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

STATE OF NEW MEXICO, ex rel. STATE ENGINEER,	**D-1116-CV-75-184**
	HON. JAMES J. WECHSLER
Plaintiff,	**Presiding Judge**
vs.	**SAN JUAN RIVER GENERAL STREAM**
THE UNITED STATES OF AMERICA, et al.,	**ADJUDICATION**
Defendants.	**Claims of the Navajo Nation**
	Case No. AB-07-1

NAME OF PARTIES: The Navajo Nation and the United States.

DESCRIPTIVE SUMMARY: The Navajo Nation and the United States respond to various motions for summary judgment filed by parties objecting to the Navajo settlement.

NUMBER OF PAGES: 24, including certificate of service.

DATE OF FILING: May 10, 2013.

RESPONSE OF THE NAVAJO NATION AND UNITED STATES IN OPPOSITION TO THE SUMMARY JUDGMENT MOTIONS OF OBJECTORS

I. INTRODUCTION

The arguments raised by Objectors in their motions for summary judgment can be condensed to an assertion that federal reserved rights for Indian tribes are unfair to non-Indian water users and, as a consequence, this Court should only consider the claims of the Navajo Nation in a manner consistent with state law. Some of Objectors' motions go so far as to deny

JUDGE

the very existence of Indian federal reserved rights, also known as *Winters* rights.[1] Others attack the unique attributes that characterize Indian federal reserved rights. Yet others argue that federal law can have no place in this expedited *inter se*, and that state water law principles govern these proceedings despite clear Congressional direction to the contrary.

As the Court is aware, the McCarran Amendment, which on its face waived the sovereign immunity of the United States so that federal water rights claims could be included in comprehensive state water rights adjudications, has been construed also to waive the immunity of the United States as trustee of Indian water rights. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The Supreme Court has also construed the McCarran Amendment to permit dismissal of federal court actions brought by a tribe on its own behalf where there is a pending general stream adjudication in state court. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). When the United States and numerous tribes urged the United States Supreme Court to limit the scope of the McCarran Amendment, a primary concern was that state courts would not provide a fair and adequate forum for the resolution of tribal reserved water rights claims. The Supreme Court brushed aside these concerns by recognizing a tribe's right to review in that Court:

> Any state court decision alleged to abridge Indian water rights protected by federal law can expect to receive, if brought for review before this Court, a particularized and exacting scrutiny commensurate with the powerful federal interest in safeguarding those rights from state encroachment.

[1] The doctrine, which holds that in setting aside a reservation for an Indian tribe Congress impliedly reserved sufficient water to meet the purposes of the reservation, had its first expression in *Winter v. United States*, 207 U.S. 564 (1908).

Id. at 571. It is now well-established that Indian reserved water rights claims may be adjudicated in state courts.

It is equally well settled that the parameters of Indian reserved rights must be determined pursuant to federal law. "[F]ederal law controls federal water rights." *State ex rel. Greely v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 712 P.2d 754, 768 (Mont. 1985); *San Carlos Apache Tribe*, 463 U.S. at 571 ([O]ur decision in no way changes the substantive law by which Indian water rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law."); *New Mexico ex rel. Martinez v. Lewis*, 116 N.M. 194, 203, 861 P.2d 235, 244 (App. 1993) ("We believe it is imperative for us to give due regard to the supremacy of federal law in this area. ..."). The motions of Objectors, to the extent that they assert that there are no Indian reserved water rights, or that this Court should determine the claims of the Navajo Nation strictly in accordance with state law, should be summarily denied.[2]

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[2] To avoid unnecessary duplication of arguments, this Response deals comprehensively with the issues raised in the Objectors' assorted motions for summary judgment addressed by the Navajo Nation and the United States. Those motions include:

(1) *Robert E. Oxford's Dispositive Motion for Summary Judgment* ("Oxford Motion");

(2) *Gary L. Horner's Motion for Summary Judgment: That is, the "Settlement Motion of the United States, Navajo Nation and the State of New Mexico for Entry of Partial Final Decrees" Should Be Denied* and supporting Memorandum (collectively "Horner S.J. Motion");

(3) *Gary L. Horner's Motion for a Determination that Federal Law, Permits, or Contracts Do Not Define the Extent of the Water Rights for the Navajo Nation* and supporting Memorandum (collectively "Federal Law Motion");

(4) *Gary L. Horner's Motion for the Determination of the Applicable Standard for the Determination of Federal Reserved Water Rights* and supporting Memorandum (collectively "Reserved Rights Motion");

II. SUMMARY JUDGMENT STANDARD

The New Mexico Supreme Court recently reaffirmed the deep-rooted standard by which motions for summary judgment are judged:

> In New Mexico, "[s]ummary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law'." *Romero v. Philip Morris Inc.*, 2010–NMSC–035, ¶ 7, 148 N.M. 713, 242 P.3d 280) (internal quotation marks and citation omitted). The party moving for summary judgment must make a *prima facie* showing and come forward with "such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted." *Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 672, 808 P.2d 955, 957 (1991).

Horne v. Los Alamos Nat. Sec., L.L.C., 2013-NMSC-004, ¶ 14, 296 P.3d 478. Put another way, "[t]he burden is on the moving party to show an absence of a genuine issue of fact, and that it was entitled as a matter of law to judgment in its favor." *Brown v. Taylor*, 120 N.M. 302, 305, 901 P.2d 720, 723 (1995) (citing *Koenig v. Perez,* 104 N.M. 664, 665, 726 P.2d 341, 342 (1986)). The burden is the moving party's alone. Until such time as the moving party has made the "*prima facie* showing" that it is entitled to summary judgment, "the non-moving party is not required to make any showing with regard to factual issues." *Brown*, 120 N.M. at 305 (citing *Knapp v. Fraternal Order of Eagles,* 106 N.M. 11, 13, 738 P.2d 129, 131 (App.1987)).

Rule 1-056 NMRA sets forth the manner in which a party moving for summary judgment must establish the materiality and undisputed nature of the underlying facts. The Rule requires

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(5) *Defendants B Square Ranch, LLC et al.'s Motion that Settling Party Navajo Nation Waived and Relinquished its Winters Rights When Navajo Indian Irrigation Project Was Built* ("B Square Motion");

(6) *Community Ditch Defendants' Motion for Partial Summary Judgment Concerning NIIP* ("NIIP Motion"); and

(7) *Community Ditch Defendants' Motion for Partial Summary Judgment Concerning the Minimum Needs of the Navajo Reservation in New Mexico* ("Minimum Needs Motion").

"a concise statement of all of the material facts as to which the moving party contends no genuine issue exists." Rule 1-056(D)(2). In addition, those facts must "refer with particularity to those portions of the record upon which the moving party relies." *Id.* Of course, the record consists of the pleadings, depositions, answers to interrogatories and admissions, and affidavits. Rule 1-056(C), (E). As New Mexico courts have recognized, "mere assertions made by a movant seeking summary judgment are meaningless unless supported by affidavits pursuant to [Rule 1-056(E)] or by other admissible evidence." *C & H Const. & Paving Co., Inc. v. Citizens Bank*, 93 N.M. 150, 163, 597 P.2d 1190, 1203 (App. 1979) (citing *Martin v. Board of Education of City of Albuquerque*, 79 N.M. 636, 447 P.2d 516 (1968)). And "the briefs and arguments of counsel are not evidence upon which a trial court can rely in a summary judgment proceeding." *V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 472, 853 P.2d 722, 723 (1993) (citing *Archuleta v. Goldman,* 107 N.M. 547, 551, 761 P.2d 425, 429 (App. 1987) and *Trujillo v. Puro,* 101 N.M. 408, 411, 683 P.2d 963, 966 (Ct.App. 1984)). "The arguments of counsel, no matter how erudite, are not evidence." *Phillips v. Allstate Ins. Co.*, 93 N.M. 648, 651, 603 P.2d 1105, 1108 (Ct. App. 1979).

Contrary to the explicit direction contained in Rule 1-056 NMRA, the great majority of Objectors' alleged undisputed and material facts, a combined total of 355,[3] make no citation to the record whatsoever. The alleged undisputed material facts are nothing more than bald assertions of counsel (or in Mr. Oxford's case, a *pro se* objector). Not one of Objectors' fact-

[3] Included in this number are two (2) statements in the Oxford Motion that are not specifically enumerated, but are followed by an assertion that the statements are undisputed facts.

based motions meets the minimum requirements for summary judgment, and each of those motions also should be summarily denied.

III. OBJECTORS' MOTIONS ERRONEOUSLY SUGGEST THAT THIS EXPEDITED *INTER SE* ENCOMPASSES A DETERMINATION ON THE MERITS OF THE NATION'S WATER RIGHTS CLAIMS

There is one issue before the Court in this expedited *inter se* subproceeding: "whether the Court should award certain water rights to the Navajo Nation in accordance with a proposed settlement ratified by Congress pursuant to Public Law 111-11." *Order of Reference to Special Master of Joint Motion Concerning Procedures for Approval of Navajo Decree* (filed Oct. 7, 2009). Neither the New Mexico Supreme Court nor New Mexico statutory law provides more than minimal guidance on the process for approving a water rights settlement; no New Mexico statute or rule directly addresses the settlement of an Indian tribe's federal reserved rights claims. *See* NMSA 1978 § 72-4-17 and Rule 1-071.2 NMRA.[4] Here the Court adopted the legal standard for approval of the Proposed Decrees[5] as contemplated under the Settlement Agreement that has been followed in other settlements, including the settlement of the water

[4] By way of comparison, the Arizona Supreme Court has provided extensive direction in special procedural rules applicable to the adjudication of the Gila and Little Colorado River Basins. *Special Procedural Order Providing for the Approval of Federal Water Rights Settlements, Including Those of Indian Tribes In re the General Adjudication the Rights to Use Water in the Gila River System and Source Nos. WC-79-001 through WC-79004 (consolidated)* (May 16, 1991); *Administrative Order, In Re the General Adjudication of All Rights to Use Water in the Little Colorado System and Source,* No. WC-79-0006 (Sep. 27, 2000). Both Procedural Orders are available at:
http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/decisionsOrders.asp

[5] Proposed *Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* ("Partial Final Decree") and proposed *Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* ("Supplemental Partial Final Decree") (collectively "Proposed Decrees").

rights of the Jicarilla Apache Nation in this general stream adjudication. Under the legal standard adopted by the Court, the Settling Parties are required to demonstrate that the Proposed Decrees are "fair, adequate, and reasonable and consistent with the public interest and applicable law" ("fair and reasonable" standard). *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof* (filed Apr. 19, 2012) at 1-2 ("Legal Standards Order").[6]

Apparently the Objectors have construed this legal standard to open the door to challenges to the attributes of every water right recognized in the Proposed Decrees. But the "fair and reasonable" standard adopted by the Court is susceptible of a more logical interpretation. As outlined in great detail in the *Joint Memorandum of the Navajo Nation and United States in Support of the Settlement Motion* (filed Apr. 15, 2013) ("Joint Memorandum"), the Settlement Agreement is the product of compromise. Joint Memorandum at 13-25, 45-62. And precisely because the sole purpose of this expedited *inter se* subproceeding is to evaluate the Proposed Decrees contemplated by the Settlement Agreement against the "fair and reasonable" standard, the standard cannot mean that the Settling Parties must prove the entitlement of the Nation to each water right recognized in the Proposed Decrees. Such a requirement would deprive the Settling Parties of the benefit of their bargain and undermine the settlement. *See, e.g., Airlines*

[6] In adopting this legal standard the Court incorporated language from the *Scheduling Order for Proceedings on Objections to the Entry of the Jicarilla Apache Tribe Partial Final Decree*, (Aug. 11, 1998) and *Order Granting Joint Motion for Entry of a Partial Final Judgment and Decree on Water Rights of the Jicarilla Apache Tribe* (Feb. 24, 1999), and cited *New Mexico ex rel. State Eng'r v. Aamodt*, 582 F. Supp. 2d 1313 (D.N.M. 2007). In the Jicarilla Apache subproceeding, the Court did not engage in an evaluation of each water right recognized under the Jicarilla Settlement; instead, the Court evaluated the settlement as a whole and found it to be "fair, adequate, and reasonable and consistent with the public interest and applicable law." *Order Granting Joint Motion for Entry of a Partial Final Judgment and Decree on Water Rights of the Jicarilla Apache Tribe* (Feb. 24, 1999) at 2.

Stewards And Stewardesses Ass'n, Local 550, TWU, AFL-CIO v. American Airlines, Inc., 573 F.2d 960, 962 (7th Cir.) (in reviewing a settlement court should not attempt to decide the merits of the controversy because "(a)ny virtue which may reside in a compromise is based upon doing away with the effect of such a decision.") (citation omitted), *cert. denied sub nom. Ass'n of Professional Flight Attendants v. Airline Stewards and Stewardesses Ass'n, Local 550, TWU, AFL-CIO,* 439 U.S. 876 (1978).

The danger inherent in Objectors' argument was squarely addressed by the Seventh Circuit Court of Appeals in Airline Stewards. The Appeals Court upheld the approval of a settlement of a Title VII case observing:

> Intervenors essentially ask this court to require in excess of 100 mini-trials on issues dealing with the adequacy of each plaintiff's complaint and the availability of defenses. It seems to us beyond serious dispute that no reasonable parties are going to settle any case if an intervenor can force them to litigate separately the merits of each claim.

573 F.2d at 963. The same can be said of the issues Objectors seek to pursue in their summary judgment motions. And for the same reasons, the Court should not entertain them. The Seventh Circuit held that: "the issues raised by the intervenor should not be decided on the basis of Title VII law, *but rather must be decided on the basis of legal principles regulating judicial review of settlement agreements*. *Id.* (emphasis added).

The Seventh Circuit Court of Appeals is not alone in cautioning that in evaluating the fairness, reasonableness, and adequacy of a settlement, no court should "reach ultimate conclusions on the issues of law or fact underlying the dispute." *Maher v. Zapata Corp.*, 714 F.2d 436, 455 n. 31 (5th Cir. 1983) (citation omitted). Finally, the court must resist "the temptation to convert [the] settlement hearing into a full trial on the merits." *Bell Atlantic Corp.*

v. Bolger, 2 F.3d 1304, 1315 (3d Cir.1993) (quoting *Mars Steel Corp. v. Continental Illinois Nat'l Bank & Trust Co.,* 834 F.2d 677, 684 (7th Cir.1987)).

The Objectors' motions attempt to delve into the attributes of the water rights recognized in the Proposed Decrees and thus go beyond the limited inquiry of this expedited *inter se* subproceeding. The motions can and should be denied on this basis alone. However, to demonstrate to the Court the particular grounds for denying Objectors' Motions, the Navajo Nation and the United States briefly address the arguments that Objectors attempt to interject.[7]

A. The General Deference Afforded State Water Law by the Reclamation Act has been Superseded by the 1962 Act and Other Reclamation Laws.

Mr. Horner inflicted a substantial blow to our dwindling forest resources in the almost two hundred pages he takes to argue that § 8 of the Reclamation Act of 1902[8] (43 U.S.C. § 383), subsequent reclamation laws, and court decisions construing them dictate that state, *not federal*, law governs the acquisition, distribution, and use of federal reclamation project water. Federal Law Motion.[9] On that basis, Mr. Horner contends he is entitled to an order declaring that the

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[7] Contemporaneously with this Response, the Navajo Nation, the United States and the State of New Mexico have filed additional responses to Objectors' dispositive motions. The Navajo Nation and the United States filed their response to the Community Ditch Objectors' *Conditional Motion to Dismiss for Lack of Jurisdiction and Failure to Join Indispensable Parties.* The United States responded to arguments raised by the Community Ditch Objectors and Mr. Horner concerning the validity of water rights for Bureau of Reclamation Projects held by the United States, which the Navajo Nation joins and incorporates herein by reference. The State has filed the *State's Consolidated Response to Motion Filed by Community Ditch Defendants, Gary L. Horner, Robert E. Oxford and Defendants B Square Ranch, LLC, et al. on April 15, 2013*, and the Navajo Nation and United States join in these filings and incorporate them herein by reference.

[8] The Reclamation Act of 1902, Pub. L. 57-161 ("Reclamation Act"), is codified at 43 U.S.C. §§ 372 *et seq.*

[9] Although the Federal Law Motion cites no authority for the relief sought, the Navajo Nation and United States treat the motion as one seeking summary judgment as a matter of law pursuant

aforementioned sources of federal law "do not define the extent of the water rights with respect to which the Navajo Nation may be entitled in the present matter." Federal Law Motion at 4, 10. However, every statute and case cited in Mr. Horner's tome is expressly qualified by some variant of the phrase "except as otherwise provided by Congress," a significant fact that Mr. Horner chooses to ignore. This glaring omission in Mr. Horner's analysis is fatal to his argument.

In 1962, the United States Congress determined to build an irrigation project for the benefit of the Navajo Nation using San Juan River water, stored in Navajo Reservoir, with an annual average diversion by the project of 508,000 acre feet per year ("afy"). Pub. L. No. 87-483, 76 Stat. 96 (June 13, 1962) ("1962 Act") § 2. The 1962 Act dictates how water is to be used from Navajo Reservoir, and this specific directive from Congress supersedes the Reclamation Act's general provisions concerning the applicability of state law:

> No person shall have or be entitled to have the use for any purpose, including uses under the Navajo Indian irrigation project ... of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of this Act.

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to Rule 1-056. To the extent that the Federal Law Motion seeks a "declaration" from the Court, he has failed to follow the process for seeking a declaratory judgment set forth in Rule 1-057 NMRA, and his motion should be summarily denied. Further, the Horner S.J. Motion includes 182 facts alleged to be material and undisputed that are identified as relevant to his Federal Law Motion. Horner S.J. Motion at 70, and ¶¶ 132-317. Only thirty-six (36) of these alleged facts are supported by citations to Exhibits attached to Mr. Horner's Federal Law Motion. No evidentiary foundation is provided for any of these Exhibits as required by Rule 1-056(E) NMRA. The Federal Law Motion, to the extent that it seeks summary judgment, is fatally flawed and must be denied. *See C & H Const. & Paving Co., Inc.*, 93 N.M. at 163, 597 P.2d at 1203.

1962 Act, § 11.[10]

The United States Supreme Court has opined that, despite the general deference to state water law reflected in the Reclamation Act, "state water law does not control in the distribution of reclamation water *if* inconsistent with other congressional directives to the Secretary." *California v. United States*, 438 U.S. 645, 667 n. 21 (1978) (citations omitted). In *California*, the Supreme Court went on to acknowledge that legislation subsequent to the Reclamation Act "authorizing a specific project may by its terms signify congressional intent that the Secretary condemn or be permitted to appropriate the necessary water rights for the project in question...." *Id.* For example, in *Arizona v. California*, 373 U.S. 546 (1963), the Supreme Court was required to address the interplay between state water law and federal reclamation law in the Boulder Canyon Project Act, 43 U.S.C. §§ 617 *et seq.*, and held that "where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, *state law has no place*." 373 U.S. at 588 (footnote omitted) (emphasis added).

The Court in *California v. United States* reaffirmed the hardly controversial proposition that the provisions of the Reclamation Act may be modified by subsequent acts of Congress, including directives to the Secretary that supplant the requirements of state water law. Lower court decisions have hewn to the course charted by the Supreme Court. The Tenth Circuit Court of Appeals in *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1137 (10th Cir. 1981), a case cited frequently by Mr. Horner, determined that "it is clear that the Secretary of the Interior may not, consistent with the Reclamation Act, knowingly release water to an individual or entity

[10] The 1962 Act was amended in 2009 by the Settlement Act to significantly broaden the potential uses of the water authorized for use at NIIP. *See* Pub. L. 111-11 ("Settlement Act") § 10401.

for a use which is not recognized as beneficial under state law, *unless such use is specifically authorized by congressional directive.*") (emphasis added). Similarly, in *United States v. Alpine Land and Reservoir Co*, 887 F.2d 207, 212 (9th Cir. 1989), the Ninth Circuit Court of Appeals observed that "Section 8 of the [Reclamation] Act, 43 U.S.C. § 383, incorporates the concept of 'federalism'." However, the Court of Appeals recognized that state law must yield where Congress directs otherwise. "[S]tate law governs the acquisition, distribution, and use of reclamation project water, and vested rights acquired thereunder, *unless directly inconsistent with congressional directives.*" *Id.* (emphasis added).

The 1962 Act is no different than the Boulder Canyon Project Act at issue in *Arizona v. California*. Congress not only authorized the Secretary to build NIIP, but directed that 508,000 afy of San Juan River water, impounded in Navajo Reservoir, would be made available for NIIP. In addition, Congress expressly provided that *no one* has the right to the use of water stored in Navajo Reservoir except as permitted by a contract approved by the Secretary and conforming to the provisions of that Act. Through the 1962 Act, Congress modified the general provisions of the Reclamation Act by specifically providing how water stored in the reclamation project authorized in the 1962 Act would be distributed and used.[11] Arguments in the Federal Law

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[11] Navajo Reservoir was authorized and constructed pursuant to the Colorado River Storage Project Act, 43 U.S.C. §§ 620 *et seq.* ("CRSP Act"), as part of a larger federal reclamation project. Section 4 of the CRSP Act provides:

> *Except as otherwise provided in this Act*, in constructing, operating, and maintaining the units of the Colorado River storage project and the participating projects listed in section 1 of this Act, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto)....

CRSP Act § 4 (emphasis added). Section 4 continues with a litany of provisos; specific directives of Congress that supersede the general provisions of the Reclamation Act.

Motion to the effect that state and not federal law controls the distribution of water stored in Navajo Reservoir are constructed upon an erroneous premise and fail as a matter of law.[12] The Court accordingly should deny the Federal Law Motion.

B. Mr. Oxford is not Entitled to Summary Judgment that the Water Rights Recognized for the Hogback and Fruitland Projects in the Settlement Agreement are Excessive.

Mr. Oxford asserts as an undisputed fact that Section 3(e) of the Proposed Final Decree recognizes water rights for acreage at the Hogback-Cudei Irrigation Project in excess of the acreage ever irrigated in any given year and the water rights for that project "therefore are represented wrongfully." Oxford Motion at 4.[13] Mr. Oxford's argument is without merit.

The total acreage for the Hogback-Cudei and Fruitland-Cambridge Irrigation Projects (collectively "Hogback and Fruitland Projects") described in the Proposed Partial Final Decree is 12,165 acres. As a preliminary matter, 12,165 acres is considerably less than the "approximately 26,000 acres" authorized by Congress. *See State of New Mexico's Revised Statement of Legal and Factual Bases for Settlement* (filed Sep. 7, 2012) at 11 ("the Navajo Nation could claim an

[12] Similar arguments are advanced by the Community Ditch Objectors in their *Motion for Partial Summary Judgment Concerning NIIP* (Apr. 15, 2013) at 4 – 7, and by Mr. Oxford in his *Robert E. Oxford's Dispositive Motion for Summary Judgment*, at 2-3. To the extent that the motions of the Community Ditch Objectors and Mr. Oxford seek summary judgment on the grounds that state prior appropriation law is determinative of the water rights for NIIP recognized in the Settlement Agreement and the Proposed Decrees, these sections of their motions must also be denied.

[13] In making his argument, Mr. Oxford makes reference to a purported statement by John Whipple, expert for the State of New Mexico, but includes no citation to the record before the Court as required by Rule 1-056 making it impossible to respond to in more detail.

already existing Congressional authorization for a total of 26,000 acres under these projects.").[14] Further, even in the absence of Congressional authorization to irrigate a greater area for the Hogback and Fruitland Projects, the Navajo Nation has the right to claim at least 13,030 historically irrigated acres for these projects. *See The United States' Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation* (filed Jan. 3, 2012) ("U.S. Statement of Claims") at 15 § III.D.a.[15]

In resolving the water rights associated with the Hogback and Fruitland Projects, the Settling Parties reached a negotiated compromise. The water rights recognized in the Proposed Final Decree for the Hogback and Fruitland Projects were based on the total amount of irrigated acres described in BIA farm permits applying irrigation criteria "similar to the historic operating practices for non-Indian ditches diverting from the San Juan River." *State of New Mexico's Technical Assessment of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement* (filed Sep. 7, 2012) at 2. This is consistent with the methodology adopted by the Court in the Echo Ditch Decree of 1948. *Id.*

Mr. Oxford has failed to establish a *prima facie* case on this issue as required by Rule 1-056, and this part of the Oxford Motion should be summarily denied.

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[14] *See also,* S. REP. NO. 85-2198, at 9 (1958), available at: http://congressional.proquest.com/congressional/docview/t47.d48.12064_s.rp.2198?accountid=14740.

[15] The technical basis for the U.S. Statement of Claims was presented in the U.S. Technical Reports. U.S. Technical Reports Exhibit G. The contents of the technical report, including the area of historically irrigated acres associated with the Hogback and Fruitland Projects, were verified by the report's author, Senior Engineer Aaron Beutler of Keller-Bliesner Engineering, LLC. Joint Memorandum, Attachment G at ¶ 6.

C. B Square Objectors are not Entitled to Summary Judgment that the Navajo Nation Waived and Relinquished its *Winters* Rights in the San Juan River Basin in Exchange for NIIP.

B Square Objectors [16] argue that the Navajo Nation waived its vast and senior reserved water rights within the entire San Juan River Basin in New Mexico in exchange for Congressional authorization to construct NIIP in the 1962 Act. B Square Motion. The B Square Motion is without merit.

No provision of the 1962 Act authorizing the construction of NIIP purports to waive the federal reserved rights of the Navajo Nation, and the B Square Motion cites to none. Such a demonstration is integral to the B Square Motion, because any congressional waiver or relinquishment of tribal property rights held in trust by the United States must be clear, express, and unambiguous, and cannot be implied. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412-13 (1968); *United States v. Truckee-Carson Irrigation Dist.*, 649 F.2d 1286, 1297-99 (9th Cir. 1981), *aff'd in part, rev'd in part on other grounds sub nom. Nevada v. United States*, 463 U.S. 110 (1983). For this reason alone, the B Square Motion should be denied.

Because the express language of the 1962 Act is clear, the Court need look no further to divine legislative intent. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999) ("As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well.") (citations and internal quotations omitted); *Sims v. Sims*, 1996-NMSC-078, ¶ 17, 122 N.M. 618, 622, 930 P.2d 153, 157 ("The plain meaning rule of statutory construction states that [w]hen a statute contains

[16] As is also true of the Community Ditch Objectors, the B Square Objectors are not defendants in this *inter se* subproceeding and Navajo Nation and United States decline to refer to them as such.

language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.") (citation and internal quotations omitted; alteration in original). Nonetheless, B Square Objectors attempt to build their novel waiver case on two public statements of Navajo Nation officials that comprise a tiny fragment of the legislative history of the 1962 Act, and a provision from a draft water delivery contract between the United States and the Navajo Tribe that was never executed by the parties. The Navajo Nation and United States do not dispute the authenticity of these fragments from the 1962 Act's legislative history. However, those facts, to the extent relevant here, merely reflect the Navajo Nation's agreement that the water supply for NIIP would be subject to pro rata sharing of shortages of the Navajo Reservoir Supply as required by the 1962 Act. Similarly, the text of the draft contract cannot be relied upon to establish that the Navajo Nation relinquished anything, much less its claim to water under the *Winters* reserved rights doctrine.

The facts on which the B Square Motion relies are insufficient to establish a *prima facie* showing on this issue, and the Motion for summary judgment must be denied.

D. Community Ditch Objectors are not Entitled to Summary Judgment that the Proposed Decrees are not Fair and Reasonable because the Water Rights Recognized for NIIP 1) were not Determined Pursuant to the Practicably Irrigable Acreage Quantification Standard, and 2) are Recognized to have an 1868 Priority.

Community Ditch Objectors argue that the Settlement Motion[17] must fail because the water rights recognized for NIIP were not determined by an analysis of practicably irrigable acreage and they are not entitled to an 1868 priority. NIIP Motion. The Motion is facially flawed and must be denied as a matter of law.

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[17] *Settlement Motion of United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees* (filed Jan. 3, 2011) ("Settlement Motion").

Eleven (11) undisputed material facts are alleged in the NIIP Motion. Nine of the eleven alleged facts, which include such dubious statements as "[t]he lands occupied by NIIP are not suitable to sustained irrigation at a reasonable cost," are not supported by citations to the record.[18] *See* Rule 1-056(D)(2) (material facts as to which the moving party contends no genuine issue exists "shall be numbered and refer with particularity to those portions of the record upon which the moving party relies."). The NIIP Motion does not meet the burden to establish a *prima facie* case under Rule 1-056 and the Motion must be summarily denied. *C & H Const. & Paving Co., Inc.*, 93 N.M. at 163, 597 P.2d at 1203.

As discussed in Section III, *supra*, and as the Community Ditch Objectors appear to acknowledge,[19] this *inter se* subproceeding is limited to deciding whether the Proposed Decrees are fair, adequate and reasonable. Questions concerning the appropriate method for quantifying the water rights of the Navajo Nation, or establishing the priority of those rights, are matters for litigation and are not before the Court. Similarly, as discussed in subsection A, *supra*, challenges to the decisions of Congress regarding the use of water from federal reclamation projects are beyond the jurisdiction of this Court. Community Ditch Objectors are not entitled to judgment on these issues as a matter of law.

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[18] Ironically, the one affidavit offered in support of the NIIP Motion is a statement from a local rancher whose knowledge of NIIP and Navajo Agricultural Products Industries ("NAPI"), the Navajo Nation enterprise that operates NIIP, is based on visits to NAPI to purchase commodities produced at NIIP, on lands he alleges are "not suitable for sustained irrigation at reasonable cost." *See* Affidavit of Jim Rogers, attached as Exhibit 1 to the motion at ¶ 5. The copy of the Affidavit served on counsel is neither signed nor verified, although the signature of the affiant, but not the notary, is indicated by "/s/".

[19] *See Introduction to Community Ditch Motions for Partial Summary Judgment* at 2 ("There is only one question before the court at this stage of the case: whether to disapprove or approve the proposed settlement agreement and proposed judgment in toto, as a package deal without change or amendment.").

E. Community Ditch Objectors are not Entitled to Summary Judgment that the Proposed Decrees are not Fair and Reasonable Because the Decrees Would Recognize Water Rights in Excess of the Minimum Needs of the Navajo Reservation.

The Response set forth in section D is incorporated herein by reference. The Minimum Needs Motion also alleges eleven (11) purportedly undisputed material facts.[20] And as is the case with the Community Ditch Objectors' counterpart motions, the "material facts" alleged here do not "refer with particularity to those portions of the record upon which the moving party relies." Rule 1-056(D)(2). One alleged fact is supported by an exhibit for which no affidavit or other evidentiary foundation is supplied as required by Rule 1-056(E) NMRA. Accordingly, the Community Ditch Objectors have not met their burden to establish a *prima facie* case, and their motion must be summarily denied.

The Minimum Needs Motion argues that the water rights recognized in the Proposed Decrees exceed the amounts that can be recognized pursuant to applicable federal law. Minimum Needs Mot. at 3. The characterization of federal law governing the quantification of reserved water rights for Indian tribes is simply wrong. The limitations that apply to water rights for non-Indian federal reservations, such as national parks or military installations, are not applicable to a determination of the rights of the Navajo Nation. *See Greely*, 712 P.2d at 766-67; *United States v. Adair,* 723 F.2d 1394, 1410 (9th Cir. 1983) (holding that Indian reservations may have been established with more than one purpose and that "[n]either Cappaert nor New Mexico [Supreme Court cases that dealt with non-Indian reserved rights] requires us to choose between a single essential purpose."), *cert. denied sub nom. Oregon v. United States*, 426 U.S. 1252 (1984).

[20] Because they are misnumbered, the motion includes eleven enumerated alleged facts rather than the ten indicated.

The Arizona Supreme Court has held that "the significant difference between Indian and non-Indian reservations preclude the application of the [*New Mexico*] test to the former." *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68, 77 (2001). The Minimum Needs Motion's bare citation to *United States v. New Mexico*, 438 U.S. 696, 700-01 (1978), without more, is plainly insufficient to establish entitlement to a judgment as a matter of law.

F. Mr. Horner is not Entitled to Summary Judgment that the Settlement Motion Should be Denied.

The Horner S.J. Motion and supporting memorandum can be distinguished from the motions and briefs of his fellow Objectors only by their prodigious length. And despite the amount of material Mr. Horner interposes, this Motion too is fundamentally flawed and must be denied as a matter of law. Consisting of three hundred twenty-eight paragraphs that consume more than seventy pages, Mr. Horner's statement of alleged undisputed, material facts is patently deficient. Mr. Horner, like his counterparts, fails to "refer with particularity to those portions of the record upon which the moving party relies." Rule 1-056(D)(2). Admittedly, there are five exhibits attached to the supporting memorandum, but the Motion neither cites those exhibits in support of the alleged facts nor includes any affidavits or other vehicle which might establish an evidentiary foundation for those exhibits.[21] Mr. Horner thus has failed to meet his burden to establish a *prima facie* case, and his motion must be summarily denied. *Knapp v. Fraternal Order of Eagles*, 106 N.M. at 13, 738 P.2d at 131.

[21] Facts paragraph 1-131 and 318-328 appear to relate to the Horner S.J. Motion. As explained in note 9, *supra*, fact paragraphs 132 – 317 appear to relate to the Federal Law Motion. Citations to Exhibits that are attached to the Federal Law Motion are addressed in note 9.

With the Horner S.J. Motion and Reserved Rights Motion this Response comes full circle. As discussed in the Introduction, many of the Objectors argue that reserved water rights for Indians tribes are unfair to non-Indian water users, but that state prior appropriation law is fair to all. Nowhere is the argument that the *Winters* Doctrine is unfair argued more passionately than in the Reserved Rights Motion and its supporting Memorandum; and nowhere is the legal analysis more misguided. The Reserved Rights Motion requests that the Court issue an order "[e]stablishing the applicable legal standard to be used in the present matter with respect to the determination of federal reserved water rights for Indian Tribes." The premise of this request is that:

> The notion of the *Winters* Doctrine, upon which the Navajo Settlement is based, represents such a departure from any notion of fairness and justice that its basic premises must be rethought and restructured – right here and right now appears to be as good a starting place as any other.

Reserved Rights Memorandum at 53.[22] The Memorandum concludes that "the state law doctrine of prior appropriation provides [] a fair method of allocating limited water resources," a method that is "not only fair, it is the law." *Id.*

The Memorandum is wrong on both counts. The application of state prior appropriation law is not fair to Indian tribes, and the United States Supreme Court and the high courts of many states, including this one, have determined that for that reason it is not the law. *Winters v. United*

[22] Just prior to the quoted language, the Memorandum states that "[t]he proposition that all water rights could be held by Indian tribes and that one must yield to the whims of such tribes in order to obtain such an essential of life is not only scary but unbelievably absurd." Anyone with any perspective on the issue must note the paradox in such a statement when the Reserved Rights Memorandum posits the corollary proposition that Indian tribes must yield to the whims of non-Indians – who settled in the Basin long after tribal people – and submit to their laws to obtain this essential of life, and argues that this proposition is not only not absurd, but fair.

States, 207 U.S. 564, *Arizona v. California*, 373 U.S. 546 (1963); *Greely*, 712 P.2d 754; *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 35 P.3d 68 (Ariz. 2001) (*en banc*) (*Gila V*). In *State ex rel. Reynolds v. Lewis*, 88 N.M. 636, 545 P.2d 1014, 1017 (1976), the New Mexico Supreme Court agreed with the United States Supreme Court's characterization of Indian reserved water rights in *Arizona v. California*. As the Supreme Court held there:

> The Court in Winters concluded that the Government, when it created that Indian Reservation, intended to *deal fairly* with the Indians by reserving for them the waters without which their lands would have been useless. Winters has been followed by this Court as recently as 1939 in United States v. Power, 305 U.S. 527. . . . We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time that Indian Reservations were created.

Arizona v. California, 373 U.S. at 600 (emphasis added). The New Mexico Supreme Court reaffirmed its support for the *Winters* doctrine in *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235 (1993). *See also State of N.M. ex rel. State Engineer v. Comm'r of Pub. Lands,* 2009-NMCA-004, ¶ 14, 145 N.M. 433, 441, 200 P.3d 86, 94, *cert. denied*, *State Engineer v. Comm'r of Pub. Lands*, 145 N.M. 531, 202 P.3d 124 (2008), *and cert. denied*, *N.M. Comm'r of Pub. Lands v. N.M. ex rel. State Engineer*, 129 S.Ct. 2075, 173 L.Ed.2d 1134 (2009). The Horner S.J. and Reserved Rights Motions thus should be denied.

IV. CONCLUSION

Taken together, and at their most essential, the motions of Objectors ask the Court to discard a century of established legal precedent that has guided the United States and the States in their relations with Indian tribes; precedent that has framed the scope of Indian reserved water rights. Even if the State of New Mexico decided to attempt such a coup, this expedited *inter se* subproceeding, which was established by the Court to determine whether to approve the Proposed Decrees and finally recognize the water rights of the Navajo Nation, is not the proper forum. As the Court has made clear in its Orders, the Court's jurisdiction in this subproceeding is limited. For all the reasons set forth in this Response, the Navajo Nation and the United States ask the Court to summarily deny the Objectors' motions for summary judgment.

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Respectfully submitted this 10th day of May, 2013.

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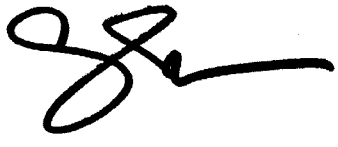

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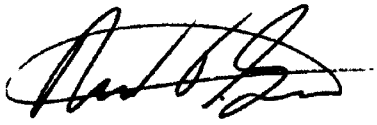

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CERTIFICATE OF SERVICE

I certify that on this 10th day of May, 2013, an electronic version of *Response of the Navajo Nation and United States in Opposition to Summary Judgment Motions of Objectors* was served by electronic mail to: wrnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the list of parties identified on the *Notice of Amended Service List* (filed Feb. 25, 2013).