen other stream adjudications in Arizona, Colorado, and New Mexico in which similar notice procedures were applied and specifically discussed the success and cost effectiveness of those procedures in the Pecos River and Jemez River adjudications. *See Lewis*, 2007-NMCA-008; *United States v. Abousleman*, U.S District Court No. 83-cv-104 MV. BHP Navajo Coal emphasizes the delay implicated by effecting formal joinder of all claimants, as opposed to providing

notice of the Navajo *inter se* proceeding.

In its supplemental brief filed July 6, 2010, Hammond asserts that there is no difference between the practical problems with providing notice of the Navajo *inter se* proceeding and the practical problems with joining as defendants all claimants who can be identified from the best available records. Hammond also states that execution of the respective notice and joinder processes requires essentially the same resources. The San Juan Water Commission states that unless joinder is substantially more costly than notice, formal joinder of all claimants is the preferable approach because subsequent notices will be necessary for other basin-wide proceedings.

Resources Necessary to Provide Notice to All Affected Parties

In their supplemental brief filed July 2, 2010, the Settling Parties contrast the resources necessary to effect notice on all potential claimants in the basin pursuant to Rule 1-071.2, with the resources necessary to effect service and joinder. In summary, the analysis indicates that notice pursuant to Rule 1-071.2 can be accomplished in about five months time with existing personnel resources and approximately \$22,000 to \$27,000 in publication, paper, and mailing costs. Joinder, in stark contrast, is estimated to require eight years, ten additional full-time employees, and cost \$150,000 to mail the service packages and personally serve claimants who refuse mail service.

In the Settling Parties' analysis, the key difference between the two approaches is completion of the hydrographic survey, a time and resource intensive technical inventory of the water uses and claimants in the San Juan River Basin. Under its current procedure for adjudicating subfiles in the San Juan River Basin, the State relies upon the hydrographic survey process in order to identify claimants with some degree of certainty prior to joinder. Thus, claimants are joined as parties to the adjudication only after water rights and ownership have been determined by the hydrographic survey.

The process described by Rule 1-071.2, which allows for an expedited approach by relying on existing sources of data, casts a broader net. For example, the county assessor's records referred to in this order will identify landowners in San Juan, McKinley, Rio Arriba, and Sandoval Counties. Many of these individuals will not own a water right. As a result, the service list compiled from these records is likely to be over-inclusive in comparison to a service list resulting from a hydrographic survey.

The Settling Parties' resource analysis leaves little doubt that formal service and joinder using information gathered through a hydrographic survey is not a viable option for effecting notice in any timely sense. In addition, initiating joinder without identifying claimants and water right information through a hydrographic survey implicates several problems noted by the Settling Parties:

1. Undue burden for persons who do not claim water rights - traditional joinder through service of process under Rule 1-003 NMRA and Rule 1-004 will burden those served who do not claim water rights, but are joined to the adjudication as defendants and ordered to file a responsive pleading. The process of Rule 1-071.2, in contrast, will apply only to claimants, and only those who wish to participate need file a response with the Court.
2. Difficulty defaulting non-responders - parties served with a summons will be required to file a responsive pleading or be subject to default. Under Section III(C) of the Scheduling Order Governing Adjudication of Irrigation Water Rights in the La Plata River Section, filed March 30, 2006, claimants who fail to respond are adjudicated to the water right initially identified through the State's hydrographic survey. Without the hydrographic survey, water rights data will not be available. Default proceedings

would therefore be at high risk for languishing for many years and would be time consuming and resource intensive to resurrect at a later time, possibly many years later.

3. Creation of additional, unnecessary paperwork for the State and the Court - if joined as defendants, many individuals would likely file documents with the State and the Court and pursue resolution of their own water rights. At this point in time, the State has not yet compiled water right information on most water rights in the basin and would be unable to respond to either general inquiries or specific requests that individual water rights be adjudicated.
4. Default of non-claimants - as noted above, pursuing joinder based upon existing records, but without a current hydrographic survey, is likely to capture many persons who do not claim water rights. Joining these individuals as defendants to the adjudication suit, and then defaulting them for not responding, implicates a significant unnecessary burden for these individuals, as well as collateral paperwork for both the Court and the State.
5. Time and expense of future ownership update efforts - if basin-wide joinder is ordered to occur on an expedited basis, the State will be required to expend significant resources updating ownership and water right information as the adjudication of subfiles progresses.

After considering the Special Master's legal analysis, the parties' supplemental briefing, and the lack of objection on the part of any party to the Settling Parties' approach to identifying claimants, the Court adopts the Special Master's analysis of the due process issues in this case. As noted by the

Special Master, *Mullane* embodies the principles that must govern the Navajo *inter se* proceeding. In *Mullane*, the United States Supreme Court stated that “an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” 339 U.S. at 314; see *Uhden v. N.M. Oil Conservation Comm’n*, 112 N.M. 528, 530, 817 P.2d 721, 723 (1991) (stating that New Mexico case law reflects the requirements of fairness and reasonableness stated in *Mullane*).

The provisions of Rule 1-071.2 set forth a notice procedure that is fair and reasonably calculated to apprise potential claimants of the Navajo *inter se* proceeding. Moreover, the detailed procedural requirements for identifying potential claimants are calculated to apprise interested parties of the Navajo *inter se* proceeding and afford claimants an opportunity to participate. Section III(B)(1) of this order enumerates several groups of existing public records that the Settling Parties must consult in order to identify all persons who should be served with notice. These records include the State’s existing hydrographic survey records and the county assessor’s records from San Juan, McKinley, Rio Arriba, and Sandoval Counties. Section III(B)(2)(a) of this order also requires that notice of the Navajo *inter se* proceeding be published in a number of publications serving both the San Juan River Basin area and other areas of New Mexico. Section III(B)(2)(b) directs the Settling Parties to conduct five public meetings in defined areas throughout the San Juan River Basin and publicize these meetings both in print and by radio advertisement.

In addition, the notice itself describes the Navajo *inter se* proceeding and emphasizes in clear language that the proceeding is the only opportunity for claimants to participate in the determination of the water rights of the Navajo Nation. The final notice will describe the terms of the Settlement

Agreement, the location of additional documents providing background information, and the time and location of the public meetings. It will further instruct claimants on how to participate and include the Notice of Intent to Participate in Navajo *Inter se* form. Objectors have pointed to no persuasive reason that the notice itself proposed by the Special Master provides inadequate information, ineffectively informs all likely claimants, or otherwise affords insufficient process to potential participants in the Navajo *inter se* proceeding.

However, as suggested by Hammond in its objection to the Special Master's report filed April 30, 2010, this notice should only be finalized after the Settling Parties have filed the final Settlement Agreement, and after the other additional disclosures required by this order have been made. An additional ten-day period to finalize the notice will provide the opportunity to address any matters that may need to be included in the notice.

This Court therefore concludes that resolution of all water rights claims of the Navajo Nation in the San Juan River Basin, as between the State and the Navajo Nation, and as among the Navajo Nation and all other water rights claimants in the basin, will promote judicial efficiency and the expeditious completion of this adjudication by 1) enabling the Court to expeditiously determine whether to adjudicate the water rights of the Navajo Nation in the manner proposed by the Settlement Agreement, in the context of a proceeding that is binding on all claimants in the basin; and 2) eliminating the necessity, should the settlement not be approved, for the Court to resolve the same or similar issues in separate proceedings, with a consequent reduction in costs and delay for all parties.

The Court further concludes that notice under Rule 1-071.2, rather than formal joinder of all claimants, is the better approach to serve notice of the Navajo *inter se* proceeding.

Accordingly, IT IS ORDERED that:

I - Authorization of Expedited *Inter se* Proceeding; Scope of Proceeding; Severance of Settlement Issues

- A. All water rights claims of the Navajo Nation throughout the San Juan River Basin, both as between the Navajo Nation and the State and as among the Navajo Nation and all other water rights claimants, shall be resolved in an expedited *inter se* proceeding pursuant to Rule 1-071.2. The Navajo *inter se* proceeding shall be deemed to have commenced upon entry of this order.
- B. In the Navajo *inter se* proceeding, the Court shall (1) determine whether to approve the settlement of the Navajo Nation's water rights claims by entering the two proposed partial final decrees attached as Appendix 1 and Appendix 2 to the Settlement Agreement, and (2) if the settlement is not approved, resolve the water rights claims of the Navajo Nation on the merits.
- C. Pursuant to Rule 1-042 NMRA, the issue of whether the Court should approve the settlement of the Navajo Nation's claims is severed (the "Severed Issue") from all other issues in the proceeding, and all discovery, dispositive motions, and other matters not related to the Severed Issue are stayed pending further order of this Court. In addition, all discovery and motion practice related to the Severed Issue are stayed, unless leave is obtained from this Court, pending entry of a Rule 1-016 Scheduling Order adopting a discovery and case management plan for resolution of the Severed Issue.

II - Required Disclosures by Settling Parties

- A. Disclosure of Terms of Settlement - No later than December 31, 2010, the Settling Parties shall file a motion (the "Settlement Motion") requesting that the Court adjudicate the water rights of the Navajo Nation in accordance with the two proposed partial final decrees attached to the Settlement Agreement as Appendix 1 and Appendix 2 . The complete Settlement Agreement, including the Appendix 1 and Appendix 2 decrees, shall be attached to the Settlement Motion, and the Settling Parties shall, when filing the motion, provide an electronic copy to the court clerk in PDF format for posting on the Court's website. The Settling Parties shall not serve the Settlement Motion, but shall provide courtesy copies to those persons who filed responses to the joint motion. Notice of the filing of the Settlement Motion and of the Navajo *inter se* proceeding shall be provided in accordance with Section III of this order, "Notice of Navajo *inter se* proceeding." Objections or other responses to the Settlement Motion shall be filed in accordance with Section V of this order, "Scheduling and Planning Conference for Resolution of Severed Issue."
- B. Additional Disclosures by United States and Navajo Nation - To assist the Court and other water rights claimants in evaluating the settlement, the United States and the Navajo Nation shall file with the court clerk the following information (the "Additional Disclosures") concerning the existing and historic uses of water by the Navajo Nation and its claims for future use.
1. On or before December 31, 2010, the United States shall file a hydrographic survey summarizing the existing and historic water uses of the Navajo Nation

related to the water rights to be awarded the Navajo Nation pursuant to the Appendix 1 decree. The hydrographic survey shall (a) be compiled from existing information concerning the water rights described in the Appendix 1 decree; (b) contain one or more maps depicting the irrigated acreage related to those water rights; (c) contain a good faith estimate, in acre-feet per year by type of use, of the water rights to be awarded pursuant to the proposed Appendix 2 decree; and (d) contain an affirmative statement that none of the water rights to be awarded pursuant to the Appendix 2 decree is predicated upon future, as opposed to historic and existing, uses. When filing the hydrographic survey, the United States shall also provide the court clerk with an electronic copy.

2. On or before December 31, 2010, the United States shall file a Statement of Claim summarizing the water rights claimed on behalf of the Navajo Nation throughout the San Juan River Basin should the settlement fail. The Statement of Claim shall, (a) for all existing or currently proposed irrigation projects on the main-stem of the San Juan River, identify the water rights claimed by the Navajo Nation by source, point of diversion, priority, place of use, and quantity of water; state whether the claim is based on federal or state law; and, if based on federal law, state whether the claim is based on historic, existing, or future use; and (b) identify all other water rights claimed in the basin in the aggregate, without reference to the point of diversion, by type of use and estimated depletion amount. When filing the Statement of Claim, the United

States shall also provide the court clerk with an electronic copy.

3. If this Court does not approve the proposed settlement decrees, the United States and the Navajo Nation shall be permitted to file more detailed statements concerning the water rights claimed by the Navajo Nation under federal and state law before this Court schedules proceedings for the resolution of the Navajo Nation's claims on the merits.

- C. Notice - The Settlement Motion, including the Settlement Agreements and the Appendix 1 and 2 decrees, and the Additional Disclosures (1) shall be posted on the website of the Office of the State Engineer, and (2) shall be available as hard copies for inspection and copying at document repositories located at:

Eleventh Judicial District Court
103 South Oliver Drive
Aztec, NM 87410

Office of the State Engineer
100 South Oliver Drive
Aztec, NM 87410

Bureau of Indian Affairs
Office of Real Estate Services
P.O. Box 328
Federal Building 2002
Crownpoint, NM 87313

Bureau of Indian Affairs
Shiprock Agency
P.O. Box 966
Highway 491
Shiprock, NM 87420

III. Notice of Navajo *Inter se* Proceeding

- A. A draft of the Notice of Navajo *inter se* proceeding is attached to this order as Exhibit A. A draft form titled Notice of Intent to Participate is attached as Exhibit B. The Notice of Navajo *inter se* proceeding and the Notice of Intent to Participate shall be finalized after all additional disclosures described in Section II of this order, “Required Disclosures by Settling Parties,” have been filed with the Court. After the filing of all required additional disclosures, both documents will be served on the parties. Parties shall have ten (10) days to file comments and suggestions to both the Notice of Navajo *inter se* proceeding and the Notice of Intent to Participate.
- B. The Notice of Navajo *inter se* proceeding and the Settlement Motion shall be provided to all water rights claimants in the San Juan Basin within sixty days after the Additional Disclosures are filed. The Notice shall be provided in accordance with the following procedures:
 1. The Settling Parties shall mail by regular first-class mail (i) the final Notice of Expedited Navajo *Inter Se* Proceeding, together with (ii) a form Notice of Intent to Participate in Navajo *Inter Se* Proceeding to all persons who may be claiming water rights in the San Juan Basin whose identity can reasonably be ascertained from the following records:
 - (a) Existing hydrographic survey and court records for this adjudication;
 - (b) The respective public records of the San Juan, McKinley, Rio Arriba, and Sandoval County Assessors;
 - (c) The public records of the State Engineer; and

(d) The respective public records of irrigation districts, acequias, water conservancy districts, and other water associations or commissions within the San Juan Basin.

2. The Notice of Navajo *inter se* proceeding and of the deadline for filing Notices of Intent to Participate shall also be given by publication and at public meetings. Specifically:

(a) No later than sixty days after the filing of the Additional Disclosures, the Settling Parties shall publish the Notice of Navajo *inter se* proceeding, pursuant to NMSA 1978, Section 14-11-10 (1978), once a week for four consecutive weeks in the Navajo Times, the Gallup Independent, the Farmington Daily Times, the Rio Rancho Observer, the Rio Grande Sun, and the Albuquerque Journal. Publication shall serve as notification to those water rights claimants who were not known to the Settling Parties and claimants whose addresses could not be determined after the exercise of reasonable diligence as described in Section III (B)(1) above. Publication shall also notify claimants of the times and location of the public meetings described in paragraph III(B)(2)(b) below. In conjunction with the certification required by Section III(B)(3) below, the Settling Parties shall file with the Court affidavits of publication from the publishers, managers, or agents of the aforementioned newspapers.

(b) Not later than 120 days after the filing of the Additional Disclosures,

the Settling Parties shall hold one public meeting within each of the following locations, for a total of five public meetings: (1) the city of Farmington, (2) the Shiprock Chapter of the Navajo Nation, (3) the town of Aztec, (4) the town of Bloomfield, and (5) the Crownpoint Chapter of the Navajo Nation. The Settling Parties shall publicize the public meetings by purchasing a quarter-page advertisement or larger once a week for three consecutive weeks in the Gallup Independent, the Farmington Daily Times, and the Navajo Times. The first advertisement shall occur no later than two weeks before the first public meeting. The advertisements shall describe the purpose of the public meetings and shall set forth the times, dates, and locations of the five meetings. Furthermore, the Settling Parties shall publicize the public meetings by purchasing a 30-second radio advertisement at least three times a day on the day before and the day of each public meeting to air on at least two radio broadcasting stations in the area of the public meetings.

3. Upon completion of the forgoing notice requirements, the Settling Parties shall file with the Court a certification describing the fulfillment of the service provisions of this order.
4. No later than 120 days after the filing of the Additional Disclosures, the Special Master shall conduct a status and scheduling conference during which
 - (a) the Settling Parties shall report to the Special Master concerning the

number of returned notices, the likely reasons for the returns, and the follow-up steps taken by the Settling Parties, and (b) the Special Master will determine whether additional steps should be taken to ensure compliance with Rule 1-071.2(C).

IV - Deadline for Filing of Notice of Intent to Participate; Consequences of Untimely Filing

- A. No later than 150 days after the filing of the Additional Disclosures, all water rights claimants who desire to object to the Navajo Settlement or otherwise participate in the Navajo *inter se* proceeding shall file a Notice of Intent to Participate with the court clerk at the following address:

Clerk of the Eleventh Judicial District Court
San Juan Water Rights Adjudication
103 South Oliver Drive
Aztec, NM 87410

- B. All persons who file a Notice of Intent to Participate will be deemed parties to the Navajo *inter se* proceeding, will be included on the service list for the proceeding, and must attend the scheduling conference to be held pursuant to Section V(a) below. Any person who fails to file a Notice of Intent to Participate by the required deadline will be prohibited from participating in this proceeding unless otherwise ordered by this Court.
- C. All water rights claimants in the San Juan River Basin will be bound by all orders entered in the Navajo *inter se* proceeding regardless of whether they have been served and joined as defendants in this adjudication or participated in or received actual notice of the Navajo *inter se* proceeding.

V - Scheduling and Planning Conference for Resolution of Severed Issue

- A. Promptly after the deadline for filing Notices of Intent to Participate has expired, the Special Master shall conduct a Rule 1-016 Scheduling Conference for the purpose of scheduling and planning proceedings for resolution of the Severed Issue. Attendance at the scheduling conference by all persons, or their counsel, who filed Notices of Intent to Participate is mandatory. Any person who fails to attend will be prohibited from participating in the Navajo *inter se* proceeding unless otherwise ordered by this Court. The deadline for filing objections or other responses to the Settlement Motion will be set at the Scheduling Conference.
- B. The Scheduling Order to be entered by the Special Master following the Scheduling Conference shall authorize discovery relevant to the Severed Issue, but the order shall impose strict limits on the amount, types, and duration of discovery and shall allow no more discovery than is reasonably necessary to enable persons who filed Notices of Intent to Participate to evaluate the merits of the settlement. All discovery disputes shall be expeditiously resolved by the Special Master.
- C. Promptly after expiration of the period allowed for discovery relevant to the Severed Issue, the Settling Parties may file a motion pursuant to Rule 1-042 requesting that prior to a hearing on any other dispositive issue, this Court conduct a separate hearing to consider whether to enter the Appendix 1 decree prior to completion of the supplemental hydrographic survey described in paragraph 4.2 of the Settlement Agreement. If this Court determines that grounds for a separate hearing exist, it shall conduct a hearing to determine whether to enter the Appendix 1 decree prior to the

hearing or whether to enter the Appendix 2 decree.

- D. At the Scheduling Conference to be held pursuant to Section V(a) of this order, the Special Master shall set a deadline for the United States and the State to file the supplemental hydrographic survey described in paragraph 4.2 of the Settlement Agreement. Any disagreements between the United States and the State over the content of the survey that have not been resolved by the deadline shall be described in the survey.

VI - Other Matters

- A. The Additional Disclosures required by this order shall be in lieu of the hydrographic survey mandated by paragraph 2 of this Court's Scheduling Order on Indian Water Rights Claims, filed August 20, 2004. For that reason, paragraph 2 of that August 20, 2004 order is vacated.
- B. If this Court does not approve the Navajo Settlement by entering the Appendix 1 and Appendix 2 decrees, it promptly thereafter will conduct a Rule 1-016 scheduling conference to determine the procedure for resolving the Navajo Nation's claims on the merits. At that conference, this Court will consider whether, and in what manner, any supplemental notice should be given of those proceedings to water rights claimants in the basin.

IT IS SO ORDERED.

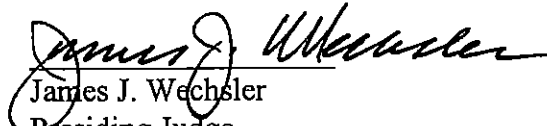

James J. Wechsler
Presiding Judge

EXHIBIT A

**DRAFT NOTICE OF EXPEDITED *INTER SE*
PROCEEDING TO ADJUDICATE THE WATER
RIGHTS OF THE NAVAJO NATION AND DEADLINE FOR
FILING NOTICES OF INTENT TO PARTICIPATE**

Exhibit A

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

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

**NOTICE OF EXPEDITED *INTER SE* PROCEEDING
TO ADJUDICATE THE WATER RIGHTS OF THE NAVAJO NATION
AND DEADLINE FOR FILING NOTICES OF INTENT TO PARTICIPATE**

To: ALL PERSONS AND ENTITIES CLAIMING WATER RIGHTS IN THE SAN JUAN RIVER SYSTEM AND THE SAN JUAN RIVER UNDERGROUND WATER BASIN WITHIN THE STATE OF NEW MEXICO, INCLUDING PERSONS PREVIOUSLY JOINED AS DEFENDANTS IN THE ABOVE-CAPTIONED ACTION, AND ALL KNOWN AND UNKNOWN CLAIMANTS OF INTEREST

YOU ARE HEREBY NOTIFIED that the Eleventh Judicial District Court for the State of New Mexico (the "Court") has ordered commencement of an expedited *inter se* proceeding to adjudicate all of the water rights claims of the Navajo Nation within the San Juan River Basin in New Mexico ("Navajo *Inter Se*"). (An "*inter se*" proceeding allows all water rights claimants to object to the water right of another claimant. This usually occurs toward the end of the adjudication, but here the Court proposes to hear this matter before all water rights claims have been adjudicated; therefore, this *inter se* proceeding is "expedited." This is the same process that was utilized for the consideration of the Jicarilla Apache settlement.) The Navajo *Inter Se* will result in entry by the Court of a final adjudication decree or decrees that will be final and binding on all others claiming water rights within the San Juan River System and the San Juan River Underground Water Basin in New Mexico ("San Juan River Basin"), whether the Navajo claims are ultimately decided by settlement or by litigation. This Notice states the deadline established by the Court for all others claiming water rights within the San Juan River Basin to file a notice of intent to participate in the Navajo *Inter Se* ("Notice of Intent to Participate").

PLEASE READ THIS NOTICE CAREFULLY. IT DESCRIBES THE ONLY OPPORTUNITY YOU WILL HAVE TO PARTICIPATE IN THE NAVAJO *INTER SE*.

This matter has come before the Court following execution of a Settlement Agreement (the "Settlement Agreement") by the Navajo Nation, the State of New Mexico on the relation of the State Engineer ("State"), and the United States of America ("United States") (collectively "the Settling

Exhibit A

Parties”). Under the terms of the Settlement Agreement all of the water rights of the Navajo Nation within the San Juan River Basin would be settled and finally determined by entry by the Court of two proposed adjudication decrees, the Appendix 1 Decree and the Appendix 2 Decree, attached to the Settlement Agreement. The Court has ordered that settlement of the Navajo claims as proposed by the Settlement Agreement be heard first and therefore has severed the issue of settlement (“Severed Issue”) from all other issues in the Navajo *Inter Se*. If determination of the Severed Issue results in the Court’s entry of the Appendix 1 and 2 Decrees, whether entered separately or jointly, the Navajo Nation’s water rights in the San Juan River Basin will be fully and finally adjudicated and no further proceeding will be required. If the Court does not enter the proposed decrees and the settlement fails, the Navajo *Inter Se* will continue and the Court will allow the Navajo Nation and the United States to file litigation complaints asserting claims to the waters of the San Juan River Basin and those claims will be resolved among all parties and claimants within the San Juan River Basin.

If you own water rights in the San Juan River Basin, you have the right to file a Notice of Intent to Participate in the Navajo *Inter Se*, including determination of the Severed Issue, but you must exercise that right in the manner, and within the deadline, established by the Court or you will be barred from further participation in the Navajo *Inter Se*. This is the only notice you will receive of your right to participate in the Navajo *Inter Se*. The Court has established _____ as the deadline for filing a Notice of Intent to Participate. If you do not file a Notice of Intent to Participate you will be bound by the determination of the Court, even if the terms of any decree(s) entered by the Court vary from the terms of the proposed Appendix 1 and 2 Decrees.

Summary of the Proceedings:

In 1975, the State of New Mexico commenced a general stream adjudication to determine all surface and underground water rights in the San Juan River Basin. In response, the United States filed a Supplemental Answer making water rights claims on behalf of the Navajo Nation and other tribes asserting the right to use, divert and impound sufficient ground and surface water to satisfy the present and future needs of the tribes for irrigation, domestic, industrial, aesthetic, recreational, streamflow and other purposes within the San Juan River Basin. The rights of the Jicarilla Apache Nation were resolved by a negotiated settlement approved by the Court in 1999. In 1997, the Navajo Nation and the State of New Mexico entered into settlement discussions and in 2005, the State and the Navajo Nation signed the Settlement Agreement. In 2009, the United States Congress enacted the Northwestern New Mexico Rural Water Projects Act (“Settlement Act”), Title X, Subtitle B of the Omnibus Public Land Management Act of 2009, Public Law 111-11. The Settlement Act authorizes the Secretary of the Interior to sign the Settlement Agreement, which calls for the Settling Parties to move the Court to enter the proposed Appendix 1 and Appendix 2 Decrees setting forth all of the Navajo Nation’s water rights in the San Juan River Basin in New Mexico.

Summary of Navajo Water Rights Proposed by Settlement:

Under the Settlement Agreement, most of the Navajo Nation’s water rights would be recognized by entry by the Court of the proposed Appendix 1 Decree. The Appendix 1 Decree would adjudicate to the Navajo Nation reserved water rights whose source of supply is from the San Juan River Basin for a total diversion and use of 606,660 acre-feet per year (afy) or the quantity of water necessary to supply a total depletion of 325,670 afy, whichever is less, for the following uses: Navajo Indian Irrigation Project; Fruitland-Cambridge Irrigation Project; Hogback-Cudei Irrigation Project; Navajo-Gallup Water Supply Project; Animas-La Plata Project; San Juan River municipal/industrial uses; and

Exhibit A

reserved ground water uses up to 2,000 afy. The locations of all surface water uses may be viewed on hydrographic survey maps described below. Pursuant to the terms of the proposed Appendix 1 Decree, these rights will be adjudicated a priority date of June 1, 1868; however, for purposes of priority administration, the Navajo Nation has agreed that the uses served by projects built by the United States shall be administered with the priorities of State Engineer Permits for those projects. Consequently, of the total diversion and depletion amounts stated above, the following more junior priority dates would apply: 1955 for a diversion of 530,650 afy and depletion of 290,780 afy for the Navajo Indian Irrigation Project and the Navajo-Gallup Water Supply Project; and 1956 for a diversion of 4,680 afy and a depletion of 2,340 afy for the Animas-La Plata Project. Of the total, a maximum diversion of 71,330 afy and depletion of 32,550 afy would be administered with the senior priority date of 1868 for the Hogback-Cudeii and Fruitland-Cambridge Irrigation Projects, San Juan River municipal/industrial uses, and reserved ground water uses up to 2,000 afy. In addition, the Navajo Nation would be subject to certain restrictions on the use of its water rights designed to protect other water users in the San Juan River Basin.

The Settlement Agreement also calls for entry of the Appendix 2 Decree, which would adjudicate to the Navajo Nation additional water rights based on historic and existing stock, irrigation and recreational uses whose source of supply is from groundwater or ephemeral surface water generally located away from the San Juan River. Because these additional water rights are made up of numerous stock ponds and ephemeral surface water irrigation spread across Navajo lands in the San Juan River Basin, a lengthy Hydrographic Survey Report is currently being prepared by the United States in a manner acceptable to the New Mexico State Engineer. Until the Hydrographic Survey Report is completed, the precise location and other elements of these additional rights will not be available. Nonetheless, in order to provide notice of the maximum potential depletion quantity of these additional rights, the United States estimates a total potential at-site depletion of up to 37,355 afy, consisting of 31,255 afy for irrigation, mostly from runoff from the Chuska Mountains, and 6,100 afy for livestock uses at stock ponds and tanks scattered across Navajo lands within the San Juan River Basin. The general locations of these uses may be viewed on preliminary hydrographic survey maps, as described below. The Settling Parties believe that actual depletions on the San Juan River caused by exercise of these additional rights will be substantially less than the United States' estimate provided above. For a more detailed discussion of the factors limiting the effects of these rights, please see the Detailed Settlement Summary at the locations described below.

The above summary provides only a short description of the terms and conditions of the Settlement Agreement and of the proposed decrees. For a more detailed explanation of the settlement or to review all the Settlement documents, please see the information referenced below under "For further information / Settlement Documents."

Rights and Options of Water Right Claimants:

If you own water rights in the San Juan River Basin, you have the following rights and options:

1. You may do nothing. If you do not wish to file a Notice of Intent to Participate, you do not have to take any further action. Whether or not you file a Notice of Intent to Participate, you will be bound by the adjudication decree or decrees ultimately entered by the Court in the Navajo *Inter Se*, even though terms of the decree or decrees may be different from the terms of the decrees proposed by the Settlement Agreement.

Exhibit A

- 2. You may file a Notice of Intent to Participate. If you wish to participate, you or your attorney must file a Notice of Intent to Participate with the Court Clerk for the Eleventh Judicial District Court, 103 South Oliver Driver, Aztec, NM 87410, on or before _____. There is no fee for filing a Notice of Intent to Participate. You may, but are not required to, be represented by an attorney.

A Notice of Intent to Participate must include the following information: (a) name of the persons submitting the notice; (b) mailing address; (c) telephone number; (d) email address (if any); and (e) description of ownership of water right in the basin or other statement of legal right to participate. Persons who do not provide all of the required information will be subject to dismissal. For convenience of those wishing to participate, a form of "Notice of Intent to Participate in the Navajo *Inter Se*" is [for the publication: available from the locations or website identified below] [for the mailed notice: is attached hereto.] The form may be filled out and filed with the Court.

IF YOU FILE A NOTICE OF INTENT TO PARTICIPATE YOU ARE AGREEING TO PARTICIPATE IN THE NAVAJO *INTER SE*. YOU WILL BE REQUIRED TO ATTEND OR HAVE YOUR LEGAL COUNSEL ATTEND ON YOUR BEHALF A MANDATORY PRE-HEARING SCHEDULING CONFERENCE TO BE HELD BEFORE THE COURT AT _____ ON _____ [include time]. If you have an objection to the proposed settlement decrees, a deadline for you to file your objection will be set at the scheduling conference. Further proceedings also will be scheduled at that scheduling conference.

Public Meetings:

The United States, the State and the Navajo Nation will be hosting a series of public meetings regarding the Settlement Agreement and the proposed decrees to adjudicate the Navajo Nation's water rights in the San Juan River Basin. The following is a list of times, dates and locations of the meetings:

<u>Date:</u>	<u>Time:</u>	<u>Location:</u>
_____		Farmington
_____		Shiprock
_____		Aztec
_____		Bloomfield
_____		Crownpoint

For further information / Settlement Documents:

This Notice provides only a brief summary of the water rights and settlement terms proposed to be decreed by the Court under the Settlement Agreement. Copies of the Settlement Agreement, the proposed Appendix 1 Decree, the proposed Appendix 2 Decree and the Settlement Act are available for you to review at the locations stated below. In addition, a Detailed Summary of the Navajo Settlement Water Rights is available for inspection at the same locations. Additional background information includes: (1) a hydrographic survey report and maps of existing and historic water uses of the rights described in the Appendix 1 Decree; (2) a preliminary hydrographic survey report and maps of existing and historic water uses of the rights described in the Appendix 2 Decree; and (3) a

Exhibit A

Statement of Claims filed by the United States on behalf of the Navajo Nation summarizing litigation claims that they would pursue if the Settlement Agreement fails.

Eleventh Judicial District Court
103 South Oliver Drive
Aztec, NM 87410

Office of the State Engineer
100 South Oliver Drive
Aztec, NM 87410

Bureau of Indian Affairs
Eastern Navajo Agency
Office of Real Estate Services
P. O. Box 328
(Federal Building 2002)
Crownpoint, NM 87313

Bureau of Indian Affairs
Shiprock Agency
P. O. Box 966
(Highway 491, building is behind
First National Bank Building)
Shiprock, NM 87420

The Settlement Agreement, the proposed Appendix 1 Decree, the proposed Appendix 2 Decree, the Settlement Act and the Detailed Summary of the Navajo Settlement Water Rights are also available for review at the Eleventh Judicial District Court's website (look under Navajo Settlement):

<http://sjrba.11thjdc.com/>

These documents are also available for review at the State Engineer's website at:

http://www.ose.state.nm.us/legal_ose_proposed_settlements_sj.html

Information explaining the Navajo *Inter Se* and how to file a Notice of Intent to Participate may be obtained from the Joe M. Stell Water Ombudsman Program at the Utton Transboundary Center of the University of New Mexico School of Law. You may call the toll-free Water Adjudication Helpline at 1-866-822-6134 (press 1). Leave your name, phone number, and question. They will attempt to call you back by the next business day. Additional information may be found at the Center's website at:

http://uttoncenter.unm.edu/ombudsman_3.html

WELDON J. NEFF
COURT CLERK

By: _____
Deputy

EXHIBIT B

**DRAFT FORM: NOTICE OF INTENT TO PARTICIPATE
IN NAVAJO *INTER SE***

Exhibit B

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

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

Plaintiff,

v.

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

Defendants,

CV-75-184

HON. JAMES J. WECHSLER
PRESIDING JUDGE

SAN JUAN RIVER
ADJUDICATION

Claims of Navajo Nation
Case No: AB-007-1

NOTICE OF INTENT TO PARTICIPATE IN NAVAJO INTER SE

The undersigned desires to participate in the adjudication of the water rights in the San Juan Basin claimed by or on behalf of the Navajo Nation. The undersigned understands that in this proceeding the Court will decide (i) whether to adjudicate the Navajo Nation's water rights in accordance with the terms of a Settlement Agreement among the United States, the Navajo Nation and the State of New Mexico and (ii), if the Court does not so adjudicate those claims, it will then schedule proceedings to resolve those claims on the merits.

Name of Person (s): _____

Mailing Address: _____

Telephone Number: _____ E-Mail: _____

Does the person signing this notice claim ownership of a water right in the San Juan Basin? Yes No If no, please provide a short statement as to why you believe you have a legal right to participate in this proceeding: _____

I understand that I (or my attorney) must also attend a scheduling conference to be held on _____ at _____.

Signed: _____ Date: _____

Instructions: To participate in the Navajo *Inter Se* you must complete this form and file it with the Clerk of the Court at the address stated below on or before _____ 2010. This form may be filed by mail, postage prepaid, provided it is received by the forgoing date.

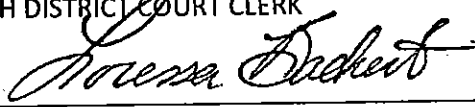
Office of the Clerk: San Juan River Adjudication
Eleventh Judicial District of the State of New Mexico
103 South Oliver Drive
Aztec NM 87410

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 19th, 2010, the foregoing **ORDER ESTABLISHING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION** was served by first class mail, postage prepaid to the following:

Shenan R. Atcitty Jicarilla Apache Nation 2309 Renard Place SE Suite 200 Albuquerque, NM 87106	Richard Cole Cassandra R. Malone Cities of Aztec and Bloomfield P.O. Box AA Albuquerque, NM
87103 Andrew J. Guarino Bradley Bridgewater U.S. Department of Justice 1961 Stout Street – 8 th Floor Denver, CO 80294	Tracy Hofmann John W. Utton Office of the State Engineer P.O. Box 25102 Santa Fe, NM 87504-5102
Gary Horner Bloomfield Irrigation District P.O. Box 2497 Farmington, NM 87499	Stanley M. Pollack Bidtah N. Becker Navajo Nation Department of Justice P.O. Drawer 2010 Window Rock, AZ 86515
Gary Risley 4991 N. Butler Farmington, NM 87401	Victor Marshall San Juan Agricultural Water Users Association 12509 Oakland NE Albuquerque, NM 87122
Jolene L. McCaleb Elizabeth N. Taylor San Juan Water Commission P.O. Box 2540 Corrales, NM 87048-2540	Maria O'Brien San Juan Coal Company P.O. Box 2168 Albuquerque, NM 87103-2168
Arianne Singer State of NM Office of the State Engineer P.O. Box 25102 Sante Fe, NM 87504-5102	

WELDON NEFF
ELEVENTH DISTRICT COURT CLERK

By: 
Deputy Court Clerk III