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

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

Plaintiff,

vs.

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

Defendants,

THE JICARILLA APACHE TRIBE AND THE NAVAJO NATION,

Defendant-Intervenors.

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

SAN JUAN RIVER GENERAL STREAM ADJUDICATION

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

Name of Party: Jicarilla Apache Nation

DESCRIPTIVE SUMMARY: The Jicarilla Apache Nation files a response brief to the Motion and Brief filed by Gary L. Horner on 8 November 2012 for the determination of the applicable standard for the determination of federal reserved water rights.

NUMBER OF PAGES: 10.

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I.
INTRODUCTION

This case was filed in State Court and the United States was joined as a party pursuant to the McCarran Amendment, 43 U.S.C. 666; that act was passed in 1952 to waive the sovereign immunity of the United States from suits filed in State Courts for the determination of water rights in general stream adjudications. In our response to the Motion and Brief filed by Gary L. Horner on the 8th of November, 2012, we will demonstrate the following: 1) in a McCarran Amendment action in State Court involving the determination of an Indian Tribe's water rights,

it is well established that federal law not State law governs the proceeding; 2) that the standard to be applied to the determination of the Navajo Nation's federal reserved water rights is a quantity of water necessary to provide a "permanent home" for the Navajo Nation and its members; this standard includes water for historic, existing and future uses for recreation, agriculture, domestic, stock, commercial, industrial, wildlife and other uses; 3) the Treaty with the Navajo Nation impliedly reserved water to meet the purpose of providing a "permanent home" for the Navajo people; 4) a federal reserve water right includes surface and groundwater necessary to meet the standard; 5) there are no secondary purposes of the Navajo reservation; 6) the priority date of the Navajo federal reserved water right is no later than the treaty date of the Treaty with the United States; 7) the Navajo Nation's water rights are not subject to forfeiture or loss due to non-use, and; 8) that Congress has the authority to authorize leasing of federally reserved water rights.

II.
FEDERAL LAW CONTROLS THE DETERMINATION OF THE NAVAJO NATION'S WATER RIGHTS

Mr. Horner argues at page 5 of his brief in support of his motion that the Navajo Settlement is not valid because it is a clear and flagrant violation of the beneficial use and prior appropriation provisions of the New Mexico Constitution. Mr. Horner does not cite any authority for this proposition because there is none. More importantly, that assertion is wrong and is contrary to both the United States Supreme Court and the New Mexico Court of Appeals rulings on what law applies to the determination of an Indian water right in a State Court proceeding filed under the McCarran Amendment, 43 U.S.C. 666.

First, the Supreme Court in *Winters v. United States*, 207 U.S. 564, 565 (1908) held that the agreement and federal statute creating the Fort Belknap Reservation exempted the Indians from state law principles of "prior appropriation" in reserving water rights for the

Indians to use on the reservation. *Id.*, at 575-577. Secondly, the United States Supreme Court in *Colorado River Water Conservation District v. United States,* 424 U.S. 800, 811 (1976) and in *Arizona v. San Carlos Apache*, 463 U.S. 545 (1983) ruled that tribal water rights were included in the McCarran Amendment waiver of the sovereign immunity of the United States to suit even though the Tribes could not be joined in the case. In so ruling, however, the Supreme Court made expressly clear that State Courts "have a solemn obligation to follow federal law" in the determination of tribal water rights. *Arizona v. San Carlos Apache*, 463 U.S. 545, 571 (1983).

Further, since 1993, the above principle is settled law in New Mexico. The New Mexico Court of Appeals in *State et al. v. Lewis et al.*, 116 N.M. 194, at 203, a case involving the Mescalero Apache Tribe's water rights, reasoned: "We believe it is imperative for us to give due regard to the supremacy of federal law and to sensitively recognize the solemn obligation the United States has toward Indian Tribes because, as state court judges, we will be reviewed under a standard of 'particularized and exacting scrutiny,'" citing *Arizona v. San Carlos Apache*, 463 U.S. 545, 571, 103 S. Ct. 3201, 3216, 77 L. Ed. 2d 837 (1983). Therefore, the law is settled in this area, federal law, not state law, is to be followed in determining the Navajo Nation's water rights.

III.
WATER SUFFICIENT TO PROVIDE A PERMANENT HOMELAND FOR THE NAVAJO PEOPLE IS THE STANDARD TO BE APPLIED IN THIS CASE

At page 6 of his brief, Mr. Horner argues that federal reserved water 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. Mr. Horner goes on further to claim that 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. Later starting at page 37 through page 40, Mr. Horner cites to and discusses the Navajo Treaty with the United States and concludes that only water necessary to meet the minimal needs that is supplied by the run-off from the mountains is what the Navajo Nation is entitled to under the federal reserved water rights standard.

Each of these assertions is clearly wrong and is not supported by either federal or state law. First, regarding the standard to be applied in the determination of the Navajo Nation's water rights that answer is provided in the Treaty between the United States of America and the Navajo Tribe of Indians of July 25, 1868. Section XIII of the Treaty provides in relevant part, "The tribe herein named, by their representatives, parties to this treaty, agree to make the **reservation herein described their permanent home ..."** (Emphasis added). This is an implied reservation of water sufficient to provide a "permanent home" for the Navajos and is the standard to be applied in this case. This standard entitles them to water for historic, existing and future uses of water for multiple purposes including recreation, agriculture, domestic, stock, commercial, industrial, wildlife and other uses.

The United States Supreme Court established long ago that the overarching purpose of an Indian reservation is to provide Indian people with "a permanent and abiding place" *Winters v. United States*, 207 U.S. 564, 565 (1908), that is, a "livable" environment, having the right to the use of "water necessary to sustain life." *Arizona v. California*, 373 U.S. 546 at 599 (1963). (*Arizona I*). The Court later summarized its holding in *Arizona I*: "We held that the creation of the reservations by the Federal Government implied an allotment of water necessary to 'make the reservation livable.'" *Arizona v. California*, 460 U.S. 605, 616 (1983), ("*Arizona II*") (quoting *Arizona I*, 373 U.S. at 565).

The Ninth Circuit has similarly recognized that "the general purpose [of an Indian reservation] is to provide a home for the Indians." *Colville Confederated Tribes v. Walton*, 647 F. 2d. 42 at 47 (9th Cir. 1981). In *Walton*, the Ninth Circuit observed that while the specific purposes of an Indian Reservation may be unexpressed, "the general purpose, to provide a home for the Indians, is a broad one and must be liberally construed." *Id.* The court then interpreted a one-paragraph Executive Order – which did not list any particular purpose, but instead simply stated that the land would be "set apart as a reservation for said Indians" – as setting aside the Colville Reservation for agriculture and traditional fisheries under a "homeland" concept. *Id.* at 47-48. *See also, Montana ex rel. Greeley v. Salish and Kootenai Tribes of the Flathead Reservation*, 712 P. 2d at 768 ("The purposes of Indian reserved rights ... are given broader interpretation in order to further the federal goal of Indian self-sufficiency."); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307 at 315, 35 P.3d 68 at 76 (Arizona 2001). ("We therefore hold that the purpose of a federal Indian reservation is to serve as a 'permanent home and abiding place' to the Native American people living there"). The homeland purpose is broad in scope, *Walton*, and must be interpreted to further the "goal of Indian self-sufficiency." *Adair*, 723 F.2d 1394 at 1408, n.13. (1983).

Lower federal courts and state courts have consistently and uniformly followed *Winters* and *Arizona I* in finding that the creation of Indian reservations, whether by Act of Congress, by treaty, or by executive order, included implied reservations of water sufficient to fulfill the purposes of the reservation, including the present and future needs of the Indians residing thereon. *See*, e.g. *United States v. Adair*, 723 F.2d 1394, 1408 (1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 46 (9th Cir.1981); *United States v. Walker River Irrig. Dist.*, 104

F.2d 334, 340 (9th Cir. 1934); *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 311, 35 P.3d 68, 72 (Ariz. 2001); *In re All Rights to Use Water in the Big Horn River System*, 753 P.2d 76, 90-94 (Wyo. 1988), aff'd by an equally divided Court, sub nom. Wyoming v. U.S., 492 U.S. 406 (1989); Montana ex rel. Greeley v. Salish and Kootenai Tribes of the Flathead Reservation, 219 Mont. 76, 89-93, 712 P.2d 754, 762-65 (Mont. 1985); *United States v. Ahtanum Irr. Dist.*, 236 F.2d 321, 326 (9th Cir. 1956).

Prevailing case law is the same in the State of New Mexico. In the *Lewis* case, supra, the District Court held that the Mescalero Reservation was created to provide the Tribe a permanent home. Next, the District Court concluded that a permanent home requires development of present and future uses of water and that the federal reserved water right includes surface and groundwater. Water for a permanent home, the Court concluded, includes water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the "arts of civilization." See paragraphs 14, 15, 16 17, and 18 of the Conclusions of Law contained in the final judgment filed in *State of New Mexico, et al., v. L.T. Lewis, et al., United States of America, defendants, Mescalero Apache Tribe, Defendant-Intervenor*, Nos. 20294 and 22600 Consolidated Rio Hondo Section, Mescalero Section filed in the District Court of Chaves County State of New Mexico on July 11, 1989. Although the District Court denied the Tribe water for a proposed irrigation project finding that the Tribe did not meet the standard for the grant of water for practicably irrigable acreage, the District Court awarded the Mescalero Tribe 2,322.4 acre feet per year to meet historic, existing and future water requirements of a permanent homeland. The District Court then assigned five different priorities to the Tribe's water rights depending on when the land the water was used on was added to the reservation.

This award of water was affirmed by the New Mexico Court of Appeals but the priority dates were reversed by the Court which then awarded one priority to the water right regardless of when the lands were made part of the reservation. That priority date is the date of the Treaty with the Apache and the United States of 1852. *See, State et al., v. Lewis et al.*, 116 N.M. 194, 197 (1993).

Mr. Horner confuses use of water for a particular activity as being the same as the purpose of the reservation. See his discussion of minimal needs at pages 37 through 40. It is inconsistent with the broad homeland purpose of an Indian reservation to limit the "purpose" of a reservation to only one specific activity or use of water. The various activities that may take place on an Indian reservation, such as grazing, agriculture, fishing, or commercial activities, are not the "purposes" of a reservation; they are merely some of the means by which the land would provide a permanent and viable "home for the Indians." Or, to put it another way, no single activity designed to make the reservation habitable, in itself, constitutes the "purpose" of an Indian reservation. There is no requirement to identify a single essential purpose for which the reservation was intended to serve. *See United States v. Adair*, 723 F.2d 1394 at 1410 (9th Cir. 1983), cert. denied, 467 U.S. 1252 (1984). Rather, "the general purpose, to provide a home for the Indians, is a broad one and must be liberally construed." *Walton II*, 647 F.2d at 47 (emphasis added).

Even if the "primary-secondary purposes test" did apply, as Mr. Horner argues at pages 32 through 34, there are no secondary purposes of the reservation. When a tribe uses its water to establish a permanent home, this is a primary purpose, not a secondary one; therefore, the tribe would still be entitled to the full measure of its reserved water rights. *See In re the General*

Adjudication of all Rights to Use Water in the Gila River System and Source, 201 Ariz. 307 at 315, 35 P.3d 68 at 77 (Ariz. 2001).

Therefore water sufficient to provide a permanent homeland for the Navajo people is the standard to be applied in this case. As such, an award of surface and ground water to meet existing and future uses of water for multiple purposes including recreation, agriculture, domestic, stock, commercial, industrial, wildlife and other uses should be recognized in this case.

At page 31 of his brief, Mr. Horner asserts that the Navajo's federal reserved water rights can be lost by non- use. Not only does the court not have jurisdiction over this issue, but, more importantly, Mr. Horner's assertion is incorrect. Part IV-Navajo Water Rights, Section 10701(c) (2)(4) of the Northwestern New Mexico Rural Water Project Act, Title X, Subtitle B of the Omnibus Public Lands Management Act of 30 March 2009, P. L, 111-11, 123 Stat 991, prescribes that the water supply of the Nation cannot be lost by non-use and that non-use shall not result in forfeiture, abandonment, relinquishment, or other loss of any part of a right decreed to the Nation. This provision is similar to the statutory provision protecting the Jicarilla Apache Nation's water rights from loss due to non-use. See Section 7(e) of the Jicarilla Apache Tribe Water Rights Settlement Act, Act of October 23, 1992, 106 Stat. 2237, 2238, P.L. 102-441.

Lastly, at page 37 of his brief Mr. Horner's argument that "there is simply no authority for allowing the Navajo Nation to lease federal reserved water rights off the reservation" is erroneous. Although, this is another issue that this Court does not have jurisdiction over and cannot rule on, suffice it to say that Part IV-Navajo Water Rights, Section 10701(c) (1)(A) and (d)(1)(A) of the Northwestern New Mexico Rural Water Project Act, Title X, Subtitle B of the Omnibus Public Lands Management Act of 30 March 2009, P. L, 111-11, 123 Stat 991 provides express Congressional authority for the Navajo Nation to lease its federally reserved water rights.

This is similar to the Congressional authority granted to the Jicarilla Apache Nation in Section 7 of the Jicarilla Apache Tribe Water Rights Settlement Act, Act of October 23, 1992, 106 Stat. 2237, 2238, P.L. 102-441."

It is beyond cavil that Congress is vested with authority over Indian affairs and has Constitutional authority to enact the above statutes. Control over Indian affairs was an issue when the United States was governed by the Articles of Confederacy. This issue was addressed in 1789 when the United States Constitution was adopted. Article I, section 8, clause 3 of the United States Constitution, known as the Commerce Clause, or in Indian Country, known as the "Indian Commerce Clause", vested Congress with the exclusive providence to "regulate Commerce with foreign Nations, and among several States, and with the Indian Tribes."

Pursuant to this grant of authority in 1790, Congress enacted the first Indian Trade and Intercourse Act, Act of July 22, 1790, 1 Stat. 137. That Act prohibited sale of Indian lands unless made under the authority of the United States.

This was a complete prohibition on the transfer of Indian lands unless made in conformity with the Trade and Intercourse Act. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). The Nonintercourse Act is codified at 25 U.S.C. Section 177 and has been construed by the Supreme Court to render void any conveyance not in compliance with this Act and as conveying no interest whatsoever. *Oneida Indian Nation v. County of Oneida*, supra. Accordingly, because Congress granted authority to the Navajo Nation to market its federally reserved water rights, there exists authority for the Navajo Nation to lease its water rights.

CONCLUSION

Federal law governs the determination of the Navajo Nation's water rights in this adjudication. The standard to be applied to the quantification of the Navajo Nation's reserved

water rights is an award of water sufficient to provide the Navajos a "permanent home" as promised in the Treaty between the Navajo Nation and the United States. The water right is implied from the Treaty and carries a priority date no later than the date of the Treaty between the Navajo Nation and the United States, and the water right includes surface and groundwater necessary to provide the Navajo Nation a "permanent home".

Respectfully submitted, this 10th day of May 2013.

JICARILLA APACHE NATION

/s/ *Natasha Cuylear*

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CERTIFICATE OF SERVICE

I certify that on this 10th day of May 2013, at approximately 12:30 pm, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of this document to an email sent to the following list servers: wrnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the list of parties identified on the *Notice of Amended Services List* filed February 25, 2013.

/s/ *Natasha Cuylear*

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