IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COMMUNITY DITCH DEFENDANTS-COUNTERCLAIMANTS;
B SQUARE RANCH, LLC; BOLACK MINERALS COMPANY A.K.A. BOLACK MINERALS COMPANY LIMITED PARTNERSHIP; ESTATE OF TOM BOLACK A.K.A. THOMAS FELIX BOLACK, DECEASED; BOLACK MINERALS FOUNDATION AND TOMMY BOLACK REVOCABLE TRUST; ESTATE OF JUANITA VELASQUEZ, DECEASED; DAVID A. PIERCE AND MAXINE M. PIERCE; DAVID M. DRAKE AND SHAWNA DRAKE ("DEFENDANTS B SQUARE RANCH, LLC ET AL.");
GARY L. HORNER; and
MCCARTY TRUST; STEPHEN ALBERT MCCARTY; TRUSTEE AND ESTATE OF MARY MCCARTY, DECEASED,
Defendants/Appellants,

v. Case No.:

STATE OF NEW MEXICO ex rel. State Engineer, Plaintiff;
UNITED STATES OF AMERICA, Defendant; and
NAVAJO NATION, Defendant-Intervenor,
Appellees.

GARY L. HORNER'S DOCKETING STATEMENT

COMES NOW Defendant/Appellant, GARY L. HORNER, Esq., *In Propria Persona* (hereinafter referred to in the first person), pursuant to NMRA Rule 12-208, and hereby files the Docketing Statement required by said Rule.

In accordance with said Rule, I state:

1. STATEMENT OF THE NATURE OF PROCEEDING.

The present matter is an appeal from an ORDER GRANTING THE SETTLEMENT MOTION FOR ENTRY OF PARTIAL FINAL DECREES DESCRIBING THE WATER RIGHTS OF THE NAVAJO NATION, entered on August 16, 2013; 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 on November 1, 2013. Each of said documents were entered in the matter of *STATE OF NEW MEXICO ex rel. State Engineer, v. UNITED STATES OF AMERICA, et al.*, Cause No. CV 75-184, in the Eleventh Judicial District Court of New Mexico, San Juan County.

The subject proceeding in the District Court is generally referred to as the "San Juan River (Water Rights) Adjudication Suit". More specifically, said documents were entered in an "Expedited *Inter Se*" subproceeding of said San Juan Adjudication Suit, designated Case No. AB-07-1, established for the specific purpose of the determination of the water rights claims of the Navajo Nation. A copy of each of said documents was attached to the NOTICE OF APPEAL which was filed by me on December 2, 2013, and each of said documents are hereby incorporated herein by reference.

The subject proceedings in the District Court were heard and decided by Presiding Judge James J. Wechsler. It should be noted that Judge Wechsler is currently a sitting Judge on the New Mexico Court of Appeals.[1]

Most of the private water rights of the San Juan River Basin in New Mexico were

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[1] Judge Wechsler was designated the Presiding Judge in the subject matter by Order of the New Mexico Supreme Court entered in the Supreme Court on November 10, 2009. Said Order was entered in the subject matter on November 13, 2009. At such time Judge Wechsler was also designated the presiding Judge in four water rights adjudication suits around the State, specifically:

1. *Anaya v. Public Service Company of New Mexico,* cause numbered CV-71-43347, pending in the First Judicial District Court;
2. The consolidated cases of *State of New Mexico, ex rel. State Engineer, and Pecos Valley Artesian Conservancy District v. Lewis, et al.* cause numbered 20294, *and State of New Mexico, ex rel. State Engineer, and Pecos Valley Artesian Conservancy District v. Hagerman Canal Co.,* cause numbered 22600, pending in the Fifth Judicial District Court;
3. *State of New Mexico, ex rel. State Engineer v. The United States of America, et al,* cause numbered CV-75-184, pending in the Eleventh Judicial District Court; and
4. *State of New Mexico, ex rel. State Engineer v, Kerr-McGee Corp.,* cause numbered CV-83-190, pending in the Thirteenth Judicial District Court.

adjudicated in 1948 pursuant to *Echo Ditch Co. v. McDermott Ditch Co.*, Cause No. 01690, San Juan County, New Mexico ("1948 Decree", or "*Echo* Decree"). However, in 1948, the State Court apparently did not believe it had jurisdiction over the water rights of the federal government or Indian tribes.

In 1952, Congress passed the McCarran Amendment, 43 U.S.C §666, in which it waived the United States' sovereign immunity in cases involving the adjudication of water rights. The McCarran Amendment further enabled suits regarding federal water rights to be heard in state courts. The McCarran Amendment includes consent to determine in state court reserved water rights held on behalf of Indians, see *United States v. District Court for Eagle County*, 401 U.S. 520, 91 S.Ct. 998, 28 L.Ed.2d 278 (1971), and *United States v. District Court for Water Div. 5*, 401 U.S. 527, 91 S.Ct. 1003, 28 L.Ed.2d 284 (1971), and the exercise of state jurisdiction does not imperil those rights or breach the Government's special obligation to protect the Indians. In *Colorado River Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976), it was held that the McCarran Amendment, which waived the sovereign immunity of the United States as to comprehensive state water rights adjudications, provides state courts with jurisdiction to adjudicate Indian water rights held in trust by the United States. *See also Arizona, et al. v. San Carlos Apache Tribe*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983).

Accordingly, on March 13, 1975, the State of New Mexico, ex rel. the State Engineer, filed a Complaint in the subject matter, primarily seeking the determination of the water rights of the federal government and Indian Tribes within the San Juan Basin in New Mexico.

Apparently, in the late 1990's the State of New Mexico began negotiations with the Navajo Nation with respect to the water rights claims of the Navajo Nation. Such negotiations

were conducted in secret. In December 2003, the State of New Mexico and the Navajo Nation released to the public a copy of their negotiated proposed SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS SETTLEMENT AGREEMENT. At the same time, they also released to the public their proposed and related:

1. PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION, for entry by the Court in the subject matter;

2. Congressional legislation entitled: "To authorize the construction of the Navajo-Gallup Water Supply Project in New Mexico, to provide for completion and rehabilitation of existing and authorized Navajo water projects in New Mexico, and to authorize the settlement of the water rights claims of the Navajo Nation in the San Juan River Basin in New Mexico"; and

3. Contract Between the United States and the Navajo Nation, which provided for the delivery of water to the Navajo Nation for the Navajo-Gallup pipeline, as well as water to be delivered to the Navajo Nation from storage in, or associated with, Navajo Reservoir, and the Animas-La Plata Project.

On April 19, 2005, the State of New Mexico and the Navajo Nation signed the subject Navajo Water Rights Settlement.

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 ("Navajo Nation") (collectively "Settling Parties") filed their JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Joint Motion re Initial Procedures"). Among other things, said Joint Motion re Initial Procedures sought the establishment of an expedited

inter se subproceeding in the subject adjudication for the purpose of considering and determining the water rights claims of the Navajo Nation. On August 19, 2010, the Court entered an ORDER ESTABLISHING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION. Pursuant to said Order, the Court ordered the commencement of the subject expedited *inter se* proceeding.

On March 30, 2009, Congress enacted Public Law 111-11, Title X, Subtitle B, which is entitled the "Northwestern New Mexico Rural Water Projects Act" (§§ 10301 - 10704) (123 Stat. 1367 - 1405 (2009)) (hereinafter referred to as the "Settlement Act"). Pursuant to the Settlement Act, Congress approved the Navajo Settlement, and directed that the United States become a consenting party to the subject agreement.

The Settlement Act required that certain revisions be made to the Navajo settlement agreement. The Navajo settlement agreement was revised and the resulting SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS SETTLEMENT AGREEMENT was executed by the Navajo Nation, State of New Mexico and the United States between December 10, 2010 and December 17, 2010 (hereinafter referred to as the "Navajo Settlement"). Accordingly, at such time the United States first became a consenting party to the Navajo Settlement.

On January 3, 2011, the Settling Parties filed their cursory SETTLEMENT MOTION OF UNITED STATES, NAVAJO NATION AND STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES ("Settlement Motion"). Attached to the Settlement Motion was their revised San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement, ("Navajo Settlement" or "Settlement Agreement"); their proposed Partial Final Judgment and Decree of the Water Rights of the Navajo Nation ("Partial Final Decree"); and

their Proposed Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation ("Supplemental Partial Final Decree").

The Court ordered the Parties to file dispositive motions on April 15, 2013. The Court entered the subject Decrees based upon such dispositive motions without a trial or evidentiary hearing.

On August 16, 2013, Judge Wechsler entered the subject ORDER GRANTING THE SETTLEMENT MOTION FOR ENTRY OF PARTIAL FINAL DECREES DESCRIBING THE WATER RIGHTS OF THE NAVAJO NATION ("Order Granting Settlement Motion"). Then, on November 1, 2013, Judge Wechsler entered the subject PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION and the subject SUPPLEMENTAL PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION.

2. DATE OF THE JUDGMENT TO BE REVIEWED.

Generally, the judgments to be reviewed are the PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Decree") and the SUPPLEMENTAL PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Supplemental Decree", collectively referred to as the "Decrees"), which were both entered on November 1, 2013. Both of said Judgments were entered following the entry of an ORDER GRANTING THE SETTLEMENT MOTION FOR ENTRY OF PARTIAL FINAL DECREES DESCRIBING THE WATER RIGHTS OF THE NAVAJO NATION, which was entered on August 16, 2013 ("Order Granting Settlement Motion").

My NOTICE OF APPEAL was timely filed in the District Court on Monday, December

2, 2013.

3. STATEMENT OF THE CASE.

The primary problem is that the negotiated Navajo Settlement and Decrees grant to the Navajo Nation water rights well in excess of 600,000 acre-feet per year ("afy"), which is as much as 400,000 afy more than the Navajo Nation has ever used. Further, the Navajo Settlement and Decrees award to the Navajo Nation a priority date of June 1, 1868 (the date of the creation of the original Navajo Reservation), which predates all other water uses in the San Juan Basin. Such an award of water rights certainly violates the New Mexico Constitutional provisions regarding beneficial use and prior appropriation.

The vast majority of the Navajo Nation's current use of water is used on the massive Navajo Indian Irrigation Project ("NIIP") which is located south of Farmington and Bloomfield. However, no water was diverted onto NIIP until 1976. Further, approximately one-half of NIIP is not even located on the Navajo Reservation at all, and none of NIIP is located on any portion of the Navajo Reservation at it was originally created in 1868.

The Navajo Settlement and Decrees provide that the majority of the water will be administered with a priority date of 1955 (the date of a Notice of Intention issued by the State Engineer with respect to the Navajo Project). All of the water so administered will be water stored in Navajo Reservoir. However, the Navajo Settlement, Decrees and the State Engineer's AWRM regulations provide for a concept called "Storage Water Administration". Pursuant to this concept, water released from storage into the river for a particular purpose can be protected from diversion by other water users - even water users with senior rights. The concept is also often cast in terms of "Direct Flow"; that is, water users below a reservoir, without storage rights,

are only entitled to divert water at any point in time equal to the amount of water flowing into the reservoir at such point in time. The result is that the right to use storage water so released trumps all other water rights, so the so-called subordination of the Navajo Nations priority date from an 1868 priority date to a 1955 priority date offers no protection and no comfort to other water users.

The problem here is that such concepts of Storage Water Administration and Direct Flow as intended by the Settling Parties are illegal. See *Luna* and *Raton*. The *Luna* case says that water released from storage into a public stream, is public water. The *Raton* case says that water stored in excess of the reservoir owners' needs, must be released to downstream users on demand.

The problems are made worse by the Bureau of Reclamation's ("BOR") Reoperation of Navajo Dam. Pursuant to such Reoperation, the BOR has given itself the authority to release as much as 5,000 cubic feet per second ("cfs") into the river from the Navajo Reservoir during the spring runoff, ostensibly for the benefit of two endangered fish species, as well as the right to limit the release of water at all times during the remainder of the year to 250 cfs. Such 250 cfs is woefully short of the needs of downstream water users during the irrigation season.

The Navajo Nation has no reasonably foreseeable need for such vast quantities of water. Their real interest in such large quantities of water is leasing such excess water to others as an additional source of revenue for the Navajo Nation. The result of all of this is that existing water users will be denied the use of the water they have historically used - that is unless they enter into contracts with the Navajo Nation to lease some of the "Navajo Nation's water stored in Navajo Reservoir." However, one my greatest concerns is that as the Navajo Nation seeks the highest bidder for its water, in a market that includes Las Vegas, Phoenix Los Angeles, San Diego, as

well as Albuquerque, Santa Fe and El Paso (all of which have the facilities to divert such water from the Colorado River system), local users will likely find themselves unable to afford such water and will therefore end up with no water at all - even though up until the subject Decrees were entered, such local users owned the senior rights to the water.

4. STATEMENT OF THE ISSUES.

Issue #1. Whether negotiated water rights settlements are inappropriate and violate the Constitution and laws of New Mexico?

This issue was first raised, and addressed in detail, in the subject matter pursuant to my MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT, which was filed in the subject matter on June 23, 2004 ("Motion to Enjoin"). Pursuant to an Order entered by the Court on September 17, 2004, the Court denied said Motion to Enjoin, but preserved such issue for consideration during the expedited *inter se* proceeding to be conducted with respect to the determination of the water rights of the Navajo Nation.

This issue was again addressed in detail pursuant to THE BID AND GARY L. HORNER'S RESPONSE TO THE JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION, which was filed in the present matter on October 6, 2009 ("Horner's Response re Initial Procedures"). Pursuant to the Court's ORDER ESTABLISHING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION, entered August 19, 2010 ("Order Establishing Initial Procedures"), the Court did not address and simply ignored this issue.

This issue was again addressed pursuant to GARY L. HORNER'S OBJECTIONS: TO

THE SETTLEMENT MOTION OF UNITED STATES, NAVAJO NATION AND STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES; AND THE PROPOSED DECREES ASSOCIATED WITH SAID SETTLEMENT MOTION, which was filed in the subject matter on September 24, 2012 ("Horner's Objections to Proposed Decrees"). Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections,[2] such procedures made no provisions for the actual consideration of, and ruling on, such objections.

The issue was again addressed pursuant to GARY L. HORNER'S MOTION FOR SUMMARY JUDGMENT: THAT IS, THE "SETTLEMENT MOTION OF THE UNITED STATES, NAVAJO NATION AND THE STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES" SHOULD BE DENIED ("Horner's Motion for Summary Judgment"), and GARY L. HORNER'S MEMORANDUM IN SUPPORT OF GARY L. HORNER'S MOTION FOR SUMMARY JUDGMENT: THAT IS, THE "SETTLEMENT MOTION OF THE UNITED STATES, NAVAJO NATION AND THE STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES" SHOULD BE DENIED ("Horner's Memo re Summary Judgment"), which were both filed in the subject matter on April 15, 2013. Pursuant to the Court's Order Granting Settlement Motion, the Court did not address, and simply ignored, my arguments and authority on this issue.

[2] On September 29, 2011, the Court entered a SCHEDULING ORDER GOVERNING INITIAL PRETRIAL ACTIVITIES. Pursuant to said Order, the Court ordered that objections to the proposed Decrees be filed on or before March 2, 2012. Said deadline was subsequently extended to Friday, September 21, 2012. (See AMENDED ORDER SETTING SCHEDULE GOVERNING DISCOVERY ON THE NON-SETTLING PARTIES AND REMAINING PROCEEDINGS, entered August 7, 2012, ¶ 2, p. 2.) The Court was closed on the afternoon of the 21st, and my Objections were filed on Monday, September 24, 2012.

Issue #2. Whether the subject expedited *inter se* proceeding is inappropriate and violates the Constitution and laws of New Mexico?

This issue was first raised, and addressed in detail, in the subject matter pursuant to my Motion to Enjoin. Pursuant to an Order entered by the Court on September 17, 2004, the Court denied said Motion to Enjoin, but preserved such issue for consideration during the expedited *inter se* proceeding to be conducted with respect to the determination of the water rights of the Navajo Nation.

This issue was again addressed in detail pursuant to Horner's Response re Initial Procedures. Pursuant to the Court's Order Establishing Initial Procedures, the Court authorized the establishment of the subject expedited *inter se* proceeding. Although the Court provided an analysis of its reasoning for so doing, it did not significantly address, and in essence ignored, my arguments and authority in opposition to such expedited *inter se* procedure.

This issue was again addressed pursuant to Horner's Objections to Proposed Decrees. Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections, such procedures made no provisions for the actual consideration of, and ruling on, such objections.

The issue was again addressed pursuant to Horner's Motion for Summary Judgment, and Horner's Memo re Summary Judgment. Pursuant to the Court's Order Granting Settlement Motion, the Court did not address, and simply ignored, my arguments and authority on this issue.

Issue #3. Whether a hydrographic survey of the current uses of water by the Navajo Nation must be completed before any water rights may be awarded to the Navajo Nation in the subject adjudication suit?

This issue was first raised, and addressed in detail, in the subject matter pursuant to my Motion to Enjoin. The issue was again addressed pursuant to GARY HORNER'S BRIEF REGARDING MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT, which was filed in the subject matter on August 13, 2004 ("Horner's Brief re Motion to Enjoin"). Pursuant to an Order entered by the Court on September 17, 2004, the Court denied said Motion to Enjoin, but preserved such issue for consideration during the expedited *inter se* proceeding to be conducted with respect to the determination of the water rights of the Navajo Nation.

This issue was again addressed pursuant to Horner's Response re Initial Procedures. Pursuant to the Court's Order Establishing Initial Procedures, the Court did not address and simply ignored this issue.

This issue was again addressed pursuant to Horner's Objections to Proposed Decrees. Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections, such procedures made no provisions for the actual consideration of, and ruling on, such objections.

The issue was again addressed pursuant to Horner's Motion for Summary Judgment, and Horner's Memo re Summary Judgment. Pursuant to the Court's Order Granting Settlement Motion, the Court did not address, and simply ignored, my arguments and authority on this issue.

Issue #4. Whether the standard for the determination of federal reserved rights for Indian tribes used by the Court is inappropriate and violates the law?

This issue was first raised, and addressed in detail, in the subject matter pursuant to my Motion to Enjoin. The issue was again addressed pursuant to Horner's Brief re Motion to

Enjoin. Pursuant to an Order entered by the Court on September 17, 2004, the Court denied said Motion to Enjoin, but preserved such issue for consideration during the expedited *inter se* proceeding to be conducted with respect to the determination of the water rights of the Navajo Nation.

This issue was again addressed pursuant to Horner's Response re Initial Procedures.

Subsequently, the Court refused to consider such issue, or any substantive issue, for years. Specifically, the Court's Order Establishing Initial Procedures (in which the Court established the subject expedited *inter se* proceeding) provided:

> "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." Order Establishing Initial Procedures (Decretal Order ¶ C, p. 11). Emphasis added.

Pursuant to the ORDER APPROVING FINAL FORMS OF NOTICE OF NAVAJO *INTER SE* AND NOTICES OF INTENT TO PARTICIPATE IN NAVAJO *INTER SE* AND SETTING DEADLINES FOR SERVICE AND FILING OF NOTICES, the Court set the subject Rule 1-016 Scheduling Conference for October 3, 2011. The purpose of said Scheduling Conference was to address the scheduling of further proceedings in the case. Attendance at said Scheduling Conference was mandatory, that is, if a party did not attend, they would be dismissed from the case.

On September 29, 2011, the Special Master entered a SCHEDULING ORDER GOVERNING PRETRIAL ACTIVITIES (in advance of said October 3, 2011 Scheduling Conference). That left only one working day before said Scheduling Conference to digest said Scheduling Order, and essentially no time whatsoever to actually respond to, object to, or

comment on said Scheduling Order.[3]

Said Scheduling Order continued the stay with respect to discovery (¶ F, p. 5) and did not address the stay regarding motion practice.

On February 3, 2012, the Court entered an ORDER (1) GRANTING SETTLING PARTIES' MOTION TO EXTEND CERTAIN DEADLINES AND (2) SETTING SCHEDULE GOVERNING DISCOVERY AND REMAINING PROCEEDINGS ("2/3/2012 Scheduling Order"). Pursuant to said 2/3/2012 Scheduling Order, the Court ordered that:

> "**On or after October 5, 2012:** Any party may file proposed common issues of fact or law that are ripe for resolution." 2/3 2012 Scheduling Order, p. 4.

Further, said 2/3/2012 Scheduling Order set deadlines of: March 1, 2013 for the filing of dispositive motions; April 1, 2013 for response to such dispositive motions; and April 16, 2013 for replies regarding said dispositive motions. (2/3/2012 Scheduling Order, p. 4.)

This issue was again addressed pursuant to Horner's Objections to Proposed Decrees. Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections, such procedures made no provisions for the actual consideration of, and ruling on, such objections.

On November 8, 2012, I filed GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS ("Horner's Motion re Federal Reserved Rights") and GARY L. HORNER'S BRIEF IN SUPPORT OF GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF

[3] Since the Special Master entered said Scheduling Order prior to the Scheduling Conference, there remained no purpose for the subject October 3, 2011 Scheduling Conference - other than to simply weed out those defendants and Claimants who failed to attend. (See my Response re Initial Procedures, pp. 89-91.)

FEDERAL RESERVED WATER RIGHTS ("Horner's Brief re Federal Reserved Rights"). On December 18, 2012, the Court entered an ORDER CONCERNING RESPONSES TO GARY HORNER'S NOVEMBER 8, 2012 MOTION. Pursuant to said Order, the Court ruled that Horner's Motion re Federal Reserved Rights was a "dispositive motion" and gave the Settling Parties until April 10, 2013 to respond to Horner's Motion re Federal Reserved Rights.

On November 6, 2012, the Court entered a SECOND AMENDED ORDER SETTING SCHEDULE GOVERNING DISCOVERY ON THE NON-SETTLING PARTIES AND REMAINING PROCEEDINGS ("11/6/2012 Scheduling Order") in which the Court extended deadlines to: March 15, 2013 for dispositive motions; April 10, 2013 for responses; and April 24, 2013 for replies. Then on March 15, 2013, the Court entered a THIRD AMENDED ORDER GRANTING MOTIONS TO EXTEND DEADLINES IN PART AND SETTING SCHEDULE GOVERNING DISCOVERY AND REMAINING PROCEEDINGS ("3/15/2013 Scheduling Order") extending again the deadlines to: April 15, 2013 for dispositive motions; May 10, 2013 for response and May 24, 2013 for replies.

The issue was again addressed pursuant to Horner's Motion for Summary Judgment, and Horner's Memo re Summary Judgment, within which I incorporated Horner's Motion re Federal Reserved Rights.

The result is that although I had been trying to get the Court to consider the subject issue since June 2004, the Court refused to consider the issue until after May 24, 2013 (nine years).

Then, pursuant to the Court's Order Granting Settlement Motion, the Court did not address, and simply ignored, my arguments and authority on this issue.

Issue #5. Whether the Navajo Nation's water rights to be awarded in the subject

adjudication suit must be limited to its current beneficial uses of water?

This issue was first raised, and addressed in detail, in the subject matter pursuant to my Motion to Enjoin. The issue was again addressed pursuant to Horner's Brief re Motion to Enjoin. Pursuant to an Order entered by the Court on September 17, 2001, the Court denied said Motion to Enjoin, but preserved such issue for consideration during the expedited *inter se* proceeding to be conducted with respect to the determination of the water rights of the Navajo Nation.

This issue was again addressed pursuant to Horner's Response re Initial Procedures.

This issue was again addressed pursuant to Horner's Objections to Proposed Decrees. Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections, such procedures made no provisions for the actual consideration of, and ruling on, such objections.

The issue was again addressed pursuant to Horner's Motion re Federal Reserved Rights and Horner's Brief re Federal Reserved Rights.

The issue was again addressed pursuant to GARY L. HORNER'S MOTION FOR A DETERMINATION THAT FEDERAL LAW, PERMITS, OR CONTRACTS DO NOT DEFINE THE EXTENT OF THE WATER RIGHTS FOR THE NAVAJO NATION ("Horner's Motion re Federal Contracts"), and GARY L. HORNER'S BRIEF IN SUPPORT OF GARY L. HORNER'S MOTION FOR A DETERMINATION THAT FEDERAL LAW, PERMITS, OR CONTRACTS DO NOT DEFINE THE EXTENT OF THE WATER RIGHTS FOR THE NAVAJO NATION ("Horner's Brief re Federal Contracts"), which were both filed in the subject matter on April 15, 2013.

The issue was again addressed pursuant to Horner's Motion for Summary Judgment, and

Horner's Memo re Summary Judgment.

Pursuant to the Court's Order Granting Settlement Motion, the Court did not address, and simply ignored, my arguments and authority on this issue.

Issue #6. Whether granting water rights to an Indian Tribe whose only purpose for such water is to market such water off of the reservation is inappropriate and violates the law?

This issue was first raised in the subject matter pursuant to my Motion to Enjoin. The issue was again addressed pursuant to Horner's Brief re Motion to Enjoin. Pursuant to an Order entered by the Court on September 17, 2001, the Court denied said Motion to Enjoin, but preserved such issue for consideration during the expedited *inter se* proceeding to be conducted with respect to the determination of the water rights of the Navajo Nation.

This issue was again addressed pursuant to Horner's Response re Initial Procedures.

This issue was again addressed pursuant to Horner's Objections to Proposed Decrees. Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections, such procedures made no provisions for the actual consideration of, and ruling on, such objections.

The issue was again addressed pursuant to Horner's Motion re Federal Reserved Rights and Horner's Brief re Federal Reserved Rights.

The issue was again addressed pursuant to Horner's Motion re Federal Contracts, and Horner's Brief re Federal Contracts.

The issue was again addressed pursuant to Horner's Motion for Summary Judgment, and Horner's Memo re Summary Judgment.

Pursuant to the Court's Order Granting Settlement Motion, the Court did not address, and

simply ignored, my arguments and authority on this issue.

Issue #7. Whether the priority date of the water rights to be awarded to the Navajo Nation in the subject adjudication suit must be determined by the date that water was first put to beneficial use?

This issue was first raised in the subject matter pursuant to my Motion to Enjoin. The issue was again addressed pursuant to Horner's Brief re Motion to Enjoin. Pursuant to an Order entered by the Court on September 17, 2001, the Court denied said Motion to Enjoin, but preserved such issue for consideration during the expedited *inter se* proceeding to be conducted with respect to the determination of the water rights of the Navajo Nation.

This issue was again addressed pursuant to Horner's Objections to Proposed Decrees. Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections, such procedures made no provisions for the actual consideration of, and ruling on, such objections.

The issue was again addressed pursuant to Horner's Motion re Federal Reserved Rights and Horner's Brief re Federal Reserved Rights.

The issue was again addressed pursuant to Horner's Motion re Federal Contracts, and Horner's Brief re Federal Contracts.

The issue was again addressed pursuant to Horner's Motion for Summary Judgment, and Horner's Memo re Summary Judgment.

Pursuant to the Court's Order Granting Settlement Motion, the Court did not address, and simply ignored, my arguments and authority on this issue.

Issue #8. Whether the Court's determination that the federal government is entitled to determine who may use most of the water of the San Juan Basin in New Mexico by virtue of contracts with the federal government violates the law?

This issue was first raised in the subject matter pursuant to my Motion to Enjoin. The issue was again addressed pursuant to Horner's Brief re Motion to Enjoin. Pursuant to an Order entered by the Court on September 17, 2001, the Court denied said Motion to Enjoin, but preserved such issue for consideration during the expedited *inter se* proceeding to be conducted with respect to the determination of the water rights of the Navajo Nation.

This issue was again addressed pursuant to Horner's Response re Initial Procedures.

This issue was again addressed pursuant to Horner's Objections to Proposed Decrees. Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections, such procedures made no provisions for the actual consideration of, and ruling on, such objections.

The issue was again addressed pursuant to Horner's Motion re Federal Contracts, and Horner's Brief re Federal Contracts.

The issue was again addressed pursuant to Horner's Motion for Summary Judgment, and Horner's Memo re Summary Judgment.

Pursuant to the Court's Order Granting Settlement Motion, the Court did not address, and simply ignored, my arguments and authority on this issue.

Issue #9. Whether the concepts of "Direct Flow" and "Storage Water Administration" incorporated within the Navajo Settlement and Decrees violate the law?

This issue was first raised pursuant to Horner's Response re Initial Procedures.

This issue was again addressed pursuant to Horner's Objections to Proposed Decrees. Although the procedures adopted by the Court in the subject expedited *inter se* proceeding required the filing of such objections, such procedures made no provisions for the actual consideration of, and ruling on, such objections.

The issue was again addressed pursuant to Horner's Motion for Summary Judgment, and Horner's Memo re Summary Judgment.

Pursuant to the Court's Order Granting Settlement Motion, the Court simply disagreed with my arguments and authority on this issue.

Issue #10. Whether the legal standard utilized by the Court with respect to the approval of the Navajo Settlement is inappropriate and violates the law?

On September 2, 2013, the Settling Parties filed their JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Motion re Initial Procedures"), and their MEMORANDUM IN SUPPORT OF JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Memo re Initial Procedures"). Pursuant to said Motion re Initial Procedures and Memo re Initial Procedures, the Settling Parties proposed a standard of review with respect to the approval of the Navajo Settlement that were entirely inappropriate and completely ignored the law and the rules of Civil Procedure. In essence the Settling Parties simply made up their own rules, which were entirely constructed for their benefit, and which left no possible path for successful objection.

I first raised this issue in detail pursuant to Horner's Response re Initial Procedures. The

Order Establishing Initial Procedures did not address this issue.

I next addressed this issue pursuant to GARY L. HORNER'S SUPPLEMENTAL BRIEF REGARDING WHAT LEGAL STANDARDS GOVERN THE COURT'S DECISION FOR APPROVAL OF THE PROPOSED DECREES, which was filed in the subject matter on November 18, 2011.

I next addressed this issue pursuant to GARY L. HORNER'S OPTIONAL SUPPLEMENTAL BRIEF REGARDING WHAT LEGAL STANDARDS GOVERN THE COURT'S DECISION FOR APPROVAL OF THE PROPOSED DECREES, which was filed in the subject matter on January 3, 2012.

On April 19, 2013, the Court entered an AMENDED ORDER ESTABLISHING THE LEGAL STANDARDS FOR EVALUATING THE PROPOSED DECREES AND RESPECTIVE BURDENS OF PROOF.

Ultimately, pursuant to the Order Granting Settlement Motion, the Court utilized its adopted legal standards to make a sham out of the entire proceeding.

Issue #11. Whether the Court's treatment of the Settling Parties' Brief in support of the Settlement Motion, and the Non-Settling Parties' Motions for Summary Judgment violate the Rules of Civil Procedure and due process of law (the concepts of justice and fundamental fairness)?

I addressed this issue pursuant to GARY L. HORNER'S RESPONSE TO THE JOINT MEMORANDUM OF THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT OF THE SETTLEMENT MOTION, which was filed in the subject matter on May 10, 2013.

Ultimately, pursuant to the Order Granting Settlement Motion, the Court simply ignored this issue.

Issue #12. Whether water rights must be awarded to individual Navajo Indians rather than simply to the Navajo Nation?

This issue was raised by me at the June 11, 2013 hearing on dispositive motions in the subject matter.

5. LIST OF AUTHORITIES and APPLICABLE STANDARD OF REVIEW.

Issue #1. Whether negotiated water rights settlements are inappropriate and violate the Constitution and laws of New Mexico?

The subject Decree grants 606,600 acre-feet per year ("afy") of water rights to the Navajo Nation, and the subject Supplemental Decree grant to the Navajo Nation the right to use an additional nearly 27,000 af/y from the San Juan Basin in New Mexico. All of such water rights would carry a priority date of June 1, 1868, which would predate the priority dates of all other water uses in the Basin. Further, pursuant to said Proposed Decrees, such water rights would not be subject to abandonment, forfeiture or loss for non-use. However, I understand that the Navajo Nation has never diverted or used more than approximately 200,000 afy. The water rights of the subject Decrees represents the largest water right in the San Juan Basin in New Mexico, probably the largest water right in the State of New Mexico, and probably the largest ever awarded to any Indian Tribe in the United States. Further, pursuant to the subject Decrees, said Navajo water rights would not be lost by nonuse, and could be leased to others off of the reservation.

Generally, the subject Navajo Settlement and Decrees are not supported by any notion of

federal law. Specifically, the subject Settlement and Decrees are not supported by any legitimate notion of federal reserved water rights.

Briefly, the federal reserved water rights doctrine provides that when a particular Indian reservation was created, Congress impliedly reserved water rights only for the original, primary purpose for which the reservation was created, and then only enough water was reserved to supply the Indian's minimal needs, and the purpose of such use cannot be changed. The concept of federal reserved water rights does not encompass the notion of water for future uses, or water for use off of the reservation. Water rights for additional or secondary purposes on such reservations must be acquired according to state law.

By September 28, 2007, the Ute Mountain Ute Tribe, and the U.S. on behalf of said Tribe, had filed their claims in the present matter to the use of water on the Ute Mountain Ute reservation in New Mexico. Then, on or about February 28, 2008, the Office of the State Engineer ("OSE") filed the STATE OF NEW MEXICO'S ANSWER TO UNITED STATES' CLAIMS ON BEHALF OF THE UTE MOUNTAIN UTE TRIBE and the STATE OF NEW MEXICO'S ANSWER TO RESTATEMENT OF THE CLAIM OF THE UTE MOUNTAIN UTE TRIBE (hereinafter referred to as the "OSE's Answers to Ute Claims").

Pursuant to the OSE's Answers to Ute Claims, the OSE has taken the positions that: said Tribe was only entitled to the water rights associated with the historic and existing beneficial uses on its lands in New Mexico; said Tribe was only entitled to such (federal reserved) water rights as may be necessary to meet the minimal needs of the Tribe to fulfill the original primary purposes for which the reservation was created; the Tribe was not entitled to water rights for future uses; and that no federal reserved right includes the right to use, lease, market or otherwise authorize the use by others of the water off the Tribe's reservation in New Mexico.

Regarding the subject Navajo Settlement, the massive amounts of water greatly in excess of current uses cannot be regarded as federal reserved water rights. Neither can such excess water be leased, or otherwise used, off of the reservation.

Therefore, any federal reserved water rights that are determined to exist with respect to the Navajos, must be a subset (portion) of their existing uses. Accordingly, such Navajo federal reserved rights can be determined by identifying the appropriate specific uses pursuant to a hydrographic survey of the existing uses of water on the Navajo reservation.

The subject Settlement and Decrees are not supported by any notion of New Mexico State law. Briefly, the granting of such water rights greatly in excess of historic or existing uses violates the doctrines of prior appropriation and beneficial use of the New Mexico Constitution.[4]

Further, in *New Mexico ex rel. Martinez v. City of Las Vegas*, 135 N.M. 375, 89 P.3d 47, (2004 NMSC), the New Mexico Supreme Court abolished the state pueblo water rights doctrine (said doctrine provided for water for future uses that could not be lost for nonuse), as sought by the New Mexico State Engineer, holding that it was inconsistent with New Mexico's system of prior appropriation. The pueblo rights doctrine had previously been adopted by the New Mexico Supreme Court in *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 64, 343 P.2d 654. In *Las Vegas* the Supreme Court stated that

> "The pueblo rights doctrine recognizes the right of the inhabitants of Mexican or Spanish colonization pueblos to use as much of an adjoining river or stream as is necessary for municipal purposes. . . . . The

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[4] N.M. Const. Article XVI, Sec. 2 [**Appropriation of water.**] provides
"The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."
N.M. Const. Article XVI, Sec. 3 [**Beneficial use.**] provides
"Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

doctrine contemplates the expansion of the pueblo's right to use water in response to increases in size and population, and if necessary, the right can encompass the entire flow of the adjoining water course." *Las Vegas* at 135 N.M. 378, 89 P.3d at 50." Emphasis added.

* * *

"The State Engineer argues that the perpetually expanding nature of the pueblo right conflicts with the fundamental principle of beneficial use that lies at the heart of New Mexico water law. As a result, the State Engineer contends that the doctrine is incompatible with water law in New Mexico and **violates public policy**. We agree. . . .

"In New Mexico, '[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water.' N.M. Const. Art. XVI, § 3. We have said that this fundamental principle 'is applicable to all appropriations of public waters.' *State ex rel. State Eng'r v. Crider*, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967). 'As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to a beneficial use.' *State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch*, 19 N.M. 352, 371, 143 P. 207, 213 (1914); *accord Snow [v. Abalos]*, 18 N.M. [681] at 694, 140 P. [1044] at 1048 [(1914)] ('[I]t is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives the appropriator the continued and continuous right to take the water.'). The principle of beneficial use is based on 'imperative necessity,' *Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 181, 113 P. 823, 825 (1911), and 'aims fundamentally at definiteness and certainty.' *Crider*, 78 N.M. at 315, 431 P.2d at 48 (quotation marks and quoted authority omitted). It promotes the economical use of water, while also protecting the important interest of conservation. *See Yeo*, 34 N.M. at 620, 286 P. at 974. . . .

"In applying these principles, we have recognized that water users have a reasonable time after an initial appropriation to put water to beneficial use, known as the doctrine of relation. *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 470-471, 362 P.2d 998, 1001 (1961); *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. At 824-25. If the application to beneficial use is made in proper time, it relates back and conpletes the appropriation as of the time when it was initiated.' *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. at 825. We have applied this principle to municipalities in order to allow for 'normal increase in population within a reasonable period of time.' *Crider*, 78 N.M. at 316, 431 P.2d at 49. In addition, a municipality may be given a more substantial 'reasonable time' for its population growth than a typical water user would have to complete an appropriation *Compare* NMSA 1978 § 72-1-9 (2003) (providing for forfeiture of water rights one year after notice of four years of nonuse). *See generally* [Wells A.] Hutchins [*Pueblo Water Rights in the West*, 38 Tex. L.Rev. 748 (1960)], *supra*, at 756 ('Preferences on the application of water are granted to municipalities in various western jurisdictions.') However, even for municipalities, if the water is not applied to beneficial use within a reasonable time, 'such right may be lost.' *Crider*, 78 N.M. at 316, 431 P.2d at 49.

"The pueblo rights doctrine is inconsistent with these principles. Under the doctrine, pueblos are not limited by the reasonable time requirement for applying water to beneficial use. Instead, the pueblo right contemplates an indefinite expansion to meet the growing demands of a increased population, regardless of how small the population of the initial pueblo and how long it takes the pueblo to expand. This aspect of the pueblo water right intolerably interferes with the goals of definiteness and certainty contemplated by prior appropriation; it envisions either the total loss of use of any amount of water the pueblo might potentially use in the future or temporary appropriation by other users subject indefinitely to elimination of their rights by possible population growth or increased needs of the pueblo. This level of uncertainty could potentially paralyze others from legitimately making beneficial use of unappropriated water on the same stream as a pueblo out of fear of potential future interference with the pueblo's expansion. Whereas, with the doctrine of relation, other water users 'are on notice that the law is granting them water rights that are temporary only' pending a reasonable time for the senior appropriator to complete the initial appropriation, there is no reasonable notice to other water users of a pueblo's potential water needs in the future because the pueblo right neither limits the quantity of water available to the municipality nor the amount of time available to complete its initial appropriation. Hutchins, *supra* at 756 (discussing the differences between prior appropriation and the pueblo rights doctrine). Our water laws, however, are designed 'to encourage use and discourage nonuse or waste.' *State ex rel. Reynolds v S. Springs Co.*, 80 N.M. 144, 148, 452 P.2d 478, 482 (1969). The pueblo rights doctrine interferes with the necessity of utilizing water for the maximum benefits.

"Additionally, unlike typical water rights, the pueblo right is not subject to forfeiture for nonuse. *See City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 142 P.2d 289, 293-94 (1943). Forfeiture, however, is an essential punitive tool by which 'the policy of our constitution and statutes is fostered, and the waters made to do the greatest good to the greatest number.' *S. Springs Co.*, 80 N.M. at 147, 452 P.2d at 481 (citations omitted). Forfeiture 'prevent[s] the waste of water-our greatest natural resource.' *State ex rel. Erickson v. McLean*, 62 N.M. 264, 272, 308 P.2d 983, 988 (1957). The pueblo right subverts these critical policies.

"By facilitating the underutilization of essential public waters, the pueblo right prevents the efficient, economic use of water that is necessary for survival in this arid region and upon which our entire system of water law is based. We therefore agree with the dissent in *Cartwright* that **the ever-expanding quality of the pueblo water right 'is as antithetical to the doctrine of prior appropriation as day is to night**.' *Cartwright*, 66 N.M. at 110, 343 P.2d at 686 (Federici, D.J., dissenting). We conclude that the pueblo rights doctrine is incompatible with New Mexico water law." *Las Vegas*, 135 N.M. at 386-388, 89 P.3d at 58-60. Emphasis added.

* * *

"[T]he pueblo rights doctrine is inconsistent with the principle of beneficial use. Therefore, we conclude that the expanding nature of the pueblo right is not an existing right within the meaning of Article XVI, Section 1 of the New Mexico Constitution. Jefferson E. LeCates, *Water Law-The Effect of Acts of the Sovereign on the Pueblo Rights Doctrine in New Mexico*, 8 Nat. Resources J. 727, 736 (1968) ('The effect of the provisions in the New Mexico Constitution was the cancellation of any rights to increase the amount of water to be appropriated in the future to satisfy the expanding needs of the growing pueblos'). We also believe that the pueblo rights doctrine unduly interferes with the State's regulation of water rights , *see McLean*, 62 N.M. at 272, 308 P.2d at 988 (The State is vitally concerned in every appropriation. The need for water is imperative, and often the supply is insufficient. Such conditions lead inevitably to many serious controversies, and demand from the state an exercise of its police power, not only to ascertain rights, but also to regulate and protect them.'); NMSA 1978, § 72-14-3.1 (2003) (providing for the preparation and implementation of a comprehensive state water plan), with the important interest of conservation, *see* NMSA 1978, § 72-5-5.1 (1985) (recognizing 'the importance of public welfare and conservation of water in administering [the State's] public waters'), and with this State's obligations under interstate compacts, *see* NMSA 1978, §§ 72-1-2.2 (1991) (recognizing a potential shortage of water on the Pecos River and declaring the shortage and the State's obligations to Texas pursuant to compact 'a statewide problem affecting all the citizens of the state'), -14-3 (1935) (delegating to the interstate stream commission the power 'to investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise'). We thus conclude that pueblo water rights are not otherwise protected by New Mexico law.

"The water right acquired by a municipality under a colonization grant from antecedent sovereigns is recognized in New Mexico in the same manner as other municipal rights. The colonization grant establishes the date of priority, but the priority date applies only to the quantity of water put to beneficial use within a reasonable time of the initial appropriation. Thus, the City's 1835 colonization grant created a vested right only to the amount of water put to beneficial use within a reasonable time. Any water not put to beneficial use within a reasonable time cannot be reserved by a municipality for future expansion; the unappropriated waters remaining after a reasonable time has elapsed from the initial appropriation 'belong to the public and [are] subject to appropriation for beneficial use.' N.M. Const. Art. XVI, § 2." *Las Vegas*, at 135 N.M. 389-390, 89 P.3d at 61-62. Emphasis added.

* * *

"Because the expanding water right recognized by this Court in *Cartwright* directly conflicts with the doctrine of prior appropriation, we conclude that the pueblo water right is a 'doctrinal anachronism.' *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855, 112S.Ct. 2791, 120 L.Ed.2d 674 (1992), and that it represents a 'positive detriment to coherence and consistency in the law.'*Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). '[T]he decision poses a direct obstacle to the realization of important objectives embodied' in New Mexico water law. *Id.* As a result, we believe that there is a compelling reason to overrule *Cartwright*." *Las Vegas*, at 135 N.M. 390, 89 P.3d at 62.

* * *

"*Cartwright* is hereby overruled." *Las Vegas*, at 135 N.M. 391, 89 P.3d at 63. Emphasis added.

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> "Our decision in this case clearly announces a new rule of law because we are overruling our clear past precedent adopting the pueblo rights doctrine." *Las Vegas*, at 135 N.M. 392, 89 P.3d at 64.
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> * * *
>
> "We overrule Cartwright and hold that New Mexico does not recognize the pueblo rights doctrine. Water rights contained in colonization grants from antecedent sovereigns are limited by the principle of beneficial use and are to be quantified by the amount of water put to beneficial use by the pueblo within a reasonable time of the first appropriation." *Las Vegas*, at 135 N.M. 396, 89 P.3d at 68. Emphasis added.

Similarly, the massive amount of water rights granted to the Navajo Nation pursuant to the Navajo Settlement and Decrees, vastly in excess of its current uses, is inconsistent with New Mexico law.

The Navajo Nation's ultimate position is based on the "paradigm" that it should be entitled to all of New Mexico's unused water supply. Apparently, the OSE agreed to bundling up all of the undeveloped and unused water supply to give to the Navajos.

The OSE has for decades denied new applications for the appropriation of surface water in the San Juan Basin, claiming that the waters of the Basin are fully appropriated. Accordingly, it can only be anticipated that the subject determination of such "senior" water rights to the Navajos in excess of current or historic uses will severely adversely impact the existing water rights and water uses of third parties in the Basin.

The New Mexico Court of Appeals in *State ex rel. State Engineer v. Commissioner of Public Lands*, 145 N.M. 433, 200 P.3d 86 (2009 NMCA), noted, with respect to the Commissioner of Public Lands claim fo federal reserved water rights in the present matter, that:

> "Thus, as the Colorado Supreme Court observed in [*United States v.*] *Jesse*[, 744 P.2d 491, at 494 (Colo. 1987) (en banc.)]:
>
> > 'In contrast to the doctrine of prior appropriation, which ... recognizes only the right to divert a quantified amount of water at a specific location for a specific purpose, the federal doctrine of reserved water rights vests the United States with a dormant and indefinite right that may not coincide with water uses sanctioned by state law."*Id.* (citations omitted).
>
> "Such dormant and indefinite rights can be very problematic when it comes to adjudicating and administering water rights in an arid state, such as New Mexico. Many stream systems in such states are already fully appropriated, and a determination that federal reserved water rights exist often requires "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." [*United States v.*] *New Mexico,* 438 U.S. [696,] at 705, 98 S.Ct. 3012 [, 57 L.Ed.2d 1052 (1978)]. Further, as demonstrated by this case, claims to federal reserved water rights are potentially very large with very early priority dates and can therefore be highly disruptive to rights existing under state law.

> *See Jesse,* 744 P.2d at 494. ("Because the priority date of the [federal] reserved right relates back to the date of the reservation, reserved water rights threaten existing appropriators with divestment of their rights without compensation."). Accordingly in recognition of the predominance of state law in the area of water rights and the potentially substantial and detrimental impact on state rights in fully appropriated stream systems, courts must construe the doctrine of federal reserved water rights narrowly. *See id.* Our analysis of the Commissioner's claim to federal reserved water rights in New Mexico's school trust lands therefore follows this principle of narrow construction." *Commissioner of Public Lands*, 145 N.M. at 441-42, 200 P.3d at 94-95. Emphasis added.

In fact, the OSE has taken the position that New Mexico is only entitled to the use of 669,000 afy within the Basin due to Compact considerations. Of this amount, the OSE asserts that New Mexico must yield 60,000 afy for evaporation in Lake Powell. Therefore, according to the OSE, New Mexico may only use 609,000 afy from the San Juan stream system in New Mexico. When these numbers are compared to the 606,600 afy "most senior" water rights to be granted to the Navajos pursuant to the subject Settlement and Proposed decree, virtually all other water uses in the Basin are at severe risk of loss of their entire use of water.

Generally, negotiated water rights settlements are inappropriate and violate the law. The State negotiated the Navajo Settlement and proposed Decree, but it is third parties that bear the adverse effects.

While the unappropriated water within New Mexico, may belong to the public, the appropriated water is actually used by many individuals and entities. Such individuals and entities rely on state law to protect their use of water. (More specifically, such individuals and entities rely on the OSE to protect their water rights.) So, while the State may control the use of the water, it is not the State that is using the water.

One of the Settling Parties arguments in favor of the subject Settlement and Decree was that:

> "The [*United States v.*] *Cannons* [*Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990)] court observed that the general policy favoring settlements 'has particular force where . . . a government actor committed to the protection of the public interest has pulled the laboring oar in constructing the proposed settlement.' *Id.* at 84. In the present case three sovereign governments have worked together to craft a settlement to eliminate the need for years of litigation which would be extremely costly for all of the parties to this case." Memo re

Initial Procedures, p. 10. Emphasis added.

In that regard, the Settling Parties imply that at least one of them must be "a government actor committed to the protection of the public interest." However, the Navajo Nation, and the United States acting on behalf of the Navajo Nation, are certainly working to further the specific interests of the Navajo Nation. And, as demonstrated herein, the water rights interests of the Navajo Nation are diametrically opposed to the interests of other water users in the Basin. Accordingly, said parties are specifically not working to protect the public interest. That leaves only the State (or the OSE) to whom the Movants must refer when implying that one of them is a government actor committed to the protection of the public interest.

Unfortunately, here, the State (OSE) is **not** committed to the protection of the public interest. Although the State negotiated the subject Navajo Settlement, the State is not (adversely) affected by the use of such new water right (the grant of such new water right results in no skin off the State's nose). Rather, the adverse effects of the subject Navajo Settlement are borne entirely by third party water users. While third parties may lose their water rights entirely, the individual State negotiators feel no pain whatsoever. In fact, State officials argue that their lot has been improved by the resolution of the nagging Navajo water rights claims.

This brings up the question as to: who in fact is the State (OSE) representing? The State is certainly not representing third party water users, the public generally, or the public interest. In fact, the negotiating State (OSE) officials are merely representing themselves. It is only the State officials themselves (other than the Navajos) who gain by negotiating the subject Settlement, so that they do not have to deal with the Navajo water rights any longer.

In the present matter, although it is third parties that are adversely affected by the negotiated Navajo water rights settlement, such third parties were not involved, indeed they were

not allowed to be involved, in the negotiation of the subject Navajo water rights.

The Navajo Settlement, as executed by executive branch of the State of New Mexico, violates the Constitutional doctrine of separation of powers (N.M. Const, Art. III, Sec. 1), because the judiciary has exclusive jurisdiction over the adjudication of water rights.

Section 72-4-17 NMSA 1978 (1997 Repl.) [**Suits for determination of water rights; parties; hydrographic survey; jurisdiction; unknown claimants.**] provides in pertinent part:

> "In any suit for the determination of a right to use the waters of any stream system, all those who claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. When any such suit has been filed the court shall, by its order duly entered, direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided in this article, in order to obtain all data necessary to the determination of the rights involved. Money heretofore spent on hydrographic surveys by the state engineer, but not assessed against the water users on the effective date of this act, shall not be assessed against the water users. The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved; and may submit any question of fact arising therein to a jury or to one or more referees, at its discretion; and the attorney general may bring suit as provided in Section 72-4-15 NMSA 1978 in any court having jurisdiction over any part of the stream system, which shall likewise have exclusive jurisdiction for such purposes . . . ." Emphasis added.

The New Mexico Supreme Court has determined that the courts have the exclusive jurisdiction to adjudicate water rights.

> "[U]nder our laws, only the courts are given the power and authority to adjudicate water rights. See also *Public Service Company v. Reynolds*, 68 N.M. 54, 358 P.2d 621 (1960)" *State ex rel. Reynolds v. Lewis*, 84 N.M. 768 at 772, 508 P.2d 577 (1973).

In *W. S. Ranch Company v. Kaiser Steel Corporation*, 79 N.M. 65, 439 P.2d 714 (1968), the New Mexico Supreme Court considered whether the validity of a claimed water right is an issue to be considered in transfer applications before the state engineer, where such water rights had been previously adjudicated.

The *W.S. Ranch* Court stated that

> "Does the adjudication decree take the place of proof of the amount of water actually applied to beneficial use by a junior appropriator? It is our considered judgment that the adjudication decree is proof of the nature and extent of the rights sought to be transferred. The adjudication court determined that the water had been applied to beneficial use, thus satisfying the constitutional and statutory requirements. The state engineer could not do else than accept the court's decree. Were it otherwise, the engineer could, in effect,

> overrule, amend or revise an adjudication decree. This of course, would offend not only the constitution but our statutes and decisional law." *W. S. Ranch* at pp. 66-67. Emphasis added.

Further, in 1971, the New Mexico Attorney General issued an opinion with respect to a question regarding proposed legislation that would increase the duty of water for irrigation for established water rights to compensate for carriage losses within an artesian basin. The Attorney General opined that such legislation would be unconstitutional on several grounds, including the separation of powers.

Specifically, the Attorney General stated that

> "Where exclusive jurisdiction has been given to the judiciary to determine water rights, it is the opinion of this office that the separation of powers doctrine forbids the Legislature from granting any such rights. Therefore, the grant of water rights contained in House Bill 82 is unconstitutional." 1971 Op. Att'y Gen No. 71-23.

The New Mexico Constitution, Article III, Section 1, reads as follows:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted."

Therefore, it is clear that the jurisdiction to adjudicate, or determine, water rights lies exclusively with the courts. The negotiated Navajo Settlement virtually precludes the fair adjudication of the waters of the San Juan Basin by the court. The negotiated Navajo Settlement, by the OSE, violates the doctrine of separation of powers.

Further, only the courts have the power and authority to adjudicate water rights. *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 508 P.2d 577 (1973).

The practice of negotiating water rights settlements generally only tends to violate the law, and such practice should not be allowed.

The only argument the Settling Parties offered in support of the subject Navajo Settlement is that:

> "In the present case three sovereign governments have worked together to craft a settlement to eliminate the

> need for years of litigation which would be extremely costly for all of the parties to this case." (Memo re Initial Procedures, p. 10.) Emphasis added. (See also, Proposed Order, p. 4.)

So, Movants **only** argument in favor of the subject Settlement is that it reduces the risk and expense of protracted litigation. However, the risk of expensive protracted litigation is a function of the resources of a party, and the apparent, or perceived, willingness or intent of such party to actually expend such resources on such protracted litigation. Such resources would include financial resources, access to experts, and access to lawyers. In short, the risk of protracted litigation is a function of how much money a party has.

Certainly, the average irrigation water user in the Basin represents little risk of protracted litigation because he simply cannot afford it. In fact, the average irrigation water user cannot afford to participate in these decades long water rights adjudication suits at all. Certainly, such irrigation user: cannot afford to pay a lawyer to participate in the present matter for decades; will not be expected to know and understand every nuance with respect to every other water users' claim to the use of water; and more specifically, will not be expected to challenge any unsupportable claims of every other water user. Accordingly, such irrigation water user does not represent a realistic risk of protracted litigation.

Further, such irrigation user cannot expect to receive favorable treatment in negotiations with the OSE, and will do well to simply obtain a water right limited to his historic beneficial use of water (basically upon whatever terms the OSE will allow).

Thus, this risk of protracted litigation is only a function of the money a party has, rather than the need, right, or priority such party is entitled to with respect to the (beneficial) use of water. Based upon observations of the subject Navajo Settlement, as well as the previous Jicarilla Apache Settlement; the greater the risk of protracted litigation, the more inclined the State (OSE) is to negotiate a settlement in which water rights are allocated in excess of existing

beneficial uses. Thus, it appears that the greater risk of protracted litigation a party represents, the more water rights a party is likely to obtain pursuant to settlement negotiations with the State (OSE).

Thus, the more money a party has, the more, and better, water rights such party is likely to obtain pursuant to negotiations with the State (OSE). Accordingly, this notion of negotiating water rights with the State, for the purpose of expediency, simply decimates the law. Pursuant to this notion of negotiated settlements, water rights are determined merely at the whim, and sole discretion, of the OSE (State).

Gone almost entirely is the determination of water rights based upon beneficial uses (hydrographic survey). Certainly, gone is any notion that water rights are being determined throughout the Basin based upon a common set of standards.[5] But most importantly, gone are the basic concepts of fundamental fairness and justice.

Since the practice of negotiating water rights settlements generally only tends to violate the law, such practice should not be allowed. Rather, water rights should be determined based upon the beneficial use of water, as evidenced by hydrographic surveys, as required by the Constitution, statutes and case law in New Mexico.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of

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[5] "It would seem self evident that if relative priorities 'one toward the other' were open for determination before the final decree was entered, it would necessarily follow that the determination of the various rights would be made by application of identical standards and rules. That a different result might be encountered in separate lawsuits is conceivable. However, where all rights are being adjudicated in one lawsuit, as here, after consolidation, the application of different standards in determining the relative priorities is patently unfair and improper. We do not see how on the face of appellants' motions it could be determined that they were without merit. This being true, as already observed, they should have been permitted to present such proof as was pertinent to establish the relative priorities of their claims as related to those of the Canal Company. The refusal to permit them to do so was reversible error." *State ex rel. Reynolds v. Allman*, 78 N.M. 1, 4, 427 P.2d 886 (1967) at 4. Emphasis added.

review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #2. Whether the subject expedited *inter se* proceeding is inappropriate and violates the Constitution and laws of New Mexico?

The "expedited *inter se*" proceeding violates existing law. The subject Decrees are intended to be binding on all water users in the Basin. Further, such Navajo water rights, greatly in excess of current uses, were determined without any hydrographic survey of current existing uses of water. Said Navajo water rights were be determined before third parties' water rights were determined in the subject matter, and even before most of such third parties were even joined as parties in the matter.

Accordingly, the "expedited *inter se*" proceeding proposed by Movants simply decimate all New Mexico water law.

The subject "expedited *inter se*" proceeding generally is inappropriate and violates the law. There is no authority for the partial final decree and expedited *inter se* procedure set forth in the Navajo Settlement.

The particular "PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION" was incorporated into the Navajo Settlement as Exhibit 1 attached thereto.

The Partial Final Decree: is partial, in the sense that, such decree will finally determine the water rights of a single entity, the Navajo Nation (and no other water user) (in this sense, the Partial Final Decree bears the characteristics of what is otherwise referred to as a "sub-file order"); is binding on all other water users in the basin; is final, in the sense that, it will not be appealable (at least after the passage of thirty days from entry); and will not be subject to

challenge in any subsequent "*inter se*" proceedings.[6]

The "expedited *inter se*" proceeding, as intended by the Settling Parties: would occur shortly after the Settling Parties move the entry of the subject Partial Final Decree; would consider only the water rights of the Navajo Nation; could occur long before most other water rights in the basin are determined; would not consider that much of the waters had never been put to beneficial use; would not consider that the Navajo Settlement has no basis in any law; would not consider the quantity or timing of water actually available in the basin; would represent the mere ratification by the Court of the Navajo Settlement; and, would result in all water users in the basin being bound by such Partial Final Decree.

Confusing the issue, the terms "partial final decree," "*inter se*," and even "expedited *inter se*" have been used before in different contexts. Unfortunately, such (ambiguous) terms have found their way into the decades long New Mexico water rights adjudication suits. Questions often arise in such lengthy suits as to whether particular orders or decrees are partial, or final, especially with regard to whether such orders or decrees are "final" for purposes of appeal.

However, the concepts of "partial final decree" and expedited "*inter se*," as intended by the Settling Parties, have no basis in any law, and have never been approved, or even considered, by the New Mexico appellate courts. But, most significantly, such concepts, as intended by the Settling Parties, completely undermine the basic principles of the fair determination of the relative water rights of all of the water rights owners within a basin

In *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959), the New Mexico

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[6] The Navajo Settlement provides at Section 3.3 Entry of the Partial Final Decree.
"The Parties then shall file a joint motion with the Court in the San Juan River Adjudication for entry of the Partial Final Decree. The joint motion shall request Court approval of procedures to make the Partial Final Decree final and binding on all claimants to the waters of the San Juan River Basin in New Mexico."
Navajo Settlement, p. 5. Emphasis added.

Supreme Court approved a procedure used by the trial court in a water rights adjudication suit whereby a step by step (township by township) process was utilized for determining facts associated with individual water rights owners, with a final hearing at the end of the adjudication suit to fix the relative priorities of the individual water rights owners.

In *Sharp*, Mack Sharp appealed an order of the trial court that limited his right to irrigate to 120 acres, instead of some larger amount. One question considered therein was whether such order, regarding an individual water rights owner, was "final" for purposes of appeal (by such owner). Regarding the issue of finality, with respect to an order determining the water rights of an individual owner, the *Sharp* Court held that

> "insofar as it covers the matters included therein, namely, the amount, purpose, periods, place of use and specific tract of land to which it was appurtenant, it was final and nothing remained for the final decree except to incorporate the same and fix the priority." *Sharp* at 196-197.

It should be noted that in *Sharp*, neither the term "partial final" nor "*inter se*" were used. However, the *Sharp* court approved the concepts of the step by step procedure, the final comprehensive hearing to fix priorities, and the final appealable nature of interim orders with respect to individual water right determinations. It should be noted that the *Sharp* Court considered only whether such interim orders were appealable by the affected individual water rights owner. The *Sharp* Court did not consider whether such interim orders were appealable by affected third parties.

It is clear that the *Sharp* Court was contemplating that a hearing will be held at a future date where the relative rights of all the various water rights holders in the basin will be collectively considered and determined. Accordingly, the priority date of each such water right cannot be fixed with respect to the various water rights holders until such future hearing.

The significance of such future hearing must not be underestimated. It must be

understood that a particular water right only has value in a context where the availability of the water is known, the relative priority dates of each water right is known and where the total quantity of water rights which are senior to any particular water right are known.

Thus, the step by step procedure authorized by the *Sharp* Court amounts to the preliminary inventory of the various water rights claims and a preliminary determination of the validity of such claims. Such procedure leaves for the future the final determination of the total availability of water in particular basin, the priority date of each individual water right and the relative rights of all the involved water rights holders.

In *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 508 P.2d 577 (1973), the term "partial final judgment and decree" was being used in reference to the "final" decree, virtually at the end of a water rights adjudication suit. The term "partial" was apparently used because the trial court intended to retain jurisdiction with respect to certain issues that may remain to be decided, such as the water rights of the United States, although said "partial final judgment and decree" incorporated all of the water rights of all of the individual owners, as well as the fixing of their relative priorities.

In *Lewis*, the New Mexico Supreme Court considered the contention raised by the State of New Mexico that:

> "the partial final judgment and decree was a valid and final judgment adjudicating the duty of water at three-acre feet [sic] per annum at the well, and the trial court erred by readjudicating the duty of water." *State ex rel. Reynolds v. Lewis*, 84 N.M. 768 at 771. Emphasis added.

The *Lewis* Court stated:

> "The partial final judgment and decree confirmed and approved the sub-file orders adjudicating the water rights of the defendants; it required the defendants to install measuring devices to measure diversion from wells; required appointment of a water master by the state engineer; retained jurisdiction to determine water rights of the United States and other defendants who may be made parties, and to enter such supplementary orders as might be necessary for enforcement of the court's decree." *State ex rel. Reynolds v. Lewis*, at 770.

The *Lewis*, Court held that

> "the partial final decree was not a complete adjudication of all of the rights of the parties involved, particularly since the record herein indicates that the parties were denied the opportunity to present evidence as to the proper measure of the duty of water." *State ex rel. Reynolds v. Lewis*, at 774. Emphasis added.

Therefore, the *Lewis* Court held that the "partial final judgment and decree" was "final" in the sense that it was appealable, but was not "final," in the sense that certain issues remained to be determined, and was, therefore, still modifiable.

It should be noted that in *Lewis*, the term "*inter se*" was still not being used.

In *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, 99 N.M. 699, 663 P.2d 358 (1983), the term "contest *inter se*" was used with respect to individual water rights owners contesting matters in relation to each other within the context of a final hearing (or process) in a water rights adjudication suit. Further, the term "*inter se*" was used in reference to the general process of contesting relative priorities between individual water rights owners, although "the term "*inter se*" was not used as a specific name for such final hearing. In *Pecos Valley*, the term "expedited priority administration" was used. Also, in *Pecos Valley*, although the term "expedited *inter se*" was not used, the concept may have been born. However, the concept of "expedited *inter se*," as used by the Settling Parties in the present matter, was not approved, or even remotely considered, by the *Pecos Valley* Court.

In *Pecos Valley*, the Court stated that:

> "The order from which the parties to this adjudication have appealed modifies the usual adjudication procedure. Typically, following the adjudication of the rights of each claimant as against the state, the court provides an opportunity for contest *inter se* of any individually adjudicated rights before a final decree is entered that adopts each of the individual decrees and appoints a watermaster to administer the interrelated rights as shortage necessitates. The order in the instant case will permit the court to enjoin water users with priorities junior to January 1, 1947, to show cause in individual proceedings why their uses should not be enjoined pursuant to Article XVI, Section 2 of the New Mexico Constitution. Such injunctions are subject to the rights of each user to contest *inter se* the rights adjudicated for use through and by means of the Carlsbad project and are also subject to the rights of each user to establish that his use of the public waters of the Pecos River stream system should not be terminated to satisfy the senior rights adjudicated for use through the Carlsbad project. The order appoints a watermaster to administer such orders of injunction as may be entered by the court in the proceedings which will be held pursuant to the order."
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> * * *

"The appellants contend that the court abused its discretion because the procedure adopted violates their rights to due process. Appellants' position is that there can be no administration of junior rights as against senior rights until the priorities of those rights have been fixed *inter se* and that this cannot be done until the court has held a single, final hearing and entered a comprehensive decree fixing the conflicting priorities. We agree that there can be no administration of junior rights as against senior rights until the parties have had an opportunity to contest priorities *inter se*. We do not agree that such administration must await the filing of a final decree. There is nothing in the statute which precludes the administration of water rights prior to the time of filing of the final decree in the office of the State Engineer. § 72-4-19." *Pecos Valley* at 700-701. Emphasis added.

The *Pecos Valley* Court approved the trial court's proposed procedure noting that:

"In the procedure proposed by the state and adopted by the trial court in this case, there is no denial of due process. While expediting priority administration, the procedure affords each defendant the opportunity to establish his priority and to contest the priority of the Carlsbad Irrigation District. The court will first determine which junior rights must, without question, be terminated to satisfy the senior rights of the Carlsbad Irrigation District, the United States, or the individual water users served by the District. Then the court will adjudicate all of the stream system priorities in reverse order, simultaneously ordering each junior user to show cause why his rights should not be terminated to satisfy such senior rights. In effect, the *inter se* portion of the suit will proceed simultaneously with the individual determinations, giving each junior user the opportunity to contest the priority or any other aspect of the senior water rights, to assert his own priority and to raise any defenses which would preclude termination of his right to satisfy the senior rights." Emphasis added.

* * *

"The procedure adopted by the trial court below does not violate the appellants' rights to due process, as they will be afforded opportunity to contest priorities before any decree is adopted with respect to the rights of the Carlsbad Irrigation District." *Pecos Valley* at 701. Emphasis added.

Thus, in *Pecos Valley* the Court specifically refers to the right of each user to "contest *inter se*" the rights adjudicated to others. Also, said Court specifically refers to the "*inter se*" portion of the suit (as that portion where such individual water rights owners may contest the rights of others). Further, said Court specifically referred to "expedited priority administration" with respect to the need to administer the waters of the Pecos River before a "final" decree is entered by the trial court.

The *Pecos Valley* Court did not specifically use the terms "partial final decree" or "expedited *inter se*." Yet, it can be understood how the term "expedited *inter se*" could be used to describe the procedure approved by the *Pecos Valley* Court where:

"The court will first determine which junior rights must, without question, be terminated to satisfy the senior rights of the Carlsbad Irrigation District, the United States, or the individual water users served by the District. Then the court will adjudicate all of the stream system priorities in reverse order, simultaneously ordering each junior user to show cause why his rights should not be terminated to satisfy such senior rights. In effect, the *inter se* portion of the suit will proceed simultaneously with the individual determinations,

> giving each junior user the opportunity to contest the priority or any other aspect of the senior water rights, to assert his own priority and to raise any defenses which would preclude termination of his right to satisfy the senior rights." *Pecos Valley* at 701. Emphasis added.

However, the concept of an "expedited *inter se*" as derived from *Pecos Valley* bears no relationship to the "expedited *inter se*" procedure proposed by the Settling Parties in the present matter.

In *Pecos Valley*, all of the rights of each user had been determined and the trial court was preparing to terminate junior waters rights in favor of senior rights.

It must be understood that in order to determine that junior water rights need to be terminated, such determination can only be made with the knowledge that there is not sufficient water available to meet all of the water rights being considered. That means, in *Pecos Valley*, the availability of water had also been determined before attempting to implement the "expedited *inter se*" procedure. Here, the question of the availability of water in the San Juan Basin is not currently known, and the Court refused to consider issues regarding the availability of water in the Basin.

Therefore, before the "expedited *inter se*" procedure derived from *Pecos Valley* could be considered in the present case: the availability of water in the San Juan Basin must be determined; all of the water rights in the San Juan Basin must be inventoried and determined; and priorities must be assigned to each water right.

The application of an "expedited *inter se*" procedure is especially inappropriate here, where: the Partial Final Decree would establish water rights for the Navajo Nation in excess of 600,000 acre-feet; much of such right has never been previously used, is not contemplated being used in the immediate future and carries a priority that pre-dates nearly all other water users in the basin; and such "new" (additional) water rights are to be established in a basin that has been

considered to be fully appropriated for decades.

Therefore, the subject Partial Final Decree cannot be entered herein until such matters have first been determined.

The subject "expedited *inter se*" procedure violates the very essence of the *Pecos Valley* procedure.

The Court and the Settling Parties intend that the subject Partial Final Decrees, entered pursuant to the expedited *inter se* proceeding, will determine the rights of the Navajos as against, and will become binding upon, every other water user in the San Juan Basin. Therefore, once the subject Partial Final Decrees are entered, no water right holder in the San Juan Basin will ever get the opportunity to address the adverse impacts said Decrees will have on his use of water.

Pecos Valley never remotely considered the preliminary determination of more than 600,000 acre-feet of an unsubstantiated federal reserved right with a priority date senior to nearly all other water users as against all other water users in the Basin.

If at some point in the subject adjudication suit it should be determined that all of the available water in the Basin has previously been appropriated, as has been the position of the state engineer for decades, the granting of the subject "new" Navajo water rights could possibly result in the loss of hundreds of thousands of acre-feet of water rights of existing non-Indian water rights holders, who are currently using such water.

Further, the present "expedited *inter se*" proceeding would result in the loss of the ability to use such water by current water holders without such water holders actually understanding that the present proceeding has eliminated, or may eventually eliminate, their right to use such water. Without the determination of the total water available in the Basin and the determination of the total amount of water rights senior to any particular water rights holder, it was impossible for any

individual water rights holder to know and understand the impact on themselves of the subject Partial Final Decrees.

Thus, it is clear that the present "expedited *inter se*" proceeding is a far cry from the procedure considered and approved by the *Pecos Valley* Court. *Pecos Valley* provides no legal authority for the "expedited *inter se"* proceeding proposed here where a future federal reserved water right for an Indian tribe is to be determined with a priority dating back to the creation of the subject Indian Reservation.

The "expedited *inter se*" procedure proposed by the Settling Parties clearly violates the due process rights of all other water users in the San Juan Basin.

Even the parties to th subject adjudication suit have not figured out the significance of the proposed Partial Final Decrees on their water rights. The present situation is very complex with issues including federal water projects, federal reclamation law, federal reserved rights, Indian rights, *Winter's* rights, federal reserved rights subordinated to contract rights, expedited *inter se* proceedings, Colorado River Compacts, the Endangered Species Act, Section 7 consultations on the Animas-La Plata Project and associated Biological Opinion and Reasonable and Prudent Alternative, the future of the NIIP project, Navajo rights in general, the amount of water available, and the total amount of water rights claimed in the Basin being completely unknown to any party (including the state engineer). The best water lawyers in the country would have their hands full here. The local municipal and industrial users are in over their heads. The state engineer is flying by the seat of his pants. And, the individual farmers and water users do not have a prayer.

In *Pecos Valley* the Court determined that the expedited *inter se* procedure proposed did not violate due process rights, in that, all affected parties would have the opportunity to contest

priorities before any decree was entered. However, here, it is not simply the priorities between the relative water rights owners that are at issue; here, every aspect of the Navajo water rights are at issue: the priority, amount, purpose, periods and place of use, are all at issue.

Further, here, the availability of water in the basin is at issue. The total number of water rights claimed, permitted, adjudicated or otherwise existing (or reserved rights yet to be established) are not known. The total amount of water rights that are senior to any particular water user are not known. Whether or not the subject Navajo water rights, the unknown Ute water rights, and/or the unknown United States water rights will cause any adverse impact on existing water users cannot yet be determined. Most significantly, it is not known whether the subject decree of Navajo water rights will ultimately cause existing non-Indian water rights to be terminated.

However, in *Pecos Valley*, the availability of water was known, all water rights were known, all adverse impacts were known, and even those individuals who were to lose water rights were specifically notified of such fact before any water rights were to be adjudicated *inter se*, and thus, before any final (partial or otherwise) decree was entered. In *Pecos Valley*, the Court held there was no denial of due process. Here, the situation is so different that the entry of the subject Partial Final Decrees constitutes a denial of the due process rights of every water right holder in the San Juan Basin.

Due process must require not only that an individual have an opportunity for his day in court, but also that he must comprehend the issues and risks involved in the proceeding so that he might be able to make an informed decision as to the level of effort he should necessarily commit to defend himself.

Identical standards must be used to determine each individual water right, the failure to

do so is patently unfair and improper.

Where a common set of standards is used to determine each individual claim to the use of water, little room is left for disputes between individual claimants. However, any difference in the standards used to determine individual water rights, will obviously create the legitimate basis for disputes between individual water rights claimants.

For instance, the determination of how much water is available affects all claimants, as does any attempt to apportion the available water supply between claimants on any basis other than on a strict priority date basis. Disputes can be expected from any claimant regarding the determination of the available water supply and the apportionment of such water on any basis other than strict priority administration.

In *State ex rel. Reynolds v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967) the Supreme Court considered a matter in which two separate water adjudication suits had been consolidated (identified therein as the "Lewis case" and the "Hagerman case"). Prior to the consolidation of the two separate suits, the priority dates in each suit had been determined based upon two separate standards.[7]

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[7] The *Allman* Court stated that

"whereas the water rights decreed to appellants in the Lewis case carried a priority date as of the commencement of the well being adjudicated, without consideration being given to whether the right should have an earlier priority by virtue of the doctrine of relation back, the well rights adjudicated to Hagerman Canal Company carried a priority date related back to the commencement of the ditch whereby the beneficial use was accomplished.

"It is appellants' theory that they were denied their day in court because not permitted to establish the priority date of their wells as the time when water was first applied to the land. There can be no doubt that due process requires all who may be bound or affected by a decree are entitled to notice and hearing, so that they may have their day in court. *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P. 2d 73 (1963). The appellants should have been given a full opportunity to establish the doctrine of relation back in showing a priority date to be that of an original appropriation of water from the same source as that of their wells. *Templeton v. Pecos Valley Artesian Conservancy District*, supra [65 N.M. 59, 332 P.2d 465 (1958)]; *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 !961." *State ex rel. Reynolds v. Allman*, 78 N.M. 2-3. Emphasis added.

The *Allman* Court held that

> "It would seem self evident that if relative priorities 'one toward the other' were open for determination before the final decree was entered, it would necessarily follow that the determination of the various rights would be made by application of identical standards and rules. That a different result might be encountered in separate lawsuits is conceivable. However, where all rights are being adjudicated in one lawsuit, as here, after consolidation, the application of different standards in determining the relative priorities is patently unfair and improper. We do not see how on the face of appellants' motions it could be determined that they were without merit. This being true, as already observed, they should have been permitted to present such proof as was pertinent to establish the relative priorities of their claims as related to those of the Canal Company. The refusal to permit them to do so was reversible error." *Allman* at 4. Emphasis added.

In the present matter, a hydrographic survey is contemplated to determine the water rights of non-Indians. In many, if not most, cases such non-Indian water rights have been previously adjudicated. Hydrographic surveys were properly conducted with respect to such previous adjudications. Therefore, an additional hydrographic survey is not actually required with respect to such non-Indian, previously adjudicated, water rights. All that would be required is the adoption of the previous adjudication decree in the present matter. From there, all that would be required would be the identification of the current owners of such water rights.

The only purpose for a hydrographic survey, with respect to such previously adjudicated water rights, is the determination of currently unused, but previously adjudicated water rights. Therefore, the sole purpose of performing hydrographic surveys with respect to previously adjudicated water rights is the elimination of as many of said previously adjudicated water rights as possible.

By contrast, the water rights of the Navajo Nation were determined pursuant to the subject Navajo Settlement, no hydrographic survey of the current and existing water uses of the Navajo Nation was conducted prior to the execution of the Navajo Settlement, or the entry of the subject Decrees. Further, the hydrographic survey that was conducted with respect to Navajo lands had no relationship to the current or existing water uses of the Navajo Nation, or the water rights awarded pursuant to the subject Decrees.

The Navajo Settlement and Decrees granted water rights to the Navajo Nation to hundreds of thousands of acre-feet of water with respect to which the Navajo Nation has never used, and cannot even speculate as to any reasonably foreseeable use, on Navajo lands.

Whereas, the State proposes a hydrographic survey for the purpose of eliminating currently unused water rights for non-Indians, the Settling Parties intend that the water rights to be acquired pursuant to the Navajo Settlement would never be subject to loss for non-use.

Whereas, the OSE is currently impeding the attempts of non-Indian water rights owners to sell or lease their currently unused water rights, one of the primary facets of the Navajo Settlement is to allow and facilitate the Navajo Nation to market (lease) its vast quantities of never before used water rights to off-reservation (and perhaps out-of-state) entities.

Whereas, the priority dates associated with the water rights of non-Indians must be established based upon when such water was first put to beneficial use, the Navajo Settlement establishes priority dates based upon when Navajo Reservation was created, with no regard as to when such water was first, or ever, put to beneficial use.

It is plain to see that vastly different standards are being employed to determine water rights in the present matter. The use of such different standards creates the legitimate basis for disputes in each instance. As stated in *Allman*, the use of such different standards is patently unfair and improper.

All water right claimants must be joined before any decree can be entered. There is no authority for the decree of hundreds of thousands of acre-feet of water rights to a particular claimant before all parties are impleaded. Specifically, the New Mexico Supreme Court in *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959) reaffirmed that:

> "It is true that no decree declaring 'the priority, amount, purpose, periods and place of use * * * the specific tracts of land to which it shall be appurtenant, together with other necessary conditions to define

the right and its priority' as required by [72-4-19 NMSA 1978], can be entered . . . until hydrographic surveys thereon have been completed and all parties impleaded, at which time it is contemplated a further hearing to determine the relative rights of the parties, toward the other, will be held." *State ex rel. Reynolds v. Sharp*, at 196. Emphasis added.

Similarly, the United States District Court, District of New Mexico, stated in *United States v. Bluewater-Toltec Irr. Dist.*, 580 F.Supp. 1434 (U.S.Dist.Ct.D.N.M. 1984) that:

"Section 72-4-17, N.M.Stat.Ann. (1978), requires that record claimants and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties to a general adjudication. **Before a decree as provided in section 72-4-19, N.M.Stat.Ann. (1978), can be entered, known claimants must be impleaded**. *New Mexico ex rel. Reynolds v. Sharp*, 66 N.M. 192, 194, 344 P.2d 943, 945 (1959). That is not to say, however, that all potential claimants must be made parties at the time the complaint is filed. In *New Mexico ex rel. Reynolds v. Sharp*, 66 N.M. 192, 194, 344 P.2d 943, 944 (1959), the New Mexico Supreme Court approved of adding parties as their identity became known, once the statutorily required hydrographic survey had been completed. 66 N.M. at 196, 344 P.2d at 945. This method complied with New Mexico's all embracing procedure for the adjudication of a stream system." *United States v. Bluewater-Toltec Irr. Dist.*, 580 F.Supp. 1434, 1438 (U.S.Dist.Ct.D.N.M. 1984). Emphasis added.

Further, the Court determined in *United States v. Bluewater-Toltec Irr. Dist.*, 580 F.Supp. 1434, 1441 (U.S.Dist.Ct.D.N.M. 1984) that all water right claimants were indispensable, rather than nominal, parties. Specifically, said Court stated:

"In a New Mexico water rights adjudication, a water rights claimant is an indispensable, rather than nominal, party. *New Mexico ex rel. Reynolds v. W.S. Ranch Co.*, 69 N.M. 169, 174-75, 364 P.2d 1036) (1961)." *United States v. Bluewater-Toltec Irr. Dist.*, 580 F.Supp. 1434, 1441 (U.S.Dist.Ct.D.N.M. 1984). Emphasis added.

NMRA Rule 1-019 [Joinder of persons needed for just adjudication] provides:

A. **Persons to be joined if feasible.** A person who is subject to service of process shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties; or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(a) as a practical matter impair or impede his ability to protect that interest; or

(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

B. **Determination by court whenever joinder not feasible.** If a person as described in Subparagraph (1) or (2) of Paragraph A of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the

action is dismissed for nonjoinder.

C. **Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subparagraph (1) or (2) of Paragraph A of this rule who are not joined, and the reasons why they are not joined.

D. **Exception of class actions.** This rule is subject to the provisions of Rule 1-023 NMRA.

In *State ex rel. Martinez v. City of Las Vegas*, 135 N.M. 375, 89 P.3d 47, (2004 NMSC), the Court stated:

> "Typically, '[i]n any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties.' NMSA 1978, § 72-4-17 (1965). This system of general stream adjudications is designed to avoid piecemeal litigation. *See Elephant Butte Irrigation Dist. V. Regents of N.M. State Univ.*, 115 N.M. 229, 233-234, 849 P.2d 372, 376-77 (Ct.App.1993). 'A comprehensive adjudication of water rights is highly important .... Waters cannot be apportioned according to conflicting decrees or decrees covering less than all claims,' *El Paso & Rock Island Ry. Co. v. Dist. Ct. of Fifth Judicial Dist.*, 36 N.M. 94, 100 8 P.2d 1064, 1067 (1931). In such an adjudication, the State Engineer furnishes the court with 'a **complete** hydrographic survey of such stream system ... in order to obtain all data necessary to the determination of the rights involved.' Section 72-4-17. The adjudication may be initiated by the Attorney General, at the request of the State Engineer, NMSA 1978, § 72-4-15 (1907), or by private claimants, but in either case, all water users whose rights may be affected must be joined. *See State ex rel. Reynolds v. W.S. Ranch Co.*, 69 N.M. 169, 173-75, 364 P.2d 1036, 1039-40 (1961). The State Engineer has a regulatory interest in the litigation. *Elephant Butte*, 115 N.M. at 238, 849 P.2d at 381."
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> "However, the City's affirmative defense of the pueblo rights doctrine potentially implicated the water rights of virtually every water user on the Gallinas. . . . .
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> * * *
>
> "In addition, we have required the State Engineer to join all affected water users when seeking an injunction against a water user for diverting water in violation of established water rights. *W.S Ranch Co.*, 69 N.M. at 173-75, 364 P.2d at 1039-40." *Las Vegas*, 135 N.M. at 393-394, 89 P.3d at 65-66.

Therefore, all water right claimants must be joined before any decree can be entered in the present matter.

Lewis (2007) does not support the subject expedited *inter se* proceeding.

The Settling Parties showed the Court that in *State of New Mexico v. Lewis, et al.*, 141 N.M. 1 (2007 NMCA 8) the New Mexico Court of Appeals approved a partial final decree pursuant to an *inter se* proceeding in a water rights adjudication suit involving the waters of the Pecos River Basin. The Settling Parties did not specifically state, but allowed the Court to infer, that the *Lewis (2007) inter se* proceeding was similar to the subject expedited *inter se* proceeding. Specifically, Movants assert that:

First, *Lewis (2007)* can be distinguished from the present matter in that the *Lewis (2007)* Court did not address the issue of whether or not, all water rights claimants had been joined in the matter. In that regard, it is assumed that all water claimants had been joined, at least that issue was apparently not raised by the parties or considered by the *Lewis (2007)* Court. In the present matter, all water rights claimants have definitely not been joined in the subject matter.

Second, *Lewis (2007)* can be distinguished from the subject matter in that apparently the *Lewis (2007)* Court assumed Appellants to be in privity with the settling parties. In *Lewis (2007)*, the Court did not specifically use the term "privity." However, it did discuss the privity issue in a somewhat backhanded way. In that regard, the *Lewis (2007)* Court noted that: the CID was a settling party; that the CID had apparent authority to enter into the settlement agreement; that Tracy/Eddy (Appellants) were members of the CID; that Tracy/Eddy did not challenge the CID's authority to enter into the settlement agreement; and, therefore, such issue was not before the Court for its consideration. Here, I was definitely not in privity with the Settling Parties.

More significantly, with regard to the issue of whether the settlement in *Lewis (2007)* was consistent with state law, the *Lewis (2007)* Court generally noted that it was consistent with the specific statute § 72-1-2.4 NMSA 1978 (2002), referred to as the "compliance statute."[8] In the

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[8] The *Lewis (2007)* Court noted that the Pecos River Compact, between, New Mexico and Texas, became law in 1949. In 1974, Texas sued New Mexico for not fulfilling its delivery obligations under the Compact. The United States Supreme Court entered an amended decree in *Texas v. New Mexico*, 485 U.S. 388, 108 S.Ct. 1201, 99 L.Ed.2d 450 (1988) requiring New Mexico to meet its Compact obligations to Texas and to submit a plan to erase any delivery shortfall. The compliance statute was enacted in 2002. The *Lewis (2007)* Court noted:

> "By enactment of the compliance statute, the Legislature called upon a state agency, the [Interstate] Stream Commission, to act, and authorized a procedure pursuant to which the Pecos River shortage problems might be resolved. The Legislature in effect charged the Stream Commission with the job of attempting to enter into agreements with the CID [Carlsbad Irrigation District] and PVACD [Pecos Valley Artesian Conservancy District] on 'actions that would effectively aid New Mexico in compliance with the ... amended decree.' § 72-1-2.4(B), (C)." *Lewis (2007)*, 141 N.M. at 11, 150 P.3d at 385.

Prompted by the compliance statute, the State of New Mexico, the United States, the CID and the PVACD (and apparently the ISC and Bureau of Reclamation) negotiated a settlement agreement and proposed partial final decree that they submitted to the Pecos adjudication court in 2003. Said settlement agreement provided for several things, but most notably, the purchase and retirement of land (and water rights) within the PVACD and CID.

present case, there is no such specific "compliance" statute, and the subject Navajo Settlement and Decrees violate a myriad of state laws.

Further, it is not apparent from *Lewis (2007)* that the parties challenged, or that the courts considered and approved the appropriateness or legitimacy of the *inter se* proceeding itself.

Therefore, *Lewis (2007)* does not support the subject "expedited *inter se*" proceeding.

Rule 1-071.2 does not provide a legitimate basis for the subject expedited *inter se* proceeding. Specifically, Rule 1-071.2 provides:

> "B. **Expedited *inter se* proceedings.**
>
> "(1) An expedited *inter se* proceeding is a proceeding in which a water rights claim is resolved in a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978 both as between the plaintiff and the defendant and as among the defendant and other water rights claimants.
>
> "(2) The plaintiff or any claimant may file a motion requesting that the court designate an expedited *inter se* proceeding. The motion shall include a short, concise description of the defendant's claims and the reasons why such a proceeding is necessary. The court *sua sponte* may consider designating an expedited *inter se* proceeding.
>
> "(3) The court shall conduct a hearing to determine whether to conduct an expedited *inter se* proceeding, and may proceed if it finds that such a proceeding will promote judicial efficiency and expeditious completion of the adjudication. Among the factors the court shall consider are:
>
> "(a) whether failure to proceed will injure the party asserting the claim;
>
> "(b) whether proceeding will injure those parties opposing the claim; and
>
> "(c) the expense and delay resulting from the failure to proceed.
>
> "(4) If the court finds that the criteria for an expedited *inter se* proceeding exist, it shall enter an order defining the scope, timing and procedures to be followed in the proceeding. Notice of the proceeding pursuant to Paragraph C of this rule shall be given to all claimants, regardless of whether they have been served and joined as defendants, in the sections of the stream system designated by the court. Unless the court orders otherwise or the parties otherwise agree, the movant requesting designation of the expedited *inter se* proceeding shall provide the notice."
>
> * * *
>
> "D. **Effect of proceeding.** Stream adjudications are special proceedings to determine the rights to use the waters of a stream system. An order resolving a stream system issue proceeding or an expedited *inter se* proceeding binds all water rights claimants regardless of whether they were served and joined as defendants, participated in or received actual notice of the proceeding, provided notice was given in accordance with Paragraph C of this rule." Emphasis added.

Said settlement agreement was objected to by several parties, and the Pecos adjudication court ultimately entered the partial final decree as proposed, dismissing the objections of appellants. Three objectors appealed, most notably, two parties referred to as "Tracy/Eddy" who owned irrigated land within the CID.

Since the *Lewis (2007)* court in essence determined that the settlement was consistent with the compliance statute, said Court apparently further determined (without specifically stating precisely) that the movants for summary judgment had met their prima facie burden, and that the burden then shifted to appellants. The *Lewis (2007)* Court ultimately held that "Appellants have failed to show any genuine issue of material fact that would preclude entry of summary judgement." *Lewis (2007)*, 141 N.M. at 20, 150 P.3d at 394.

Therefore, said Rule would apparently allow the commencement of the an expedited *inter se* proceeding before all of the water claimants are joined in the matter, and said proceeding would bind all water rights claimants regardless of whether they were served or joined as defendants.

However, the New Mexico Constitution prohibits the application of Rule 1-071.2 to the present matter. Specifically, N.M. Const. Article IV, Section 34 [**Change of rights or procedure in pending cases.**] provides

> "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

Then, the Courts have held that said constitutional provision applies to court rules. *State v. DeBaca*, 90 N.M. 806, 568 P.2d 1252 (Ct. App. 1977). Rules adopted by the supreme court are not effective to change the procedure in any pending case. *State v. Gallegos*, 91 N.M. 107, 570 P.2d 938 (Ct. App. 1977). Said section should be considered applicable to rules of court as well as statutes. *Marquez v. Wylie*, 78 N.M. 544, 434 P.2d 69 (1967).

Accordingly, said Rules, having been provisionally adopted in 2007, 2008, and 2009 cannot be applied to change or establish procedures in the present matter which was initiated in 1975. Therefore, Rule 1.071.2 cannot provide the basis for the "expedited *inter se*" procedure proposed by Movants.

Rule 1-071.2 would violate the principle that no decree can be entered before all parties are impleaded and their water rights are determined.

Said Rule 1-071.2 (B.) (4) provides that:

> "Notice of the proceeding pursuant to Paragraph C of this rule shall be given to all claimants, regardless of whether they have been served and joined as defendants. . . ."

In that regard, said Rule allows for the establishment of an expedited *inter se* proceeding,

to determine the water rights of a single entity, such as the Navajo Nation here, before all claimants have been joined and their water rights have been determined. Further, said Rule 1-071.2 (B) (1) provides that the determination of such water rights, pursuant to such an expedited *inter se*, shall be binding on all other water rights claimants.

However, as held in *State ex rel. Reynolds v. Sharp*., 66 N.M. 192, 344 P.2d 943 (1959), no decree can be entered in a water rights adjudication suit until: a full and complete hydrographic survey has been completed; all water rights claimants are impleaded; and the water rights of all claimants have been determined. Accordingly, said Rule 1-071.2 would violate these principles.

Further, Rule 1-071.2 does not authorize the approval of a negotiated. Certainly, said Rule does not authorize: the determination of a water right for hundreds of thousands of acre-feet for an entity that had never before beneficially used such water; the determination of a water right that has no basis in any law whatsoever; the approval of a negotiated settlement that has no basis in a hydrographic survey (as otherwise required by law); procedures in which third party objections would be given no fair or reasonable consideration, but such third parties would be bound anyway; procedures that would provide third parties no realistic possibility of raising a successful objection, or protecting their own water rights; or a partial final decree (a decree for only a portion of the water rights of an entity).

Rule 1-071.2 would bind third parties to the results of an expedited *inter se* proceeding even where such third parties have never been served or joined in the matter. This directly conflicts with the fact that the Supreme Court itself has long held that:

> "It is true that no decree declaring 'the priority, amount, purpose, periods and place of use * * * the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority' as required by § [72-4-19 NMSA 1978], can be entered . . . until hydrographic surveys thereon have been completed and all parties impleaded, at which time it is

contemplated a further hearing to determine relative rights of parties, one toward the other, will be held." *State ex rel. Reynolds v. Sharp*., 66 N.M. 192, 196, 344 P.2d 943, 945 (1959). Emphasis added.

Said Rule also conflicts with § 72-4-17 NMSA 1978 [**Suits for determination of water rights; parties; hydrographic survey; jurisdiction; unknown claimants. (1965)**], which provides that:

> "In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. When any such suit has been filed the court shall, by its order duly entered, direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided in this article, in order to obtain all data necessary to the determination of the rights involved." Emphasis added.

Further, said Rule 1-071.2 would violate the very essence of due process in binding an individual to a decree where he has not been properly served and joined in the matter. Specifically, NMRA Rule 1-001 (B) (3) and (4) provides:

> "(3) 'process' is the means by which jurisdiction is obtained over a person to compel the person to appear in a judicial proceeding and includes a:
> (a) summons and complaint;
> (b) summons and petition;
> (c) writ or warrant; and
> (d) mandate; and
> (4) 'service of process' means delivery of a summons or other process in the manner provided by Rule 1-004 NMRA of these rules." Emphasis added.

In that regard, if an individual is not properly served with process, the court has no jurisdiction over the individual.

Then, NMRA Rule 1-004 provides how such process is to be issued and served. Certainly, Rule 1-071.2 does not even pretend to comply with Rule 1-004.

Further, the courts have held that in a New Mexico water rights adjudication, a water rights claimant is an indispensable, rather than nominal, party. *New Mexico ex rel. Reynolds v. W.S. Ranch Co.*, 69 N.M. 169, 174-75, 364 P.2d 1036) (1961)." *United States v. Bluewater-Toltec Irr. Dist.*, 580 F.Supp. 1434, 1441 (U.S.Dist.Ct.D.N.M. 1984).

NMRA Rule 1-019 [**Joinder of persons needed for just adjudication**] provides:

"A. **Persons to be joined if feasible.** A person who is subject to service of process shall be joined as a party in the action if:

"(1) in his absence complete relief cannot be accorded among those already parties; or

"(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

"(a) as a practical matter impair or impede his ability to protect that interest; or

"(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

"B. **Determination by court whenever joinder not feasible.** If a person as described in Subparagraph (1) or (2) of Paragraph A of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

"C. **Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subparagraph (1) or (2) of Paragraph A of this rule who are not joined, and the reasons why they are not joined." Emphasis added.

The Settling Parties' ultimate goal is to bind all water users in the Basin to the subject Decrees. In order to accomplish this goal, in accordance with the above cited authority, all water claimants must be served and joined before the subject Navajo Decree can be entered. Rule 1-071.2 simply violates all of such authority, where it would allow all claimants to be bound by an expedited *inter se* proceeding without such claimants being served and joined.

Certainly, claimants who have not been involved in the present matter cannot be expected to comprehend the adverse implications the subject Navajo Decree would have on their own use of water. Generally, individual water claimants cannot afford to hire and pay an attorney for decades to protect their interests in these water adjudication suits. In fact, most water rights claimants cannot be expected to follow and understand the implications of these proceedings for decades without an attorney. The present matter has been ongoing for more than 38 years to date without getting around to determining the water rights of most individual. Such individual water rights have never been served and joined in the present matter, and have therefore, never even

been reasonably informed that significant things are happening here that may adversely affect them.

The Settling Parties intentionally take advantage of the perhaps 10,000 individual water claimants who have no comprehension of what is going on in the present matter. One would hope that the Supreme Court did not similarly intend to take advantage of such uninformed vulnerable claimants when it approved said Rule 1-071.2. But, regardless of what the Supreme Court intended to do when it approved said Rule 1-071.2, the result is that perhaps 10,000 individual water rights claimants in the San Juan Basin will be severely disadvantaged by the application of said Rule.

Therefore, all claimants must be properly served and joined in the present matter before any decree can be entered, the provisions of Rule 1-071.2 to the contrary notwithstanding.

Rule 1-071.2 would decimate all New Mexico water law.

Said Rule 1-071.2 would arguably allow the Settling Parties to submit their Navajo Settlement and proposed Decrees under the guise of an expedited *inter se* proceeding. The Settling Parties propose to obtain 400,000 afy of water rights for the Navajo Nation in direct violation of the New Mexico Constitutional doctrines of prior appropriation and beneficial use. The State entered into the subject Navajo Settlement, with no authority to do so, in direct violation of the Constitutional doctrine of separation of powers. The State (OSE) would allocate water rights generally pursuant to negotiated settlements without regard to the previously mentioned constitutional doctrines. The State (OSE) would allocate water rights purely on their own whim, and therefore, to the parties with the most money, or those presenting the State with the biggest headaches. The Settling Parties eliminated the statutorily required hydrographic survey. The Settling Parties intended that Navajo Decrees would be binding on all water users in

the Basin, in direct violation of the law. The Settling Parties intended to bind all water users in the Basin without ever even properly serving and joining such water users in the present matter in violation of the law. The Settling Parties intended to so overwhelm water users that they would not even respond. Therefore, The Settling Parties intended to trample the due process rights of all of these water claimants into dust. The Settling Parties intended to do all of these things in the complete absence of authority to do so, except Rule 1-071.2.

Therefore, the Settling Parties looked to and relied upon said Rule 1-071.2 to make all of these illegal things legal. In that regard, said Rule 1-071.2 simply decimates the law. There is simply no escaping the conclusion that Rule 1-071.2 has become a rule of wrong.

The Supreme Court should reject Rule 1-071.2 entirely in light of the present circumstances. Perhaps the problems with said Rule are the result of the fact that said Rule was not completely thought through before being provisionally approved, or that the Supreme Court was duped by those with undisclosed ulterior motives. Hopefully, the Supreme Court did not approve said Rule knowing that it would be used to completely decimate the law, and any notion of justice or fairness in water rights adjudication suits. Certainly, said Rule should be reconsidered, and rejected entirely, in light of the circumstances of the present matter.

Generally, the Settling Parties have shown no authority where the legislature has authorized, or the appellate courts have considered and approved, an expedited *inter se* proceeding as utilized in the subject matter. The entry of the subject Decrees pursuant to the subject expedited *inter se* proceeding was a travesty, and this Court should denounce the use of such an expedited *inter se* proceeding and overturn the subject Decrees.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of

review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #3. Whether a hydrographic survey of the current uses of water by the Navajo Nation must be completed before any water rights may be awarded to the Navajo Nation in the subject adjudication suit?

New Mexico law requires hydrographic surveys in water right adjudication suits. Specifically, § 72-4-17 NMSA 1978 [Suits for determination of water rights; parties; hydrographic survey; jurisdiction; unknown claimants. (1965)] provides:

> "In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. When any such suit has been filed the court shall, by its order duly entered, direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided in this article, in order to obtain all data necessary to the determination of the rights involved. . . . The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved; and may submit any question of fact arising therein to a jury or to one or more referees, at its discretion; and the attorney general may bring suit as provided in Section 72-4-15 NMSA 1978 in any court having jurisdiction over any part of the stream system, which shall likewise have exclusive jurisdiction for such purposes, and all unknown persons who may claim any interest or right to the use of the waters of any such system, and the unknown heirs of any deceased person who made claim of any right or interest to the waters of such stream system in his lifetime, may be made parties in such suit by their names as near as the same can be ascertained, such unknown heirs by the style of unknown heirs of such deceased person and said unknown persons by the name and style of unknown claimants of interest to water in such stream system, and service of process on, and notice of such suit, against such parties may be made as in other cases by publication." Emphasis added.

Further, there is no authority for the decree of hundreds of thousands of acre-feet of water rights to a claimant without a hydrographic survey. In fact, in *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959) the New Mexico Supreme Court reaffirmed that:

> "It is true that no decree declaring 'the priority, amount, purpose, periods and place of use * * * the specific tracts of land to which it shall be appurtenant, together with other necessary conditions to define the right and its priority' as required by [72-4-19 NMSA 1978], can be entered . . . until hydrographic surveys thereon have been completed and all parties impleaded, at which time it is contemplated a further hearing to determine the relative rights of the parties, toward the other, will be held." *State ex rel. Reynolds v. Sharp*, at 196. Emphasis added.

By contrast, the water rights of the Navajo Nation were determined pursuant to the subject Navajo Settlement. Such water rights were determined before any hydrographic survey

was conducted with respect to water use on Navajo lands. The U.S. has now conducted a hydrographic survey with respect to water use on Navajo lands. However, the water rights of the Decrees are not limited by the findings of such hydrographic survey. Further, said hydrographic survey appears to bear very little relationship to what water is currently being used on Navajo lands. Therefore, said hydrographic survey represents no basis or limitation, with respect to the bulk of the water rights acquired pursuant to the Navajo Settlement.

On January 3, 2011, the United States filed in the subject matter the UNITED STATES' HYDROGRAPHIC SURVEY OF NAVAJO LANDS WITHIN THE SAN JUAN RIVER BASIN ("Hydrographic Survey"). Pursuant to said Hydrographic Survey, the United States stated that:

> "As more fully described below, this hydrographic survey is the United States' description of existing and historic water uses. This description is based exclusively on information assembled by the United States, reflects the sole work of the United States, and is not the hydrographic survey referenced in paragraph 4.2.1 of the Navajo Settlement Agreement." Hydrographic Survey, p. 3. Emphasis added.

Said Hydrographic Survey specifies quantities of water far in excess of the Navajo Nation's current use of water ("existing uses"), and far in excess of those quantities the Navajo Nation has ever used before ("historic uses").

The QUANTIFICATION ANALYSIS FOR THE PROPOSED SUPPLEMENTAL PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION, Prepared in Furtherance of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement, prepared by John Whipple, Consultant to the State of New Mexico, New Mexico Office of the State Engineer, dated April 2, 2012, indicates that the United States' Hydrographic Survey of Navajo Lands, filed in the present matter on January 3, 2011, significantly overstates acreage and capacity of impoundments of tributary waters on Navajo Lands. Pursuant to said Quantification Analysis Mr. Whipple indicates that said Hydrographic

Survey overstates the acreage and capacity of such impoundments by perhaps a factor of three. Said Hydrographic Survey similarly overstates irrigated acreage and water use associated therewith of the irrigated acreage associated with said Proposed Supplemental Decree.

In fact, the Settling Parties have made not provided a hydrographic survey of the current and existing water uses of the Navajo Nation as required by New Mexico law.

The subject Decrees grant hundreds of thousands of acre-feet of water rights to the Navajo Nation without any showing that such water has ever been applied to beneficial use. Indeed, it is clear that hundreds of thousands of acre-feet of such water rights have never been applied to beneficial use.

The New Mexico Constitution, Article XVI, Sec. 3 [**Beneficial use.**] provides

> "Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

Therefore, the subject Decrees are a clear and flagrant violation of the beneficial use provision of the New Mexico Constitution.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #4. Whether the standard for the determination of federal reserved rights for Indian tribes used by the Court is inappropriate and violates the law?

Regarding federal reserved rights for Indian Tribes: such rights are limited to the minimal needs of the Tribe to fulfill the original primary purposes for which the reservation was created; a Tribe is not entitled to water rights for future uses; such rights may be lost for nonuse; such rights do not include the right to use, lease, or market such water off of the reservation; and such rights

must be narrowly construed.

The Settling Parties assert that the Navajo Settlement, settles the reserved water rights claims of the Navajo Nation. Further, the Settling Parties assert that all of the water rights awarded to the Navajo Nation pursuant to the Navajo Settlement are federal reserved rights.

However, I assert that none of the water rights of the subject Decree, and a significant portion of the water rights of the Supplemental Decree can, or should, be considered to be federal reserved water rights.

In that regard, I have proposed that the Navajo water rights be determined by the same standards as all other water rights in the Basin, that is by hydrographic survey. Such proposal may appear to disregard the significant matter of the federal reserved rights of the Navajo Nation, but actually, such matters can easily be incorporated into the water rights determined by hydrographic survey by simply identifying which water uses should be recognized as legitimate federal reserved rights and determining an appropriate priority date associated with such uses.

Such hydrographic survey proposal could only determine water rights based upon existing uses, future uses would not be considered. Adjudicating water rights with respect to never before used water would be inappropriate.

The *Winters* doctrine represents the underlying premise for the Navajo Settlement. The concept of federal reserved water rights for Indian tribes is based upon the *Winters* doctrine.

Generally, pursuant to the *Winters* doctrine, it has been considered that Indian tribes are granted federal reserved rights to the use of water on their reservations for irrigation purposes with a priority date associated with the creation of each such reservation. It has been considered that since such rights are federal reserved rights they are not subject to state law and are, therefore, not subject to loss or forfeiture for non-use.

Further, in *Arizona v. California*, 373 US 546,10 L ed 2d 542, 83 S Ct 1468, reh. den. 375 US 892, 11 L ed 2d 122, 84 S Ct 144, (1963), the United States Supreme Court determined, with respect to certain Colorado River Indian tribes, that said Indian irrigation rights were to be quantified based upon the "practically irrigable acreage" (hereinafter referred to as "PIA") within each particular reservation.

Accordingly, it has been considered that each Indian tribe is to be allowed the right to the use of water sufficient to meet any future PIA needs, even though such water has never before been used for irrigation purposes on such reservation, and without the fear of loss or forfeiture of such water rights for non-use.

Often, the Indian reservations were created very early in the development of their respective geographic areas, and thus, priority dates associated with such federal reserved Indian water rights would predate most other uses in such areas. Therefore, where such Indian water rights have not been quantified or adjudicated, they have created considerable uncertainty with respect to the ownership of water rights.

In that regard, federal reserved water rights have often stood in direct, often irreconcilable, conflict with state-based water rights.

However, most of the above regarding the *Winters* doctrine is only partially correct, although the foregoing appears to be the underlying premise upon which most people believe the Navajo Nation stands as the basis for the Navajo Settlement.

In fact, the *Winters* doctrine has been eroded considerably, to the point even that the concept of PIA has been completely rejected. Further, a careful analysis of the *Winters* doctrine reveals that the concept of federal reserved water rights in reality should reserve very little water for Indian tribes.

The *Winters* doctrine is loosely derived from the United States Supreme Court case *Winters v. United States*, 207 US 564, 52 L ed 340, 28 S Ct 207 (1908). In *Winters*, the Court upheld an injunction as against non-Indians who had dammed and diverted the waters of the Milk River in Montana upstream from the Fort Belknap Indian Reservation (Gros Ventre and Assiniboine Tribes). The suit had been brought by the United States on behalf of the Indians in the Federal District Court of Montana.

The United States alleged that the United States and the Indians initially diverted 1,000 miners' inches of water from said River in 1889 for domestic purposes and that on July 5, 1898 (and long prior to the acts of the non-Indians complained of - 1900) diverted an additional 10,000 miners' inches of water from said River to irrigate 30,000 acres of land, and that ever since such times, such amounts had been diverted and used by the United States and the Indians. *Winters*, at 566, L ed at 341.[9]

The claim by the United States for said injunction was not based upon any notion of "federal reserved rights" associated with the reservation, but rather was based upon the claim that the Indians had been diverting and using the waters of the Milk River before any use of such waters by non-Indians. Thus, the Indian claim for injunction in *Winters* was actually based simply upon the doctrine of prior appropriation. See *Winters,* at 565-566, L ed at 340-341.

The *Winters* Court stated that:

> "The case, as we view it, turns on the agreement of May, 1888, resulting in the creation of the Fort Belknap Reservation." *Winters*, at 575, L ed at 346.

Of extreme significance is the fact that the *Winters* order only enjoined:

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[9] 1 cfs = 50 Miner's Inches in Idaho, Kansas, Nebraska, New Mexico, North Dakota and South Dakota; and
1 cfs = 40 Miner's Inches in Arizona, California, Montana and Oregon.
Standard Handbook for Civil Engineers, Second Edition, Frederick S. Merritt, Editor, Table 21-2, p. 21-3.

> "the defendants in the suit from interfering with the use by the reservation of 5,000 inches of the water of the river." *Winters*, at 565, L ed at 340.

In that regard, said order appears particularly troubling, because said order apparently only allowed the Indians less than one-half[10] of the 11,000 miners' inches of water with respect to which they appear to have been entitled under the doctrine of prior appropriation.

It should be noted that the subject Fort Belknap treaty expressed no congressional intent to reserve water for the subject reservation. In fact, said treaty was completely silent with respect to the use of water on said reservation. However, the *Winters* Court stated:

> "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. *United States v. Rio Grande Dam & Irrig. Co.* 174 U.S. 702, 43 L. ed. 1141, 19 Sup. Ct. Rep. 770; *United States v. Winans*, 198 U.S. 371, 49 L. ed. 1089, 25 S. Ct. Rep. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through the years." *Winters*, at 577, L ed at 346-347.

In that regard, the *Winters* case represents the origin of the judicial concept federal reserved water rights for Indian tribes, essentially determining that the federal government impliedly reserved certain waters for the benefit of said Indians when the subject reservation was created, and that such waters were exempt from appropriation under state law.

However, in light of the fact that the Indian's (United States') complaint in *Winters* was actually based upon the Indian's senior right to use the subject waters, by virtue of the doctrine of prior appropriation, it would appear that deciding *Winters* in terms of federal reserved rights was entirely unnecessary, and has messed up water law throughout the west ever since.

The *Winters* case itself, dealt only with the specific parties thereto (that is, the *Winters* case was not a general stream system adjudication suit), and therefore, shed little light on how such federal reserved rights for Indian tribes should actually be quantified in other instances (although specifically in the *Winters* case the Indian Tribes appeared to have obtained the right to

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[10] 5,000 miner's / 11,000 miner's inches = 45.45%.

use less than half of the water to which they were entitled).

In *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) (the *Arizona v. California* case was a suit between the two states, and was therefore also not a general stream system adjudication suit), the United States Supreme Court construed *Winters* stating that:

> "The Court in *Winters* concluded that the Government, when it created that Indian reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. *Winters* has been followed by this Court as recently as 1939 in *United States v. Powers*, 305 US 527, 83 L ed 330, 59 S Ct 244. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, and are 'present perfected rights' and as such are entitled to priority under the Act."
>
> "We also agree with the Master's conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practically irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians' 'reasonably foreseeable needs.' which in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable." *Arizona*, at 600-601, L ed 2d at 578. Emphasis added.

Therefore, pursuant to *Arizona v. California*, the concept of PIA was created. From such point, the *Winters* doctrine, was generally considered to encompass the quantification of Indian water rights based upon the PIA of a particular reservation, and that such Indian water rights should include the amounts necessary for future, although currently unused, quantities of water, as determined by a PIA analysis.

The preceding concepts of the *Winters* doctrine have been restricted considerably since the United States Supreme Court construed *Winters* pursuant to its *Arizona v. California* decision in 1963. In fact, the entire concept of PIA has been completely rejected by the Arizona Supreme Court.

In *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976), the United States Supreme Court determined that the allocation of federal reserved water rights must be tailored to the "minimal need" of the reservation. In an important caveat, the Court stated that

this right "reserves only that amount of water necessary to fulfill the purpose of the reservation, no more." *Id.* At 141, 96 S.Ct. At 2071. (Emphasis added.) Thus, the allocation must be tailored to the "minimal need" of the reservation. *Id.* (Emphasis added.) (*See also*, *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 at 73 (2001).)

In *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed2d 1052 (1978), the United States Supreme Court determined reserved rights are narrowly quantified to meet the original, primary purpose of the reservation, water for secondary purposes must be acquired under state law. 438 U.S. at 702, 98 S.Ct. at 3015.

In *New Mexico*, the issue before the Court was whether the New Mexico Supreme Court, in an adjudication concerning the Rio Membres, properly quantified the federal reserved water right associated with the Gila National Forest. After reiterating *Cappaert's* limiting principle, that, the "implied-reservation-of-water doctrine" applies only to that amount of water necessary to fulfill a reservation's purpose, the Court emphasized that "both the asserted water right and the specific purposes for which the land was reserved" must be examined to ascertain "that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700, 98 S.Ct. At 3014. Because federal reserved water rights are implied, the Court also determined that

> "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator. *Id.* At 702, 98 S.Ct. At 3015. Emphasis added.

This is now known as the "primary-secondary purposes test." Therefore, at least with respect to non-Indian reservations, the *New Mexico* Court determined that reserved rights are

narrowly quantified to meet the original, primary purpose of the reservation, water for secondary purposes must be acquired under state law. See *New Mexico*, 438 U.S. at 702, 98 S.Ct. At 3015. (See also, *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 at 73 (2001).)

In *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979) the principal question considered was the character of the treaty rights of several Indian tribes in the State of Washington to take anadromous fish (e.g., salmon). Pursuant to a series of treaties entered into in 1854 and 1855, the Indians relinquished their interest in certain lands in exchange for monetary payments, certain small parcels of land reserved for their exclusive use, and other guaranties, "including protection of their 'right of taking fish at usual and accustomed grounds and stations . . . in common with all citizens of the Territory.' 10 Stat 1133." *Washington*, at 661-662.

Of the utmost significance here, the *Washington* Court stated

> "the central principle here must be that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a moderate living." *Washington* at 686.

Thus, the *Washington* Court expressed, regarding Indian treaty rights to natural resources, that Indians were entitled to no more than is necessary to provide the Indians with a "livelihood," or a "moderate living."

But, also of significance was the concept expressed by the *Washington* Court that a right to such natural resource, although exercised at the time of the treaty, does not necessarily continue through the years if circumstances change; for example, "if . . . a tribe should dwindle to just a few members, or if it should find other sources of support that lead it to abandon its fisheries . . ." *Washington* at 687.

United States v. Adair (1983) applies the principles of *Cappaert* and *New Mexico* to Indian water rights, that is, federal reserved water rights can only be used for the original purpose for which the reservation was created; only the minimum amount necessary for the purpose is reserved; and the purpose cannot be changed.

In *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. Denied sub nom.*, *Oregon v. United States*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984), the United States Ninth Circuit Court of Appeals was considering the effect of the *Winters* doctrine on Indian water rights. The *Adair* Court made reference to *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976) and *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed2d 1052 (1978). The *Adair* Court stated that:

> "*New Mexico* and *Cappaert* while not directly applicable to the *Winters* Doctrine rights on Indian reservations, [citations omitted] establish several useful guidelines. First, water rights may be implied only '[w]here water is necessary to fulfill the very purposes for which a federal reservation was created.' and not where it is merely 'valuable for a secondary use of the reservation.' *New Mexico*, 438 U.S. at 702, 98 S.Ct. at 3014. Second, the scope of the implied right is circumscribed by the necessity that calls for its creation. The doctrine 'reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.' *Cappaert*, 426 U.S. at 141, 96 S.Ct. At 2071." *Adair* at 1408-1409. Emphasis added.

The *Adair* Court further would limit Indian water rights to those currently exercised as opposed to those rights as they were exercised at the time of the treaty. The *Adair* Court stated that:

> "We find authority for such a construction of the Indians' rights in the Supreme Court's decision in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). There citing *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 l. Ed.2d 542 (1963), a reserved water rights case, that court stated 'that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living,' 443 U.S. at 686, 99 S.Ct at 3075. Implicit in this 'moderate living' standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living. See *Washington v. Fishing Vessel Ass'n*, 443 U.S. at 686, 99 S.Ct. at 3074-75." *Adair* at 1415. Emphasis added.

Further, the *Adair* Court would not allow the United States to change the purpose of a federal reserved (*Winters*) water right. The Court reasoned that the purpose of a federal

reservation defines the scope and nature of impliedly reserved water rights (at the time of the creation of the reservation) and that such water rights are limited to only so much water as is essential to accomplish the purpose for which such land was reserved. In *Adair,* the United States unsuccessfully argued that:

> "it reserved water rights in 1864 for Indian reservation purposes and converted those rights to forest and wildlife preserve purposes upon acquisition of beneficial interest in the land." *Adair* at 1419.

The *Adair* Court disagreed stating:

> "The purpose of a federal reservation of land defines the scope and nature of impliedly reserved water rights. See *United States v. New Mexico*, 438 U.S. at 700, 98 S.Ct. At 3014. Because the reserved water rights doctrine is an exception to Congress's explicit deference to state water law in other areas, *see id.* at 715, 98 S.Ct. at 3021, the Supreme Court has emphasized the importance of the limitation of such rights to only so much water as is essential to accomplish the purpose for which the land was reserved. *Id.* at 700, 98 S.Ct. at 3014. We conclude that it would be inconsistent with the principles expressed in *United States v. New Mexico*, to hold that the Government may 'tack a currently claimed *Winters* right to a prior one by asserting that it has merely changed the purpose of its previously reserved water right." *Adair*, at 1419. Emphasis added.

Therefore, the *Adair* Court determined that with respect to Indian reservations, federal reserved water rights can only be used for the purpose for which the reservation was created; only the minimum amount necessary for the purpose is reserved; and the purpose cannot be changed.

Martinez v. Lewis (1993) restricted the concept of PIA to allow only those acres susceptible to sustained irrigation at reasonable costs. Specifically in New Mexico, in *Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235 (1993), the New Mexico Court of Appeals considered the water rights of the Mescalero Apache Indian Reservation as part of the general adjudication of the Rio Hondo River system. *Lewis* at 237.

The trial court had considered the extent of the Mescalero Tribe's water rights and the measure by which they should be determined. The trial court had ruled that the United States on behalf of the Tribe was entitled to a diversion of 2,322.4 acre-feet per year. *Lewis* at 237-238.

In *Lewis*, the United States and the Mescalero Apache Tribe contended they were entitled to a diversion of 17,750.4 acre-feet per year, because Indian water rights are to be measured by

the standard of "practically irrigable acreage" (PIA). *Lewis* at 238.

In determining the Tribe's water rights, the trial court had used a PIA analysis, but had rejected the Tribe's claim for water rights associated with projects it found to not be economically feasible.

In *Lewis*, the State challenged the trial court's decision to use a PIA analysis, rather than an analysis that would afford the Tribe their minimal needs or a moderate living. However, the State indicated that its challenge to the use of the PIA standard need not be addressed if the trial court's ruling was affirmed whereby the trial court rejected the Tribe's request for additional water rights under a PIA analysis. *Lewis* at 238.

Therefore, in *Lewis*, the State was apparently taking the position, with respect to the specific facts and the trial court's determination therein, that the results of the PIA analysis were consistent with an analysis based upon the Tribe's minimal needs.

Accordingly, the *Lewis* Court, pursuant to a somewhat convoluted reasoning (although consistent with the State's asserted position), did reject the Tribe's request for additional water rights (based upon a PIA analysis), and therefore, did not address the State's challenge to the use of the PIA analysis (and the State's assertion that the appropriate analysis was one affording the Tribe their minimal needs or a moderate living).

Therefore, the *Lewis* Court did consider the appropriateness of the PIA analysis used by the trial court in order to determine whether the Tribe should be granted the additional water rights requested by the Tribe. With regard to such PIA analysis, the *Lewis* Court stated that:

> "The definition of PIA used in this case is the same as that used in the *Big Horn I* case:[11]

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[11] *In re the General Adjudication of All Rights to Use Water in the Big Horn River System*, 753 P.2d 76 (Wyo. 1988), *cert denied sub nom.*, *Shoshone Tribe v. Wyoming*, 492 U.S. 926, 109 S.Ct. 3265, 106 L.Ed.2d 610, *cert. Granted in part sub nom.*, *Wyoming v. United States*, 488 U.S. 1040, 109 S.Ct. 863, 102 L.Ed.2d 987, *and aff'd without opinion by equally divided Court sub nom.*, *Wyoming v. United States*, 492 U.S. 406, 109 S.Ct. 2994,

> 'those acres susceptible to sustained irrigation at reasonable costs.' The determination of practically irrigable acreage involves a two-part analysis, i.e., the PIA must be susceptible of sustained irrigation (not only proof of the arability but also of the engineering feasibility of irrigating the land) and irrigable 'at reasonable cost.'" *Lewis,* at 247. Emphasis added.

Thus, the *Lewis* Court was stating that the PIA standard allowed only those acres susceptible of sustained irrigation at reasonable costs. The *Lewis* Court further placed the burden on the subject Mescalero Apache Indian Tribe to set forth what irrigation projects it intended to pursue and to establish that such projects were in fact economically feasible.

The *Lewis* Court upheld the trial court's determination that the specific projects proposed by the Tribe were not feasible and accordingly upheld the trial court's decision to allow the Tribe's water rights in the amount of only 2,322.4 acre-feet per year, as opposed to the 17,750.4 acre-feet per year sought by the Tribe.[12] It should be noted that Martinez in said *Martinez v. Lewis* case was Eluid Martinez, the New Mexico state engineer at the time. It was the State Engineer's office in *Lewis* that was asserting the restriction on the Tribe's water rights claims.

Thus, in *Lewis*, the Court skirted the issue of determining the Tribe's water rights on the basis of the Tribe's minimal needs. However, as indicated above, the State's position was that, under the specific facts of that case, the results reached using the described PIA analysis were consistent with the results that would have been reached under a minimal needs analysis.

In *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) (hereinafter referred to as "*Gila V*"), the Arizona Supreme Court completely rejected the determination of Indian water rights based upon the concept of PIA.

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106 L.Ed.2d 342 (1989) (hereinafter referred to as '*Big Horn I*')

[12] The *Lewis* Court determined that the priority date for the Tribe's water rights was 1852, the date of the subject Treaty.

The *Gila V* case was an interlocutory appeal in the apparently decades long general stream adjudication suit regarding the Gila River system in Arizona. Said case apparently involved the water rights of several Indian tribes.[13] On December 11, 1990, the Arizona Supreme Court had granted interlocutory review of six issues decided by the trial court. The Arizona Supreme Court had previously heard and decided four of such interlocutory issues, and had issued opinions generally referred to as *Gila I* - *Gila IV*.[14] *Gila V* at 71.

In *Gila V*, the Court addressed the issue of

> "What is the appropriate standard to be applied in determining the amount of water reserved for federal lands?" *Gila V* at 71.

The *Gila V* Court was reviewing a 1988 trial court decision that stated each Indian reservation was entitled to:

> "such water as is necessary to effectuate the purpose of that reservation. While as to other types of federal lands courts have allowed controversy about what the purpose of the land is and how much water will satisfy that purpose, as to Indian reservations the courts have drawn a clear and distinct line. It is that the amount is measured by the amount of water necessary to irrigate all of the *practically irrigable acreage* (PIA) on that reservation." *Gila V* at 71.

The *Gila V* opinion begins with a discussion of the doctrine of prior appropriation (which appears to be identical to the doctrine of prior appropriation as it exists in New Mexico), and the *Winters* doctrine. The *Gila V* opinion goes on to discuss at length *Winters v. United States*, supra, *Arizona v. California*, supra, *Cappaert v. United States*, supra, *United States v. New Mexico*, supra, and *United States v. Adair*, supra.

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[13] The *Gila V* opinion notes appearances on behalf of the San Carlos Apache Tribe, Tonto Apache Tribe, Yavapai Apache Nation, Gila River Indian Community, Navajo Nation, San Juan Southern Paiute Tribe, Pueblo of Zuni, and the Hopi Tribe. *Gila V* at 70.

[14] As referred to in *Gila V*, *Gila I* is *In re the General Adjudication of all Rights to Use Water in the Gila River*, 171 Ariz. 230, 830 P.2d 442 (1992); *Gila II* is *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 175 Ariz. 382, 857 P.2d 1236 (1993); *Gila III* is *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 195 Ariz. 411, 989 P.2d 739 (1999); and *Gila IV* is *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 9 P.3d 1069 (2000).

Next, the *Gila V* opinion examines the question of the purposes for which Indian reservations were created and concludes that:

> "the essential purpose of Indian reservations is to provide Native American people with a 'permanent home and abiding place,' . . . that is, a 'livable' environment." *Gila V* at 74.

The *Gila V* Court noted that about the time the Indian reservations were created many felt that "the Indian must soon be swept from the face of the earth." *Gila V* at 75. The *Gila V* Court further noted that:

> "General William T. Sherman made clear that 'if [the Indians] wander outside they at once become objects of suspicion, liable to be attacked by the troops as hostile." . . . . In a November 9, 1871 letter to the Secretary of War, Sherman closed by stating that General Crook, head of the Army in Arizona, 'may feel assured that whatever measures of severity he may adopt to reduce the Apaches to a peaceful and subordinate condition will be approved by the War Department and the President.'" *Gila V* at 75.

The *Gila V* Court further noted that:

> "General George Crook served as the commanding officer for the Department of Arizona from 1871- 1875 and again from 1882-1886. A large part of Crook's job was to force Indians onto reservations and hunt down those who dared step off, in order to transform the Indians into 'docile inhabitants of the reservation.'" *Gila V* at 75, footnote 3.

The *Gila V* Court also noted that:

> "The trial court here failed to recognize any particular purpose for these Indian reservations, only finding that the PIA standard should be applied when quantifying tribes' water rights. It is apparent that the judge was leery of being 'drawn into a potential racial controversy' based on historical documentation." *Gila V* at 76.

The *Gila V* Court then determined that the purpose of an Indian reservation should not be limited to agriculture as the PIA standard implicitly does. *Gila V* at 76.

The *Gila V* Court went on to reject the application of the primary-secondary test, set forth in *New Mexico*, with respect to Indian reservations, even though such test had been applied to Indian reservations pursuant to *Adair*. *Gila V* at 76-77.

The *Gila V* Court went on to state:

> "The *Winters* doctrine retains the concept of 'minimal need' by reserving 'only that amount of water necessary to fulfill the purpose of the reservation, no more.' *Cappaert*, 426 U.S. at 141, 96 S.Ct. At 2071. The method utilized in arriving at such amount, however, must satisfy both present and future needs of the reservation as a liveable homeland." *Gila V* at 77.

Next, the *Gila V* Court undertook an analysis of the PIA standard, noting that:

> "PIA constitutes 'those acres susceptible to sustained irrigation at reasonable costs. . . . This implies a two-step process. First, it must be shown that crops can be grown on the land considering arability and the engineering practicality of irrigation. . . . Second, the economic feasibility of irrigation must be demonstrated." *Gila V* at 77-78.

Next, the *Gila V* Court stated:

> "The United States and tribal litigants argue that federal case law has preemptively established PIA as the standard by which to quantify reserved water rights on Indian reservations. We disagree. As observed by Special Master Tuttle in his *Arizona II* report, 'the Court did not necessarily adopt this standard as the universal measure of Indian reserved rights . . . .' *Id.* at 566 n. 40 (quoting Special Master's Report at 90 (Feb. 22, 1981)). Indeed, nothing in *Arizona I* or *II* suggests otherwise." *Gila V* at 78. (As used by the *Gila V* Court: *Arizona I* is *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); and *Arizona II* is *Arizona v. California*, 460 U.S. 605, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983).)

The *Gila V* Court goes on to state:

> "On its face, PIA appears to be an objective method of determining water rights. But while there may be some 'value of the certainty inherent in the practicably irrigable acreage standard.' . . . its flaws become apparent on closer examination.
>
> "The first objection to an across-the-board application of PIA lies in its potential for inequitable treatment of tribes based solely on geographic location. . . ."
>
> "Another concern with PIA is that it forces tribes to be farmers in an era when 'large agricultural projects . . . are risky marginal enterprises . . . .'"
>
> "Limiting the applicable inquiry to a PIA analysis not only creates a temptation for tribes to concoct inflated, unrealistic irrigation projects, but deters consideration of actual water needs based on realistic economic choices. . . ."
>
> "The PIA standard also potentially frustrates the requirement that federally reserved water rights be tailored to minimal need. . . ." *Gila V* at 78-79.

Finally, the *Gila V* Court completely rejects the PIA standard stating:

> "For the foregoing reasons, we decline to approve the use of PIA as the exclusive quantification measure for determining water rights on Indian lands." *Gila V* at 79. Emphasis added.

At this point, the *Gila V* Court had rejected all of the work that had gone into quantifying the water rights of the subject Indian tribes in said matter to date, and said Court struck out in a completely new direction stating:

> "Recognizing that the most likely reason for PIA's endurance is that 'no satisfactory substitute has emerged.' . . . we now enter essentially uncharted territory. In *Gila III*, this court stated that determining the amount of water necessary to accomplish a reservation's purpose is a 'fact-intensive inquir[y] that must be made on a reservation-by-reservation basis.' 195 Ariz. At 420, 989 P.2d at 748, ¶ 31. We still adhere to the belief that this is the only way federally reserved rights can be tailored to meet each reservation's minimal need." *Gila V* at 79. Emphasis added.

The *Gila V* Court noted that in a previous case, one of the then current litigants had

argued that:

> "there should be a 'balancing of a myriad of factors' in quantifying reserved water rights." *Gila V* at 79.

The *Gila V* Court went on to reason that:

> "During oral arguments in the present case, counsel for the Apache tribes made a similar argument. Considering the objective that tribal reservations be allocated water necessary to achieve their purpose as permanent homelands, such a multi-faceted approach appears best suited to produce a proper outcome.
>
> "Tribes have already used this methodology in settling water rights claims with the federal government. One feature of such settlements has been the development of master land use plans specifying the quantity of water necessary for different purposes on the reservation" *Gila V* at 79.

In that regard, the *Gila V* Court essentially introduced and suggested the concept of determining Indian federal reserved water rights based upon master land use plans. Specifically, the Court stated:

> "While we commend the creation of master land use plans as an effective means of demonstrating water requirements, tribes may choose to present evidence to the trial court in a different manner. The important thing is that the lower court should have before it actual and proposed uses, accompanied by the parties' recommendations regarding feasibility and the amount of water necessary to accomplish the homeland purpose. In viewing this evidence, the lower court should consider the following factors which are not intended to be exclusive.
>
> "A tribe's history . . .
>
> " . . . tribal culture . . .
>
> " . . .the tribal land's geography, topography, and natural resources, including groundwater availability. . . .
>
> " . . . a tribe's economic base . . .
>
> "Past water use . . .
>
> " . . .a tribe's present and projected future population . . ." *Gila V* at 79-80.

With regard to the consideration to be given to non-Indian water users, the *Gila V* Court stated:

> "The state litigants argue that courts should act with sensitivity toward existing state water users when quantifying tribal water rights. *See New Mexico*, 438 U.S. at 718, 98 S.Ct. At 3023 (Powell, J., dissenting in part) (concurring that the *Winters* doctrine 'should be applied with sensitivity to its impact upon those who have obtained water rights under state law'). They claim that this is necessary because when a water source is fully appropriated, there will be a gallon-for-gallon decrease in state users' water rights due to the tribes' federally reserved rights. *See Arizona II* , 460 U.S. at 621, 103 S.Ct. at 1392; *New Mexico*, 438 U.S. at 705, 98 S.Ct. at 3016. When an Indian reservation is created, the government impliedly reserves water to carry out its purpose as a permanent homeland. *See Winters*, 207 U.S. at 566-67, 577, 28 S.Ct. at 208-09, 212. The court's function is to determine the amount of water necessary to effectuate this purpose, tailored to the reservation's minimal need. We believe that such a minimalist approach demonstrates appropriate sensitivity and consideration of existing users' water rights, and at the same time provides a realistic basis for measuring tribal entitlements." *Gila V* at 81. Emphasis added.

The *Gila V* Court went on to state that:

> "Again, the foregoing list of factors is not exclusive. The lower court must be given the latitude to consider other information it deems relevant to determining tribal water rights. We require only that proposed uses be reasonably feasible. As with PIA, this entails a two-part analysis. First, development projects need to be achievable from a practical standpoint–they must not be pie-in-the-sky ideas that will likely never reach fruition. Second, projects must be economically sound." *Gila V* at 80.

Ultimately, the *Gila V* Court concluded by stating:

> "We wish it were possible to dispose of this matter by establishing a bright line standard, easily applied, in order to relieve the lower court and the parties of having to engage in the difficult, time-consuming process that certainly lies ahead. Unfortunately, we cannot.
>
> " . . . [I]t is our hope that interested parties will work together in a spirit of cooperation, not antagonism. 'Water is far too ecologically valuable to be used as a political pawn in the effort to resolve the centuries-old conflict between Native Americans and those who followed them in settling the West.'" *Gila V* at 81. Emphasis added.

Therefore, the *Gila V* Court completely rejected the notion of determining Indian federal reserved water rights on the basis of PIA. Unfortunately, the *Gila V* Court suggested the even more disastrous notion of determining such Indian water rights on the basis of master land use plans.

What should be clear from the preceding, is that trying to determine the water rights of Indian tribes based upon some sort of concept of federal reserved water rights is a complete disaster. The *Gila V* Court not only rejected the probably more than twenty years worth of efforts previously expended in that case to determine the water rights of the Indian tribes, it also rejected most of the United States Supreme Courts decisions of the previous 96 years since the *Winters* Court first introduced the concept of federal reserved water rights in 1908.

Granting Indian tribes federally reserved water rights for future uses is inappropriate and is completely unworkable. Generally, the concept of the implied reservation of water rights for future Indian uses is often considered one of the hallmarks of the *Winters* doctrine. The reservation of water rights for such future Indian uses was more or less presumed in the *Gila V* decision. However, the concept of allocating water rights for future Indian uses is probably the primary reason for the chaos that surrounds the application of the *Winters* doctrine, and why the

courts have been unable to successfully and fairly apply the *Winters* doctrine in general stream adjudication suits since the *Winters* decision was announced in 1908.

Granting Indian tribes reserved water rights based upon a PIA standard provides for future uses, but as specifically decided in *Gila V*, said PIA standard is completely unfair and inappropriate. *Gila V* was concerned that the use of the PIA standard would tempt Indian tribes to concoct unrealistic irrigation projects. However, the land use plan suggestion from *Gila V* simply tempts Indian tribes to concoct any manner of unrealistic water use projects.

The use of a PIA standard would provide a definite upper limit with respect to the determination of Indian water rights, simply because the number of (practically irrigable) acres within any reservation is finite. However, in the case of the Navajo Nation, such upper limit, based on the PIA standard, would be well in excess of all of the water available, due to the enormous size of the Navajo Reservation.

By contrast, the determination of Indian water rights based upon land use plans as set forth in *Gila V*, has no upper limit at all. The amount of water that could be used on the Navajo Reservation, for any conceivable purpose, for all time, is simply limitless, or infinite. Therefore, the *Gila V* decision, while recognizing the problems of the PIA standard, just makes matters infinitely worse by suggesting the use of land use plans to determine the future uses of Indian tribes.

But, even solely within the realm of the determination of federally reserved water rights, including water rights for future uses is diametrically opposed to the concept of the implied reservation of only so much water as is necessary for minimal needs.

The concept of granting Indians the right to water, with a priority date as of the creation of the reservation, for all water uses they can possibly imagine in the future is absolutely,

completely irreconcilable with respect to all other water rights. Water resources are obviously finite. However, projected future growth, and thus, projected future water requirements, are infinite. To state the problem another way; are the water requirements of the Indian tribes to be determined based upon their possible future uses: for the next twenty years; the next forty years; the next 100 years; the next 1,000 years; the next 100,000,000,000 years; or, simply until such time as the sun explodes and destroys all life on the planet earth entirely?

Hopefully, it can be seen that if the Indians are to be granted water rights with respect to all of their future uses, the court could make the determination of their water rights a simple matter by just giving them the right to all of the water available. Then, it just becomes a (not so simple) matter of determining which Indian tribes get how much water, no one else gets any, except as they may contract from the Indians at whatever terms the Indians choose to dictate. I would hope the absurdity is obvious, with respect to the concept of determining Indian water rights based upon future uses.

If it should be determined that the Indians should be granted federally reserved water rights with respect to their future uses for a more reasonable period, the questions arise as to what constitutes a reasonable period, and from what point in time should such reasonable period be measured? Should such reasonable period be ten years, twenty years, or forty years? Should the point in time from which such future uses be measured be: today; when the Indian water rights are finally determined herein; or from the authorization of the NIIP project (1962)? I would suggest the most reasonable point in time from which any such future use should be measured would be the date of the creation of the reservation itself. Of course, the Navajo Reservation was created in 1868, therefore, a forty year future use period expired 105 years ago.

Determining such future uses for a forty year period from the date the reservation was

created would not be unreasonable, and would be entirely consistent with the *Winters* doctrine. In fact, since such "future" uses have now been in existence for 105 years, such uses could be easily determined and quantified by hydrographic survey.

Existing uses would be a reasonable way to determine the water rights of the Navajo Nation. The Navajo Nation has had 145 years to date to develop its water uses. During such time, no one has ever denied the Navajos the right to divert water from the San Juan River, in fact, the OSE has apparently always taken the position that it is has no jurisdiction on the Navajo Reservation. The Navajo Nation has always diverted and used whatever it wanted.

Currently, the Navajo Nation is far and away the largest water user in the San Juan Basin in New Mexico. Any unmet water needs on the Navajo Reservation are not the result of a lack of water rights, or water use restrictions imposed by any authority. Rather, any unmet water needs on the Reservation are simply the result of the lack of funds or political priorities.

What purpose is served by granting the Navajo Nation the rights to hundreds of thousands of acre-feet of water per year, with priority dates of 1868, over and above existing uses, other than to create a revenue source for the Navajo Nation at the expense of other existing water users? Such a grant of water rights to the Navajo Nation is certainly not fair to other water users in the Basin.

We all live on the same planet, we all need water to survive, water resources are finite, and a means must be developed where the water rights of all water users are fairly determined. The doctrine of prior appropriation establishes a means for allocating finite water resources. The doctrine of prior appropriation may or may not be the best way, but it is the law, it is in the Constitution, and if applied consistently with respect to all water users, provides a fair standard upon which all water users can rely to allocate limited water resources. Reliable, consistently

applied rules, are essential to allow a society to function efficiently and grow.

Hopefully, it can be seen that granting Indians the right to water for all of their future uses is a completely unworkable concept.

But most significantly, upon closer examination, it should be observed that the concept of the reservation of Indian water rights for future uses is not really even in the law.

Gila V assumes the *Winters* doctrine incorporates the concept of including within the concept of federal reserved rights the notion that future uses of water by Indian tribes should be given a priority date as of the date of the creation of the reservation. However, the inclusion of such future uses is not really even in the law. The *Gila V* Court looked to *Winters, supra* itself and the PIA concept from *Arizona v. California, supra*, as the basis for the inclusion of future uses.

Specifically, the *Gila V* Court stated:

> "The *Winters* doctrine retains the concept of "minimal need" by reserving "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert*, 426 U.S. at 141, 96 S.Ct. at 2071. The method utilized in arriving at such an amount, however, must satisfy both present and future needs of the reservation as a livable homeland. *See Arizona I*, 373 U.S. at 599-600, 83 S.Ct. at 1497-98; *Winters*, 207 U.S. at 577, 28 S.Ct. at 212." *Gila V* at 77.

Specifically, referring to *Arizona v. California*, *supra*, the *Gila V* Court stated:

> "the [*Arizona I*] Court found that the United States reserved water rights 'to make the reservation[s] livable.' *Id.* This allocation was intended to 'satisfy the future as well as the present needs of the Indian Reservations.' *Id.* at 600, 83 S.Ct. at 1498." *Gila V* at 72-73.

However, as indicated herein above, the most significant holding of *Gila V* was the complete rejection of the concept of PIA as the basis for determining the reserved rights of Indian tribes.

Specifically, with respect to the origin of the concept of PIA from *Arizona v. California*, the *Gila V* Court noted that:

> "The United States and tribal litigants argue that federal case law has preemptively established PIA

> as the standard by which to quantify reserved water rights on Indian reservations. We disagree. As observed by Special Master Tuttle in his *Arizona II* report, 'the Court did not necessarily adopt this standard as the universal measure of Indian reserved rights . . . .' *Id.* at 556 n. 40 (quoting Special Master's Report at 90 (Feb. 22, 1981)). Indeed, nothing in *Arizona I* or *II* suggests otherwise." *Gila V* at 78. Emphasis added.

If the concept of including future uses is based upon the utilization of the PIA standard, the rejection of the PIA standard rejects the future use concept inherent therein.

The *Gila V* Court also apparently looked to the *Winters* case itself to find that the determination of Indian water rights should include rights for future uses. In that regard, the *Gila V* Court states:

> "The Supreme Court, recognizing the "lands were arid, and, without irrigation, were practically valueless," *id.* at 576, 28 S.Ct. at 211, held that Congress, by creating the Indian reservation, impliedly reserved "all of the waters of the river . . . necessary for . . . the purposes for which the reservation was created." *Id.* at 567, 28 S.Ct. at 208. As noted by the Court, the purpose for creating the Fort Belknap reservation was to establish a permanent homeland for the Gros Ventre and Assiniboine Indians. The Court further declared that this reservation of water was not only for the present needs of the tribes, but "for a use which would be necessarily continued through years." *Id.* at 577, 28 S.Ct. at 212." *Gila V* at 72. Emphasis added.

The full relevant quote from *Winters* is actually:

> "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. [citations omitted] That the government did reserve them we have decided, and for a use which would be necessarily continued through the years." *Winters* at 577. Emphasis added.

In that regard, *Winters* says absolutely nothing about reserving water rights for Indian tribes for future uses (with priority dates as of the date of the creation of the reservation).

The concept of the right to use water that "would be necessarily continued through the years" is absolutely the same as a water right under the state law doctrine of prior appropriation. Specifically, § 72-2-2 NMSA 1978 provides for "the right to use the water, so long as the water can be beneficially used thereon . . ."

In fact, as pointed out herein above, the *Winters* Court, pursuant to the federally reserved water rights doctrine created therein, gave the Indians therein the right to less than one-half of the water they were apparently then using, and to which they should have apparently been entitled under the state law doctrine of prior appropriation.

Therefore, the notion that the courts have decided that Indians are entitled to federal reserved water rights for future uses is merely myth.

Similarly, another one of the hallmarks of the *Winters* doctrine is often considered to be that water rights for Indian tribes are not subject to loss for non-use. However, the *Winters* case says absolutely nothing about reserving water rights that will not be subject to loss for non-use.

Inherent in the concept of providing water for future Indian uses could be the notion that such right to future uses would not be subject to loss for non-use. However, as indicated herein above, there really exists no federal reserved water right for Indian tribes for future uses. Accordingly, there is no such right to water that is not subject to loss for non-use.

In fact, as indicated herein above, the *Adair* Court stated that:

> "We find authority for such a construction of the Indians' rights in the Supreme Court's decision in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). There citing *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 l. Ed.2d 542 (1963), a reserved water rights case, that court stated 'that Indian treaty rights to a natural resource that once was thoroughly and exclusively exploited by the Indians secures so much as, but no more than, is necessary to provide the Indians with a livelihood — that is to say, a moderate living,' 443 U.S. at 686, 99 S.Ct at 3075. Implicit in this 'moderate living' standard is the conclusion that Indian tribes are not generally entitled to the same level of exclusive use and exploitation of a natural resource that they enjoyed at the time they entered into the treaty reserving their interest in the resource, unless, of course, no lesser level will supply them with a moderate living. See *Washington v. Fishing Vessel Ass'n*, 443 U.S. at 686, 99 S.Ct. at 3074-75." *Adair* at 1415. Emphasis added.

In that regard, both *Washington* and *Adair* explicitly state that Indian tribes are not necessarily entitled to the same level of use of a natural resource that they enjoyed at the time they entered into the treaty. Thus, the United States Supreme Court has clearly held that a federal reserved Indian right can, in fact, be lost by non-use, or even changed circumstances.

Therefore, once again, the notion that federal reserved water rights for Indian tribes cannot be lost for non-use, is merely myth.

As indicated herein above, the United States Supreme Court provided the solution to the future use dilemma in *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed2d

1052 (1978). In *New Mexico*, the Court determined reserved rights are narrowly quantified to meet the original, primary purpose of the reservation, water for secondary purposes must be acquired under state law. 438 U.S. at 702, 98 S.Ct. at 3015.

In *New Mexico*, after reiterating *Cappaert's* limiting principle, that, the "implied-reservation-of-water doctrine" applies only to that amount of water necessary to fulfill a reservation's original purpose, the Court emphasized that "both the asserted water right and the specific purposes for which the land was reserved" must be examined to ascertain "that without the water the purposes of the reservation would be entirely defeated." *New Mexico*, 438 U.S. at 700, 98 S.Ct. At 3014. Because federally reserved water rights are implied, the Court also determined that:

> "[w]here water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended . . . that the United States would acquire water in the same manner as any other public or private appropriator. *Id.* At 702, 98 S.Ct. At 3015. Emphasis added.

This is now known as the "primary-secondary purposes test." Therefore, at least with respect to non-Indian reservations, the *New Mexico* Court determined that reserved rights are narrowly quantified to meet the original, primary purpose of the reservation, water for secondary purposes must be acquired under state law. *New Mexico*, 438 U.S. at 702, 98 S.Ct. At 3015. (*See also*, *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 at 73 (2001).)

Also as indicated herein above, in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), *cert. Denied sub nom.*, *Oregon v. United States*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984), the principles of *Cappaert* and *New Mexico* were applied to Indian water rights, that is, federal reserved water rights can only be used for the original purpose for which the reservation

was created; only the minimum amount necessary for the purpose is reserved; and the purpose cannot be changed.

Further, the *Adair* Court limited Indian water rights to those currently exercised as opposed to those rights as they were exercised at the time of the treaty, and the *Adair* Court would not allow the United States to change the purpose of a federal reserved (*Winters*) water right. The Court reasoned that the purpose of a federal reservation defines the scope and nature of impliedly reserved water rights (at the time of the creation of the reservation) and that such water rights are limited to only so much water as is essential to accomplish the purpose for which such land was reserved.

Therefore, the *Adair* Court determined that with respect to Indian reservations, federal reserved water rights can only be used for the original, primary purpose for which the reservation was created; only the minimum amount necessary for the purpose is reserved; the purpose cannot be changed; water for secondary purposes must be acquired under state law.

The Navajo Nation water claims in the San Juan Basin must ultimately be determined in this adjudication suit. If such claims are to be determined by the Navajo Settlement they could very easily completely change the ownership of water rights in the San Juan Basin. Now that the subject Decrees have been entered, all other existing (previously permitted or adjudicated) water rights in the San Juan Basin could be virtually eliminated.

The PIA standard of the *Winters* doctrine, as described above, ultimately based its determination of a tribe's right to water on the "practicably irrigable acreage of the particular reservation. Therefore, such *Winters* rights would be determined by the size or configuration of a particular reservation, rather than even the water needs of the particular Indian people.

Water rights based solely upon said PIA standard, would be essentially determined in a

vacuum, that is, without any consideration being given to the needs of other users in the particular basin. Further, the *Winters* doctrine, based solely upon the PIA standard, would not even consider the availability of water in the particular basin at all.

Further, such *Winters* doctrine would completely undermine the doctrine of prior appropriation in New Mexico. Water rights obtained by virtue of such *Winters* doctrine would not be subject to loss or forfeiture for non-use, and no showing of beneficial use would be required. Therefore, such *Winters* doctrine would completely abrogate the long established principles of water right acquisition and administration in the State of New Mexico as provided by the laws and constitution of this State.

Such *Winters* rights of the Navajo Nation would be enormous (using the PIA standard) due to the enormous size of the Navajo Reservation. Pursuant to the Navajo Settlement, the Navajo Nation seeks the right to divert more than 600,000 acre-feet annually from the San Juan Basin in New Mexico, while the depletion schedules being used only allow approximately 600,000 acre-feet of depletion for the entire San Juan Basin in New Mexico. Further, the Decrees provide a priority date of 1868, although they have never put much of such water to use in the last 145 years, and have no realistic plans of putting such water to use on their reservation in the foreseeable future. In fact, the Navajo Nation intends to market such water off of the reservation.

The Ute Mountain Utes also have a large reservation in New Mexico, although there are actually very few Utes residing on such reservation. Again, the application of said PIA standard from the *Winters* doctrine for the benefit of the Utes would have a devastating effect on the rights of existing water users in the San Juan Basin in New Mexico.

It should be noted at this point that the *Winters* case was not a general stream adjudication

suit. Accordingly, *Winters* did not consider the affect of the determinations made therein upon other affected water users. It is elementary that a decision in a particular case is only binding upon the parties thereto. Certainly, the courts' determinations in *Winters* and *Arizona v. California* were made specifically with respect to the parties thereto. There simply was no broader consideration given in said cases as to how the concept of federal reserved rights would, or should, be applied in every subsequent general adjudication suit in the west.

Obviously, the determination of Indian water rights pursuant to the *Winters* doctrine conflicts violently with the determination of non-Indian water rights according to state law. Now, trying to apply the *Winters* doctrine standards in a general adjudication suit simply leads to chaos.

Hopefully, it is becoming apparent how devastating the piecemeal application of the *Winters* doctrine would be on existing water rights holders in the San Juan Basin.

Therefore, if there is to be any notion of fairness with respect to the adjudication of water rights in the San Juan Basin, the water rights of Indian tribes must only be determined in the context of all other water users, in the context of the available water supply, and must ultimately be determined on the basis of established state law. Indian water rights must be determined like any other, based upon the application of such water to beneficial use with a priority date established by the date when such water was first put to such beneficial use. Any notion of justice and fairness requires that all parties play by the same rules. To do otherwise only creates chaos.

The *Winters* doctrine, as previously described, would ultimately reorder political power in the West by giving Indian tribes the right to control that greatest single element required for life on this planet (or apparently anywhere else in the universe) - water. The proposition that all

water rights could be held by Indian tribes and that one must yield to the whims of such tribes in order to obtain such an essential of life is not only scary but unbelievably absurd.

The Navajo Settlement provides that the (excess) water rights granted to the Navajo Nation may be leased off of the Reservation. Such a right to lease federal reserved water rights to third parties has never been granted, or even considered, by any of the foregoing authorities. In fact, the notion that an Indian tribe could lease federal reserved water rights to third parties is absolutely diametrically opposed to the concept that federal reserved water rights only provide such water as is necessary for the minimal needs of the reservation.

But here, the Navajo Settlement, taken together with the reoperation of Navajo Dam, would take water away from existing users, give such water to the Navajo Nation, and then the Navajo Nation would turn around and lease such water back to such original user. The doctrine of prior appropriation and any notion of the fair appropriation and use of water in New Mexico (and the West) would be absolutely decimated.

There simply is no authority for allowing the Navajo Nation to lease federal reserved water rights off of the Reservation.

With regard to the original purpose for the creation of the Indian reservations, the *Gila V* Court concluded that:

> "the essential purpose of Indian reservations is to provide Native American people with a 'permanent home and abiding place,' . . . that is, a 'livable' environment." *Gila V* at 74.

Specifically with regard to the Navajo Nation, Article XIII of the TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE NAVAJO TRIBE OF INDIANS, With a record of discussions that led to its signing (Concluded June 1, 1868; Ratification advised July 25, 1868; and Proclaimed August 12, 1868. Hereinafter referred to as the "Navajo Treaty" and associated "Record of Discussions." A copy of said Navajo Treaty and Record of Discussions is

attached hereto as Exhibit A, and is hereby incorporated herein by reference.) provides:

> "The Tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere . . . . and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians." Navajo Treaty, Art. XIII.

Similarly, Article IX of the Navajo Treaty provides:

> "the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined . . . ." Navajo Treaty, Art. IX.

In that regard, the original purpose for the creation of the Navajo Reservation was not merely to provide the Native American people with a "permanent home and abiding place," rather, it was also to permanently establish essentially the only place where the Navajo people could "abide" (at least peacefully, with the protection of the United States).

As pointed out in *Gila V*, when the Indian reservations were initially created, the Indians were forced onto such reservations, and those Indians who dared step off were likely to be considered hostile and were subject to being shot. *Gila V* at 75.

Fortunately, those days are gone forever. However, regarding the original purpose of the Navajo Reservation, the Navajo Treaty provided:

- for the creation of a Reservation of approximately 100 miles square (that would be approximately 10,000 square miles.) (Navajo Treaty, Art. II; see also Record of Discussions, p. 10.)[15];

[15] However, it appears that the Navajo Reservation as it was originally created in 1868 was actually approximately 5,030 square miles. See THE BID AND GARY L. HORNER'S SUGGESTIONS REGARDING: the SPECIAL MASTER'S REPORT CONCERNING JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION; and 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, p. 27, filed in the present matter on March 8, 2012. I understand that what the Settling Parties currently refer to as "Navajo Lands" is more on the order of 27,000 square miles.

- for the construction of a warehouse, agency building, carpenter shop, blacksmith shop, school house and chapel. (Navajo Treaty, Art. III.);
- for the selection of land from the Reservation for farming by individual tribal members. Such selected land to cease to be held in common, and to be occupied and held in the exclusive possession of the person selecting it, as long as the land continued to be cultivated. (Navajo Treaty, Art. V.);
- for the compulsion of Navajo children to attend school, and provided for houses and teachers for said schools. (Navajo Treaty, Art. VI.);
- with respect to the head of a family who has selected land for cultivation, seeds and agricultural implements for a period of three years. (Navajo Treaty, Art. VII. & VIII.);
- for certain articles of clothing, goods and raw materials, for a period of ten years (not exceeding a value of five dollars per Indian), each Indian being encouraged to manufacture their own clothing, blankets, etc., and no article to be furnished which the Indians can manufacture themselves. (Navajo Treaty, Art. VIII.); and
- for the purchase of fifteen thousand sheep and goats, five hundred cattle and a million pounds of corn. (Navajo Treaty, Art. XII.).

In short, the Navajo Treaty provided for the minimal needs of the Indians, encouraging and expecting them to become self sufficient with limited initial assistance. As indicated above, such limited assistance was expected to continue for a period of perhaps three to ten years.

With respect to the water rights associated with the creation of the Navajo Reservation, the Navajo Treaty was silent. However, pursuant to the Record of Discussions, Barboncito, the Navajo Chief, said he wanted his people to return to the land that was provided as the Navajo

Reservation pursuant to the Navajo Treaty. Regarding such land Barboncito said:

> "I . . . want to go to Canon de Chelly . . . . I will take all the Navajos to Canon de Chelly leave my family there – taking the rest and scattering them between San Mateo Mountain and San Juan river. I said yesterday this was the heart of the Navajo country. In this place there is a mountain called Sierra Chusque or mountain of agriculture from which (when it rains) the water flows in abundance creating large sand bars on which the Navajos plant their corn; it is a fine country for stock or agriculture . . . ." Record of Discussions, p. 8.

In that regard, it appears evident that the Navajos wanted the land set forth in the Navajo Treaty as their reservation. Further, it appears that the Navajos expected the runoff from the mountains contained therein to be their source of water supply for their domestic and agricultural needs.

The foregoing constitutes the "original, primary purpose" for which the Navajo Reservation was created. Therefore, the federal reserved water rights associated with the creation of the Navajo Reservation, necessary to meet their minimal needs, and contemplated at the time of the creation of said Reservation, should be considered satisfied by the runoff from the mountains contained within the Navajo Reservation.

In *New Mexico ex rel. Martinez v. City of Las Vegas*, 135 N.M. 375, 89 P.3d 47, (2004 NMSC), the New Mexico Supreme Court abolished the state pueblo water rights doctrine, as sought by the New Mexico State Engineer, holding that it was inconsistent with New Mexico's system of prior appropriation. The pueblo rights doctrine had previously been adopted by the New Mexico Supreme Court in *Cartwright v. Public Service Co. of New Mexico*, 66 N.M. 64, 343 P.2d 654 (1958).[16] In *Las Vegas* the Supreme Court stated that

> "The pueblo rights doctrine recognizes the right of the inhabitants of Mexican or Spanish colonization pueblos to use as much of an adjoining river or stream as is necessary for municipal purposes. . . . . The doctrine contemplates the expansion of the pueblo's right to use water in response to increases in size and population, and if necessary, the right can encompass the entire flow of the adjoining water course." *Las*

[16] Prior to the Supreme Court's certiorari review of the matter, the New Mexico Court of Appeals, in *State ex rel. Martinez v. City of Las Vegas*, 118 N.M. 257, 880 P.2d 868 (1994 NM Ct.App.), held the pueblo rights doctrine invalid, predicting the Supreme Court would overrule *Cartwright* if presented with the issue.

Vegas at 135 N.M. 378, 89 P.3d at 50." Emphasis added.

* * *

"The State Engineer argues that the perpetually expanding nature of the pueblo right conflicts with the fundamental principle of beneficial use that lies at the heart of New Mexico water law. As a result, the State Engineer contends that the doctrine is incompatible with water law in New Mexico and **violates public policy**. We agree. . . .

"In New Mexico, '[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water.' N.M. Const. Art. XVI, § 3. We have said that this fundamental principle 'is applicable to all appropriations of public waters.' *State ex rel. State Eng'r v. Crider*, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967). 'As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to a beneficial use.' *State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch*, 19 N.M. 352, 371, 143 P. 207, 213 (1914); *accord Snow [v. Abalos]*, 18 N.M. [681] at 694, 140 P. [1044] at 1048 [(1914)] ('[I]t is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives the appropriator the continued and continuous right to take the water.'). The principle of beneficial use is based on 'imperative necessity,' *Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 181, 113 P. 823, 825 (1911), and 'aims fundamentally at definiteness and certainty.' *Crider*, 78 N.M. at 315, 431 P.2d at 48 (quotation marks and quoted authority omitted). It promotes the economical use of water, while also protecting the important interest of conservation. *See Yeo*, 34 N.M. at 620, 286 P. at 974. . . .

"In applying these principles, we have recognized that water users have a reasonable time after an initial appropriation to put water to beneficial use, known as the doctrine of relation. *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 470-471, 362 P.2d 998, 1001 (1961); *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. At 824-25. If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated.' *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. at 825. We have applied this principle to municipalities in order to allow for 'normal increase in population within a reasonable period of time.' *Crider*, 78 N.M. at 316, 431 P.2d at 49. In addition, a municipality may be given a more substantial 'reasonable time' for its population growth than a typical water user would have to complete an appropriation *Compare* NMSA 1978 § 72-1-9 (2003) (providing for forfeiture of water rights one year after notice of four years of nonuse). *See generally* [Wells A.] Hutchins [*Pueblo Water Rights in the West*, 38 Tex. L.Rev. 748 (1960)], *supra*, at 756 ('Preferences on the application of water are granted to municipalities in various western jurisdictions.') However, even for municipalities, if the water is not applied to beneficial use within a reasonable time, 'such right may be lost.' *Crider*, 78 N.M. at 316, 431 P.2d at 49.

"The pueblo rights doctrine is inconsistent with these principles. Under the doctrine, pueblos are not limited by the reasonable time requirement for applying water to beneficial use. Instead, the pueblo right contemplates an indefinite expansion to meet the growing demands of a increased population, regardless of how small the population of the initial pueblo and how long it takes the pueblo to expand. This aspect of the pueblo water right intolerably interferes with the goals of definiteness and certainty contemplated by prior appropriation; it envisions either the total loss of use of any amount of water the pueblo might potentially use in the future or temporary appropriation by other users subject indefinitely to elimination of their rights by possible population growth or increased needs of the pueblo. This level of uncertainty could potentially paralyze others from legitimately making beneficial use of unappropriated water on the same stream as a pueblo out of fear of potential future interference with the pueblo's expansion. Whereas, with the doctrine of relation, other water users 'are on notice that the law is granting them water rights that are temporary only' pending a reasonable time for the senior appropriator to complete the initial appropriation, there is no reasonable notice to other water users of a pueblo's potential water needs in the future because the pueblo right neither limits the quantity of water available to the municipality nor the amount of time available to complete its initial appropriation. Hutchins, *supra* at 756 (discussing the differences between prior appropriation and the pueblo rights doctrine). Our water laws, however, are designed 'to encourage use and discourage nonuse or waste.' *State ex rel. Reynolds v S. Springs Co.*, 80 N.M. 144, 148, 452 P.2d 478, 482 (1969). The pueblo rights doctrine interferes with the necessity of utilizing water for the maximum benefits.

"Additionally, unlike typical water rights, the pueblo right is not subject to forfeiture for nonuse. *See City of Los Angeles v. City of Glendale*, 23 Cal.2d 68, 142 P.2d 289, 293-94 (1943). Forfeiture,

however, is an essential punitive tool by which 'the policy of our constitution and statutes is fostered, and the waters made to do the greatest good to the greatest number.' *S. Springs Co.*, 80 N.M. at 147, 452 P.2d at 481 (citations omitted). Forfeiture 'prevent[s] the waste of water-our greatest natural resource.' *State ex rel. Erickson v. McLean*, 62 N.M. 264, 272, 308 P.2d 983, 988 (1957). The pueblo right subverts these critical policies.

"By facilitating the underutilization of essential public waters, the pueblo right prevents the efficient, economic use of water that is necessary for survival in this arid region and upon which our entire system of water law is based. We therefore agree with the dissent in *Cartwright* that **the ever-expanding quality of the pueblo water right 'is as antithetical to the doctrine of prior appropriation as day is to night**.' *Cartwright*, 66 N.M. at 110, 343 P.2d at 686 (Federici, D.J., dissenting). We conclude that the pueblo rights doctrine is incompatible with New Mexico water law." *Las Vegas*, 135 N.M. at 386-388, 89 P.3d at 58-60. Emphasis added.

* * *

"[T]he pueblo rights doctrine is inconsistent with the principle of beneficial use. Therefore, we conclude that the expanding nature of the pueblo right is not an existing right within the meaning of Article XVI, Section 1 of the New Mexico Constitution. Jefferson E. LeCates, *Water Law-The Effect of Acts of the Sovereign on the Pueblo Rights Doctrine in New Mexico*, 8 Nat. Resources J. 727, 736 (1968) ('The effect of the provisions in the New Mexico Constitution was the cancellation of any rights to increase the amount of water to be appropriated in the future to satisfy the expanding needs of the growing pueblos'). We also believe that the pueblo rights doctrine unduly interferes with the State's regulation of water rights , *see McLean*, 62 N.M. at 272, 308 P.2d at 988 (The State is vitally concerned in every appropriation. The need for water is imperative, and often the supply is insufficient. Such conditions lead inevitably to many serious controversies, and demand from the state an exercise of its police power, not only to ascertain rights, but also to regulate and protect them.'); NMSA 1978, § 72-14-3.1 (2003) (providing for the preparation and implementation of a comprehensive state water plan), with the important interest of conservation, *see* NMSA 1978, § 72-5-5.1 (1985) (recognizing 'the importance of public welfare and conservation of water in administering [the State's] public waters'), and with this State's obligations under interstate compacts, *see* NMSA 1978, §§ 72-1-2.2 (1991) (recognizing a potential shortage of water on the Pecos River and declaring the shortage and the State's obligations to Texas pursuant to compact 'a statewide problem affecting all the citizens of the state'), -14-3 (1935) (delegating to the interstate stream commission the power 'to investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise'). We thus conclude that pueblo water rights are not otherwise protected by New Mexico law.

"The water right acquired by a municipality under a colonization grant from antecedent sovereigns is recognized in New Mexico in the same manner as other municipal rights. The colonization grant establishes the date of priority, but the priority date applies only to the quantity of water put to beneficial use within a reasonable time of the initial appropriation. Thus, the City's 1835 colonization grant created a vested right only to the amount of water put to beneficial use within a reasonable time. Any water not put to beneficial use within a reasonable time cannot be reserved by a municipality for future expansion; the unappropriated waters remaining after a reasonable time has elapsed from the initial appropriation 'belong to the public and [are] subject to appropriation for beneficial use.' N.M. Const. Art. XVI, § 2." *Las Vegas*, at 135 N.M. 389-390, 89 P.3d at 61-62. Emphasis added.

* * *

"Because the expanding water right recognized by this Court in *Cartwright* directly conflicts with the doctrine of prior appropriation, we conclude that the pueblo water right is a 'doctrinal anachronism.' *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855, 112S.Ct. 2791, 120 L.Ed.2d 674 (1992), and that it represents a 'positive detriment to coherence and consistency in the law.'*Patterson v. McLean Credit Union*, 491 U.S. 164, 173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). '[T]he decision poses a direct obstacle to the realization of important objectives embodied' in New Mexico water law. *Id.* As a result, we believe that there is a compelling reason to overrule *Cartwright*." *Las Vegas*, at 135 N.M. 390, 89 P.3d at 62.

* * *

"*Cartwright* is hereby overruled." *Las Vegas*, at 135 N.M. 391, 89 P.3d at 63. Emphasis added.

* * *

"Our decision in this case clearly announces a new rule of law because we are overruling our clear past precedent adopting the pueblo rights doctrine." *Las Vegas*, at 135 N.M. 392, 89 P.3d at 64.

* * *

"We overrule Cartwright and hold that New Mexico does not recognize the pueblo rights doctrine. Water rights contained in colonization grants from antecedent sovereigns are limited by the principle of beneficial use and are to be quantified by the amount of water put to beneficial use by the pueblo within a reasonable time of the first appropriation." *Las Vegas*, at 135 N.M. 396, 89 P.3d at 68. Emphasis added.

Similarly, the massive amounts of water in excess of current uses of the Navajo Settlement and Decree is inconsistent with New Mexico law.

The New Mexico Court of Appeals in *State ex rel. State Engineer v. Commissioner of Public Lands*, 145 N.M. 433, 200 P.3d 86 (2009 NMCA), noted, with respect to the Commissioner of Public Lands claim for federal reserved water rights in the present matter, that:

"Thus, as the Colorado Supreme Court observed in [*United States v.*] *Jesse*[, 744 P.2d 491, at 494 (Colo. 1987) (en banc.)]:

'In contrast to the doctrine of prior appropriation, which ... recognizes only the right to divert a quantified amount of water at a specific location for a specific purpose, the federal doctrine of reserved water rights vests the United States with a dormant and indefinite right that may not coincide with water uses sanctioned by state law."*Id.* (citations omitted).

"Such dormant and indefinite rights can be very problematic when it comes to adjudicating and administering water rights in an arid state, such as New Mexico. Many stream systems in such states are already fully appropriated, and a determination that federal reserved water rights exist often requires "a gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." [*United States v.*] *New Mexico,* 438 U.S. [696,] at 705, 98 S.Ct. 3012 [, 57 L.Ed.2d 1052 (1978)]. Further, as demonstrated by this case, claims to federal reserved water rights are potentially very large with very early priority dates and can therefore be highly disruptive to rights existing under state law. *See Jesse,* 744 P.2d at 494. ("Because the priority date of the [federal] reserved right relates back to the date of the reservation, reserved water rights threaten existing appropriators with divestment of their rights without compensation."). Accordingly in recognition of the predominance of state law in the area of water rights and the potentially substantial and detrimental impact on state rights in fully appropriated stream systems, courts must construe the doctrine of federal reserved water rights narrowly. *See id.* Our analysis of the Commissioner's claim to federal reserved water rights in New Mexico's school trust lands therefore follows this principle of narrow construction." *Commissioner of Public Lands*, 145 N.M. at 441-42, 200 P.3d at 94-95. Emphasis added.

Thus, the New Mexico Court of Appeals has established that the federal reserved rights doctrine must be construed narrowly.

The standard for determining federal reserved water rights in Arizona, from the *Gila V* case, has become known as the "homeland standard." The result is there are no rules - the Indian tribes can be awarded as much water as they can negotiate out of the state.

In the subject matter, the Settling Parties repeatedly assert that the water rights of the

Navajo Nation should be determined by federal law, or the concept of federal reserved rights, rather than state law. Then, the Settling Parties assert that the appropriate standard for determining federal reserved rights for Indian tribes is the Arizona "homeland standard", and that appears to be the standard adopted by Court in the subject matter.

However, in *United States v. Washington,* 375 F. Supp. 2d 1050 (W.D. Wash. 2005), the court flatly rejected the "homeland standard" and emphasized that water is reserved for reservation purposes at the time the reservation is created. Specifically, the *Washington* court stated:

> **"[N]o federal court has ever found an impliedly reserved water right by first looking to the modern day activities of the Indian nation**. *But see* Gila River V, 35 P.3d at 76. **This Court finds that the 'homeland purpose' theory adopted in *Gila River V* is contrary to the 'primary purpose' doctrine under federal law**. Ecology correctly argues that the 'homeland purpose' theory is 'simply a formulation that does away with determining the purpose and begs the question of what water was reserved to make the 'homeland' livable.' . . . . More importantly, Plaintiffs' 'homeland' purpose theory conflicts with clear Ninth Circuit precedent. *Walton II* acknowledged that 'one purpose for creating this reservation was to provide a homeland for the Indians to maintain their agrarian society.' 647 F.2d at 47-48. However, this language does not constitute a determination of primary purpose for which water was reserved. *Id.* The Court cannot find a 'homeland primary purpose and end its inquiry. Although compelling in analysis and result, *Gila River V* is contrary to Ninth Circuit precedent. **Plaintiffs' 'homeland' theory of reserved water rights must fail as a matter of law**. The appropriate inquiry under federal law requires a primary purpose determination based on the intent of the federal government at the time the reservation was established. *Winters,* 207 U.S. at 577, 28 S.Ct. 207. These implied *Winters* rights are necessarily limited in nature.
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> "In order to support a finding of primary purpose, activities must be more than 'valuable for a secondary use,' as determined at the time of the Treaty. *See New Mexico,* 438 U.S. at 702, 98 S.Ct. 3012; *see also Adair,* 723 F.2d at 1408-09 ('Water rights may be implied only 'where water is necessary to fulfill *the very purposes* for which a federal reservation was created,' and not where it is merely 'valuable for a secondary use of the reservation.' ') (citing *New Mexico,* 438 U.S. at 702, 98 S.Ct. 3012) (emphasis added); *Arizona I,* 373 U.S. at 600, 83 S.Ct. 1468 (**Water is reserved for reservation purposes at the time the reservation is created**). **Only the amount of water necessary to fulfill the purpose of the reservation is reserved, no more**. *See Cappaert,* 426 U.S. at 141, 96 S.Ct. 2062." *Washington*, at 1065, 1066. Emphasis added.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #5. Whether the Navajo Nation's water rights to be awarded in the subject adjudication suit must be limited to its current beneficial uses of water?

New Mexico water law is firmly rooted in the doctrines of prior appropriation and beneficial use.

The New Mexico Constitution Article XVI, Sec. 2 [Appropriation of water] provides:

> "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. **Priority of appropriation shall give the better right**." Emphasis added.

Further, the New Mexico Constitution Article XVI, Sec. 3 [Beneficial use.] provides:

> "**Beneficial use shall be the basis, the measure and the limit of the right to the use of water**." Emphasis added.

Similarly, § 72-1-2 NMSA 1978 [Water rights; appurtenant to land; priorities.] provides:

> "Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water, so long as the water can be beneficially used thereon, or until the severance of such right from the land in the manner hereinafter provided in this article. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to March 19, 1907, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of the water initiated thereafter shall relate back to the date of the receipt of an application therefore in the office of the territorial or state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder."

In New Mexico, no one is entitled to receive water for a use not recognized as beneficial. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1137 (10th Cir. 1981). Because water conservation and preservation is of utmost importance, maximum utilization is fundamental requisite of "beneficial use." *Id.* at 1133. No matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use. *Id.* at 1134.

Federal Reclamation Law specifically provides that:

> "The right to the use of water acquired under the provisions of this Act [of June 17, 1902 - 32 Stat. 388] shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372 (1902). Emphasis added.

Issue #6. Whether granting water rights to an Indian Tribe whose only purpose for such water is to market such water off of the reservation is inappropriate and violates the law?

The *Adair* Court determined that with respect to Indian reservations, federal reserved water rights can only be used for the original, primary purpose for which the reservation was created; only the minimum amount necessary for the purpose is reserved; the purpose cannot be changed; water for secondary purposes must be acquired under state law.

"In order to support a finding of primary purpose, activities must be more than 'valuable for a secondary use,' as determined at the time of the Treaty. *See New Mexico,* 438 U.S. at 702, 98 S.Ct. 3012; *see also Adair,* 723 F.2d at 1408-09 ('Water rights may be implied only 'where water is necessary to fulfill *the very purposes* for which a federal reservation was created,' and not where it is merely 'valuable for a secondary use of the reservation.' ') (citing *New Mexico,* 438 U.S. at 702, 98 S.Ct. 3012) (emphasis added); *Arizona I,* 373 U.S. at 600, 83 S.Ct. 1468 (Water is reserved for reservation purposes at the time the reservation is created). Only the amount of water necessary to fulfill the purpose of the reservation is reserved, no more. *See Cappaert,* 426 U.S. at 141, 96 S.Ct. 2062." *Washington*, at 1065, 1066. Emphasis added.

The marketing of the Navajo Nation's water rights off of the reservation was never remotely considered at the time of the creation of the reservation. So, even if the marketing of the Navajo Nation's excess water rights off of the reservation were to be arguably considered to be valuable as a secondary purpose, such excess water rights would not be considered to be

federal reserved rights, and must be acquired in accordance with state law. State law is based on beneficial use, so the acquisition of excess water rights for marketing off of the reservation could not be accomplished under state law.

In *Jicarilla Apache Tribe*, the Court determined that the City of Albuquerque (with regard to a contract with the United States for the diversion and use of San Juan-Chama Project water) could not take the water then with the mere hope of possible sales in the future, most of which sales were yet to materialize. *Colorado River Water Conservation District v. Vidler Tunnel Water Co., Colo.*, 594 P.2d 566 (1979); *Carlsbad Irrigation District v. Ford*, 46 N.M. 335, 128 P.2d 1047 (1942). *Jicarilla.* at 1135. Although the City had a reasonable time to develop use for the water and to thus perfect its appropriation, this right, was not unlimited. The City could not divert the water which looked to future negotiation for various beneficial uses. *Colorado River Water Conservation District v. Vidler Tunnel Water Co., supra*. The reasonable time for development, 72-5-6 and 72-5-28(C), NMSA (1978), relates back to the date of showing an intent to appropriate by acquiring a permit. Until the City could apply the water it could not be said to have a beneficial use, nor, for that matter, a completed appropriation. *State ex rel State Engineer v. Crider*, 78 N.M. 312, 481 P.2d 45 (1967); *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (1961). It is essential that there shall have been a beneficial use which is more than speculative. The Bureau could not deliver the water to the City under a plan which was nothing more than speculative with respect to the beneficial uses. *Jicarilla,* at 1135.

Therefore, granting water rights to an Indian Tribe whose only purpose for such water is to market such water off of the reservation is inappropriate and violates the law.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of

review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #7. Whether the priority date of the water rights to be awarded to the Navajo Nation in the subject adjudication suit must be determined by the date that water was first put to beneficial use?

The *Adair* Court determined that with respect to Indian reservations, federal reserved water rights can only be used for the original, primary purpose for which the reservation was created; only the minimum amount necessary for the purpose is reserved; the purpose cannot be changed; water for secondary purposes must be acquired under state law.

"In order to support a finding of primary purpose, activities must be more than 'valuable for a secondary use,' as determined at the time of the Treaty. *See New Mexico,* 438 U.S. at 702, 98 S.Ct. 3012; *see also Adair,* 723 F.2d at 1408-09 ('Water rights may be implied only 'where water is necessary to fulfill *the very purposes* for which a federal reservation was created,' and not where it is merely 'valuable for a secondary use of the reservation.' ') (citing *New Mexico,* 438 U.S. at 702, 98 S.Ct. 3012) (emphasis added); *Arizona I,* 373 U.S. at 600, 83 S.Ct. 1468 (Water is reserved for reservation purposes at the time the reservation is created). Only the amount of water necessary to fulfill the purpose of the reservation is reserved, no more. *See Cappaert,* 426 U.S. at 141, 96 S.Ct. 2062." *Washington*, at 1065, 1066. Emphasis added.

Most of the current water uses of the Navajo Nation, such as NIIP, were not remotely considered at the time of the creation of the reservation. So, even if they were to be arguably considered to be valuable as a secondary purpose, they would not be considered to be federal reserved rights, and must be acquired in accordance with state law. Therefore, the priority date of the water rights for such purposes must be determined by the date that water was first put to

beneficial use.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #8. Whether the Court's determination that the federal government is entitled to determine who may use most of the water of the San Juan Basin in New Mexico by virtue of contracts with the federal government violates the law?

The State and Navajo Nation assert that the water rights of the Navajo Settlement and Decrees have been "authorized" by federal law, permits and contracts. Similarly, the Navajo Nation asserts that the Navajo Settlement and Proposed Decrees encompass only water rights for "existing and authorized" uses, that such "authorizations" are based upon federal law, permits and contracts, and that this Court has no jurisdiction to do more than simply approve the water rights already conclusively established by Congress and state permits.

I assert that federal law, permits, or contracts - do not define, authorize, or establish the extent of the water rights with respect to which the Navajo Nation may be entitled in the present matter. To date, the water rights of the Navajo Nation have never been properly established, and the determination of the water rights of the Navajo Nation is clearly within the jurisdiction of the Court.

New Mexico water law is firmly rooted in the doctrines of prior appropriation and beneficial use.

The New Mexico Constitution Article XVI, Sec. 2 [Appropriation of water] provides:

"The unappropriated water of every natural stream, perennial or torrential, within

the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. **Priority of appropriation shall give the better right**." Emphasis added.

Further, the New Mexico Constitution Article XVI, Sec. 3 [Beneficial use.] provides:

"**Beneficial use shall be the basis, the measure and the limit of the right to the use of water**." Emphasis added.

Similarly, § 72-1-2 NMSA 1978 [Water rights; appurtenant to land; priorities.] provides:

> "Beneficial use shall be the basis, the measure and the limit of the right to the use of water, and all waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water, so long as the water can be beneficially used thereon, or until the severance of such right from the land in the manner hereinafter provided in this article. Priority in time shall give the better right. In all cases of claims to the use of water initiated prior to March 19, 1907, the right shall relate back to the initiation of the claim, upon the diligent prosecution to completion of the necessary surveys and construction for the application of the water to a beneficial use. All claims to the use of the water initiated thereafter shall relate back to the date of the receipt of an application therefore in the office of the territorial or state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder."

In New Mexico, no one is entitled to receive water for a use not recognized as beneficial. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1137 (10th Cir. 1981). Because water conservation and preservation is of utmost importance, maximum utilization is fundamental requisite of "beneficial use." *Id.* at 1133. No matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use. *Id.* at 1134.

In *Jicarilla Apache Tribe*, the Court determined that the City of Albuquerque (with regard to a contract with the United States for the diversion and use of San Juan-Chama Project water) could not take the water then with the mere hope of possible sales in the future, most of which sales were yet to materialize. *Colorado River Water Conservation District v. Vidler Tunnel Water Co., Colo.*, 594 P.2d 566 (1979); *Carlsbad Irrigation District v. Ford*, 46 N.M. 335, 128

P.2d 1047 (1942). *Jicarilla.* at 1135. Although the City had a reasonable time to develop use for the water and to thus perfect its appropriation, this right, was not unlimited. The City could not divert the water which looked to future negotiation for various beneficial uses. *Colorado River Water Conservation District v. Vidler Tunnel Water Co., supra*. The reasonable time for development, 72-5-6 and 72-5-28(C), NMSA (1978), relates back to the date of showing an intent to appropriate by acquiring a permit. Until the City could apply the water it could not be said to have a beneficial use, nor, for that matter, a completed appropriation. *State ex rel State Engineer v. Crider*, 78 N.M. 312, 481 P.2d 45 (1967); *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (1961). It is essential that there shall have been a beneficial use which is more than speculative. The Bureau could not deliver the water to the City under a plan which was nothing more than speculative with respect to the beneficial uses. *Jicarilla,* at 1135.

Private power and water company lost rights to unsold capacity of reservoir, not put to beneficial use because not appurtenant to land, upon tax sale. *San Luis Power and Water Co. v. State*, 57 N.M. 734, 740, 263 P.2d 398, 402 (1953).

Federal Reclamation Law specifically provides that:

> "The right to the use of water acquired under the provisions of this Act [of June 17, 1902 - 32 Stat. 388] shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. § 372 (1902). Emphasis added.

The rights of the United States as storer of water in western projects have been distinctly understood to be simply that of 'a carrier and distributor of the water.' *Ickes v. Fox*, 1937, 57 S.Ct. 412, 300 U.S. 82, 95, 81 L.Ed. 525, rehearing denied 57 S.Ct. 504, 300 U.S. 640, 81 L.Ed. 855.

In constructing reclamation project, property right in water right is separate and distinct from property right in reservoirs, ditches, or canals, in that water right is appurtenant to land

owner of which is the appropriator, and is acquired by perfecting an "appropriation", that is, by an actual diversion followed by an application within a reasonable time of the water to a beneficial use. *State of Neb. v. State of Wyo.*, Neb. & Wyo. 1945, 65 S.Ct. 1332, 325 U.S. 589, 614, 89 L.Ed. 1815.

Where in action to adjudicate water rights to the Truckee River in Nevada the United States sued for benefit of both Pyramid Lake Indian Reservation and the Newlands Reclamation Project the project landowners and not the government received the beneficial interest in water rights confirmed to the government and the government was not thereafter at liberty to simply reallocate water rights decreed to the reservation and the project as if it owned those rights. *Nevada v. U.S.*, Nev. 1983, 103 S.Ct. 2906, 463 U.S. 110,77 L.Ed. 2d 509, rehearing denied 104 S. Ct. 210, 78 L.Ed. 2d 185,186, on remand 720 F.2d 622.

Federal government's diversion, storage, and distribution of water at reclamation project pursuant to 43 U.S.C. § 372 and contracts with landowners did not vest in United States ownership of water rights which remained vested in owners as appurtenant to land and wholly distinct from property of government in irrigation works, while government remained carrier and distributor of water with right to receive sums stipulated in contract for construction and annual charges for operation and maintenance of works. Under 43 U.S.C. § 372, rights and water users are not determined by contract, but by beneficial use. *Ickes v. Fox*, 1937, 57 S.Ct. 412, 300 U.S. 82, 81 L.Ed. 525, rehearing denied 57 S.Ct. 504, 300 U.S. 640, 81 L.Ed. 855. See also, *State of Neb. v. State of Wyo.*, Neb. & Wyo. 1945, 65 S.Ct. 1332, 325 U.S. 589, 89 L.Ed. 1815.

By filing notices of intent to appropriate and thereafter impounding water of Rio Grande River, pursuant to authority granted by 43 U.S.C. § 372, United States did not become owner of water in its own right. *Hudspeth County v. Conservation and Reclamation Dist. No. 1 v.*

Robbins, C.A. Tex. 1954, 213 F.2d 425, certiorari denied 75 S.Ct.. 56, 348 U.S. 833, 99 L.Ed. 657.

Under 43 U.S.C. § 372, United States is not owner of water, government is carrier or trustee for owners. *Holguin v. Elephant Butte Irrigation Dist*., 1977, 575 P.2d 88, 91 N.M. 398.

Federal Reclamation Law specifically provides that:

> "Nothing in this Act [of June 17, 1902 - 32 Stat. 388] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, or the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, nothing herein shall in anyway affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof." 43 U.S.C. § 383 (1902).

The government, like an individual, can appropriate only so much water as it applies to beneficial uses, and can only restrain a diversion which operates to its prejudice. *U.S. v. West Side Irrigating Co.*, D.C. Wash. 1916, 230 F. 284.

State law governs the distribution of water from federal projects unless Congress expresses a different approach. The state controls the use of water because it does not part with ownership, but only allows the usufructuary right to water. *Jicarilla Apache Tribe v. U. S.*, C. A.N.M. 1981, 657 F.2d 1126.

Federal law specifically defers to state appropriation laws in determining right of the United States to appropriate water within a state. *Northport Irr. Dist. v. Jess*, 1983, 337 N.W. 2d 733, 215 Neb. 152.

Under 43 U.S.C. § 383, the Secretary of the Interior must follow state law as to appropriation of water and condemnation of water rights; if state law does not allow for the appropriation or condemnation of the necessary water, the Secretary is not to initiate project. *California v. U.S.*, Cal. 1978, 98 S.Ct. 2895, 438 U.S. 645, 57 L.Ed. 2d 1018, on remand 509 F.Supp. 867.

43 U.S.C. § 383 not only recognizes the constitution and laws of the state providing for the appropriation of its waters and the reclamation of its arid lands, but it requires that the Secretary of the Interior, in carrying out provisions of said section, shall proceed in conformity with such laws. *Burley v. U.S.*, Idaho 1910, 179 F. 1, 102 C.C.A. 429, 33 L.R.A. (N.S.) 807.

State's restrictive five-year requirement for completion of irrigation appropriations was binding on United States, engaged in reclamation project. *Pioneer Irrigation Dist. v. American Ditch Ass'n*., 1931, 1 P.2d 196, 50 Idaho 732.

In *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (C. A.N.M. 1981), the Court quoted the United States Supreme Court decision in *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), where:

> "the Supreme Court found that under § 8 [43 U.S.C. § 383], water rights needed for reclamation projects had to be acquired by the Secretary of the Interior in strict conformity with state law. 'Second, once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law." 438 U.S. at 665, 667, 98 S.Ct. at 2996. However, the Court indicated that 'state water law does not control in the distribution of reclamation water if inconsistent with other congressional directives to the Secretary.' 438 U.S. at 668, n. 21, 98 S.Ct. at 2997, n. 21. (Emphasis in original.)" *Jicarilla Apache Tribe v. U. S.*, C. A.N.M. 1981, 657 F.2d 1126, at 1137. Emphasis added.

In *Hydro Resources Corp. v. Gray*, 143 N.M. 142, 173 P.3d 749 (2007), the New Mexico Supreme Court acknowledged that:

> "Water rights are determined under state law, not federal law. . . . state law controls any issues pertaining to water rights." *Hydro*, at 143 N.M. 147, 173 P.3d 754.

Engineers.

Where multiple purpose projects (including municipal and industrial purposes) were contemplated, Congress made it clear that while reference may be made to municipal and industrial water supply projects, what was to be provided was in fact storage space in the particular reservoirs. In that regard, said 43 U.S.C. § 390b. continues:

> "(b) Storage in reservoir projects; agreements for payment of cost of construction or modification of projects

> "In carrying out the policy set forth in this section, it is provided that storage may be included in any reservoir project surveyed, planned, constructed or to be planned, surveyed and/or constructed by the Corps of Engineers or the Bureau of Reclamation to impound water for present or anticipated future demand or need for municipal or industrial water, and the reasonable value thereof may be taken into account in estimating the economic value of the entire project: Provided, That the cost of any construction or modification authorized under the provisions of this section shall be determined on the basis that all authorized purposes served by the project shall share equitably in the benefits of multiple purpose construction, as determined by the Secretary of the Army or the Secretary of the Interior, as the case may be: Provided further, That before construction or modification of any project including water supply provisions for present demand is initiated, State or local interests shall agree to pay for the cost of such provisions in accordance with the provisions of this section: . . . ." [Title 43 - Public Lands; Chapter 12 - Reclamation And Irrigation of Lands by Federal Government; Subchapter I - General Provisions; Sec. 390b. Development of water supplies for domestic, municipal, industrial, and other purposes; SOURCE- (Pub. L. 85-500, title III, Sec. 301, July 3, 1958, 72 Stat. 319; Pub. L. 87-88, Sec. 10, July 20, 1961, 75 Stat. 210; Pub. L. 99-662, title IX, Sec. 932(a), Nov. 17, 1986, 100 Stat. 4196.)] Emphasis added.

Making it clear that Congress intended that such state and local interests were to be provided with storage space in such projects, Congress passed Pub. L. 88-140 (77 Stat. 249) on October 16, 1963. Said Pub. L. 88-140 has been codified at 43 U.S.C. § 390c. - f. 43 U.S.C. § 390c. [**Water reservoirs; interest of States and local agencies in storage space**] provides:

> "Cognizant that many States and local interests have in the past contributed to the Government, or have contracted to pay to the Government over a specified period of years, money equivalent to the cost of providing for them water storage space at Government-owned dams and reservoirs, constructed by the Corps of Engineers of the United States Army, and that such practices will continue, and, that no law defines the duration of their interest in such storage space, and realizing that such States and local interests assume the obligation of paying substantially their portion of the cost of providing such facilities, their right to use may be continued during the existence of the facility as hereinafter provided." [TITLE 43 - PUBLIC LANDS; CHAPTER 12 - RECLAMATION AND IRRIGATION OF LANDS BY FEDERAL GOVERNMENT; SUBCHAPTER I - GENERAL PROVISIONS; Sec. 390c. Water reservoirs; interests of States and local agencies in storage space; SOURCE- (Pub. L. 88-140, Sec. 1, Oct. 16, 1963, 77 Stat. 249.)] Emphasis added.

Then, apparently in recognition of the confusion that may have existed as to what rights were actually being acquired by such state and local interests in such federal projects, Congress specifically authorized the revision of any existing leases and agreements to evidence that only storage space was provided pursuant to such leases and agreements. In that regard, 43 U.S.C. § 390f. [**Revision of leases or agreements to evidence conversion of rights to use of storage rights**] specifically provides:

> "Upon application of any affected local interest its existing lease or agreement with the Government will be revised to evidence the conversion of its rights to the use of the storage as prescribed in sections 390c to 390f of this title." [TITLE 43 - PUBLIC LANDS; CHAPTER 12 - RECLAMATION

AND IRRIGATION OF LANDS BY FEDERAL GOVERNMENT; SUBCHAPTER I - GENERAL PROVISIONS; Sec. 390f. Revision of leases or agreements to evidence conversion of rights to use of storage rights; SOURCE- (Pub. L. 88-140, Sec. 4, Oct. 16, 1963, 77 Stat. 250.)] Emphasis added.

Therefore, it is absolutely clear that the Navajo Nation never acquired any form of water right from the United States, pursuant to the subject NIIP contract, basically because the United States itself never acquired any right to the subject water, except for the right to store and deliver such water. The only right acquired by the Navajo Nation pursuant to said contract was the right to storage space in the particular reservoirs and structures, and perhaps the right to use a certain portion of the capacity of the subject delivery facilities. Any water right with respect to the subject water must be acquired by the Navajo Nation pursuant to New Mexico law (appropriation), and this the Navajo Nation has to date failed or refused to do.

Congressional legislation does not "authorize" or "establish" water rights for the Navajo Nation.

Public Law 111-11, Title X, Subtitle B (March 30, 2009) - Northwestern New Mexico Rural Water Projects Act ("Navajo Settlement Act" or "Settlement Act") provides for the approval of the Navajo Settlement by Congress. While Public Law 111-11 provides for a contract between the United States and the Navajo Nation, said Law makes no attempt to define, establish, or mandate, water rights for the Navajo Nation. Nothing in Public Law 111-11 is intended to modify, conflict with, preempt or otherwise affect previous federal legislation.

Public Law 87-483 (76 Stat. 96), enacted on June 13, 1962. provided for construction, operation and maintenance of NIIP and the initial stage of the San Juan-Chama Project. Public Law 87-483 allocates a portion of the storage space of Navajo Reservoir, and provides for the delivery of stored water to the NIIP project, and does not preempt state law with respect to the acquisition or adjudication of the NIIP water rights.

On October 16, 1963, Congress passed Pub. L. 88-140 (77 Stat. 249), making it clear that Congress intended that state and local interests were to be provided with only storage space in such projects.

The use of water and the operation and maintenance of all facilities authorized by Public Law 87-483 are to be subject to and controlled by previous federal water law.

Section 8 of The Reclamation Act of 1902 specifically provides:

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

Thus, such principles have been firmly embedded in federal law since at least 1902.

California v. United States, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), is perhaps the preeminent case with respect to the issues related to the appropriation and ownership of water rights associated with a federal reclamation project. *California* made absolutely clear that: neither the water, nor the water rights associated with a federal reclamation project ever become vested in the United States; the appropriation of water, for federal water projects under the Reclamation Act of 1902, was made not for the use of the federal government, but, for the use of the land owners; the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works; and the federal government was and remained simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for

operation and maintenance of the works.

In *Jicarilla Apache Tribe v. United States*, the court made clear that the principles of the Reclamation Act of 1902 were incorporated into Public Law 87-483, and that both the Reclamation Act of 1902 and New Mexico law specify that 'beneficial use shall be the basis, the measure, and the limit of the right,' to use the project water.

Contracts with the United States provide for the storage and delivery of water, and cannot be construed to: conclusively establish water rights; supersede federal law; or preempt state law - with respect to the acquisition or adjudication of water rights for the Navajo Nation.

There have been no permits issued by the State Engineer that would establish a legitimate basis for the water rights of the Navajo Nation. Applications for Permits were filed with the New Mexico State Engineer by, or on behalf of the United States, for more than to 1,550,000 acre-feet of water from the San Juan Basin, but permits were never granted and said Applications do not constitute valid water rights under New Mexico law. While the subject Applications may have been filed with the State Engineer, such Applications were never approved, no permits were ever issued, no "license to appropriate" was ever issued (or sought), and no water rights ever vested in the United States with respect to such Applications. Further, the United States never applied, and never intended to apply, the subject waters to a beneficial use in its own right (with the possible exception of File No. 2873, for Navajo Reservoir evaporation).

Until the Applicant can apply the water it cannot be said to have a beneficial use, nor, for that matter, a completed appropriation. *State ex rel State Engineer v. Crider*, 78 N.M. 312, 481 P.2d 45 (1967); *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (1961). In fact, an "appropriation," is defined as an actual diversion followed by an application within a reasonable time of the water to a beneficial use. *State of Neb. v. State of Wyo.*, Neb. & Wyo.

1945, 65 S.Ct. 1332, 325 U.S. 589, 614, 89 L.Ed. 1815.

John Carangelo, Assessment Payers Association of the Middle Rio Grande Conservancy District, Amigos Bravos, and Rio Grande Restoration, Protestants-Appellants, v. Albuquerque-Bernalillo County Water Utility Authority, Applicant-Appellee, and New Mexico State Engineer, John R. D'Antonio, Jr., Respondent-Appellee," Case No. 26,575 ("*Carangelo v. ABCWUA*" or "*Carangelo*") (2011) states that the OSE must follow statutory procedures in order to authorize diversion and appropriation of water, and this was never done.

The *Carangelo* Court stated:[17]

> "any application for a permit must adequately comply with applicable statutes that govern the substance of the request. Moreover, the OSE must abide by statutory requirements for its publication of the notice for a pending application. In sum, statutes limit the OSE's power to act on certain matters." *Carangelo*, p. 9. Underlining added.
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> "Subject matter jurisdiction depends on the class of questions that a decisionmaker has been empowered by the constitution or a statute to hear and determine. *See Williams v. Rio Rancho Pub. Sch.*, 2008-NMCA-150, ¶ 10, 145 N.M. 214, 195 P.3d 879. Thus, for an application to fall within the general category of those the OSE has jurisdiction to consider, the application must be of a form and substance that comports with the Water Code's predicate requirements for the OSE to act. *See, e.g.*, *Mathers v. Texaco, Inc.*, 77 N.M. 239, 248, 421 P.2d 771, 777 (1966) (observing that applications for appropriation must be in a form prescribed by the OSE and must contain those recitals required by statute)." *Carangelo*, ¶ 16, p. 10. Underlining added.
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> "**B. The Application and the OSE's Procedure Must Meet the Statutory Requirements for the OSE to Have Jurisdiction to Grant the Permit**" *Carangelo*, p. 11. Underlining added.
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> "In order for the OSE to authorize diversion and appropriation of water, the OSE must follow statutory procedures. . . . [T]he OSE may have broad powers of supervision over surface water, but the required steps to divert surface water are determined by the relevant statutes and must be followed by the OSE and Applicant alike." *Carangelo*, ¶ 22, pp. 12-13. Underlining added.
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> "Sections 72-5-1 and 72-5-24 are part of a framework that requires an applicant to describe proposed actions in detail, including the source and proposed disposition of the water and the potential effects of the proposed actions on other water users. The essence of these statutes is to require the disclosure of sufficient information to provide notice to interested parties and to allow the determination of likely impairment of others' water rights by any contemplated changes. *See* § 72-5-4 (delineating the information requirements of an application)." *Carangelo*, ¶ 23, p. 13. Underlining added.
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> "The Water Code confers the power to review a use for possible impairment to others' water rights on the

[17] I initially downloaded the subject opinion from the Court of Appeals website. Such Opinion was not signed. Celina Jones emailed me a copy of the Opinion that was signed. The page numbers of the two Opinions vary slightly. Here, the page numbers to which I refer were taken from the signed Opinion provided by Ms. Jones. The paragraph numbers between the two Opinions appear to be the same.

OSE, which, regardless of citation, must comply with statutes that set out the form for applications or notice of its contents. We hold that the OSE has subject matter jurisdiction to review the Application . . . . so long as the Application seeks permission to do something authorized by an applicable statute and comports with statutory and regulatory form requirements as set out in regulations promulgated under authority of the Water Code.

"Subject matter jurisdiction may confer the power and authority to act within a permissible scope as delineated by statute. *In re Proposed Revocation of Food & Drink Purveyors's Permit for House of Pancakes*, 102 N.M. 63, 66, 691 P.2d 64, 67 (Ct. App. 1984) (stating that '[a]dministrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them'). Section 72-5-1 (setting out requirements to apply for an appropriation of surface water to a new beneficial use) and Section 72-5-4 (setting forth requirements for publication of notice upon filing an application to divert surface water) require the application to meet form requirements specifically delineating the nature and scope of the proposed action an applicant is undertaking with a specific eye toward its effect on other water users. Whether a particular application is sufficiently complete to confer upon the OSE the power to act upon it depends on its purpose and compliance with the applicable statute requiring specific information to be included in any application seeking a permit of a particular nature. *See* § 72-5-3 (requiring the OSE to send an application back if it is defective). All applicants have the burden to fulfill the statutory requirements for completing an adequate application and notice of intent to divert . . . . The OSE must then ascertain whether the statutory requirements were met. Since statutes govern what issues may be considered and how issues are raised and handled, we judge compliance of an application with all applicable statutes." *Carangelo*, ¶¶ 24-25, pp. 13-15. Underlining added.

* * *

"A water permit provides the authority to pursue a water right specific to a place and a beneficial use. *Hanson v. Turney*, 2004-NMCA-069, ¶ 9, 136 N.M. 1, 94 P.3d 1." *Carangelo*, ¶ 35, p. 23. Underlining added.

* * *

"**1. No Use of Water is Permitted That is not a Beneficial Use**

"Water in New Mexico belongs to the state, subject to acquisition by appropriation, the basis of which must be beneficial use. Our constitution's framers clearly intended that no one has a right to use or divert water except for beneficial use. *State ex rel. Erickson v. McLean*, 62 N.M. 264, 273, 308 P.2d 983, 988 (1957). '[I]t is the application to a beneficial use which gives the continuing right to divert and utilize the water.' *Snow v. Abalos*, 18 N.M. 681, 694, 140 P. 1044, 1048 (1914). Article XVI, Section 3 of the New Mexico Constitution states that '[b]eneficial use shall be the basis, the measure[,] and the limit of the right to the use of water' in New Mexico. *See* § 72-1-2. Put another way, '[t]he amount of water which has been applied to a beneficial use is . . . a measure of the quantity of the appropriation.' *McLean*, 62 N.M. at 271, 308 P.2d at 987.

"This constitutional proposition declares the sole basis of the right to use water, which use is then subject to regulation by statute. *See Harkey v. Smith*, 31 N.M. 521, 526-27, 247 P. 550, 552 (1926). That the state regulates the appropriation or acquisition of the state's water for a beneficial use presumes that, for any water to be put to such a use, such use must be supported by an appropriation of water. Section 72-5-1 (requiring anyone seeking to put surface water to a beneficial use to request an appropriation to do so from the OSE). Furthermore, 'the taking or diversion of [water] from some natural stream . . . *in accordance with law*, with the intent to apply it to some beneficial use or purpose, and consummated . . . by the actual application of all of the water to the use designed' is an appropriation of the water. *Carlsbad Irrigation Dist. v. Ford*, 46 N.M. 335, 340, 128 P.2d 1047, 1050 (1942). Thus, any diversion for a beneficial use must be accompanied by a right to the water acquired by the user's appropriation of the water to be used. 'An appropriator can take only such water as he can beneficially use.' *Worley v. U.S. Borax & Chem. Corp.*, 78 N.M. 112, 115, 428 P.2d 651, 654 (1967).

"There can be no right to divert and, therefore, no right to use public water without applying it to a beneficial use. '[W]ater rights are both established and exercised by beneficial use, which forms the basis, the measure[,] and the limit of the right to use of the water.' *State ex rel. State Eng'r v. Comm'r of Pub. Lands*, 2009-NMCA-004, ¶ 15, 145 N.M. 433, 200 P.3d 86 (internal quotation marks and citation omitted); *see In re Water Rights in Rio Grande Cnty.*, 53 P.3d 1165, 1168 (Colo. 2002) (en banc) (holding that a water right is a property right created by a person appropriating unappropriated water and applying it to a beneficial use). *Carangelo*, ¶¶ 39-41, pp. 25-27. Underlining added.

* * *

" 'There must be an ultimate, actual beneficial use of the water resulting from the diversion.' [*State ex rel. Martinez v. McDermett,* 120 N.M. 327, 331, 901 P.2d 745, 749 (Ct. App. 1995)] A diversion without applying the water thus diverted to a beneficial use is simply not permissible under the law. '[T]he rule that no one has a right to use or divert water except for beneficial use is clearly indicated by the framers of our [c]onstitution.' *McLean*, 62 N.M. at 273, 308 P.2d at 988." *Carangelo*, ¶ 48, pp. 31-32. Underlining added.

* * *

"'Use' is something that occurs with water after it is diverted as a result of proper appropriation. Put another way, an appropriation is nothing more than the right acquired by permit to divert water to a beneficial use. *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 20 n.5, 143 N.M. 142, 173 P.3d 749 ('The right to use water . . . is a possessory right which may be acquired by appropriation and diversion for a beneficial use[.]' (internal quotation marks and citation omitted)).

"Beneficial use is the basis of the right to use water at all. NM Const. art. XVI, § 2; § 72-1-1. We conclude that Applicant is misguided to believe that it may divert water for anything but a beneficial use." *Carangelo* ¶¶ 49-50, pp. 32-33. Underlining added.

* * *

"A beneficial use of water is a 'use of such water as may be necessary for some useful and beneficial purpose.' *McDermett*, 120 N.M. at 330, 901 P.2d at 748 (internal quotation marks and citation omitted); *see Hanson*, 2004-NMCA-069, ¶ 10 (discussing beneficial use).

"Appropriation is the act of taking water for a beneficial use, and the perfection of the appropriation, according to law, is the sole source of the right to use the water and the protection of the appropriator's right to continue its use. A right to apply water to a beneficial use springs 'from appropriation for beneficial use.' *Walker v. United States*, 2007-NMSC-038, ¶ 22, 142 N.M. 45, 162 P.3d 882 (internal quotation marks and citation omitted). 'The right to use water . . . is a possessory right which may be acquired by appropriation and diversion for a beneficial use[.]' *Hydro Res. Corp.*, 2007-NMSC-061, ¶ 20 n.5 (internal quotation marks and citation omitted)." *Carangelo*, ¶¶ 51-52, pp. 33-34. Underlining added.

* * *

"the Application and its contents must specify sufficient information to provide notice to the OSE and all other potentially interested persons of the nature and purpose of the Application. . . . [T]he notice requirements of applicable statutes must be observed. With regard to the native Rio Grande water, Applicant requested a permit for only a diversion and specifically eschewed a claim to any appropriation for beneficial use. The Application and the resulting Permit are insufficient as a matter of law because Applicant failed to request an appropriation of the Rio Grande surface water to be diverted for the new nonconsumptive, beneficial use." *Carangelo*, ¶ 55, p. 35. Underlining added.

* * *

"The principle of limiting the use of the public's waters to what constitutes beneficial use is intended to promote the economical use of water by requiring definiteness and certainty in appropriating a finite and limited resource. *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 34, 135 N.M. 375, 89 P.3d 47." *Carangelo*, ¶ 58, p. 36. Underlining added.

* * *

"Our Supreme Court held that water may be essential to various uses, but 'water rights must still be acquired by appropriation to beneficial use.' *Hydro Res. Corp.*, 2007-NMSC-061, ¶ 25." *Carangelo*, ¶ 58, p. 37. Underlining added.

* * *

"Actual diversion or application of water to the beneficial use must be preceded by the existence of a water right. Any entity intending to appropriate surface water for a new beneficial use is required to do so by 'mak[ing] an application to the [OSE] for a permit to appropriate, in the form required by the rules and regulations established by [it].' [§ 72-5-1] Section 72-5-1 also sets forth the requirements for any application to appropriate surface water. . . . .

"Section 72-5-1 applies to new appropriations of native water and provides that anyone 'hereafter intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purposes, make an application to the [OSE] for a permit to appropriate, in the form required by the rules and regulations established by [it].'

"An applicant is required

"to state the amount of water and period or periods of annual use, and all other data necessary for the proper description and limitation of the right applied for, together with such information, maps, field notes, plans[,] and specifications as may be necessary to show the method of practicability of the construction and the ability of the applicant to complete the same.

"*Id.* It further requires that '[a]ll such maps, field notes, plans[,] and specifications, shall be made from actual surveys and measurements, and shall be duly filed [with] the [OSE] at the time of filing of formal application for permit to appropriate[.]' *Id.*" *Carangelo*, ¶¶ 59-61, pp. 37-38. Underlining added.

* * *

"As a result, the Application was insufficient under Sections 72-5-1 and 72-5-24 to allow the OSE to issue a permit to divert water to a use unsupported by an appropriation. We discuss the consequences of this deficiency to the OSE's jurisdiction below.

"**6. The Application Did Not Confer Upon the OSE the Authority to Permit Diversion of Water to Which Applicant Lacks Any Appropriative Rights**" *Carangelo*, ¶ 62, p. 39. Underlining added.

* * *

"The Middle Rio Grande Basin may be fully appropriated, but that issue has not yet been adjudicated." *Carangelo*, ¶ 68, p. 43.

* * *

"None of this establishes a right to use water for which appropriation has not been requested or granted. We have rejected Applicant's argument that its use of the native Rio Grande water as 'carry water' is not a new appropriation, as well as its assertion that Section 72-5-1 is not invoked where that water is concerned. We view the Application as including a new beneficial use of native Rio Grande water as a result of the requested diversion. . . . [O]ur holding implicates Section 72-5-1 to the extent that the Application and its review by the OSE must satisfy the requirements for granting a permit for a new appropriation, not just a new diversion.

"Section 72-5-1 requires that if a type of new beneficial use is contemplated, then it is the responsibility of the applicant to include a request for a 'permit to appropriate' in the application. By failing to request a permit that included an appropriation for the right to use the native Rio Grande water, Applicant omitted requisite information for the OSE to prepare its notice of pending action and to consider the Application.

"Although the OSE has broad jurisdiction to act on an application . . . the OSE has no statutory authority to allow applicants to make a beneficial use or diversion of water that has not been requested. No use that is not beneficial is allowed by law, and Applicant is quite clear that it does not consider itself to be undertaking a beneficial use. Hence, it did not apply for an appropriation of water to support, or a diversion to engage in, such a use. Absent an application for these two things, the OSE lacked subject matter jurisdiction to allow Applicant's use and diversion of the native Rio Grande water. We therefore reverse the district court's ruling that the OSE had jurisdiction to allow the new beneficial use of the native Rio Grande water." *Carangelo*, ¶¶ 71-73, pp. 44-46. Underlining added.

* * *

"The OSE, as the steward of New Mexico's obligations under the Compact, must ensure that it approves only those applications that are 'not contrary to the conservation of water within the state and . . . not detrimental to the public welfare of the state[.]' Section 72-5-6; *see Montgomery* [*v. Lomas Altos, Inc.,* 2007-NMSC-002, 141 N.M. 21, 150 P.3d 971], ¶ 15 (discussing rules promulgated by the OSE to ensure compliance with the Compact); *Heine v. Reynolds*, 69 N.M. 398, 401, 367 P.2d 708, 710 (1962) (holding that the OSE has a positive duty to determine whether an application impairs existing water rights)." *Carangelo*, ¶ 89, p. 57. Underlining added.

* * *

"Though it extensively adopted the OSE's findings of fact, the district court also made many of its own. Foremost, it agreed with the OSE

"that compliance with the . . . Compact is always at the forefront of any permit assessment. Not only would the issue concern public welfare of the state, but the obligation of the [OSE] in evaluating impairment or detriment to existing water rights naturally encompasses compliance with the . . . Compact. If the [OSE] satisfied its duty to ensure that granting the [A]pplication would not be detrimental to existing water rights, then there is no doubt that [C]ompact compliance would have to be part of the analysis." *Carangelo*, ¶ 91, p. 59. Underlining added.

With respect to OSE File No.s 2847, 2849, 2873, 2883, 2917, and 3215: most of the Notices of Intention were not filed by a proper officer of the United States; very few plans were submitted to the State Engineer; no notices were ever provided to the public; no hearings were ever held regarding the subject applications; the issue of impairment to other water rights was apparently never properly considered, the issues related to compliance with applicable interstate water compacts was apparently never properly considered; no valid permits were ever issued by the State Engineer; the facilities were never inspected or approved by the State Engineer; most of the water associated with said File No.s has never been beneficially used; and the water that has been beneficially used was not used for decades after the associated Notices of Intention were filed; and licenses to appropriate the water associated such File No.s have never been issued.

Certainly, the statutory procedures have never been followed with respect to such File No.s. In fact, the statutory procedure have been completely disregarded with respect to said File No.s. However, *Carangelo* held that the OSE *must* follow statutory procedures in order to authorize diversion and appropriation of water.

Therefore, according to *Carangelo*, there has never been an authorization of the diversion and appropriation of water associated with such File No.s in *accordance with the law*, and the State Engineer has never had subject matter jurisdiction with respect to such File No.s to properly issue permits or licenses with respect to such File Nos. Accordingly, there has never been any valid water rights established with respect to such File No.s.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #9. Whether the concepts of "Direct Flow" and "Storage Water Administration" incorporated within the Navajo Settlement and Decrees violate the law?

The Navajo Settlement (pp. 14-29) has significant provisions regarding the administration of the San Juan River system. Similarly, the Decrees have significant provisions regarding the administration of the subject River system.

(First, it appears that any references to the administration of the San Juan River system is inappropriate in the Decrees, in that such administration provisions are generally inappropriate with respect to the determination of any water rights in this, or any other, water rights adjudication suit in New Mexico.)

While, the Navajo Settlement Administration provisions make significant references to the concept of "direct flow," the Administration provisions of the Decrees do not make similar references to the concept of "direct flow." However, the Decree incorporates by reference the entirety of the Navajo Settlement.

There are two primary aspects of the concept of "direct flow" that are illegal, as such term is used or intended by the Settling Parties. First, is the notion that water users downstream from a water storage facility, with rights senior to those of the storage right, are only entitled to "direct flow." That is, that such senior water users are only entitled to the release of water (rate of flow - cfs) from an on-stream storage facility for their use, that is no greater than the rate (cfs) at which water is flowing into the storage facility at any point in time. Inherent in this concept of direct flow, is the notion that all of the water stored in a storage facility belongs to the storage facility's owner (or perhaps its contractors). In fact, that is not the law in New Mexico. Rather, water stored in excess of that which can be used by those with rights to such stored water within a one year period, must be released to downstream users on demand by such downstream users.

The second illegal aspect of "direct flow," as intended by the Settling Parties, is that water released from a storage facility into a public stream, intended for the benefit of those with contract rights to such stored water, can be protected from diversion and use by users with senior rights. In fact, that is not the law in New Mexico. Rather, any water in a public stream is public water and may be diverted and used by those with senior rights (the doctrine of prior appropriation).

The State makes significant reference to the Active Water Resource Management Regulations ("AWRM" - NMAC 19.25.13.1 et seq.), which were promulgated by the OSE in 2004, where the concepts of "Direct Flow Administration" and "Storage Water Administration" are set forth.[18]

These relatively simple, apparently straightforward, provisions are, in reality, very problematic. Such provisions represent an intentional undermining of New Mexico water law, specifically the constitutional doctrine of prior appropriation.

Simply put, said provisions would make any water placed in storage the property of the storer, and those without storage rights would have absolutely no right to use such stored water. All of sudden, by OSE fiat, a storage right is absolutely paramount to any other New Mexico water right.

This is of enormous significance when considering that most waters in New Mexico are stored in federal reservoirs at some point before diversion and use by New Mexico water users. All of a sudden, the OSE has deftly given nearly all of the water rights in the state to the federal

[18] Since the AWRM regulations were promulgated by the OSE, certain portions of the AWRM regulations were overturned by the Court of Appeals. *See Tri-State Generation and Transmission Assoc., Inc. v. John D'Antonio, Jr, N.M. State Engineer*, 149 N.M. 349, 249 P.3d 932 (2011 - NMCA). However, the New Mexico Supreme Court reversed the Court of Appeals pursuant to an opinion issued November 1, 2012 in *Tri-State Generation and Transmission Assoc., Inc. v. John D'Antonio, Jr, N.M. State Engineer*, 289 P.3d 1232 (2012 - NMSC). The "direct flow" provisions of the AWRM regulations were not considered in such litigation.

government, and one must have a contract with the federal government in order to use any of such water, without any regard to the doctrine of prior appropriation, that is, with no regard whatsoever to senior rights or priority dates.

Unfortunately, within New Mexico, the BOR recognizes only its responsibility to its contractors, with no recognition of any responsibility towards senior water rights holders, or any other water rights at all. Even more unfortunately, the BOR's objectives appear to be changing. The BOR's responsibilities extend throughout the west, and it appears that the BOR is trying to move New Mexico's water through the state unused, such that such water may be used in other states.

In that regard, the BOR appears to be utilizing new operating schemes of moving the water between reservoirs in large pulses, that is, large flows for short periods of time, such that water is not actually in the river when needed for senior water rights holders. The prime example of this is the Reoperation of Navajo Dam, where large amounts of water (5,000 cfs) are released during the spring runoff, and the water released through the Dam is drastically reduced (250 cfs) during the remainder of the year. Therefore, although a sufficient supply of water may actually exist and otherwise be available for use, it may not be there and available when needed by senior water rights holders.

Further, the AWRM would regard water once stored in a BOR reservoir as "storage water" and would prevent senior water rights holders from using such storage water once it is released from such reservoir. Unfortunately, these results of the AWRM are not merely potential results of poorly drafted regulations, rather, such results are intentionally sought for the specific purpose of ratifying nearly 100 years of misguided policies by the OSE, and undermining the Constitution and laws of this State and the United States.

Unfortunately, the AWRM for the first time creates a regulation authorizing the abdication of the authority for the storage and distribution of the water within the State to the BOR, while the OSE simply becomes the enforcement authority (or the "leg breaker" if you will) for the BOR.

In *City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 678 P.2d 1170 (1984), the court determined that water stored in excess of the storer's annual right to use water must be released to downstream users upon demand.

In *State ex rel. Reynolds v. Luna Irrigation Company*, 80 N.M. 515, 458 P.2d 590 (1969), the New Mexico Supreme Court determined that all waters flowing in a natural stream were public waters and not subject to private ownership (and were therefore subject to adjudication), and are therefore, subject to diversion and use by priority date. That is, water released from storage into a public stream cannot be protected from diversion by users with senior priority rights.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #10. Whether the legal standard utilized by the Court with respect to the approval of the Navajo Settlement is inappropriate and violates the law?

On January 3, 2011, the United States filed THE UNITED STATES' STATEMENT OF CLAIMS OF WATER RIGHTS IN THE NEW MEXICO SAN JUAN RIVER BASIN ON BEHALF OF THE NAVAJO NATION ("Statement of Claims"). Pursuant to said Statement of Claims, the United States asserted a claim for more than 920,000 afy, with a priority date from

time immemorial, within the Basin on behalf of the Navajo Nation.

On January 3, 2012, I filed GARY L. HORNER'S OPTIONAL SUPPLEMENTAL BRIEF REGARDING WHAT LEGAL STANDARDS GOVERN THE COURT'S DECISION FOR APPROVAL OF THE PROPOSED DECREES ("Horner's Optional Brief re Legal Standards"). Pursuant to Horner's Optional Brief re Legal Standards, I noted that the Settling Parties would argue that the subject Decrees are smaller than the claims made by the United States, and that they intended to use a comparison between the subject Decrees and the larger Statement of Claims as evidence that the subject Decrees are "fair and reasonable" and "in the public interest." In that regard, the Settling Parties would argue that they have already met their burden under such "fair and reasonable" standard, and that the burden of proof should now shift to any objector to show that the subject Decrees are not fair, not reasonable, and not consistent with applicable law or the public interest.

The result of the Settling Parties arguments is that they would never be required to show that the subject Decrees are consistent with any law. Certainly, if the subject Decrees have no basis in the law, neither does the much larger claim submitted by the United States.

Then, the Settling Parties argue that the burden should now shift to any objector to show that he is prejudiced or harmed by the subject Decrees. In fact, the Settling Parties have consistently argued that if any objector does not demonstrate such harm when such objection is filed, that such objection should be routinely dismissed without further consideration.

I was also arguing that the Settling Parties must demonstrate that the Navajo Nation is somehow entitled to the water rights to be awarded pursuant to the subject Decrees.

In *United States v. Miami*, 664 F.2d 435 (5th Cir. 1981), the Fifth Circuit Court of Appeals determined that a consent decree does not bind nonconsenting third parties. Specifically, the

Miami Court stated that:

"This case requires us to examine the circumstances under which, and the procedure by which, a court may enter a consent decree in a multiparty suit when some, but not all, of the litigants agree to the decree and parts, but not all, of the decree affect the rights of a nonconsenting party. We conclude that a decree disposing of some of the issues between some of the parties may be based on the consent of the parties who are affected by it but that, to the extent the decree affects other parties or other issues, its validity must be tested by the same standards that are applicable in any other adversary proceeding. . . . . However, because a part of the decree, entered without a trial, affects the rights of an objecting party, we limit its effect as to that party and remand for trial of the complaint insofar as a remedy is sought against that party." *Miami*, at 436.

* * *

"The entry of a consent decree necessarily implies that the litigants have assented 'to all of its significant provisions.' *High v. Braniff Airways, Inc.*, 592 F.2d 1330, 1334 (5th Cir. 1979). In this respect a consent decree is akin to a contract, to be interpreted in the same manner. *United States v. ITT Continental Bakery Co.*, 420 U.S. 223, 236-37 & n.10, 95 S.Ct. 926, 934 n.10, 43 L.Ed.2d 148, 161 & n.10 (1975)." *Miami*, at 440.

* * *

"Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provision, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence. This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation. If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.[FN14]" *Miami*, at 441.

"FN14. We reviewed the standards for consent decrees in *United States v. City of Alexandria*, in which we said: the degree of appellate scrutiny must depend on a variety of factors, such as the familiarity of the trial court with the lawsuit, the stage of the proceeding at which the settlement is approved, and the types of issues involved. 614 F.2d at 1361; *cf.* Antitrust Procedures and Penalties Act, § 2, 15 U.S.C. § 16(b)-(f) (prescribing publicity, comment, and determination of public interest procedures for proposed consent decrees in civil antitrust suits brought by or on behalf of United States)." *Miami*, at 441.

* * *

"Our analyses of the record, set forth more fully below, leads ineluctably to the conclusion that the consent decree between the United States and the City was a hybrid decree: in what was essentially a three-party suit, only two parties consented to the decree. Insofar as the decree does not affect the nonconsenting party and its members, or contains provision to which they do not object, the trial court properly exercised its discretion in approving it. However, parts of the decree do affect the third party who did not consent to it, and these parts cannot properly be included in a valid consent decree." *Miami*, at 442.

* * *

"A party potentially prejudiced by a decree has a right to a judicial determination of the merits of his objection. . . . Those who seek affirmative remedial goals that would adversely affect other parties must demonstrate the propriety of such relief." *Miami*, at 447.

* * *

GEE, Circuit Judge, concurring in part and dissenting in part, joined by CHARLES CLARK, AINSWORTH, RONEY, JAMES C. HILL. FAY, VANCE, GARZA, HENDERSON, REAVLEY and POLITZ, Circuit Judges:

* * *

"The procedural and factual background of this case are set out at length in the panel opinion. 614 F.2d 1322. Little of this need be repeated for our present purposes, since in our view the appeal is disposed of by a rule both elementary and procedural: a nonconsenting party may not be subjected to a permanent injunction without a trial on the merits of his case.[FN1] Two of the parties to this litigation, the plaintiff

United States and the defendant City of Miami, settled their differences and executed a proposed consent decree. The court below imposed that settlement on the unconsenting union without so much as a setting for trial on the merits. Such a procedure was improper." *Miami*, at 4428.

"FN1. There is no question here of a summary judgment or of one somehow granted on the pleadings. No such motions were filed, heard, or so much as set for hearing; nor did the court give the parties the notice required by Rule 12, Fed.R.Civ.P., that it proposed to treat any anomalous request for relief as one for summary judgment." *Miami*, at 4428

* * *

"An appellant is before us complaining that it has had no day in court-has never been set for trial or had notice of a setting-but has been judged away. This error is so large and palpable that, like an elephant standing three inches from the viewer's eye, it is at first hard to recognize. The major dissent is reduced to arguing that it is all right to enter a permanent injunction without a trial against one who is unable, in advance of such a trial, to show the court how his rights will be infringed by the order. Here is new law indeed, law that we cannot accept.

"And while it is well and very well to extoll the virtues of concluding Title VII litigation by consent, as do our brethren-a sentiment in which we concur-we think it quite another to approve ramming a settlement between two consenting parties down the throat of a third and protesting one, leaving it bound without trial to an agreement to which it did not subscribe. If this be permitted, gone is the protester's right to appear in court at a trial on the merits, present evidence, and contend that the decree proposed is generally infirm-as imposing unconstitutional or illegal exactions-so that it should not be entered at all or so as to bind any party or affected third party.[FN8] Who can know what the protester might have been able to show at such a hearing, one to which first-reader principles of procedural due process entitle it? Surely, whether or not it had the power to persuade the trial court, it had the right to try." *Miami*, at 451-52.

"FN8. Even consent decrees must not be entered if 'unlawful, unreasonable or inequitable.' *United States v. City of Alexandria*, 614 F.2d 1358, 1361 n.6 (5th Cir. 1980). *Miami*, at 451.

* * *

"Gone as well is the suppressed party's right to try to demonstrate particular infirmities in the decree as applied to bind it and its union members. Any suggestion that the union's contract rights are not affected by this decree is unsupportable. Promotion, for example, is one of the most important subjects of collective bargaining. . . . As Judge Rubin's opinion demonstrates, it is undeniable that this decree affects promotions, merit increases, and job transfers that are embodied in an existing city ordinance, incorporated by reference in the FOP's bargaining agreement.

"We think it evident that what has been done below is to infringe the collective bargaining rights of the FOP and its members without either a consent or trial, to subject it to a potential contempt order, and enjoin it publicly from doing various reprehensible and illegal things that no one proved it had ever done or so much as thought of doing.

"It seems elementary that one made a party to a lawsuit is entitled to his day in court before permanent relief is granted against him over his protest. This the FOP has not had. No amount of argument that this union has not shown how its rights were affected can obscure the fact that the question was begged below and its answer assumed: here there was no trial on the merits at which it might have made such a showing and tried out its claim that the consent decree, with its racial and sexual quotas, violates the fourteenth amendment and hence is generally infirm. [FN9 omitted]

"At trial, the union's contentions may fail; they may deserve to fail. That is not the question. The question is whether the union can be enjoined over its protests without a trial on the merits, without notice, without evidence, without supporting findings of fact. We would answer that it cannot be. As to it, therefore, the entry of the consent decree and the injunction enforcing it should be vacated and the case remanded." *Miami*, at 452.

* * *

"Should the United States and the City of Miami conclude that binding the FOP to their consent decree is not after all necessary to their purposes, they may of course seek its dismissal from the case and the reentry of the decree forthwith. What they may not do, we think, is agree among themselves about FOP's legal rights and impose their agreement upon it with neither consent nor trial. Results are important.

> But, as we tirelessly reiterate in the criminal field, they may not, however desirable, be obtained in federal court at the expense of due process. Since these were, they cannot stand.
>
> "Those concurring in this opinion would decree relief as suggested above. As the court's per curiam statement indicates, however, we are in full accord that at least the relief directed by Judge Rubin's opinion should be granted the FOP. We therefore concur in the result mandated by his opinion, although we would have granted broader relief, and dissent from the failure of the court to do so." *Miami*, at 453. Emphasis added.

So, according to the *Miami* Court, a consent decree is not valid as to third parties simply by virtue of the fact that such third parties did not consent to such decree. Further, to any extent that a consent decree affects other parties or other issues, its validity must be tested by the same standards that are applicable in any other adversary proceeding. But, even when a consent decree affects only the consenting parties, the court should examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on, and power behind, a decree that violates the Constitution, a statute, or jurisprudence.

In *Miami*, the majority did approve the subject consent decree, but only to the extent that it did not affect the protesting party. However, in dissent, Judge Gee (joined by nine other circuit judges) argued that the subject consent decree did appear to affect the protesting party. Accordingly, Judge Gee argued that the protestor simply had his rights judged away, in that the protestor: did not have his day in court; did not have the opportunity to present his case at trial on the merits; did not have the opportunity to present evidence; and was not allowed to contend that the consent decree was generally unconstitutional or illegal. Accordingly, Judge Gee concluded that the proceeding, whereby the consent decree was approved, violated the protestor's due process rights.

Then in 1986, the United States Supreme Court similarly held that a consent decree does not bind a nonconsenting party. Specifically in *Local Number 93, International Association of Firefighters v. Cleveland*, 478 U.S. 501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), the Supreme Court stated:

> "[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. 3B Moore ¶ 24.16[6], p. 181; see also, *United States Steel Corp. v. EPA*, 614 F.2d 843, 845-846 (CA3 1979); *Wheeler v. American Home Products Corp.*, 563 F.2d 1233, 1237-1238 (CA5 1977). And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree. See, *e.g., United States v. Ward Baking Co.*, 376 U.S. 327, 84 S.Ct. 763, 11 L.Ed.2d 743 (1964); *Hughes v. United States*, 342 U.S. 353, 72 S.Ct. 306, 96 L.Ed. 394 (1952); *Ashley v. City of Jackson*, 464 U.S., at 902, 104 S.Ct., at 257 (REHNQUIST, J., dissenting from denial of certiorari); 1B Moore ¶ 0.409[5], p. 326, n. 2." *Local 93*, 478 U.S. at 529, 106 S.Ct. at 3079. Emphasis added.
>
> Justice REHNQUIST, with whom THE CHIEF JUSTICE dissenting.
>
> "But the fact remains that the judgment is not an *inter partes* contract; the Court is not properly a recorder of contracts, but is an organ of government constituted to make judicial decisions and when it has rendered a consent judgment it has made an adjudication." 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.409[5], pp. 330-331 (1984). *Local 93*, 478 U.S. at 529, 106 S.Ct. at 3079. Emphasis added.

Clearly, a consent decree does not bind nonconsenting third parties.

Pursuant to the AMENDED ORDER ESTABLISHING THE LEGAL STANDARDS FOR EVALUATING THE PROPOSED DECREES AND RESPECTIVE BURDENS OF PROOF, entered in the present matter on April 19, 2012 ("Order re Legal Standards"), the Court stated with respect to such Legal Standard for Approval that:

> "The Settling Parties must demonstrate that the Proposed Decrees are 'fair, adequate, and reasonable, and consistent with the public interest and applicable law.' Order re Legal Standards, pp. 1-2. Emphasis added.

Said Order re Legal Standards also provided, regarding the Respective Burdens of the parties, that:

> "The Settling Parties shall have the burden of production and the burden of persuasion to demonstrate that (a) the Settlement Agreement is the product of good faith, arms-length negotiations, (b) the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights, (c) there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial, and (d) the Settlement Agreement is consistent with public policy and applicable law. The Settling Parties must first demonstrate that the Proposed Decrees satisfy these four elements by prima facie evidence to meet their burden of production. If the Settling Parties satisfy the initial burden of production, the burden of rebutting the Settling Parties' evidence shall shift to the Objectors. The Settling Parties, however, shall retain the burden of persuasion by a preponderance of the evidence. The Objectors need not demonstrate injury to their own water rights claims in order to state a cognizable objection." Order re Legal Standards, p. 3. Emphasis added.

So, pursuant to the Order re Legal Standards, the Court eliminated the Settling Parties

proposals that objectors must demonstrate harm. I was further hoping that said Legal Standards also required the Settling Parties to demonstrate that the Navajo Nation was entitled to the water rights of the Decrees.

Unfortunately, that is not how it turned out. Rather, pursuant to the Order Granting Settlement Motion, the Court simply compared the Statement of Claims to the Navajo Settlement and Decrees and found that since the water rights of the Decrees were significantly less than the water rights of the Decrees, the Decrees reduced impacts on junior water users, and that the Settlement Agreement provided for less than the potential claims that could be secured at trial. In that regard, the Court never considered whether the Navajo Nation was actually entitled to the water rights of the subject Decrees (or the water rights of the Statement of Claims). (Actually, the Court did find that the "homeland" standard was applicable. However, as demonstrated herein above, the "homeland" standard would allow unlimited water rights, but, the "homeland" standard is not consistent with either federal or New Mexico law.)

Ultimately, pursuant to the Order Granting Settlement Motion, the Court utilized its adopted legal standards to make a sham out of the entire proceeding.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #11. Whether the Court's treatment of the Settling Parties' Brief in support of the Settlement Motion, and the Non-Settling Parties' Motions for Summary Judgment violate the Rules of Civil Procedure and due process of law (the concepts of justice and fundamental fairness)?

I addressed this issue pursuant to GARY L. HORNER'S RESPONSE TO THE JOINT MEMORANDUM OF THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT OF THE SETTLEMENT MOTION, which was filed in the subject matter on May 10, 2013.

First, it should be noted that the Joint Memo re Settlement Motion is not a motion for summary judgment. The Joint Memo re Settlement Motion is not formatted as a motion for summary judgment, the Navajo Nation and United States ("Movants") have made no attempt to comply with the requirements of NMRA Rule 1-056 (re summary judgment), and said Rule 1-056 is not even mentioned in said Memo. Similarly, the Joint Memo re Settlement Motion is not formatted as a motion for judgment on the pleadings, Movants made no attempt to comply with the requirements of NMRA Rule 1-012 (re motions for judgment on the pleadings), and said Rule 1-012 is not even mentioned in said Memo.

Movants have not provided a list of authorities as required by NMRA Rule 1-056 (D)(2). Movants have not provided a numbered list of the material facts with respect to which they assert no genuine issue exists, as required by said Rule 1-056 (D)(2). In fact, the Joint Memo re Settlement Motion sets forth no facts at all.

However, Movants argue that:

> "Courts that have considered motions to approve Indian water rights settlements have generally treated such dispositive motions as the equivalent of motions for summary judgment. *See, e.g.*, *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 223 Ariz. 362, 367 ¶ 6, 224 P.3d 178, 183 (Ariz. 2010) ("*Gila VIII*")." Joint Memo re Settlement Motion, p. 6.

Therefore, it would appear that Movants would like the Court to regard their Joint Memo re Settlement Motion as a motion for summary judgment, even though they blatantly disregard the Rules. In fact, the Joint Memo re Settlement Motion should not be regarded as a motion for summary judgement or in any manner a dispositive motion.

Rather, the Joint Memo re Settlement Motion should be regarded precisely as the title states; that is, as a brief in support of the SETTLEMENT MOTION OF UNITED STATES, NAVAJO NATION AND STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES, which was filed in the present matter on January 3, 2011 ("Settlement Motion").

However, as a brief in support of the Settlement Motion, the Joint Memo re Settlement Motion should have been filed at the time the Settlement Motion was filed; that is, more than two years ago. In that regard, NMRA Rule 1-007.1 [Motions; how presented] provides:

> "A. **Requirement of written motion.** All motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with particularity the grounds and the relief sought.
>
> "B. **Unopposed motions.** The movant shall determine whether a motion will be opposed. If the motion will not be opposed, an order approved by all parties shall accompany the motion.
>
> "C. **Opposed motions.** The motion shall recite that the movant requested the concurrence of all parties or shall specify why no such request was made. . . .
>
> "Notwithstanding the provisions of any other rule, the movant may file with any opposed motion a brief or supporting points with citations or authorities. If the motion requires consideration of facts not of record, the movant shall file copies of all affidavits, depositions or other documentary evidence to be presented in support of the motion. Motions to amend pleadings shall have attached the proposed pleading. A motion for judgment on the pleadings presenting matters outside the pleading shall comply with Rule 1-056 NMRA. . . ." Emphasis added.

Similarly, Local Rule, LR11-104 [Motions] specifically provides:

> "A. All motions will state the grounds therefor with particularity. A motion which fails to state the grounds as required may be denied summarily by the court.
>
> "B. Each motion . . . shall be accompanied by a supporting written brief, separate and apart from the motion itself. Such brief shall be denominated as 'Brief in Support of Motion to (subject of motion).' " Emphasis added.

The Settlement Motion itself did not state with particularity the grounds therefore. In fact, the Settlement Motion was barely two paragraphs long (attached the Navajo Settlement and Proposed Decrees) and requested that "the Court consider and then enter the Partial Final Decree and Supplemental Partial Final Decree, thereby finally adjudicating the Navajo Nation's water rights in the San Juan River Basin in New Mexico." Settlement Motion, pp. 1-2.

Therefore, as a brief in support of the Settlement Motion, the Joint Memo re Settlement Motion should be disregarded or even stricken as untimely.

The Court intended that the Settling Parties file a dispositive motion in support of the Settlement Motion on April 15, 2013.

The THIRD AMENDED ORDER GRANTING MOTIONS TO EXTEND DEADLINES IN PART AND SETTING SCHEDULE GOVERNING DISCOVERY AND REMAINING PROCEEDINGS, entered in the present matter on March 15, 2013 ("3/15/13 Scheduling Order") provided:

> "2. March 31, 2013: Close of Discovery.
> "3. Dispositive Motions
> "a. April 15, 2013: Settling Parties' memorandum in support of the Settlement Motion of the United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees, filed January 3, 2011.
> "b. April 15, 2013: Non-Settling Parties' dispositive motions;
> "c. May 10, 2013: Responses to dispositive motions.
> "d. May 24, 2013: Replies to responses to dispositive motions.
> "e. Week of June 10, 2013: Hearing on dispositive motions." 3/15/13 Scheduling Order, pp. 2-3.

Therefore, it appears that the Court intended the Settling Parties to file dispositive motions in support of their Settlement Motion on April 15, 2013. However, the concept of the Joint Memo [In Support Of the] Settlement Motion (as opposed to a dispositive motion) is actually consistent with the precise language of the 3/15/13 Scheduling Order (3. a.).

The Court's Scheduling Orders have completely fouled up the respective burdens of the Parties.

On September 2, 2009, the Settling Parties filed their JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Motion re Initial Procedures"). Pursuant to said Motion re Initial Procedures, the Settling Parties proposed wholly inappropriate standards and burdens in the present matter, essentially proposing that the Objectors should entirely bear the initial burden of establishing that the Navajo Settlement

should *not* be approved and that the Proposed Decrees should *not* be entered. These issues were litigated in the present matter for more than two and one-half years. Finally, on April 19, 2012, the Court entered the AMENDED ORDER ESTABLISHING THE LEGAL STANDARDS FOR EVALUATING THE PROPOSED DECREES AND RESPECTIVE BURDENS OF PROOF ("Order re Legal Standards").

Pursuant to said Order re Legal Standards, the Court determined that:

> "The Settling Parties must demonstrate that the Proposed Decrees are 'fair, adequate, and reasonable, and consistent with the public interest and applicable law.' Order re Legal Standards, pp. 1-2. Emphasis added.

Said Order re Legal Standards also provided, regarding the Respective Burdens of the parties, that:

> "The Settling Parties shall have the burden of production and the burden of persuasion to demonstrate that (a) the Settlement Agreement is the product of good faith, arms-length negotiations, (b) the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights, (c) there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial, and (d) the Settlement Agreement is consistent with public policy and applicable law. The Settling Parties must first demonstrate that the Proposed Decrees satisfy these four elements by prima facie evidence to meet their burden of production. If the Settling Parties satisfy the initial burden of production, the burden of rebutting the Settling Parties' evidence shall shift to the Objectors. The Settling Parties, however, shall retain the burden of persuasion by a preponderance of the evidence. The Objectors need not demonstrate injury to their own water rights claims in order to state a cognizable objection." Order re Legal Standards, p. 3. Emphasis added.

In that regard, the Court has clearly appropriately determined that the Settling Parties have the (initial) burden of proof in the present matter. Only after the Settling Parties establish a *prima facie* case that they are entitled to the relief requested (approval of the Navajo Settlement and Proposed Decrees) does the burden of rebutting the Settling Parties' case shift to Objectors.

In the present matter, there was no complaint filed with respect to the Settling Parties' requested approval of the Navajo Settlement and Proposed Decrees. Similarly, the Settling Parties provided no brief, or authority, in support of the Settlement Motion at the time of filing the Settlement Motion. Objectors were left to their own devices to determine not only upon what

authority the Settling Parties relied in support of their Settlement Motion, but also, Objectors were left to their own devices to determine how the Navajo Settlement and Proposed Decrees would adversely affect their own use of water. Rather, pursuant to the 3/15/13 Scheduling Order,[19] the Settling Parties' were not required to provide authority for their Settlement Motion until April 15, 2013, more than two years after the Settlement Motion was filed, and then only

[19] Regarding dispositive motions, in addition to the 3/15/13 Scheduling Order, the ORDER (1) GRANTING SETTLING PARTIES' MOTION TO EXTEND CERTAIN DEADLINES AND (2) SETTING SCHEDULE GOVERNING DISCOVERY AND REMAINING PROCEEDINGS, entered in the present matter on February 3, 2012 ("2/3/12 Scheduling Order"), provided:

"6. **February 1, 2013: Close of Discovery.**

"7. **Dispositive Motions**

"a. **March 1, 2013:** Dispositive motions by any party, including the Settling Parties' memorandum in support of the Settlement Motion of the United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees, filed January 3, 2011.

"b. **April 1, 2013:** Responses to dispositive motions.

"c. **April 16, 2013:** Replies to responses to dispositive motions.

"d. **Week of May 6, 2013:** Hearing on dispositive motions." 2/3/12 Scheduling Order, p. 4. Underlining added.

The AMENDED ORDER SETTING SCHEDULE GOVERNING DISCOVERY ON THE NON-SETTLING PARTIES AND REMAINING PROCEEDINGS, entered in the present matter on August 7, 2012 ("8/7/12 Scheduling Order"), provided:

"9. **February 1, 2013: Close of Discovery.**

"10. **Dispositive Motions**

"a. **March 1, 2013:** Settling Parties' memorandum in support of the Settlement Motion of the United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees, filed January 3, 2011.

"b. **April 1, 2013:** Responses to dispositive motions.

"c. **April 16, 2013:** Replies to responses to dispositive motions.

"d. **Week of May 6, 2013:** Hearing on dispositive motions." 8/7/12 Scheduling Order, p. 4.

The SECOND AMENDED ORDER SETTING SCHEDULE GOVERNING DISCOVERY ON THE NON-SETTLING PARTIES AND REMAINING PROCEEDINGS, entered in the present matter on November 6, 2012 ("11/6/12 Scheduling Order"), provided:

"8. **March 1, 2013: Close of Discovery.**

"9. **Dispositive Motions**

"a. **March 15, 2013:** Setting Parties' memorandum in support of the Settlement Motion of the United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees, filed January 3, 2011.

"b. **April 10, 2013:** Responses to dispositive motions.

"c. **April 24, 2013:** Replies to responses to dispositive motions.

"d. **Week of May 6, 2013:** Hearing on dispositive motions." 11/6/12 Scheduling Order, pp. 2-3.

after the close of discovery.[20]

On the other hand, Objectors were required to file their objections to the Settlement Motion on September 21, 2012, and to file dispositive motions by April 15, 2013, both before the Settling Parties were required to establish a *prima facie* case in support of the Settlement Motion.

Therefore, the 3/15/13 Scheduling Order is not consistent with the Order re Legal Standards, in that, the 3/15/13 Scheduling Order has completely fouled up the respective burdens of the parties, as previously meticulously litigated and determined by the Court pursuant to the Order re Legal Standards.

At the very least, the Settling Parties should have been required to establish a *prima facie* case that the Settling Parties were entitled to the approval of the Navajo Settlement and entry of the Proposed Decrees, before Objectors were required to file dispositive motions in the present matter.

The Technical Reports and Affidavits referred to by Movants, are merely efforts to rationalize the Settling Parties' arguments for such future uses. Pursuant to Horner's Motion re Federal Reserved Rights, I demonstrated that the concept of federal reserved water rights does not include water for future uses.

First, and foremost, the Navajo Settlement and Decrees are primarily about water rights for future uses, that is, as much as 400,000 af/y more than the Navajo Nation has ever used before. The Statement of Claims is entirely about even more water rights for future uses.

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[20] Actually, pursuant to the 2/3/12 Scheduling Order, the Court ordered that by April 2, 2012, the State shall file a statement of the legal and factual bases for the Navajo Settlement. (2/3/12 Scheduling Order, p. 2, ¶ 1 (d).) On April 12, 2012, the State filed in the present matter the STATE OF NEW MEXICO'S STATEMENT OF LEGAL AND FACTUAL BASES FOR THE SETTLEMENT ("Statement re Bases"). On September 7, 2012, the State filed the STATE OF NEW MEXICO'S REVISED STATEMENT OF LEGAL AND FACTUAL BASES FOR SETTLEMENT ("Revised Statement re Bases"). (It should be noted that neither the U.S. nor the Navajo Nation signed, adopted, joined, or have indicated that they in any manner agreed with either of said Statements.)

However, pursuant to Horner's Motion re Federal Reserved Rights, I demonstrated that the concept of federal reserved water rights does not include water for future uses. Pursuant to Horner's Motion re Federal Law, Permits and Contracts, I demonstrated that both federal law and state law are based upon the concept of beneficial use.

The Technical Reports and Affidavits referred to by Movants, are merely efforts to rationalize the Settling Parties' arguments for such future uses. Apparently, if you have enough money, you can find an "expert" to say anything you want. In that regard, the Settling Parties' "experts" do not offer "sound scientific evidence," or even fact-based opinions in support of their positions, rather, such "experts" merely manipulate numbers and statistics in an effort to substantiate the Settling Parties' arguments for future uses.

As they stand, the Technical Reports and Affidavits are inadmissible hearsay. They were prepared in anticipation of litigation, and are not business records. I dispute essentially all of their conclusions. The Settling Parties' "experts" may be highly qualified, but, it does not appear that their conclusions can withstand the slightest scrutiny, and could easily be discredited on cross-examination. The Settling Parties' have not even attempted to set forth any material facts which they might claim are undisputed.

On the other hand, on April 15, 2013, I filed GARY L. HORNER'S MOTION FOR SUMMARY JUDGMENT: THAT IS, THE "SETTLEMENT MOTION OF THE UNITED STATES, NAVAJO NATION AND THE STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES" SHOULD BE DENIED, and GARY L. HORNER'S MEMORANDUM IN SUPPORT OF GARY L. HORNER'S MOTION FOR SUMMARY JUDGMENT: THAT IS, THE "SETTLEMENT MOTION OF THE UNITED STATES, NAVAJO NATION AND THE STATE OF NEW MEXICO FOR ENTRY OF PARTIAL

FINAL DECREES" SHOULD BE DENIED. In so doing I made every effort to comply with Rule 1-056. I included a Table of Authorities and a list of 328 material facts I claimed were undisputed. No one disputed any of such material facts.

However, the Court ignored my Motion for Summary Judgment and all of my listed undisputed material facts. However, even though I disputed the Technical Reports and Affidavits of the Settling Parties experts, the Court took them all to be true, without ever allowing me the opportunity to cross-examine such experts.

In *Washington*, *supra*, the Court considered the technical report and affidavit of the same Dr. Greene that authored one of the Technical Reports and Affidavits in the subject matter. In *Washington*, the Court stated that:

> "the Court clarifies that although Dr. Greene will be permitted to testify, the parties may object to any testimony under the Rules of Evidence if the testimony is (1) not relevant, or (2) the answer would result in speculation." *Washington*, at 1067.

Similarly, in the subject case, the Court should have considered the disputed Technical Reports and Affidavits as inadmissible hearsay during the summary judgments proceedings. If the Court wanted to consider such Technical Reports, the experts should have been permitted to testify at trial where I would have been allowed to cross-examine such experts.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

Issue #12. Whether water rights must be awarded to individual Navajo Indians rather than simply to the Navajo Nation?

The subject Navajo Settlement and Decrees make no provision for the award of water

rights to individual Navajos. However, in *Washington*, the court stated:

> "The parties dispute whether individual Indians 'owned' a proportionate share of tribal waters, or merely had the opportunity to 'participate' in the tribal waters. The Court finds, as a matter of law, pursuant to *Adair* and *Preston,* that each individual Lummi Indian owned a proportionate share of the agricultural and domestic tribal waters which became appurtenant to their land at the time of allotment. *See United States v. Adair,* 478 F.Supp. 336, 348 (D.Or.1979) (citing *United States v. Preston,* 352 F.2d 352, 358 (9th Cir.1965)). Thereafter, each individual Lummi allottee was entitled to 'sell his right to reserved water.' *Walton II,* 647 F.2d at 50. Such appurtenant water rights, and the ability of each Indian allottee to transfer his right to reserved water, is inconsistent with Plaintiff Lummi's assertion that these rights were held communally. Rather, the rights were appurtenant to allotted lands, and were freely transferable by individual Indian allottees.
>
> "**Agricultural**. An Indian living on a tribal reservation owns a proportionate share of the tribal waters 'the minute the reservation is created, and his rights become appurtenant to his land the minute he acquires his allotment.' *Adair,* 478 F.Supp. at 348 (citing *Preston,* 352 F.2d at 358)." Washington, at 1070-1071.

Standard of Review. This issue presents a pure question of law. Where a pure question of law is at issue, an appellate court reviews all issues on appeal under a de novo standard of review. *Rutherford v. Chaves County,* 2003–NMSC–010, ¶ 8, 133 N.M. 756, 69 P.3d 1199.

6. STATEMENT REGARDING TAPE RECORDING.

I understand that all of the hearings in the subject matter were recorded, and that more recent hearings were recorded by digital means.

7. PRIOR APPEALS.

On October 7, 2004, I filed an APPLICATION FOR INTERLOCUTORY APPEAL with respect to Horner's Motion to Enjoin and this Court's September 17, 2004 ORDER denying said Motion. On October 26, 2004, the Court of Appeals entered an ORDER summarily denying said Application for Interlocutory Appeal.

8. ORDER APPOINTING APPELLATE COUNSEL.

Not applicable.

Respectfully, submitted by:

January 2, 2014

GARY L. HORNER, Esq., Date
In Propria Persona
Post Office Box 2497
Farmington, New Mexico 87499
(505) 326-2378

CERTIFICATE OF SERVICE

I hereby certify, in accordance with NMRA Rule 12-208 (C), that a true copy of the foregoing DOCKETING STATEMENT was mailed by first-class postage, or delivered, to the following individuals this 2nd day of January, 2014:

Appellate Court
New Mexico Court of Appeals
Post Office Box 2008
Santa Fe, NM 87504-2008
(505) 827-4925
(505) 827-4946 (Fax)

Trial Judge
Presiding Judge James J. Wechsler
103 South Oliver Drive
Aztec, New Mexico 87410
(505) 334-6151

Court Monitor
Loressa Bachert
103 South Oliver Drive
Aztec, New Mexico 87410
(505) 334-6151

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and

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and

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_____
GARY L. HORNER, Esq.

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 January, 2014:

wrnavajointerse@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 January, 2014.

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