DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2012 NOV -8 PM 2: 57

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.
v.
THE JICARILLA APACHE TRIBE and the
NAVAJO NATION,
Defendant-Intervenors.

No. CV 75-184
SAN JUAN RIVER
ADJUDICATION SUIT

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

GARY L. HORNER'S BRIEF IN SUPPORT OF GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS

SUMMARY

1. Name of party filing the present document: **Gary L. Horner**

2. Title of the present document: **GARY L. HORNER'S BRIEF IN SUPPORT OF GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS**

3. Descriptive summary of the relief sought: **Mr. Horner seeks the Court's determination of the applicable standard for the determination of federal reserved water rights in the present matter. Specifically, Mr. Horner asserts that the applicable standard, for the determination of federal reserved water rights, should be based upon the minimal needs of an Indian Tribe as such needs existed at the time of the creation of the reservation.**

4: Number of pages of the present document: **78** (58 + 20 pages of Exhibits)

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), in support of GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED

WATER RIGHTS, which has been filed concurrently herewith (my "Motion," or Horner's "Motion re Federal Reserved Rights").

As and for good cause for said Motion, I respectfully state:

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I. Introduction.

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 (hereinafter referred to as the "2/3/12 Scheduling Order"); as well as 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 that: "**On or after October 5, 2012**: Any party may file proposed common issues of fact or law that are ripe for resolution." 2/3/12 Scheduling Order, ¶ 5; 8/7/12 Scheduling Order, ¶ 4.

On January 3, 2011, the State of New Mexico ("State"), the Navajo Nation ("Navajo"), and the United States of America ("U.S.") (collectively referred to as the "Settling Parties") filed in the present matter their SETTLEMENT MOTION OF UNITED STATES, NAVAJO NATION AND STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES ("Settlement Motion"). Attached to said Settlement Motion was the SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS AGREEMENT, which was executed December 10-17, 2010 (hereinafter referred to as the "Settlement Agreement" or the "Navajo Settlement"). Attached to said Settlement Motion as Appendix 1 was the Settling Parties' PROPOSED PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Proposed Decree"), and as Appendix 2 was the Settling Parties' PROPOSED SUPPLEMENTAL PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Proposed Supplemental Decree").

Pursuant to the Proposed Decree, the Settling Parties seek the Court's determination that the Navajo Nation is entitled to water rights in the San Juan River Basin in New Mexico of more than 600,000 acre-feet per year ("afy"), broken down as follows:

	Diversion Amount (afy)	Rate (cfs)	Depletion Amount (afy)	Decree Reference (¶)
Navajo Indian Irrigation Project ("NIIP")	508,000	1,800	270,000	3(a)
Navajo-Gallup Water Supply Project ("NGWSP")	22,650	41	20,780	3(b)
NGWSP use in Arizona (Window Rock)	6,411	12	6,411	6
Animas-La Plata Project ("ALP")	4,680	12.9	2,340	3(c)
Municipal and Domestic Uses ("DCMI")	2,600	5	1,300	3(d)
Hogback-Cudei Irrigation Project ("Hogback")	48,550	221	21,280	3(e)
Fruitland-Cambridge Irrigation Project ("Fruitland")	18,180	100	7,970	3(f)
Supplemental Carriage Water	?	?	0	4
Groundwater	2,000	?	2,000	7(a)
SUBTOTAL Proposed Decree	613,071	2,191.9	332,081	

The Proposed Supplemental Decree attached as Appendix 2 to the Navajo Settlement did not specify a quantity of water rights to be acquired thereby, apparently because the Settling Parties had not yet reached an agreement on such quantity. However, on April 2, 2012, the Settling Parties filed the SETTLING PARTIES' NOTICE OF FILING REVISED PROPOSED SUPPLEMENTAL PARTIAL FINAL DECREE. Attached to said Notice was a revised Appendix 2 (Settling Parties' revised proposed SUPPLEMENTAL PARTIAL FINAL DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION) ("Revised Appendix 2 Decree" or "Revised Proposed Supplemental Decree"). (The Proposed Decree and Revised Proposed Decree are collectively referred to as the "Proposed Decrees").[1] Pursuant to said Revised Proposed Supplemental Decree, the Settling Parties proposed that the Navajo Nation be awarded

[1] The Settling Parties generally refer to the water rights associated with the Proposed Decree as water rights for diversions from the mainstem of the San Juan (and Animas) River, and to the water rights associated with the Revised Proposed Supplemental Decree as water rights for tributary uses (not directly diverted from the San Juan or Animas Rivers).

(in addition to the quantities of the Proposed Decree) water rights of 26,872 afy diversion, or 11,061 afy depletion, plus an additional 11,309 afy (depletion) for evaporation from stock ponds and irrigation reservoirs. (Revised Proposed Supplemental Decree, ¶ 3.)

Thus, the total water rights the Settling Parties propose to be awarded to the Navajo Nation pursuant to the two Proposed Decrees are as follows:

	Diversion Amount (afy)	Diversion Rate (cfs)	Depletion Amount (afy)
Proposed Decree (Appendix 1)	613,071	2,191.9	332,081
Revised Proposed Supplemental Decree (Appendix 2)	26,872	?	11,061
(Appendix 2 Evaporation)	0	?	11,309
TOTAL Both Proposed Decrees	639,943	2,191.9	354,451

The Settling Parties propose that all of said water rights be considered to be federal reserved water rights, and that all of such water rights be given a priority date of June 1, 1868 (with the exception of the supplemental carriage water, and possibly the NGWSP uses in Arizona). (See Proposed Decree, ¶¶ 2, 3, 7(a), 8, 10, and 11, and the Revised Proposed Supplemental Decree, ¶ 3.)

I understand that the Navajo Nation currently diverts not much more than 200,000 afy from the San Juan and Animas Rivers. Therefore, the Proposed Decree would grant to the Navajo Nation as much as 400,000 afy water rights more than the Navajo Nation has ever used before, with a priority date that would be senior to all other water users in the Basin. I assume that the water rights of the Revised Proposed Supplemental Decree are similarly inflated or overstated.

I assert, regarding federal reserved rights for Indian Tribes, that the courts have established that: 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.

In that regard, to the extent that the characterizations and/or declarations within the Navajo Settlement and Proposed Decrees, that the Navajo Nation's proposed water rights are, or are based upon the concept of, federal reserved water rights, I assert that the Navajo Settlement and Proposed Decrees are not consistent with, and have absolutely no legitimate basis in, applicable law.

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.

Therefore, it is critical for the Court to determine in the present matter just what is the applicable law with respect to federal reserved water rights, and what is the appropriate standard

to be applied with respect to the determination of federal reserved rights for Indian Tribes generally, and the Navajo Nation specifically.

Accordingly, I respectfully move the Court for an order establishing the standard by which federal reserved water rights for Indian Tribes should be determined in the present matter, and specifically, for an order that federal reserved rights for Indian Tribes 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.[2]

II. The Navajo Settlement is a clear and flagrant violation of the beneficial use and prior appropriation provisions of the New Mexico Constitution.

The Navajo Settlement would 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."

Further, the award of a priority date of June 1, 1868 for all (or most) of the water rights of

[2] The Navajo Settlement and Proposed Decrees are problematic in many respects. I objected to many of such problems 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 present matter on September 24, 2012 ("Horner's Objection to Settlement Motion"). The present Motion is intended to focus only on the federal reserved water right aspect of the Navajo Settlement and Proposed Decrees. I reserve the right to address other problematic aspects of the Navajo Settlement and Proposed Decrees by motion at a later date.

the Navajo Settlement and proposed Decrees, where the Navajo Nation has never before used most of such water, would violate the New Mexico Constitutional doctrine of prior appropriation. In New Mexico, the doctrine of prior appropriation is set forth in the Constitution, and the relative weight of each such water right is determined by the date each water use was first put to beneficial use (priority date). Specifically, 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.

The Navajo Settlement is a clear and flagrant violation of the beneficial use and prior appropriation provisions of the New Mexico Constitution.

Accordingly, the Settling Parties must look to some authority, other than state law, as support for the Navajo Settlement and Proposed Decrees. One such authority, that the Settling Parties look to, is the concept of federal reserved rights.

III. 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. [3]

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[3] Paragraph 2, of the Proposed Partial Final Decree provides:
"The Navajo Nation's reserved rights, which are held in trust by the United States on behalf of the Navajo Nation, are described in paragraphs 3, 7(a), 8 and 10 of this Decree . These reserved rights have a priority date of June 1, 1868 and are not subject to abandonment, forfeiture or lass for non-use." Proposed Partial

However, I assert that none of the water rights of the Proposed Partial Final (Appendix 1) Decree, and a significant portion of the water rights of the Revised Supplemental Partial Final (Appendix 2) 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.

Final Decree, p. 2.

Paragraph 3 of the Proposed Revised Supplemental Partial Final Decree provides:

> "The Navajo Nation has reserved rights, which are held in trust by the United States on behalf of the Navajo Nation, for historic and existing water uses on lands in the San Juan River Basin in New Mexico. Reserved rights are not subject to abandonment, forfeiture or loss for non-use. . . . The total annual quantities of water to which the Navajo Nation has a reserved right for historic and existing uses and which are not included in paragraph 3 or subparagraph 7(a) of the Decree shall not exceed an annual diversion of 26.872 acre-feet, or an annual depletion at the places of use of 11,061 acre-feet for uses other than reservoir storage described in subparagraphs 3.A.1 and 3.B.2 below, or a net evaporation from stockponds and irrigation reservoirs of 11,309 acre-feet. . . .
>
> "The reserved water rights described below are subject to the conditions of use set forth in paragraph 5 of this Supplemental Decree and constitute the rights described in paragraph 8 of the Decree. . . ." Proposed Supplemental Partial Final Decree, p. 3

Paragraph 1 of the WAIVERS AN RELEASES, attached to the Navajo Settlement as Appendix 3, provides:

"In return for recognition of the Navajo Nation's water rights and other benefits as set forth in the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement and its three referenced appendices (collectively referred to in this appendix as the 'Settlement Agreement') and the Northwestern New Mexico Rural Water Projects Act, Subtitle B of Title X of the Act of March 30, 2009 P.L. 111-11, (123 Stat. 1367) ('Settlement Act'), the Navajo Nation, on behalf of itself and members of the Navajo Nation (other than members in the capacity of the members as allottees), and the United States, acting in its capacity as trustee for the Navajo Nation, hereby waive and release:

"1.1 all claims for water rights in, or for waters of, the San Juan River Basin in the State of New Mexico that the Navajo Nation, or the United States as trustee for the Navajo Nation, asserted, or could have asserted, in any proceeding, including but not limited to the stream adjudication, up to and including the effective date described in paragraph 6.0, except to the extent that such rights are recognized in the Settlement Agreement or the Settlement Act:" Waivers and Releases, ¶ 1.

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.

While the foregoing proposal sets forth a simple format for determining the water rights of the Navajo Nation by this Court without a settlement, such proposal probably does little to comfort the Court with respect to the significant body of law regarding federal reserved water rights. In that regard, a discussion of the law with respect to federal reserved water rights follows.

A. The *Winters* doctrine as 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.

B. *Winters v. United States* (1908) as the origin of federal reserved rights

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.[4]

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 situation in *Winters* appears to have been complicated by the fact that a large tract of land was set apart as an Indian reservation by an Act of Congress, approved April 15, 1874 [18 Stat. at L. 28, chap. 96]. Apparently, the United States subsequently wanted to open a large portion of such reservation for settlement, and therefore, entered into an agreement with the Indians on May 1, 1888 [25 Stat. at L. 113, chap. 213] in which all of such reservation was ceded

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4 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.

by the Indians back to the United States, except for the subject Fort Belknap Reservation. *Winters* at 567-568, L ed at 341. While the relevance of such dates and actions is not at all certain, the parties relied extensively on them, and the Court appeared to have been confused thereby.

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:

> "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[5] 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.

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

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.

C. *Arizona v. California* (1963) as the origin of the concept of PIA.

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 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.

D. The courts have retreated from the *Winter's* doctrine as described above.

However, 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.

1. *Cappaert v. United States* (1976) restricted federal reserved rights to the "minimal need" of the reservation.

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 *Cappaert*, the government brought a lawsuit to declare its rights to an underground pool of water appurtenant to Devil's Hole in the Death Valley National Monument. 426 U.S. at 131, 96 S.Ct. At 2066. The Cappaerts, by pumping groundwater, were threatening the amount of water available to an endangered species of desert fish. Because the Devil's Hole Monument had been established in part to conserve natural and historical objects and the wildlife therein, the Court found a reserved water right to fulfill this purpose.

In an important caveat, however, 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).)

2. *United States v. New Mexico* (1978) 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.

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).)

3. *Washington v. Fishing Vessel Ass'n* (1979) determined that Indian tribes are not generally entitled to the same level of exclusive use of water that they enjoyed at the time they entered into the treaty.

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).[6] 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.

The *Washington* Court noted

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[6] The *Washington* Court noted that
"The regular habits of these fish make their 'runs' predictable; this predictability in turn makes it possible for both fishermen and regulators to forecast and control the number of fish 'harvested.' Indeed, as the terminology associated with it suggests, the management of anadromous fisheries is in many ways more akin to the cultivation of 'crops' – with its relatively high degree of predictability and productive stability . . . ." *Washington* at 663. Emphasis added.

"adequate regulation must not only take into account the potentially conflicting interests of sport and commercial fishermen, as well as those of Indian and nontreaty fishermen, but must also recognize that the fish runs may be harmed by harvesting either too many or too few of the fish returning to spawn.

"The anadromous fish constitute a natural resource of great economic value to the State of Washington. Millions of salmon . . . are harvested each year. Over 6,600 nontreaty fishermen and about 800 Indians make their livelihood by commercial fishing; moreover, some 280,000 individuals are licensed to engage in sport fishing in the State.

"One hundred and twenty-five years ago when the relevant treaties were signed, anadromous fish were even more important to most of the population of western Washington than they are today. At that time, about three-fourths of the approximately 10,000 inhabitants of the area were Indians. Although in some respects the cultures of the different tribes varied . . . all of them shared a vital and unifying dependence on anadromous fish." *Washington* at 663-664. [footnotes and citations omitted].

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.

4. *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.

5. *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:[7] '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.

[7] *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, 106 L.Ed.2d 342 (1989) (hereinafter referred to as '*Big Horn I*')

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.[8] 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.

E. *Gila V* (2001) completely rejects the concept of PIA.

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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[8] 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.[9] 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*.[10] *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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[9] 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.

[10] 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.

F. The fallacies and myths of federal reserved water rights for Indian tribes.

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.

1. 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 104 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 104 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 144 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.

2. The *Winters* doctrine does not provide for the reservation of water rights for future uses.

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. <u>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</u> . . . .' *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 "<u>for a use which would be necessarily continued through years</u>." *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 <u>for a use which would be necessarily continued through the years</u>." *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.

<u>3. The *Winters* doctrine does not provide that federal reserved Indian water rights cannot be lost for non-use.</u>

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.

4. Reserved rights are narrowly quantified to meet the original, primary purpose of the reservation, water for secondary purposes must be acquired under state law.

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. <u>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</u>. *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

5. The *Winter's* doctrine allows no consideration for other existing water users.

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. If the subject Proposed Decrees were to be 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 Navajo Nation seeks a priority date of 1868, although they have never put much of such water to use in the last 144 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.

6. The *Winters* doctrine has never embraced the concept of leasing federal reserved water rights off of the reservation.

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.

G. The original purpose of the Navajo Reservation, and the federal reserved water rights associated therewith.

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 <u>only</u> 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.)[11];
- 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

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[11] 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 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.

H. In *Las Vegas* (2004), the New Mexico Supreme Court abolished the pueblo water rights doctrine - said doctrine provided for water for future uses that could not be lost for nonuse.

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).[12] 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 Vegas* at 135 N.M. 378, 89 P.3d at 50." Emphasis added.
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> * * *
>
> "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

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[12] 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.

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.

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"[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.

I. In *Commissioner of Public Lands* (2009), the New Mexico Court of Appeals established that federal reserved rights doctrine must be construed narrowly.

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 <u>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</u>." [*United States v.*] *New Mexico,* 438 U.S. [696,] at 705, 98 S.Ct. 3012 [, 57 L.Ed.2d 1052 (1978)]. Further, <u>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.</u> *See Jesse,* 744 P.2d at 494. ("Because the priority date of the [federal] reserved right relates back to the date of the reservation, <u>reserved water rights threaten existing appropriators with divestment of their rights without compensation</u>."). Accordingly <u>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</u>. *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.

<u>IV. There is simply no authority (state or federal) for granting water rights to an Indian Tribe whose only purpose for such water is to market such water off of the reservation.</u>

The Navajo Settlement would allow the Navajo Nation to market the unused water acquired thereunder to entities off of the Navajo Reservation. The marketing of water to third parties was a hallmark of the Jicarilla Settlement and Decree. The Jicarilla Decree provided for approximately 32,000 afy in excess of the Jicarilla's needs. I understand that by now a significant portion, if not most, of such excess water has been marketed to third parties, and the