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 RESPONSE TO THE JOINT MEMORANDUM OF THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT OF THE SETTLEMENT MOTION

SUMMARY

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

2. Title of the present document: **GARY L. HORNER'S RESPONSE TO THE JOINT MEMORANDUM OF THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT OF THE SETTLEMENT MOTION**

3. Descriptive summary of the relief sought: **This document represents Mr. Horner's response to the Joint Memorandum of the Navajo Nation and the United States in Support of Settlement Motion for Entry of Partial Final Decrees.**

4: Number of pages of the present document: **53**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), and respectfully responds to the JOINT MEMORANDUM OF THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT OF SETTLEMENT MOTION FOR ENTRY OF PARTIAL FINAL DECREES, which was filed in the present matter on April 15,

JUDGE

2013 ("Joint Memo re Settlement Motion").

As and for good cause for said Response I state:

TABLE OF CONTENTS

Description: **Page:**

TABLE OF AUTHORITIES

Description: **Page:**

Federal Constitution:

Federal Statutes:

Federal Cases:

New Mexico Constitution:

New Mexico Statutes:

New Mexico Cases:

New Mexico Court Rules:

Other States' Cases:

Compacts and Agreements:

Law Review Articles:

Other:

I. Introduction.

A. The Joint Memo re Settlement Motion is not a dispositive motion.

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

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

However, Movants argue that:

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

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

summary judgement or in any manner a dispositive motion.

B. The Joint Memo re Settlement Motion should have been filed with the Settlement Motion, more than two years ago.

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

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

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

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

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

The Settlement Motion itself did not state with particularity the grounds therefore. In fact, the Settlement Motion was barely two paragraphs long (attached the Navajo Settlement and Proposed Decrees) and requested that "the Court consider and then enter the Partial Final Decree

and Supplemental Partial Final Decree, thereby finally adjudicating the Navajo Nation's water rights in the San Juan River Basin in New Mexico." Settlement Motion, pp. 1-2.

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

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

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

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

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

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

On September 2, 2009, the Settling Parties filed their JOINT MOTION FOR ORDER

GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("SP Motion re Initial Procedures"). Pursuant to said SP Motion re Initial Procedures, the Settling Parties proposed wholly inappropriate standards and burdens in the present matter, essentially proposing that the Objectors should entirely bear the initial burden of establishing that the Navajo Settlement should *not* be approved and that the Proposed Decrees should *not* be entered. These issues were litigated in the present matter for more than two and one-half years. Finally, on April 19, 2012, the Court entered the AMENDED ORDER ESTABLISHING THE LEGAL STANDARDS FOR EVALUATING THE PROPOSED DECREES AND RESPECTIVE BURDENS OF PROOF ("Order re Legal Standards").

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

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

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

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

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

and Proposed Decrees) does the burden of rebutting the Settling Parties' case shift to Objectors.

In the present matter, there was no complaint filed with respect to the Settling Parties' requested approval of the Navajo Settlement and Proposed Decrees. Similarly, the Settling Parties provided no brief, or authority, in support of the Settlement Motion at the time of filing the Settlement Motion. Objectors were left to their own devices to determine not only upon what authority the Settling Parties relied in support of their Settlement Motion, but also, Objectors were left to their own devices to determine how the Navajo Settlement and Proposed Decrees would adversely affect their own use of water. Rather, pursuant to the 3/15/13 Scheduling Order,[1] the Settling Parties' were not required to provide authority for their Settlement Motion

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

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

"7. **Dispositive Motions**

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

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

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

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

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

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

"10. **Dispositive Motions**

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

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

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

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

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

"8. **March 1, 2013: Close of Discovery.**

"9. **Dispositive Motions**

until April 15, 2013, more than two years after the Settlement Motion was filed, and then only after the close of discovery.[2]

On the other hand, Objectors were required to file their objections to the Settlement Motion on September 21, 2012, and to file dispositive motions by April 15, 2013, both before the Settling Parties were required to establish a *prima facie* case in support of the Settlement Motion.

Therefore, the 3/15/13 Scheduling Order is not consistent with the Order re Legal Standards, in that, the 3/15/13 Scheduling Order has completely fouled up the respective burdens of the parties, as previously meticulously litigated and determined by the Court pursuant to the Order re Legal Standards.

At the very least, the Settling Parties should have been required to establish a *prima facie* case that the Settling Parties were entitled to the approval of the Navajo Settlement and entry of the Proposed Decrees, before Objectors were required to file dispositive motions in the present matter.

E. Movants grossly exaggerate the size of the Navajo Reservation.

"a. **March 15, 2013:** Setting Parties' memorandum in support of the Settlement Motion of the United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees, filed January 3, 2011.
"b. **April 10, 2013:** Responses to dispositive motions.
"c. **April 24, 2013:** Replies to responses to dispositive motions.
"d. **Week of May 6, 2013:** Hearing on dispositive motions." 11/6/12 Scheduling Order, pp. 2-3.

[2] Actually, pursuant to the 2/3/12 Scheduling Order, the Court ordered that by April 2, 2012, the State shall file a statement of the legal and factual bases for the Navajo Settlement. (2/3/12 Scheduling Order, p. 2, ¶ 1 (d).) On April 12, 2012, the State filed in the present matter the STATE OF NEW MEXICO'S STATEMENT OF LEGAL AND FACTUAL BASES FOR THE SETTLEMENT ("Statement re Bases"). On September 7, 2012, the State filed the STATE OF NEW MEXICO'S REVISED STATEMENT OF LEGAL AND FACTUAL BASES FOR SETTLEMENT ("Revised Statement re Bases"). (It should be noted that neither the U.S. nor the Navajo Nation signed, adopted, joined, or have indicated that they in any manner agreed with either of said Statements.)

Pursuant to Horner's Motion re Federal Reserved Rights, I demonstrated 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. Further, 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. Typically, the concept of federal reserved rights presumes that a priority date will be awarded that relates to the date of the creation of the reservation.

The Navajo Reservation was created by treaty on June 1, 1868. Therefore, a priority date of 1868 would be appropriate for the Navajo Nation with respect to the water the Navajos were using on such Reservation at the time it was created, or perhaps within a reasonable time thereafter. However, the Navajo Settlement and Proposed Decrees would award the Navajo Nation an 1868 priority date for water uses that have never been used before, with respect to lands that were never part of the Navajo Reservation. (I assert that none of the water rights of the Proposed Decree should be considered federal reserved rights, and only a portion of the water rights of the Proposed Supplemental Decree should be considered federal reserved water rights.)

In that regard, Movants state that:

> "Lands throughout the Basin have been taken into trust by the United States on behalf of the Navajo Nation. In this Memorandum, lands in the Basin held in trust by the United States on behalf of the Navajo Nation are referred to as the 'Navajo Reservation.' " Joint Memo re Settlement Motion, p. 2, Footnote 4.

Pursuant to Horner's Motion for Summary Judgment, I demonstrated that the lands the Settling Parties refer to as "Navajo Lands" are roughly three times larger than the Navajo Reservation as it was created in 1868, and approximately twice as large as the Navajo Reservation currently exists today. The point here is that pursuant to the preceding quote, Movants begin their arguments in favor of the Navajo Settlement with an enormous intentional

misrepresentation of the very definition of the Navajo Reservation.

II. Standard of review and burdens of proof.

Pursuant to the Joint Memo re Settlement Motion, pp. 3-11, 25-28, Movants expend considerable effort rearguing the standard of review and burdens of proof to be utilized by the Court in the present expedited *inter se* proceeding. However, the Settling Parties first presented their proposed standard of review pursuant to their JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION, which was filed in the present matter on September 2, 2009 ("SP Motion re Initial Procedures").

Pursuant to said SP Motion re Initial Procedures, the Settling Parties proposed wholly inappropriate standards and burdens in the present matter; essentially proposing that the Objectors should entirely bear the initial burden of establishing that the Navajo Settlement should *not* be approved and that the Proposed Decrees should *not* be entered. These issues were litigated in the present matter for more than two and one-half years. Finally, on April 19, 2012, the Court entered the AMENDED ORDER ESTABLISHING THE LEGAL STANDARDS FOR EVALUATING THE PROPOSED DECREES AND RESPECTIVE BURDENS OF PROOF ("Order re Legal Standards").

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

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

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

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

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

Pursuant to the Joint Memo re Settlement Motion, Movants try to once again reargue their proposed inappropriate standard of review. These matters have already been decided by this Court. Movants disregard for this Court's previous decisions is not surprising when it is considered that the Settling Parties generally completely disregard the law with respect to the Navajo Settlement and Proposed Decrees.

III. The Settling Parties have not established that the Navajo Settlement should be granted.

A. The Navajo Settlement is not the product of good faith arms-length negotiations.

Pursuant to the Joint Memo re Settlement Motion, pp. 12-23, Movants expend considerable effort in detailing the negotiating history of the Navajo Settlement. Based upon such history, Movants argue that the Navajo Settlement is the product of good faith arms-length negotiations. Ultimately, Movants specifically argue that:

> "There is absolutely no evidence to suggest that the settlement is other than a freely-negotiated agreement that is fair to the Settling Parties and the constituents they represent." Joint Memo re Settlement Motion, p. 25.

The problem is that the entire point of this expedited *inter se* proceeding is to ultimately bind all other water users to the terms of the Navajo Settlement and the Proposed Decrees. The Settling Parties may have negotiated and agreed to the terms of the Navajo Settlement, but the terms of the Navajo Settlement violate the law in many respects, and thus, the terms of the Navajo Settlement are not consistent with the public interest and applicable law, and the Navajo Nation is not legally entitled to the water rights set forth therein. Further, the other water users in the Basin will be injured by the massive quantities of water rights, most of which have never been used before, and the very early priority dates of such rights set forth therein. Similarly, there is no basis in the law for, and other water users will be injured by, the terms of the Navajo Settlement with respect to the administration of such water rights and the right the Navajo Nation would acquire to lease its water rights to other (possibly out of state) users. The Settling Parties may have negotiated and agreed to the terms of the Navajo Settlement, but the benefits the Navajo Nation will receive, will be realized only at the expense of other water users.

Therefore, to any extent that the Settling parties negotiated and agreed to the terms of the Navajo Settlement really has no relevance in the present matter. The relevant factors are whether the Navajo Settlement is consistent with the public interest and applicable law, whether the Navajo Nation is actually entitled to such water rights (and other terms of the Navajo Settlement), and whether other water users are inappropriately injured thereby.

B. Movants have shown no reasonable basis to conclude the Navajo Settlement provides for less water than the potential claims that could be secured at trial.

1. The only basis Movants assert as a reasonable basis to conclude the Navajo Settlement provides for less water than the potential claims that could be secured at trial, is that the Navajo Settlement involves less water than the U.S. Claims.

THE UNITED STATES' STATEMENT OF CLAIMS OF WATER RIGHTS IN THE NEW MEXICO SAN JUAN RIVER BASIN ON BEHALF OF THE NAVAJO NATION, was filed with the Court on January 3, 2011 ("U.S. Claims"). The U.S. Claims, represented simply a trumped up statement of water rights claims for the Navajo Nation which the Settling Parties intended to use as a scare tactic to convince other water users that they should support the Navajo Settlement, or the Navajo Nation would simply come in, pursuant to the U.S. Claims, and take all of the water in the San Juan Basin in New Mexico.

Further, the Settling Parties intended to use the U.S. Claims as the basis for their argument that the Navajo Settlement was "fair and reasonable." Specifically, pursuant to the SETTLING PARTIES' SUPPLEMENTAL BRIEF [re Legal Standards] filed in the present matter on January 3, 2012 ("SP Supplemental Brief"), the Settling Parties proposed to meet their burden by showing that:

> "that the water rights secured under the Proposed Decrees are significantly less than the potential claims of the Navajo Nation, both in quantity and priority". SP Supplemental Brief, p. 7.

Since the U.S. Claims had already been filed (January 3, 2011), the Settling Parties were in essence proposing that they had already met such burden; and that the resolution of the Court's ultimate question, whether the Navajo Settlement and Proposed Decrees were fair and reasonable, was a foregone conclusion (simply by virtue of the filing of the U.S. Claims, because the water rights of the Navajo Settlement and Proposed Decrees were significantly less that the water rights of the U.S. Claims).

Ultimately, the Court rejected the Settling Parties' proposed burden, that the Proposed Decrees were less than the U.S. Claims, and established that the Settling Parties had the burden to prove (among other things) that "there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial". (See 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".))

Still, the Settling Parties repeatedly attempt to show that the Navajo Settlement and Proposed Decrees are fair and reasonable, by simply arguing that if the Settlement Motion is rejected, pursuant to the U.S. Claims, the Navajo Nation and United States will claim all of the water in the San Juan Basin for the benefit of the Navajo Nation.

Specifically, Movants still argue that:

> "the Court must compare the potential claims of the Navajo Nation, as presented in the U.S. Statement of Claims and supported by the extensive technical reports of the United States, and the OSE Technical Assessment, with the water rights provided for in the Proposed Decrees." Joint Memo re Settlement Motion, pp. 27-28.

It appears that pursuant to the Settling Parties' burden to prove that "there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial", the Court was in essence requiring the Settling Parties to prove that the Navajo Nation is somehow "entitled" to the water rights of the Navajo Settlement and Proposed Decrees. However, as demonstrated pursuant to Horner's Motion re Reserved Rights, Horner's Motion re Federal Law, Permits and Contracts, and Horner's Motion for Summary Judgment, the Settling Parties cannot prove that the Navajo Nation is "entitled" to the water rights of the Navajo Settlement and Proposed Decrees, because, the Navajo Nation is simply not "entitled" to

such water rights. Therefore, the Settling Parties cannot meet their burden of proving that "there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial".

However, as I have shown, the Settling Parties will never be able to show at trial, or anywhere else, that the Navajo Nation is entitled to the water rights of even the Navajo Settlement and Proposed Decrees, let alone all of the water of the U.S. Claims, or all of the water in the San Juan Basin.

2. Movants argument that the United States owns all of the water in the San Juan Basin, and the United States can impart the right to use such water on anyone it chooses by virtue of a contract, and this Court has no jurisdiction to even consider the matter, is simply absurd.

Pursuant to the Joint Memo re Settlement Motion, Movants argue that:

> "the Court's scrutiny of the settlement does not require consideration of the Navajo Nation's use of water for NIIP, NGWSP, and ALP or the water for these projects ("Project Water") in its analysis. The Navajo Nation draws Project Water under the existing permanent contract BOR contracts and is permitted to use Project Water pursuant State Permit Nos. 2849, 2883, and 3215 as authorized by Congress in the 1962 Act, the Colorado Ute Settlement Act Amendments of 2000, *see* n. 22, *supra*, and the Settlement Act § 10701(b)(1)(B). Since this water is only available for use pursuant to contract with the United States, it is not available for appropriation by other water users and should be excluded from the Court's analysis of whether there is a reasonable basis to conclude the Navajo Nation settled for less water than it could prove at trial. *See Gila VIII*, 224 P. 3d at 189; 223 Ariz. at 373 ("[Central Arizona Project ("CAP")] water is delivered pursuant to contract with the federal government and is not subject to appropriation under state law. [citation omitted] Therefore, CAP water, which is outside the jurisdiction of the adjudication court, was properly excluded from ADWR's analysis."). Stated another way, the Navajo Nation could enter into contracts at any time with the United States to receive water from federal projects, and the amount of water the Navajo Nation receives by way of contract would be beyond the scrutiny of this Court. Under the Proposed Decrees the Navajo Nation has agreed to subordinate its reserved water rights in exchange for water to be provided pursuant to the Settlement Contract. Like the CAP water included in the GRIC settlement in *Gila VIII*, Navajo Nation Project Water should not be part of the analysis of whether the Navajo Nation settled for less water than it could prove at trial." Joint Memo re Settlement Motion, p. 27.

Movants in essence argue that the United States owns all of the water in the San Juan Basin, and the United States can impart the right to use such water on anyone it chooses by virtue of a contract, and this Court has no jurisdiction to even consider the matter. Such argument is

simply absurd, and so disrespectful of this Court's jurisdiction that Movants should be held in contempt of Court and sanctioned.

Movants act as if they have no knowledge whatsoever of *any* water law. They certainly appear to be hoping that the Court has absolutely no knowledge of, or interest in, any water law.

However, I have addressed precisely these issues pursuant to Horner's Brief re Federal Law, Permits and Contracts. There, I demonstrated that federal law provides, or the courts have established that: with regard to federal reclamation projects the federal government is a storer and/or deliverer of water and not the owner of the water right; property right in water right is separate and distinct from property right in reservoirs, ditches, or canals; water rights acquired for federal reclamation projects belong to the ultimate water user rather than the federal government; water rights for federal reclamation projects never vest in the United States; the United States is not the owner of the water, rather the United States is a carrier or trustee for owners; water rights for federal reclamation projects must be acquired in strict compliance with state law, if state law cannot be complied with, the federal government is not to initiate the project; federal law specifically defers to state appropriation laws in determining right of the United States to appropriate water within a state; state law governs the distribution of water once released from a federal reclamation project; nothing in the reclamation law shall be construed as to affect or interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water, or any vested right acquired thereunder; the Secretary of the Interior, in carrying out the provisions of the reclamation law, shall proceed in conformity with state laws; nothing in the reclamation law shall affect any right of any state or landowner, appropriator, or user of water from any interstate stream; the doctrine of prior appropriation, linked to beneficial

use of the water, arose through local customs, laws, and judicial decisions; even before many of the Western States had been admitted to the Union, Congress deferred to the growing local law; local appropriation rights are rights which the government has, by its conduct, recognized and encouraged and is bound to protect; under the equal-footing doctrine, the Western States, upon their admission to the Union, acquired exclusive sovereignty over the unappropriated waters in their streams; the authority of each state in the disposal of the water-supply within its borders is unquestioned and supreme; the states gained absolute dominion over their nonnavigable waters upon their admission to the Union: the water through which the reclamation would be accomplished does not belong to the federal government, the reservoirs in which the water is stored belong to the government, but the water belongs to the states and will be controlled by them; authority over intrastate waterways lies with the states; federal legislation cannot override state laws in respect to the general subject of reclamation; each State has full jurisdiction over the lands within its borders, including the beds of streams and other waters; the foregoing principles were incorporated in the Reclamation Act of 1902; the Reclamation Act of 1902 was incorporated into Public Law 87-483; the Secretary of the Interior may not, consistent with the Reclamation Act, knowingly release water to an individual or entity for a use which is not recognized as beneficial under state law, unless such use is specifically authorized by a congressional directive; no one is entitled to receive water for a use not recognized as beneficial under state law; § 5 of the 1902 Act, 43 U.S.C. s 431, prohibits the sale of water to tracts of land in excess of 160 acres; and originally the federal reclamation laws made provision only for water to be used in irrigation.

Further, pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated

that with respect to contracts regarding federal reclamation projects: Congress intended state and local interests to acquire only storage space; rights and water users are not determined by contract, but by beneficial use; such contracts are for the delivery of water, and/or the allocation of storage space in reservoir; the United States owns the facilities and is entitled to compensation for the use of such facilities; the water rights associated with federal reclamation projects are the property of the land owners, wholly distinct from the property right of the government in the irrigation works; and the government was and remains simply a carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.

Similarly, pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that New Mexico law provides, or the courts have established, that: "beneficial use" requires maximum utilization; our entire state has only enough water to supply its most urgent needs; water conservation and preservation is of utmost importance; utilization of water for maximum benefits is a requirement second to none, not only for progress but for survival; maximum utilization is a fundamental requirement which prevents waste of water; no matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use; an excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use within the meaning of the New Mexico Constitution, Article 16, §§ 1, 2 and 3, and § 72-1-2 NMSA 1978; water, in this state, is too scarce, and consequently too precious, to admit waste; whatever right one has, is subject to that established principle that his use shall not be injurious to the rights of others, or of the general public; an appropriator cannot take more water than he can beneficially use; an appropriator cannot take the

water now with a mere hope of possible sales in the future, most of which sales are yet to materialize; an appropriator has a reasonable time to develop use for the water and to thus perfect its appropriation, however, such right is not unlimited; an appropriator cannot divert water which looks to future negotiation for various beneficial uses; the reasonable time for development, §§ 72-5-6 and 72-5-28(C), NMSA 1978, relates back to the date of showing an intent to appropriate by acquiring a permit; until an appropriator can apply the water it cannot be said to have a beneficial use, nor, for that matter, a completed appropriation; the Bureau cannot deliver the water to an appropriator under a plan which is nothing more than speculative with respect to the beneficial uses; the requirements of state law govern the distribution of water from federal reclamation projects unless specifically overridden by congressional mandate or directives; and nothing in the statutes nor the legislative history with respect to the San Juan-Chama/NIIP Act (Public Law 87-483) indicates that Congress intended to authorize uses of water otherwise prohibited under state law.

The Settling Parties repeatedly make broad assertions that the water rights of the Navajo Settlement and Proposed Decree are either based on, or authorized by, permits issued by the State Engineer. However, there are no specific references in the Navajo Settlement indicating that the water rights to be adjudicated to the Navajo Nation are based upon permits issued by the State Engineer. The only specific references to State Engineer File No.s in the Proposed Decree relate to the Navajo Nation's rights pursuant to the Settlement Contract. The Settlement Contract relates only to the storage of water in, and the delivery of water from, federal storage reservoirs (Navajo Reservoir or Lake Nighthorse (ALP)).

Apparently, no notices of intention, or applications for permit, were ever filed with the

State Engineer with respect to the Navajo Nation's: Fruitland, Cambridge or Cudei irrigation projects; municipal uses; ground water uses; or tributary uses.

No license to appropriate was ever issued by the State Engineer with respect to File No. 758 because the United States refused to comply with the State Engineer's requirements. In fact, the United States stated:

> "so far as the [Federal] Government is concerned, the issuance or non-issuance of your Certificate of Construction and Final License will have no effect on its paramount rights to divert or use the water, and the State or its officers cannot interfere in any way with such diversion or use."

There has been no water use for decades associated with File No.s 2472 (helium plant), and 2807 (uranium mill), 2875 (uranium mill).

The permits associated with File No.s 758, 2472, 2807, and 2875 are to be cancelled by agreement pursuant to § 4.3.1 of the Navajo Settlement, and no water rights are to be adjudicated with respect to said File No.s.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that the Notices of Intention with respect to File No.s 2847 (San Juan-Chama Project), 2848 (Hammond Project), 2849 (NIIP Project), 2873 (Navajo Reservoir evaporation), and 2883 (A-LP Project) were not submitted in accordance with New Mexico law, because said Notices of Intention were submitted by the State Engineer himself, rather than a proper officer of the United States (see § 72-5-33 NMSA 1978).

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that with respect to the issuance of permits regarding applications for permits to appropriate water, submitted to the New Mexico State Engineer, the New Mexico Courts have determined: any application for a permit must adequately comply with applicable statutes that govern the

substance of the request; the OSE must abide by statutory requirements for its publication of the notice for a pending application; statutes limit the OSE's power to act on certain matters; subject matter jurisdiction depends on the class of questions that a decisionmaker has been empowered by the constitution or a statute to hear and determine; for an application to fall within the general category of those the OSE has jurisdiction to consider, the application must be of a form and substance that comports with the Water Code's predicate requirements for the OSE to act; applications for appropriation must be in a form prescribed by the OSE and must contain those recitals required by statute; the application and the OSE's procedure must meet the statutory requirements for the OSE to have jurisdiction to grant the permit; in order for the OSE to authorize diversion and appropriation of water, the OSE must follow statutory procedures; the required steps to divert surface water are determined by the relevant statutes and must be followed by the OSE and applicant alike; §§ 72-5-1 and 72-5-24 are part of a framework that requires an applicant to describe proposed actions in detail, including the source and proposed disposition of the water and the potential effects of the proposed actions on other water users; the essence of these statutes is to require the disclosure of sufficient information to provide notice to interested parties and to allow the determination of likely impairment of others' water rights by any contemplated changes; the Water Code confers the power to review a use for possible impairment to others' water rights on the OSE, which, regardless of citation, must comply with statutes that set out the form for applications or notice of its contents; the OSE has subject matter jurisdiction to review an application so long as the application seeks permission to do something authorized by an applicable statute and comports with statutory and regulatory form requirements as set out in regulations promulgated under authority of the Water Code; subject matter

jurisdiction may confer the power and authority to act within a permissible scope as delineated by statute; administrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them; § 72-5-1 (setting out requirements to apply for an appropriation of surface water to a new beneficial use) and § 72-5-4 (setting forth requirements for publication of notice upon filing an application to divert surface water) require the application to meet form requirements specifically delineating the nature and scope of the proposed action an applicant is undertaking with a specific eye toward its effect on other water users; whether a particular application is sufficiently complete to confer upon the OSE the power to act upon it depends on its purpose and compliance with the applicable statute requiring specific information to be included in any application seeking a permit of a particular nature; all applicants have the burden to fulfill the statutory requirements for completing an adequate application and notice of intent to divert, the OSE must then ascertain whether the statutory requirements were met; statutes govern what issues may be considered and how issues are raised and handled, thus, compliance of an application is judged with respect to all applicable statutes; a water permit provides the authority to pursue a water right specific to a place and a beneficial use; no use of water is permitted that is not a beneficial use; water in New Mexico belongs to the state, subject to acquisition by appropriation, the basis of which must be beneficial use; no one has a right to use or divert water except for beneficial use; it is the application to a beneficial use which gives the continuing right to divert and utilize the water; beneficial use is the basis, the measure, and the limit of the right to the use of water in New Mexico; the amount of water which has been applied to a beneficial use is the a measure of the quantity of the appropriation; this constitutional proposition declares the sole basis of the right to use water, which use is then

subject to regulation by statute; the state regulates the appropriation or acquisition of the state's water for a beneficial use; for any water to be put to such a use, such use must be supported by an appropriation of water; § 72-5-1 requires anyone seeking to put surface water to a beneficial use to request an appropriation to do so from the OSE; the taking or diversion of water from some natural stream, *in accordance with law*, with the intent to apply it to some beneficial use or purpose, and consummated by the actual application of all of the water to the use designed is an appropriation of the water; any diversion for a beneficial use must be accompanied by a right to the water acquired by the user's appropriation of the water to be used; an appropriator can take only such water as he can beneficially use; there can be no right to divert and, therefore, no right to use public water without applying it to a beneficial use; water rights are both established and exercised by beneficial use, which forms the basis, the measure, and the limit of the right to use of the water; a water right is a property right created by a person appropriating unappropriated water and applying it to a beneficial use; there must be an ultimate, actual beneficial use of the water resulting from the diversion; a diversion without applying the water thus diverted to a beneficial use is simply not permissible under the law; the rule that no one has a right to use or divert water except for beneficial use is clearly indicated by the framers of our constitution; "use" is something that occurs with water after it is diverted as a result of proper appropriation; an appropriation is nothing more than the right acquired by permit to divert water to a beneficial use; the right to use water is a possessory right which may be acquired by appropriation and diversion for a beneficial use; beneficial use is the basis of the right to use water at all; an applicant is misguided to believe that it may divert water for anything but a beneficial use; a beneficial use of water is a use of such water as may be necessary for some useful and beneficial

purpose; appropriation is the act of taking water for a beneficial use, and the perfection of the appropriation, according to law, is the sole source of the right to use the water and the protection of the appropriator's right to continue its use; a right to apply water to a beneficial use springs from appropriation for beneficial use; the right to use water is a possessory right which may be acquired by appropriation and diversion for a beneficial use; the application and its contents must specify sufficient information to provide notice to the OSE and all other potentially interested persons of the nature and purpose of the application; the notice requirements of applicable statutes must be observed; an application and the resulting permit are insufficient as a matter of law if applicant fails to request an appropriation surface water to be diverted for a new beneficial use; the principle of limiting the use of the public's waters to what constitutes beneficial use is intended to promote the economical use of water by requiring definiteness and certainty in appropriating a finite and limited resource; water may be essential to various uses, but water rights must still be acquired by appropriation to beneficial use; actual diversion or application of water to the beneficial use must be preceded by the existence of a water right; any entity intending to appropriate surface water for a new beneficial use is required to do so by making an application to the OSE for a permit to appropriate, in the form required by the rules and regulations established by it; § 72-5-1 sets forth the requirements for any application to appropriate surface water; § 72-5-1 applies to new appropriations of native water and provides that anyone intending to acquire the right to the beneficial use of any waters, shall, before commencing any construction for such purposes, make an application to the OSE for a permit to appropriate, in the form required by the rules and regulations established by it; an applicant is required to state the amount of water and period or periods of annual use, and all other data

necessary for the proper description and limitation of the right applied for, together with such information, maps, field notes, plans, and specifications as may be necessary to show the method of practicability of the construction and the ability of the applicant to complete the same; § 72-5-1 further requires that all such maps, field notes, plans, and specifications, shall be made from actual surveys and measurements, and shall be duly filed with the OSE at the time of filing of formal application for permit to appropriate; § 72-5-1 requires that if a type of new beneficial use is contemplated, then it is the responsibility of the applicant to include a request for a permit to appropriate in the application; the OSE has no statutory authority to allow applicants to make a beneficial use or diversion of water that has not been requested; no use that is not beneficial is allowed by law; the OSE, as the steward of New Mexico's obligations under the Compact, must ensure that it approves only those applications that are not contrary to the conservation of water within the state and not detrimental to the public welfare of the state; the OSE has a positive duty to determine whether an application impairs existing water rights; compliance with compacts is always at the forefront of any permit assessment; not only would the issue concern public welfare of the state, but the obligation of the OSE in evaluating impairment or detriment to existing water rights naturally encompasses compliance with compacts; and if the OSE satisfied its duty to ensure that granting an application would not be detrimental to existing water rights, then there is no doubt that compact compliance would have to be part of the analysis.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that no permits were ever issued, and it appears that the State Engineer never intended to issue any permit, in accordance with New Mexico law, with respect to the Applications for Permit filed with respect to OSE File No.s 2848; 2847, 2849, 2873, & 2917 Combined; 2883; and 3215.

With respect to all of said Applications, the State Engineer only "endorsed," rather than "approved" said Applications. Further, regarding all of said Applications: few plans were ever submitted; no notices were ever published; the public was given no opportunity to protest; no hearings were held; no Proofs of Completion of works were ever submitted; no Proofs of Beneficial Use were ever submitted; much of such water was never put to beneficial use; most of the water that was put to beneficial use, was not used for decades after the Notices of Intention were filed; no inspections were ever made by the State Engineer; and no licenses to appropriate water were ever issued by the State Engineer. In fact, there was never any project, facilities, or proposed specific use at all associated with File No.s 2917 and 3215.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that the statutory procedures have never been followed with respect to such File No.s. In fact, the statutory procedures have been intentionally, completely disregarded with respect to said File No.s. Thus, there was never even the slightest attempt made by the State Engineer to comply with New Mexico law with respect to said Applications. However, *Carangelo* held that the OSE *must* follow statutory procedures in order to authorize diversion and appropriation of water, or to even establish subject matter jurisdiction with respect to such Applications.

Therefore, pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that according to *Carangelo*, there has never been an authorization of the diversion and appropriation of water associated with such File No.s in *accordance with the law*, and the State Engineer has never had subject matter jurisdiction with respect to such File No.s to properly issue permits or licenses with respect to such File Nos. Accordingly, there has never been any valid water rights established with respect to such File No.s.

However, pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that based on said File No.s, the State Engineer has considered the waters of the San Juan Basin to be fully appropriated. The result is that the State Engineer has denied any further applications to appropriate the waters of the San Juan Basin since such time, although only approximately one-half of the water, with respect to which New Mexico is entitled pursuant to the Colorado River Compact (1922) and the Upper Colorado River Basin Compact (1948), has ever been used. The result is that, for decades, New Mexico's unused share of such water has been simply flowing down the river for use by Arizona, California and Nevada.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that the United States has no valid permits for the more than 1,550,000 af/y of water with respect to notices of intention or applications for permit filed with the New Mexico State Engineer regarding the waters of the San Juan Basin. No water right has ever vested with the United States with respect to said 1,550,000 af/y of water. Clearly, a party cannot sell or lease that which he does not own. Therefore, the United States cannot impart a valid water right on the Navajo Nation pursuant to any of the subject State Engineer File No.s.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that while the United States may be able to contract with the Navajo Nation for the storage or delivery of water, the subject File No.s clearly do not provide a basis for the establishment of a valid water for the Navajo Nation.

Accordingly, pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that there have been no valid permits issued by the State Engineer with respect to any of the water rights or water uses contemplated by the Navajo Settlement or Proposed

Decrees.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that § 72-5-33 NMSA 1978 does not provide that somehow New Mexico law is inapplicable with respect to the acquisition of water rights for federal reclamation projects. In fact, the courts have clearly and specifically held that the United States must comply with state laws regarding the acquisition of water rights for, and distribution of water from, federal reclamation projects.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that § 72-5-33 *does not say* that by simply filing plans within three years of a notice of intention that the subject waters are tied up forever, and unavailable for any use in New Mexico for any purpose, regardless of whether such reclamation project is ever built or whether such waters are ever put to beneficial use. Moreover, to any extent that either § 72-5-33 or § 72-9-4 are considered to allow the United States to acquire the right to water in New Mexico without beneficially using such water in a timely manner, said statutes are clearly unconstitutional as applied.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that to date, the issue of the control and administration of such waters plagues New Mexico. The United States apparently continues to take the position that the United States has control over most of the water in New Mexico such that such water can only be used by virtue of contracts with the United States. Unfortunately, the State Engineer either agrees with the United States on such matters, or is unbelievably slow in challenging the United States with respect to the acquisition and control of such waters.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that the State Engineer has clearly taken the position for decades that no unappropriated water remains in

the San Juan or Rio Grande River Basins, for appropriation and use by the citizens of New Mexico, based upon the "filings" submitted by, or on behalf of, the United States to the State Engineer during the 1950s and 1960s. Since such "filings," the State Engineer has rejected, or discouraged the filing of, applications to appropriate water by other potential water users, and simply referred such other potential water users to the BOR, suggesting that they might be able to obtain the right to use water by virtue of contracts with the BOR. In that regard, it appears that the State Engineer has simply abdicated all control, with respect to the appropriation, distribution and use of New Mexico water, to the BOR.

Accordingly, pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that the State Engineer appears to not comprehend his jurisdiction or authority with respect to New Mexico waters. The result, with respect to the orderly administration of the waters of New Mexico, is simply chaos. Certainly, the State Engineer demonstrates little, if any, interest in protecting existing water users, or preserving the use of water in New Mexico for use by New Mexico water users.

Therefore, pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that neither federal law, state law, federal contracts, nor permits issued by the State Engineer to the United States, define, authorize, or establish any legitimate bases for, the water rights to be awarded to the Navajo Nation pursuant to the Navajo Settlement or Proposed Decrees.

Pursuant to Horner's Brief re Federal Law, Permits and Contracts, I demonstrated that to date, the water rights of the Navajo Nation have never been properly established, and the determination of the water rights of the Navajo Nation is clearly within the jurisdiction of this

Court.

3. Looking to Arizona for guidance on the law with respect to water rights associated with federal contracts, or Indian water rights for future uses, is a very bad idea.

Movants only authority for their argument that the Court should not consider the water rights associated with NIIP, ALP, or NGWSP is *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 223 Ariz. 362, 224 P.3d 178 (Ariz. 2010) ("*Gila VIII*"). Movants cite *Gila VIII*, 224 P. 3d at 189; 223 Ariz. at 373 for the proposition that "[Central Arizona Project ("CAP")] water is delivered pursuant to contract with the federal government and is not subject to appropriation under state law. [citation omitted] Therefore, CAP water, which is outside the jurisdiction of the adjudication court, was properly excluded from ADWR's analysis." Joint Memo re Settlement Motion, p. 27.

However, it must be noted that matters in Arizona are unique. Part of Arizona's issues involve the Central Arizona Project ("CAP"). The CAP is a Bureau of Reclamation (BOR) project that was constructed in the 1970s and 80s to move water via an enormous canal from the Colorado River at Lake Havasu to Phoenix and then all the way to Tucson. Said CAP project sounded like a good idea, enabling Arizona to divert a substantial portion of its 2.8 million af/y share of water from the Colorado River.

But, once the Project was completed, the CAP Project participants found that they could not repay their share of the Project construction costs. Ultimately, the matter was resolved by the Project participants relinquishing their water rights associated with the Project to various Indian Tribes. Such water was significantly in excess of the current needs of such Indian Tribes (future

uses). Under federal Reclamation law, Indian tribes are not required to repay their share of the Project construction costs. This allowed the Project participants to avoid their construction cost repayment obligations.

Then, the previous Project participants turned around and leased said water back from the Indians pursuant to a long-term (100 year) lease for a one-time, up-front fee of $1,500 per acre-foot. Normally, Reclamation law would require the repayment of construction costs to kick-in again, if the Indians leased the water to others. However, the Project participants were able to coax Congress into passing legislation approving the deal, that provided that such repayment obligation would not kick-in in the subject instance. Thus, the subject legislation superseded Reclamation law on the matter.

The result is that the State of Arizona, most of the larger municipal governments and the Indian Tribes (as well as Congress) all agreed in such instance, that such Indian tribes should be granted water for future uses, with the right to lease the subject water to users off of the reservation. Pursuant to such deal, the Indian tribes and Project participants all benefitted. Unfortunately, it was the American taxpayer who ended up paying the price that should have been borne by the Project participants. Water is a very big deal in Arizona, and the CAP deal was very complex, having been put together by major-league water lawyers.

It is not clear that the Navajo Nation was specifically involved in the CAP matter, but the Navajo Nation was clearly paying close attention. The present Navajo Settlement resembles the Arizona deal in several respects. First, the Navajo Nation would receive a large amount of water for future uses (although such water for future uses is not supported by the law). Next, the Navajo Nation would receive the right to lease the water off of the reservation, enabling it to

make money on any water rights it acquires for which it has no use (although the law does not provide the right for Indian tribes to lease such water off of the reservation).

But, the present matter differs from the CAP deal in several significant respects. First, the CAP deal had a prearranged lease agreed to by the parties (the $1,500/af one-time fee for a 100 year lease). The present matter has no such lease agreement and no limit to the amount the Navajo Nation may charge for the lease of the subject water once it acquires the right to such water.

Another significant difference is that the CAP deal involved water to be diverted from the Colorado River that had not been previously used in Arizona. The present matter differs in that the adjudication of the subject water rights will take water away from current users to give to the Navajo Nation.

In that regard, the Navajo Nation must perceive that they have scored a major coup with respect to the subject Navajo Settlement. Most of the New Mexico minor-leaguers, who have had no such experiences, never saw it coming.

In the present matter, if the subject Navajo Settlement is approved, the Navajo Nation will end up with the right to most of the water in the San Juan Basin in New Mexico, and current water users will be required to pay the Navajo Nation for the water they currently use, at whatever rates the Navajo Nation should decide to charge (that is, if the Navajo Nation does not lease the water to water users out of state at rates local users cannot afford).

The Arizona *Gila III* decision was made in the political environment where all of the major water players in Arizona had agreed to the CAP deal. Accordingly, the notions that: Indian tribes could be given water rights for future uses; and Indian tribes could lease such water

to the largest water users in the State (in order to avoid their CAP repayment obligations), had been baked-in to the political environment, regardless of the law to the contrary.

Therefore, the point here is that looking to Arizona for guidance on the law with respect to water rights associated with federal contracts, or Indian water rights for future uses, is a very bad idea.

IV. Counsel for the Settling Parties violate their duty to serve the public interest.

One very significant problem in the present matter, is that counsel for the Settling Parties do not appear to comprehend that they have any responsibility or obligation with respect to the protection of the public interest. Rather, such counsel appear to believe that their obligations are solely to their clients, and in that regard, solely to furthering the agreement made between the Settling Parties in the form of the Navajo Settlement. However, I have consistently maintained that the Navajo Settlement adversely affects nearly all other water users in the San Juan Basin to such an extent that all such other water users may lose their right to use water entirely following the entry of the proposed Navajo Decrees.

A. Even the Special Master did not appear to comprehend the duty of the Settling Parties to protect the public interest.

Not only do counsel for the Settling Parties appear to not understand their obligation to represent the public interest, it is not clear that the Special Master, or possibly even the Court, appear to comprehend counsel for the Settling Parties' obligation to represent the public interest. This problem is illustrated by the dialogue that occurred at the October 3, 2011 Scheduling Conference between Michael Black and Special Master Snyder as follows:

Michael Black: Presumably you are filing an objection because your water right - you feel that your water right would be in jeopardy . . .
Special Master: Most people do, yes.
Michael Black: Okay, What happens if - Who's representing those that, that aren't being represented in the case?
Special Master: You are. You're representing yourself.
Michael Black: The people who don't object?
Special Master: Then they don't have a voice, in the Court. They have a voice in the political system, but as far as the Court is concerned, the people that did not file a Notice of Intent, by the required deadline, unless they can show a good reason like, you know, they are out of the country and didn't receive it in the mail, you know there is always exceptions because of unusual circumstances. But, the basic rule is you had close to six months to file a Notice of Intent to Participate and you had to be here today. Absent a good excuse, you've lost your opportunity to participate.
Michael Black: So, the State is not representing anyone's water rights, or the present decreed rights?
Special Master: No, the State, the State of New Mexico, the State Engineer you mean?
Michael Black: Well, yeah, somebody to assist us.
Special Master: No, well the State Engineer that's, let me say this differently, the State of New Mexico in water proceedings is, speaks through the State Engineer's Office. Ms. Singer here is the attorney for the State Engineer along with Mr. Utton. They speak for the State of New Mexico. The State of New Mexico, as you probably know, is an advocate for the Settlement. They advocate the Settlement. So, if, if you have a different view, the State of New Mexico is not representing that view.
Michael Black: So, if, if you fail to object, and it comes down to it, could you lose your water rights, because you failed to object, and your neighbor did object?
Special Master: No, I wouldn't not phrase it that way. Now we're running into the legal advice area, but, nevertheless, I'm gonna to take a shot at it. The Navajo Nation is gonna have water rights. I don't know what they're gonna be... and they may be what the Parties have agreed to, they may be something else. But, whatever they are, they are... and once it's finally determined what they are, if they adversely affect your water rights in the sense that in years of shortage you may not get yours, that's the way our system works. (October 3, 2011 Scheduling Conference, Time counter, from the beginning of the recording, 56:50 - 59:37). Emphasis added.

So, clearly, the Special Master believed that the Settling Parties, including the State of New Mexico, are simply advocates for Navajo Settlement and the Proposed Decrees, with no obligation whatsoever to represent, protect, or serve the public interest.

B. Government Lawyer's have a duty to serve the public interest.

The notion that government lawyers have a duty to serve the public interest was addressed by the United States Supreme Court as early as 1935. In *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935), in a case regarding prosecutorial misconduct, the Court stated:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Emphasis added.

In *In re: Bruce R. LINDSEY (Grand Jury Testimony)*, 158 F.3d 1263, 332 U.S.App.D.C. 357, 42 Fed.R.Serv.3d 27, 50 Fed.R. Evid. Serv. 13 (United States Court of Appeals, District of Columbia - 1998), the Court put a bit more flesh on the concept of the obligations of government lawyers, when it stated:

> "When an executive branch attorney is called before a federal grand jury to give evidence about alleged crimes within the executive branch, reason and experience, duty, and tradition dictate that the attorney shall provide that evidence. With respect to investigations of federal criminal offenses, and especially offenses committed by those in government, government attorneys stand in a far different position from members of the private bar. Their duty is not to defend clients against criminal charges and it is not to protect wrongdoers from public exposure. The constitutional responsibility of the President, and all members of the Executive Branch, is to 'take Care that the Laws be faithfully executed.' U.S. CONST. art. II, § 3. Investigation and prosecution of federal crimes is one of the most important and essential functions within that constitutional responsibility. Each of our Presidents has, in the words of the Constitution, sworn that he 'will faithfully execute the Office of President of the United States, and will to the best of [his] ability, preserve, protect and defend the Constitution of the United States.' *Id.* Art. II, § 1, cl. 8. And for more than two hundred years each officer of the Executive Branch has been bound by oath or affirmation to do the same. *See id.* art. VI, cl. 3; *see also* 28 U.S.C. § 544 (1994). This is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency. FN3

FN3. We recognize, as our dissenting colleague emphasizes, that every lawyer must take an oath to enter the bar of any court. But even after entering the bar, a government attorney must take another oath to enter into government service; that in itself shows the separate meaning of the government attorney's oath. Morever, the oath is significant to our analysis only to the extent that it underlies the fundamental differences in the roles of government and private attorneys-of particular note, the fact that private attorneys cannot take official actions.'

"The oath's significance is underscored by other evocations of the ethical duties of government lawyers. FN4 The Professional Ethics Committee of the Federal Bar Association has described the public trust of the federally employed lawyer as follows:

FN4. Indeed, the responsibilities of government lawyers to the public have long governed the action they can take on behalf of their 'client':

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest ... is not that it shall win a case, but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). In keeping with these interests, prosecutors must disclose to the defendant exculpatory evidence, *see Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and must try to 'seek justice, not merely to convict,' MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1980). Similarly, the government lawyer in a civil action must 'seek justice' and avoid unfair settlements or results. *Id.* EC 7-14.

"'[T]he government, over-all and in each of its parts, is responsible to the people in our democracy with its representative form of government. Each part of the government has the obligation of carrying out, in the public interest, its assigned responsibility in a manner consistent with the Constitution, and the applicable laws and regulations. In contrast, the private practitioner represents the client's personal or private interest.... [W]e do not suggest, however, that the public is the client as the client concept is usually understood. It is to say that the lawyer's employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the governmental organization of which he is a part. *Federal Bar Association Ethics Committee, The Government Client and Confidentiality: Opinion 73-1*, 32 FED. B.J. 71, 72 (1973). Indeed, before an attorney in the Justice Department can step into the shoes of private counsel to represent a federal employee sued in his or her individual capacity, the Attorney General must determine whether the representation would be in the interest of the United States. *See* 28 C.F.R. § 50.15(a). The obligation of a government lawyer to uphold the public trust reposed in him or her strongly militates against allowing the client agency to invoke a privilege to prevent the lawyer from providing evidence of the possible commission of criminal offenses within the government. As Judge Weinstein put it,

'[i]f there is wrongdoing in government, it must be exposed .... [The government lawyer's] duty to the people, the law, and his own conscience requires disclosure....' Jack B. Weinstein, *Some Ethical and Political Problems of a Government Attorney*, 18 MAINE L. REV. 155, 160 (1966).'

"This view of the proper allegiance of the government lawyer is complemented by the public's interest in uncovering illegality among its elected and appointed officials. While the President's constitutionally established role as superintendent of law enforcement provides one protection against wrongdoing by federal government officials, *see* United States v. Valenzuela-Bernal, 458 U.S. 858, 863, 102 S.Ct. 3440, 73 L.Ed.2d 1193 (1982), another protection of the public interest is through having transparent and accountable government. [FN5] As James Madison observed,

[FN5] Congress has clearly indicated, as a matter of policy, that federal employees should not withhold information relating to possible criminal misconduct by federal employees on any basis. We discuss at more length Congress's recognition of these concerns below in our discussion of 28 U.S.C. § 535(b).

"'[a] popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.' Letter from James Madison to W.T. Barry (Aug. 4, 1822) *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910).

"This court has accordingly recognized that 'openness in government has always been thought crucial to ensuring that the people remain in control of their government.' *In re Sealed Case (Espy)*, 121 F.3d at 749. Privileges work against these interests because their recognition 'creates the risk that a broad array of materials in many areas of the executive branch will become 'sequester[ed]' from public view.' *Id.* (Quoting *Wolfe v. Department of Health & Human Servs.*, 815 F. 2d 1527, 1533 (D.C.Cir.1987)). Furthermore, 'to allow any part of the federal government to use its in-house attorneys as a shield against the production of information relevant to a federal criminal investigation would represent a gross misuse of public assets.' *In re Grand Jury Subpoena Duces Tecum*, 112 F. 3d 910, 921 (8th Cir.), *cert. denied*, 521 U.S. 1105, 117 S.Ct. 2482, 138 L.Ed.2d 991 (1997)." *In re: Bruce R. LINDSEY (Grand Jury Testimony)*, 158 F.3d 1263, 1272-1274, 332 U.S.App.D.C. 357, 366-368, 42 Fed.R.Serv.3d 27, 50 Fed.R. Evid. Serv. 13 (United States Court of Appeals, District of Columbia - 1998).

Therefore, a government lawyer's duty is not merely to represent the interests of his or her client, but rather a government lawyer must be impartial and strive to ensure that justice is done. Further, as stated in *Berger* a government lawyer is the representative not of an ordinary

party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all. Thus, counsel for the Settling Parties cannot merely take the position of advocating for the Navajo Settlement, but they must always be mindful of their duty to represent the public interest, and must at all times be impartial.

1. All government lawyers, not just criminal prosecutors, have a duty to serve the public interest.

In an article entitled, Ethics of Prosecutor Contact with the Unrepresented Defendant, The, *Georgetown Journal of Legal Ethics, The*, (Fall 2006) by Kempinen, Ben, page 21, it was opined that:

> "Whatever their station, all government lawyers have a duty to serve the public interest both in advocating for the interests they represent and in the fair treatment of citizens with whom they share an adversary relationship. Thus, the term "prosecutor," for purposes of the ethical rules, should be defined to include all lawyers representing units of government, whether they are involved in criminal, quasi-criminal, or civil matters." Emphasis added.

Similarly, in *Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C.Cir.1992) (Mikva, C.J.), regarding an attorney representing Federal Energy Regulatory Commission in civil litigation, the Court stated:

> "We understand that what seems obvious in hindsight might not have occurred at the time to a busy agency lawyer. We do not understand, however, FERC counsel's repeated insistence at oral argument that he had no obligation at all to take any of the steps we have mentioned. "I don't think we had to do that," counsel said in response to the suggestion that a phone call to opposing counsel might have put an end to the case; "the burden is on him." When a member of the panel submitted that counsel for a public agency has special obligations, FERC's counsel replied that "I think we can agree to disagree on that point." At the close of oral argument, FERC's counsel summed up his position: "all I can say is that I think you're holding us to a different standard here."
>
> "The notion that government lawyers have obligations beyond those of private lawyers did not originate in oral argument in this case. A government lawyer "is the representative not of an ordinary party to a controversy," the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, "but of a sovereignty

whose obligation ... is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). The Supreme Court was speaking of government prosecutors in *Berger*, but no one, to our knowledge (at least prior to oral argument), has suggested that the principal does not apply with equal force to the government's civil lawyers. In fact, the American Bar Association's Model Code of Professional Responsibility expressly holds a "government lawyer in a civil action or administrative proceeding" to higher standards than private lawyers, stating that government lawyers have "the responsibility to seek justice," and "should refrain from instituting or continuing litigation that is obviously unfair." Model Code of Professional Responsibility EC 7-14 (1981).

* * *

"We stress, to conclude, that we are concerned not so much with the failings of FERC's counsel in this case, but with the underlying view of the government lawyer's responsibilities the counsel revealed at oral argument. We find it astonishing that an attorney for a federal administrative agency could so unblushingly deny that a government lawyer has obligations that might sometimes trump the desire to pound an opponent into submission." *Freeport*, 962 F.2d 45, 47. Emphasis added.

More recently, in *Former Employees of BMC Software, Inc. v. United States Secretary of Labor*, Not Reported in F.Supp.2d, 2008 WL 4386874 (CIT), 30 ITRD 2167 (2008), the Court stated:

"To be sure, counsel for the Government - like private counsel - must be free to zealously represent the interest of their clients. However, all lawyers must balance that obligation against other (sometimes competing) ethical obligations. Thus, for example, counsel must take care to 'properly temper [ ] enthusiasm for a client's cause with careful regard for the obligations of truth, candor, accuracy, and professional judgment that are expected of them as officers of the court.' *Oliveri v. Thompson*, 803 F.2d 1265, 1267 (2d Cir.1986); *see also, e.g.*, ABA Model Rules of Professional Conduct (2008), Rule 3.3 ('Candor Toward the Tribunal'), Comment [4] (emphasizing that '[t]he underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case'); *Amoco Oil Co. v. United States*, 234 F.3d 1374, 1378 (Fed.Cir.2000) (criticizing counsel's 'fail[ure] to cite, much less distinguish, clearly governing case law' as potential violation of Rule 3.3). [FN4]

[FN4] Indeed government lawyers play a unique role in the administration of justice, and therefore have some special duties. 'A government lawyer 'is the representative not of an ordinary party to a controversy,' the Supreme Court said long ago in a statement chiseled on the walls of the Justice Department, 'but of a sovereignty whose obligation .... is not that it shall win a case, but that justice shall be done.'' *Freeport-McMoran Oil & Gas Co. v. Federal Energy Regulatory Comm'n*, 962 F.2d 45, 47 (D.C.Cir.1992) (Mikva, C.J.) (quoting *Berger v. United States*, 295 U.S. 78, 88, 55

S.Ct. 629, 79 L.Ed. 1314 (1935), and emphasizing that the solemn duty to do justice applies 'with equal force to the government's civil lawyers'). *See Trout v. Garrett, 780 F.Supp.* 1396, 1421 n. 60 (D.D.C.1991) (noting inscription above entrance to Office of the Attorney General of the U.S.; 'The United States wins its point whenever justice is done its citizens in the courts.').

See generally, e.g., New York Code of Professional Responsibility (2007), Ethical Consideration 7-14 (stating that '[a] government lawyer in a civil action or administrative proceeding has the responsibility to seek justice and to develop a full and fair record, and should not use his or her position or the economic power of the government to harass parties or to bring about unjust settlements or results') (mirroring ABA Model Code of Professional Responsibility EC 7-14); *In re Lindsey*, 158 F.3d 1263, 1273 n. 4 (D.C.Cir.1998) (citing EC 7-14, and noting that 'the government lawyer in a civil action must 'seek justice' and avoid unfair settlements or results'); *Williams v. Sullivan*, 779 F.Supp. 471, 472 (W.D.Mo.1991) (explaining that government lawyer 'has a duty beyond just zealously representing her client'; 'there is a special duty imposed on government lawyers to "seek justice and to develop a full and fair record"'); *Bonanza Trucking Corp. v. United States*, 10 CIT 314, 321 n. 18, 642 F.Supp. 1170, 1176 n. 18 (1986) (noting that EC 7-14 mandates 'that a government lawyer in an administrative proceeding has the responsibility to develop a full and fair record'); *Jones v. Heckler*, 583 F.Supp. 1250, 1256 n. 7 (N.D.Ill.1984) (quoting EC 7-14, and emphasizing that 'counsel for the United States has a special responsibility to the justice system'). *See also, e.g., City of Los Angeles v. Decker*, 18 Cal. 2d 860, 871, 135 Cal.Rptr. 647, 558 P.2d 545, 551 (1977) (explaining that '[o]ccupying a position analogous to a public prosecutor, [a government lawyer in the civil arena] is possessed of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice') (internal quotation marks omitted).)" *BMC v. U.S.*, p. 2

2. All government lawyers, not just United States attorneys, have a duty to protect and serve the public interest.

In *City of Los Angeles v. Decker*, 18 Cal.3d 860, 135 Cal.Rptr. 647, 558 P.2d 545 (1977), the California Supreme Court considered the ethical obligations of a city attorney in a civil eminent domain action. In *Decker*, said Court determined that the ethical obligations of government lawyers apply also to city attorneys. The *Decker* court specifically stated:

> "'A government lawyer in a civil action ... has the responsibility to seek justice and to develop a full and fair record, and he should not use his position or the economic power of the government to harass parties or to bring about unjust settlements or results.'

(ABA Code of Prof. Responsibility, canon 7, ethical consideration 7-14.) Occupying a position analogous to a public prosecutor, he is 'possessed ... of important governmental powers that are pledged to the accomplishment of one objective only, that of impartial justice.' (*Professional Responsibility: Report of the Joint Conference* (1958) 44 A.B.A.J. 1159, 1218.)" *L.A. v. Decker*, 18 Cal.3d at 870-871. Emphasis added.

3. Even lawyers working as independent contractors for the government, have a duty to protect and serve the public interest.

In *County of Santa Clara et al. v. The Superior Court of Santa Clara County; Atlantic Richfield Company et al.*, 50 Cal.4th 35, 235 P.3d 21, 112 Cal.Rptr.3d 697, 10 Cal. Daily Op. Serv. 9422, 2010 Daily Journal D.A.R. 11, 498 (2010), the Supreme Court of California stated that even lawyers working as independent contractors for the government, have a duty to protect and serve the public interest. Specifically, the *Santa Clara* Court stated:

"We concluded that for purposes of evaluating the propriety of a contingent-fee agreement between a public entity and a private attorney, the neutrality rules applicable to criminal prosecutors were equally applicable to government attorneys prosecuting certain civil cases. ([*People ex rel.] Clancy [v. Superior Court* (1985)], *supra*, 39 Cal.3d [740] at pp. 746-747, 218 Cal.Rptr. 24, 705 P.2d 347.) Accordingly, our decision set forth the responsibilities associated with the prosecution of a criminal case, noting that a prosecutor does not represent merely an ordinary party to a controversy, but instead is the representative of a ' " 'sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' " ' (*Clancy, supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347; see *People v. Superior Court* (1977) 19 Cal. 3d 255, 266, 137 Cal. Rptr. 476, 561 P.2d 1164 (Greer).) We noted that a prosecutor's duty of neutrality stems from two fundamental aspects of his or her employment. As a representative of the government, a prosecutor must act with the impartiality required of those who govern. Moreover, because a prosecutor has as a resource the vast power of the government, he or she must refrain from abusing that power by failing to act evenhandedly. (*Clancy, supra*, 39 Cal.3d at p. 746, 218 Cal.Rptr. 24, 705 P.2d 347.) With these principles in mind, we declared that not only is a government lawyer's neutrality 'essential to a fair outcome for the litigants in the case in which he is involved, it is essential to the proper function of the judicial process as a whole.' (Ibid.)

"Recognizing that a city attorney is a public official, we noted that 'the rigorous ethical duties imposed on a criminal prosecutor also apply to government lawyers generally.' (*Clancy, supra*, 39 Cal.3d at p. 748, 218 Cal.Rptr. 24, 705 P.2d 347.) Thus,

pursuant to the American Bar Association's then Model Code of Professional Responsibility, a lawyer who is a public officer ' "should not engage in activities in which his personal or professional interests are or foreseeably may be in conflict with his official duties." ' (*Clancy, supra*, 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347, quoting former ABA Model Code Prof. Responsibility, WC 8-8.) ' "[An] attorney holding public office should avoid all conduct which might lead the layman to conclude that the attorney is utilizing his public position to further his professional success or personal interests." ' (*Clancy, supra*, 39 Cal.3d at p. 747, 218 Cal.Rptr. 24, 705 P.2d 347, quoting ABA Com. on Prof. Ethics, opn. No. 192 (1939).) Notably, we held that because public lawyers handling noncriminal matters are subject to the same ethical conflict-of-interest rules applicable to public prosecutors, 'there is a class of civil actions that demands the representative of the government to be absolutely neutral. This requirement precludes the use in such cases of a contingent fee arrangement.' (*Clancy, supra*, 39 Cal.3d. At p. 748, 218 Cal. Rptr. 24, 705 P.2d 347.)

* * *

"We concluded that James Clancy–although he was an independent contractor and not an employee of the City of Corona– nonetheless was subject to the same neutrality guidelines applicable to Corona's public lawyers, because 'a lawyer cannot escape the heightened ethical requirements of one who performs governmental functions merely by declaring he is not a public official. The responsibility follows the job: if Clancy is performing tasks on behalf of and in the name of the government to which greater standards of neutrality apply, he must adhere to those standards.' (*Clancy, supra*, 39 Cal.3d ap p. 747, 218 Cal.Rptr. 24, 705 P.2d 347.)

* * *

"The history of Corona's efforts to shut down the bookstore revealed a profound imbalance between the institutional power and resources of the government and the limited means and influence of the defendants – whose vital property rights were threatened." *Santa Clara v. Superior Court*, 50 Cal.4th 35, 48-53, 112 Cal.Rptr.3d 697, 706-710, 235 P.3d 21, 29-32 (2010). Emphasis added.

C. The obligation of government lawyers to protect and serve the public interest has been confirmed by the New Mexico courts.

The New Mexico Court of Appeals has reached the same conclusions. Specifically, referring to Canon 7 of the ABA Committee on Professional Ethics– the Court of Appeals stated that it is:

"the duty of the public prosecutor to seek justice, not merely to convict, and the duty of all government lawyers to seek just results rather than the result desired by a client." *State of New Mexico v. Pennington*, 115 N.M. 372, 377, 851 P. 2d 494, 499 (1993).

Emphasis added.

D. Movants acknowledge their duty to protect the public interest.

The United States' attorneys acknowledge their duty to protect the public interest. Specifically, Movants state:

> "During the course of the settlement negotiations, the United States acted not only in accordance with its trust obligations to the Navajo Nation, but also consistent with its other obligations under federal law, and its general obligations to act in the public interest." Joint Memo re Settlement Motion, p. 24. Emphasis added.

Movants even argue that their obligation to protect the public interest ensures that the United States acts in good faith and at arms-length in such a settlement process. Specifically, Movants argue that:

> "Thus, the Administration's obligation to balance multiple, often competing, interests and Congress' ultimate, independent, authority to approve or reject a proposed Indian water rights settlement provide inherent protection to ensure that the United States acts in good faith and at arms-length in such a settlement process." Joint Memo re Settlement Motion, p. 25.

E. The Settling Parties' assertion of the U.S. Claims can only be viewed as a threat, or collusive action, their acknowledged duty to protect the public interest notwithstanding.

After acknowledging their duty to protect the public interest, Movants turn around and threaten the public, that if the Navajo Settlement is not approved, they will claim essentially all of the water in the San Juan Basin for the Navajo Nation. Specifically, Movants state:

> "Without a settlement, the United States will claim a federal reserved water right for the Navajo Nation for no less than a diversion of 920,745 afy with a resulting depletion of 591,401 afy. *See* U.S. Statement of Claims at 23." Joint Memo re Settlement Motion, p. 31. Emphasis added.

Similarly, Movants state:

> "the United States stands ready to assert a claim to divert 920,745 acre-feet per year ("afy") (with a resulting depletion of 591,401 afy) . . . ." Joint Memo re Settlement Motion, p. 2. Emphasis added.

Pursuant to Horner's Motion re Federal Law, Permits and Contracts, I demonstrated that

pursuant to the BOR's 2007 Hydrologic Determination, and the associated Depletion Schedules, New Mexico's share of the water of the Upper Colorado River Basin is 642,000 af/y. (Pursuant to the 1988 Hydrologic Determination, New Mexico's share was 611,000 af/y.) Pursuant to the Jicarilla Decree, the Jicarilla Apache Tribe was awarded 32,000 af/y of depletion from the San Juan Basin. When the Jicarilla share is added to the Navajo Nation's share from the U.S Claims, the two tribes would receive 623,401 af/y (591,401 + 32,000) of New Mexico's 642,000 af/y share of the water of the Upper Colorado River Basin. That would leave a grand total of 18,599 af/y for all other water users combined (with respect to the waters of the San Juan Basin). (Of course, the Ute Mountain Ute Indian water rights are yet to be determined in the present matter.)

So, Movants' acknowledged duty to protect the public interest did not last long - only seven pages (Joint Memo re Settlement Motion from page 24 to page 31.) Movants certainly do not appear to have a problem with the concept of requiring other water users to pay the Navajo Nation for their continued use of water, if they should happen to want to continue using any water at all.

Therefore, the Settling Parties' assertion of the U.S. Claims can only be viewed as a threat, or collusive action, their acknowledged duty to protect the public interest notwithstanding.

V. The Technical Reports and Affidavits referred to by Movants, are merely efforts to rationalize the Settling Parties' arguments for such future uses. Pursuant to Horner's Motion re Federal Reserved Rights, I demonstrated that the concept of federal reserved water rights does not include water for future uses.

First, and foremost, the Navajo Settlement and Proposed Decrees are primarily about water rights for future uses, that is, as much as 400,000 af/y more than the Navajo Nation has ever used before. The U.S. Claims is entirely about even more water rights for future uses.

However, pursuant to Horner's Motion re Federal Reserved Rights, I demonstrated that the concept of federal reserved water rights does not include water for future uses. Pursuant to Horner's Motion re Federal Law, Permits and Contracts, I demonstrated that both federal law and state law are based upon the concept of beneficial use.

The Technical Reports and Affidavits referred to by Movants, are merely efforts to rationalize the Settling Parties' arguments for such future uses. Apparently, if you have enough money, you can find an "expert" to say anything you want. In that regard, the Settling Parties' "experts" do not offer "sound scientific evidence," or even fact-based opinions in support of their positions, rather, such "experts" merely manipulate numbers and statistics in an effort to substantiate the Settling Parties' arguments for future uses.

I do not have sufficient time at this point to address each of Movants' Technical Reports and "experts'" Affidavits. As they stand, the Technical Reports and Affidavits are inadmissible hearsay. They were prepared in anticipation of litigation, and are not business records. I dispute essentially all of their conclusions. The Settling Parties' "experts" may be highly qualified, but, it does not appear that their conclusions can withstand the slightest scrutiny, and could easily be discredited on cross-examination. The Settling Parties' have not even attempted to set forth any material facts which they might claim are undisputed.

VI. Incorporation by reference of Horner's Response to Joint Memo re Settlement Motion.

The arguments made by Movants pursuant to the Joint Memo re Settlement Motion are very similar in many respects to the arguments made by the State pursuant to the STATE OF NEW MEXICO'S MEMORANDUM IN SUPPORT OF SETTLEMENT MOTION FOR

ENTRY OF PARTIAL FINAL DECREES, which was filed in the present matter on April 15, 2013 ("State's Memo re Settlement Motion"). To a certain extent, I have addressed different points in my Response to the State's Memo re Settlement Motion. Therefore, I hereby incorporate by reference herein GARY L. HORNER'S RESPONSE TO THE STATE OF NEW MEXICO'S MEMORANDUM IN SUPPORT OF SETTLEMENT MOTION FOR ENTRY OF PARTIAL FINAL DECREES ("Horner's Response to State's Memo re Settlement Motion"), which will be filed concurrently herewith.

VII. Conclusion.

For the foregoing reasons, the Settlement Motion should be denied.

Respectfully, submitted by:

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May 10, 2013
Date

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I HEREBY CERTIFY - in accordance with the ORDER MANDATING ALTERNATIVE METHOD FOR SERVICE OF ORDERS, MOTIONS, NOTICES AND OTHER COURT PAPERS, entered in the present matter on September 28, 2011 by the Honorable James Wechsler, Presiding Judge - that a true copy of the foregoing was served on the parties and Claimants in the present matter, by attaching a copy of said document to an email sent to the following email list server(s) maintained by the Court, this 10th day of May, 2013:

wrnavajointerse@nmcourts.gov

Further, pursuant to the Court's CORRECTED ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBER 6, 2012 DISCOVERY CONFERENCE, entered in the present matter on November 19, 2012, that a true copy of the foregoing document was emailed to the following individuals, this 10th day of May, 2013.

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