DISTRICT COURT
SAN JUAN COUNTY NM
FILED

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

SUMMARY

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

2. Title of the present document: **GARY L. HORNER'S REPLY TO THE RESPONSE OF THE NAVAJO NATION AND UNITED STATES IN OPPOSITION TO THE SUMMARY JUDGMENT MOTIONS OF OBJECTORS.**

3. Descriptive summary of the relief sought: **This document represents Mr. Horner's reply to the RESPONSE OF THE NAVAJO NATION AND UNITED STATES IN OPPOSITION TO THE SUMMARY JUDGMENT MOTIONS OF OBJECTORS.**

4: Number of pages of the present document: **32**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), and respectfully replies to the RESPONSE OF THE NAVAJO NATION AND UNITED STATES IN OPPOSITION TO THE SUMMARY JUDGMENT MOTIONS OF OBJECTORS, which was filed in the present matter on May 10, 2013 ("NN & US Response to Motions for Sum Judgment").

As and for good cause for said Reply I state:

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I. Introduction.

The Navajo Nation and United States argue 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." NN & US Response to Motions for Sum Judgment, p. 3.

In that regard, the Navajo Nation and the United States mischaracterize Ojectors' Motions as badly as they mischaraterize the law. Specifically, I have never asserted 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".

Certainly, GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS, which was filed in the present matter on November 8, 2012 ("Horner's Motion re Reserved Rights"), and GARY L. HORNER'S BRIEF IN SUPPORT OF GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS, which was filed in the present matter on November 8, 2012 ("Horner's Brief re Reserved Rights"), were both filed for the specific purpose of determining the applicable standard in the present matter for the determination of federal reserved rights.

The Navajo Nation and the United States do not ever directly address any of the points and authorities of Horner's Motion re Reserved Rights. On the other hand, all of the points and

authorities regarding federal reserved rights for Indian Tribes asserted pursuant to the NN & US Response to Motions for Sum Judgment have been addressed pursuant to Horner's Motion re Reserved Rights.

II. None of the Parties having specifically controverted a single one of the 328 enumerated material facts set forth in Horner's Memo re Summary Judgment, all of such facts must now be deemed admitted by all of the Parties to this proceeding.

Regarding the "summary judgment standard," the Navajo Nation and United States specifically argue that:

> "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 '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, 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-based motions meets the minimum requirements for summary judgment, and each of those motions also should be summarily denied." NN & US Response to Motions for Sum Judgment, pp. 4-6. Footnote omitted.

From the foregoing it is apparent that there is no substance to the Navajo Nation and United States' argument that the Motions for Summary Judgment fail to make a *prima facie* showing and should be denied. Such statement is simply a completely unsupported self-serving conclusion, that ignores the hundreds of pages of documentation supporting said Motions for Summary Judgment.

A. Horner's Motion re Summary Judgment clearly establishes a *prima facie* showing that the Settlement Motion should be denied.

Horner's Motion re Summary Judgment clearly makes a *prima facie* showing that there is no legitimate factual or legal basis for the vast majority of the water rights to be awarded to the Navajo Nation pursuant to the Navajo Settlement and Proposed Decrees.

For authority on this subject the Navajo Nation and United States point to *Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 808 P.2d 955 (NMSC 1991). In *Rivera* the New Mexico Supreme Court stated:

> "SCRA 1986, 1–056(C), provides that summary judgment is proper 'if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Such proofs are examined in a light most favorable to an appellant's claims. *Ellingwood v. N.N. Investors Life Ins. Co.,* 111 N.M. 301, 805 P.2d 70 (1991). As movants, the defendants were obligated to make a prima facie showing of entitlement to summary judgment on the issue of title to the subject land. *See Goodman v. Brock,* 83 N.M. 789, 498 P.2d 676 (1972). A prima facie showing contemplates such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted. *Id.* The movant need not demonstrate beyond all possibility that no genuine factual issue existed. *Koenig v. Perez,* 104 N.M. 664, 726 P.2d 341 (1986). Once this showing was made, the burden shifted to appellant to show, in this case, that genuine questions of material fact existed regarding his title to the land. *See id.* at 666, 726 P.2d at 343. On appeal, this court must look to the whole record and take note of any evidence therein that puts a material fact in issue. *Pharmaseal Laboratories, Inc. v. Goffe,* 90 N.M. 753, 568 P.2d 589 (1977)." *Rivera v. Brazos Lodge Corp.*, 111 N.M. 670, 672, 808 P.2d 955, 957 (NMSC 1991). Emphasis added.

Accordingly, "a prima facie showing contemplates such evidence as is sufficient in law to

raise a presumption of fact or establish the fact in question unless rebutted." Horner's Motion re Summary Judgment clearly makes such a *prima facie* showing. Further, "[t]he movant need not demonstrate beyond all possibility that no genuine factual issue existed"; and "[o]nce this showing was made, the burden shifted to [the non-moving party] to show . . . that genuine questions of material fact existed . . . ." Here, no Party has even attempted to rebut or dispute any of my asserted material facts. Certainly, the Settling Parties have not even attempted to point to any evidence in the record that puts any of my asserted material facts in issue.

Therefore, Horner's Motion re Summary Judgment has clearly made a *prima facie* showing that the Settlement Motion should be denied.

B. The bases for the 328 enumerated material facts set forth in Horner's Memo re Summary Judgment were established within my Motions.

The Navajo Nation and United States' preceding argument boils down to an argument that the 328 numbered material facts listed in Horner's Memo re Summary Judgment, did not 'refer with particularity to those portions of the record upon which the moving party relies.' Rule 1-056(D)(2) NMRA. Due to a lack of time, I was unable to refer with particularity to those portions of the record upon which I relied, within each specifically numbered fact. However, all of such numbered facts were drawn directly from my Motions, where in nearly all cases the bases for such facts (references to the record) were established.

Similarly, due to a lack of time, I was unable to prepare an affidavit in support of such facts by the time Horner's Motion re Summary Judgment was filed. However, I did file such an affidavit on May 10, 2013. (See AFFIDAVIT OF GARY L. HORNER, P.E., P.S., Esq., filed in the present matter on May 10, 2013.)

C. No Party has disputed a single one of the 328 enumerated material facts set forth in Horner's Memo re Summary Judgment.

However, of the utmost significance is the fact that, no Party has disputed a single one of the 328 enumerated material facts listed pursuant to Horner's Memo re Summary Judgment. As previously shown, the *Rivera* Court stated that: "[t]he movant need not demonstrate beyond all possibility that no genuine factual issue existed"; and "[o]nce this showing was made, the burden shifted to [the non-moving party] to show . . . that genuine questions of material fact existed . . . ." Here, no Party has even attempted to rebut or dispute any of my asserted material facts. Certainly, the Settling Parties have not even attempted to point to any evidence in the record that puts any of my asserted material facts in issue.

The Navajo Nation and United States should be well aware that said Rule 1-056 (D)(2) provides that:

> "All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted."

I acknowledge that any disputed material facts must be determined at trial. In fact, this Court has set a schedule for a three week trial to do just that. However, it makes no sense to spend three weeks at trial proving facts that are not even in dispute. In fact, no where does the Navajo Nation and the United States argue that, pursuant to Horner's Motion re Summary Judgment, there exists genuine factual issues for trial.

Likewise, it makes no sense to deny Horner's Motion re Summary Judgment on the sole basis that I have not provided specific references to the record in support of my asserted material facts, when no one has even disputed any of such asserted material facts. It would appear that all Parties comprehend that all of such facts could be proven at trial.

So, while I acknowledge that to date I have not established, by references to the record, that each of such 328 enumerated facts exists beyond all possibility, it also must be acknowledged that no Party has disputed a single one of such facts necessitating that any of such facts be proven at trial.

None of the Parties having specifically controverted a single one of the 328 enumerated material facts set forth in Horner's Memo re Summary Judgment, pursuant to Rule 1-056 (D)(2), all of such facts must now be deemed admitted by all of the Parties to this proceeding.

III. The Navajo Nation and United States simply ignore the previous orders of this Court, just as they ignore every other authority that does not support their positions.

Pursuant to the NN & US Response to Motions for Sum Judgment, the Navajo Nation and United States argue that "objectors' motions erroneously suggest that this expedited *inter se* encompasses a determination on the merits of the Nation's water rights claims". Specifically, they argue that:

> "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. Here the Court adopted the legal standard for approval of the Proposed Decrees as contemplated under the Settlement Agreement that has been followed in other settlements, including the settlement of the water 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').
>
> "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 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. NN & US Response to Motions for Sum Judgment, pp. 6-9. Footnotes omitted.

Here, the Navajo Nation and United States continue to reargue the standards and burdens of the Parties that were previously meticulously litigated and determined by the Court over a period of more than two and one-half years. 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"). On October 6, 2009, in Response to the SP Motion re Initial Procedures, I filed THE BID AND GARY L. HORNER'S RESPONSE TO THE JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF

THE NAVAJO NATION ("Horner's Response re Initial Procedures"). (Said Horner's Response re Initial Procedures is hereby incorporated herein by reference.)

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. 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.

Here, the Navajo Nation and United States simply ignore that portion of said standard that the "Settling Parties must demonstrate that the Proposed Decrees are . . . consistent with the public interest and applicable law." They also ignore their burden to demonstrate 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". Specifically, the Navajo Nation and United States complain that "Objectors have construed this legal standard to open the door to challenges to the attributes of every water right recognized in the Proposed Decrees."

In that regard, the Navajo Nation and the United States apparently hope the Court will forget that such standard and burden were adopted because they would impose the Navajo Settlement and Proposed Decrees on every other water user in the Basin.

The Settling Parties' burden to demonstrate 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", in essence requires the Settling Parties to prove that the Navajo Nation is somehow entitled to the water rights to be awarded pursuant to the Navajo Settlement and Proposed Decrees. This does "open the door to challenges to the attributes of every water right recognized in the Proposed Decrees." The Settling Parties' complaint comes from the fact that, in fact, the Settling Parties cannot demonstrate that the Navajo Nation is entitled to such water rights, or that "the Settlement Agreement provides for less than the potential claims that could be secured at trial", simply because there is no legitimate legal or factual basis for such water rights.

A. Consent judgments are only immune from attack by the consenting parties themselves, or those in privity with the consenting parties.

Above, the Navajo Nation and United States argue in essence that Objectors should not be allowed to challenge the terms of Navajo Settlement and Proposed Decrees, because any such challenge would deprive the Settling Parties of the benefit of their bargain and undermine the settlement. Specifically, they argued that:

> "the Settlement Agreement is the product of compromise. . . . 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.

However, consent decrees are only immune from attack by the consenting parties themselves, or those in privity with the consenting parties. In that regard, in *Lewis v. City of Santa Fe*, 137 N.M. 152, 108 P.3d 558 (2005 NMCA), the Court stated that:

> "Our review of the published case law has revealed that in the past, judgments entered by the consent of the parties and upon stipulations have only been regarded as immune from collateral attack by the parties themselves, or those in privity with them. *See Myers v. Olson*, 100 N.M. 745, 748, 676 P.2d 822, 825 (1984) ('Properly authorized and acknowledged consent judgments and judgments rendered on stipulations are conclusive of all claims determined therein and may not be collaterally attacked by the parties thereto.'); *Johnson v. Aztec Well Servicing Co.*, 117 N.M. 697, 700, 875 P.2d 1128, 1131 (Ct.App.1994) (observing that a judgment entered by consent pursuant to a settlement 'is not subject to collateral attack by a party or a person in privity, and it bars a second suit on the same claim or cause of action') (internal quotation marks and citation omitted).
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> "Accordingly, to the extent that Petitioner's administrative appeal could be characterized as a collateral attack on the stipulated dismissal and settlement, the propriety or impropriety of the attack would turn upon Petitioner's status as a party to the litigation or a person in privity with a party. It is undisputed that Petitioner was not a party to the litigation between the City and Wal-Mart. 'A person in privity with another is a person so identified in interest with another that he represents the same legal right.' *Bentz v. Peterson*, 107 N.M. 597, 600, 762 P.2d 259, 262 (Ct.App.1988). Generally speaking, governmental agencies are only said to be in privity with private individuals to the extent that the entity 'acts on behalf of an individual claimant and seeks individual relief.' *Rex, Inc. v. Manufactures Hous. Comm.*, 119 N.M. 500, 509, 892 P.2d 947, 956 (1995). In this case, the City's involvement in the prior litigation with Wal-Mart could not be characterized as action on behalf of any individual. Had the City stood by its initial decisions to reject Wal-Mart's development plan, it might have been 'identified in interest' with Petitioner, who has consistently registered opposition to the proposed development. However, in the brief course of the litigation with Wal-Mart, the City reversed its position. This position had resulted from full administrative consideration by its Planning Council. When Wal-Mart appealed, the City Council also gave it due consideration before it denied Wal-Mart's appeal. By settling the case and opting to permit Wal-Mart to move forward with the development in order to obtain a rapid resolution on terms that it came to find acceptable, the City made another zoning decision without this full process. Because the City could not be said to have acted on Petitioner's behalf, and because Petitioner's interests have proven demonstrably dissimilar from the City's, we conclude that Petitioner was not in privity with the City."
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> "[T]he district court's review of the City's decision pursuant to statute is governed in its scope by Section 39-3-1.1, which plainly delineated the factors a district court may properly consider in such an appeal. *See Hart v. City of Albuquerque*, 199-NMCA-043, P 15, 126 N.M. 753, 975 P.2d 366 ('The procedure for district court review of zoning decisions under both Section 3-21-9 and section 3-19-8 ... now follow [Section 39-3-1.1] for obtaining court review of an agency's decision.'). . . . [i]f the record is insufficient to consider these factors, (i.e., whether the municipality acted fraudulently, arbitrarily or capriciously, without substantial evidence, or in accordance with the law it could well be related to the City's decision to handle discussion of the settlement agreement in an executive session. In such a case, the district court, as we mentioned above, can remand for creation of an adequate record." *Lewis v. City of Santa Fe*, 137 N.M. 152, 156-58, 108 P.3d 558, 562-64 (2005 NMCA). Emphasis added.

1. Objectors are not in privity with any of the Settling Parties, and Objectors would not be bound by the Navajo Settlement and Proposed Decrees.

The Settling, or consenting, Parties are specifically, the Navajo Nation, the United States and the State of New Mexico.

The Navajo Nation, and the United States acting on behalf of the Navajo Nation, are certainly working to further the specific interests of the Navajo Nation, and the water rights interests of the Navajo Nation are diametrically opposed to the interests of other water users in the Basin. While the Navajo Nation stands to gain the right to use hundreds of thousands of acre-feet of water they have never before used (pursuant to the entry of the Proposed Decrees), the entry of the Proposed Decrees would put the water rights of all other water users at severe risk of loss in their entirety. Accordingly, Objectors are certainly not in privity with either the Navajo Nation or the U.S. with respect to the subject Navajo Settlement or Proposed Decrees.

Further, Objectors are not in privity with the State. Although the State negotiated the subject Navajo Settlement, the State would not be (adversely) affected by the Navajo Nation's use of their new water right (the grant of such new water right results in no skin off the State's nose). Rather, the adverse effects of the subject Navajo Settlement are borne entirely by third party water users. While third parties may lose their water rights entirely, neither the State, nor the individual State negotiators would feel any pain whatsoever. In fact, the State argues that the State's lot would be improved by the resolution of the nagging Navajo water rights claims.

Certainly, Objectors are not so identified in interest with any of the Settling Parties that any of the Settling Parties represent the same legal right as Objectors. Clearly, none of the (governmental) Settling Parties are acting on behalf of Objectors individually, nor are any of the Settling Parties seeking individual relief on behalf of Objectors. Therefore, in accordance with

Lewis (2005) Objectors are not in privity with any of the Settling Parties.

Accordingly, Objectors and other third parties, not having consented to the subject Navajo Settlement, and not being in privity with any of the consenting parties, are not bound by such Settlement. Further, since the Proposed Decrees are consent decrees, even if such Decrees were entered by the Court, such Decrees would not be binding on Objectors or other third parties and would be subject to collateral attack by Objectors and other third parties.

B. The court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce, not from the parties' consent to the decree.

The Navajo Nation and United States also argue above that the Court's consideration of a settlement should not be decided on the basis of the "law, but rather must be decided on the basis of legal principles regulating judicial review of settlement agreements ." In fact, pursuant to Horner's Response re Initial Procedures, I demonstrated that in *Firefighter v. Stotts*, 476 U.S. 561, 576, n. 9, 104 S.Ct. 2576, 2586, 81 L.Ed.2d 483 (1984), the Supreme Court stated that the court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce, not from the parties' consent to the decree. Specifically, the *Stotts* Court stated:

> "'The District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce,' not from the parties' consent to the decree. *Railway Employees v. Wright*, 364 U,S. 642, 651 [81 S.Ct., at 373] (1961)." *Firefighter v. Stotts*, 476 U.S. 561, 576, n. 9, 104 S.Ct. 2576, 2586, 81 L.Ed.2d 483 (1984). Emphasis added.

C. The parties cannot, by giving each other consideration, purchase from a court a continuing injunction, and the court is free to reject agreed-upon terms as not in furtherance of statutory objectives

In *System Federation No. 91, Railway Employees' Department v. Wright*, 364 U.S. 642,

81 S.Ct. 368, 5 L.Ed.2d 349 (1961), the Supreme Court stated that: the parties cannot, by giving each other consideration, purchase from a court a continuing injunction; the court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce; the parties, were only incidentally served when the court enters a consent decree; the court is free to reject agreed-upon terms as not in furtherance of statutory objectives; and the parties could not become the conscience of the court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute.

Specifically, the *Railway Employees* Court stated that:

> "[T]he court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it was [sic] been doing has been turned through changing circumstances into an instrument of wrong." *United States v. Swift & Co.*, supra, 286 U.S. [106] at pages 114-115, 52 S.Ct. [460] at page 462 [76 L.Ed. 999 (1932)]. A balance must thus be struck between the policies of res judicata and the right of the court to apply modified measures to changed circumstances." *Railway Employees,* 364 U.S. at 647-648, 81 S.Ct at 371.
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> "The parties cannot, by giving each other consideration, purchase from a court of equity a continuing injunction. In a case like this the District Court's authority to adopt a consent decree comes only from the statute which the decree is intended to enforce. Frequently of course the terms arrived at by the parties are accepted without change by the adopting court. But just as the adopting court is free to reject agreed-upon terms as not in furtherance of statutory objectives, so must it be free to modify the terms of a consent decree when a change in law brings those terms in conflict with statutory objectives. In short, it was the Railway Labor Act, and only incidentally the parties, that the District Court served in entering the consent decree now before us. The court must be free to continue to further the objectives of that Act when its provisions are amended. The parties have no power to require of the court continuing enforcement of rights the statute no longer gives." *Railway Employees,* 364 U.S. at 651-52, 81 S.Ct 373. Emphasis added.
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> "The type of decree the parties bargained for is the same as the only type of decree a court can properly grant-one with all those strengths and infirmities of any litigated decree which arise out of the fact that the court will not continue to exercise its powers thereunder when a change in law or facts has made inequitable what was once equitable. The parties could not become the conscience of the equity court and decide for it once and for all what was equitable and what was not, because the court was not acting to enforce a promise but to enforce a statute." *Railway Employees,* 364 U.S. at 652-53, 81 S.Ct 374. Emphasis added.

In the present matter the court is not acting to enforce a promise, but to enforce the adjudication statutes. Therefore, any water rights settlement with the Navajo Nation must be consistent with such statutes.

D. A consent decree does not bind nonconsenting third parties; and where a consent decree does affect a third party, such nonconsenting party may not be subjected to a permanent injunction without a trial on the merits of his case.

The Navajo Nation and United States argue 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.' . . . [T]he court must resist 'the temptation to convert [the] settlement hearing into a full trial on the merits.' . . .
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> "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." NN & US Response to Motions for Sum Judgment, pp. 8-9. Citations omitted.

However, of the utmost significance is the fact that consent decrees do not bind nonconsenting third parties.

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

> "This case requires us to examine the circumstances under which, and the procedure by which, a court may enter a consent decree in a multiparty suit when some, but not all, of the litigants agree to the decree and parts, but not all, of the decree affect the rights of a nonconsenting party. We conclude that a decree disposing of some of the issues between some of the parties may be based on the consent of the parties who are affected by it but that, to the extent the decree affects other parties or other issues, its validity must be tested by the same standards that are applicable in any other adversary proceeding. . . . . However, because a part of the decree, entered without a trial, affects the rights of an objecting party, we limit its effect as to that party and remand for trial of the complaint insofar as a remedy is sought against that party." *Miami*, at 436.
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> "The entry of a consent decree necessarily implies that the litigants have assented 'to all of its significant provisions.' *High v. Braniff Airways, Inc.*, 592 F.2d 1330, 1334 (5th Cir. 1979). In this respect a consent decree is akin to a contract, to be interpreted in the same manner. *United States v. ITT Continental Bakery Co.*, 420 U.S. 223, 236-37 & n.10, 95 S.Ct. 926, 934 n.10, 43 L.Ed.2d 148, 161 & n.10 (1975)." *Miami*, at 440.
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> "Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provision, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute, or jurisprudence. This requires a determination that the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation. If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.[FN14]" *Miami*, at 441.
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> "FN14. We reviewed the standards for consent decrees in *United States v. City of Alexandria*, in which we said: the degree of appellate scrutiny must depend on a variety of factors, such as the familiarity of the trial

court with the lawsuit, the stage of the proceeding at which the settlement is approved, and the types of issues involved. 614 F.2d at 1361; *cf.* Antitrust Procedures and Penalties Act, § 2, 15 U.S.C. § 16(b)-(f) (prescribing publicity, comment, and determination of public interest procedures for proposed consent decrees in civil antitrust suits brought by or on behalf of United States)." *Miami*, at 441.

* * *

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

* * *

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

* * *

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

* * *

"The procedural and factual background of this case are set out at length in the panel opinion. 614 F.2d 1322. Little of this need be repeated for our present purposes, since in our view the appeal is disposed of by a rule both elementary and procedural: <u>a nonconsenting party may not be subjected to a permanent injunction without a trial on the merits of his case</u>.[FN1] Two of the parties to this litigation, the plaintiff United States and the defendant City of Miami, settled their differences and executed a proposed consent decree. The court below imposed that settlement on the unconsenting union without so much as a setting for trial on the merits. Such a procedure was improper." *Miami*, at 4428.

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

* * *

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

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

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

* * *

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

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

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

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

* * *

"Should the United States and the City of Miami conclude that binding the FOP to their consent decree is not after all necessary to their purposes, they may of course seek its dismissal from the case and the reentry of the decree forthwith. What they may not do, we think, is agree among themselves about FOP's legal rights and impose their agreement upon it with neither consent nor trial. Results are important. But, as we tirelessly reiterate in the criminal field, they may not, however desirable, be obtained in federal court at the expense of due process. Since these were, they cannot stand.

"Those concurring in this opinion would decree relief as suggested above. As the court's per curiam statement indicates, however, we are in full accord that at least the relief directed by Judge Rubin's opinion should be granted the FOP. We therefore concur in the result mandated by his opinion, although we would have granted broader relief, and dissent from the failure of the court to do so." *Miami*, at 453. Emphasis added.

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

In *Miami*, the majority did approve the subject consent decree, but only to the extent that

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

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

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

Clearly, a consent decree does not bind nonconsenting third parties. Where, as here, a party is potentially prejudiced by a decree, he has a right to a judicial determination of the merits of his objection. It is absolutely clear, that a nonconsenting party may not be subjected to a

permanent injunction without a trial on the merits of his case.

All of the issues set forth above by the Navajo Nation and the United, have been previously meticulously litigated and decided by the Court pursuant to the Order re Legal Standards. Here, the Navajo Nation and United States simply ignore the previous orders of this Court, just as they ignore every other authority that does not support their positions.

IV. The State has no jurisdiction to enter into water rights settlements, so the Navajo Settlement is void.

It should be noted that (above) the Navajo Nation and United States point out that:

> "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."

In that regard, it should be considered that in *Carangelo v. ABCWUA*, Case No. 26,575 (NM Ct. App.) (November 28, 2011), the Court reiterated the following principles:

1) "Subject matter jurisdiction may confer the power and authority to act within a permissible scope as delineated by statute . . .'[a]dministrative bodies are creatures of statute and can act only on those matters which are within the scope of authority delegated to them' *Carangelo*, ¶ 25, p. 14;

2) "[S]tatutes limit the OSE's power to act on certain matters." *Carangelo*, p. 9; and

3) "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. . . . . Thus, for an application to fall within the general category of those the OSE has jurisdiction to consider, the application must be of a form and substance that comports

with the Water Code's predicate requirements for the OSE to act. " *Carangelo*, ¶ 16, p. 10.

In sum, the Navajo Nation and United States point out that there is no statutory authority, or even Court based authority, for the approval of water rights settlements in New Mexico. Accordingly, pursuant to *Carangelo*, the OSE has no jurisdiction whatsoever to enter into such settlement agreements. In fact, there is no authority, and thus no jurisdiction, for any other official or representative of the State of New Mexico to enter into such water right settlements.

In the absence of jurisdiction, any act taken is void. In *SEC v. Ross*, 504 F.3d 1130 (9th Cir. 2007), (regarding the Court's lack of jurisdiction in the absence of proper service of process - which also happens to be an issue in the present matter) the Court stated:

> "'[S]ervice of process is the *mechanism* by which the court [actually] acquires' the power to enforce a judgment against the defendant's person or property. *United States v. 2,164 Watches, More or Less Bearing a Registered Trademark of Guess?, Inc.*, 366 F.3d 767, 771 (9th Cir.2004) (emphasis added). In other words, service of process is the means by which a court asserts its jurisdiction over the person. *See Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir.1986) ('A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with FED. R. CIV. P. 4.'); FED. R. CIV. P. 4(k) (stating that '[s]ervice of a summons or filing a waiver of service is effective to establish jurisdiction over the person of a defendant'). Service of process has its own due process component, and must be 'notice reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950).
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> "Without a proper basis for jurisdiction, or in the absence of proper service of process, the district court has no power to render any judgment against the defendant's person or property unless the defendant has consented to jurisdiction or waived the lack of process. *Mason v. Genisco Tech. Corp.*, 960 F.2d 849, 851 (9th Cir.1992); *see also Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987). . . . A judgment entered without jurisdiction over the defendant is void." *SEC*, at 1138-39 Emphasis added.

V. Public Law 87-483 did not supersede the Reclamation Act of 1902 with respect to the general deference afforded state water law by the Reclamation Act.

Pursuant to Section III (A) of the NN & US Response to Motions for Sum Judgment, the Navajo Nation and United States generally argue that the general deference afforded state water

law by the Reclamation Act has been superseded by the 1962 Act and other reclamation laws. (Pursuant to Horner's Motion re Federal Law, Permits and Contracts, I have previously addressed most of the Navajo Nation and United States' arguments presented in this section. Therefore, here I only address any issue I have not previously addressed, or emphasize my previously made arguments as necessary.)

The Navajo Nation and United States specifically argue that:

> "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 <u>to the use of which the United States is entitled</u> under these projects except under contract satisfactory to the Secretary and conforming to the provisions of this Act.
>
> 1962 Act, § 11." NN & US Response to Motions for Sum Judgment, pp. 10-11. Emphasis added.

Accordingly, the Navajo Nation and United States specifically argue that said § 11 of Public Law 87-483 was intended to supersede the Reclamation Act's general provisions concerning the applicability of state law. Further, the Navajo Nation and United States imply, or at least encourage the Court to infer, without specifically stating, that pursuant to said § 11, the United States now owns outright all of the water of the San Juan Basin, and that the United States is now free to do whatever it wishes with any, or all, of such water. That is, the Navajo Nation and United States imply, or at least encourage the Court to infer, without specifically stating, that pursuant to said § 11, the United States may now: allocate "its" water to anyone it chooses with no regard to state law; may reoperate Navajo Dam such that most of "its" stored water is moved to the Lower Colorado River Basin for use therein; and/or completely disregard the senior water rights of others that were acquired under state law, or even previously

adjudicated by the Court. After all, according to the United States, said § 11 provides that "No person shall have or be entitled to have the use for any purpose . . . water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir . . . except under contract satisfactory to the Secretary . . . ." (Then, the United States would probably argue that pursuant to OSE File No. 3215, the United States has also acquired the right to all of the water "below" Navajo Reservoir.)

In reality, said § 11 does not say, or do, any of those things. In fact, nothing in Public Law 87-483 says that it preempts state law, and nothing in said law even (as specifically stated by the Navajo Nation and the United States above) says that it "supersedes the Reclamation Act's general provisions concerning the applicability of state law".

It should be noted that said § 11 is also qualified by the phrase "to the use of which the United States is entitled". In fact, the United States, as the owner of the project facilities, is "entitled" to make contracts for the storage and delivery of the water associated with such facilities, and is "entitled" to charge those using such facilities a proportionate share of the costs incurred by the United States associated therewith.

To any extent that Public Law 87-483 could be construed to say or do any of the things alleged, or implied, by the Navajo Nation and the United States, said Public Law 87-483 was itself superseded by Public Law 88-140 (77 Stat. 249). Public Law 87-483 (76 Stat. 96), was enacted on June 13, 1962. However, on October 16, 1963, Congress passed Pub. L. 88-140 (77 Stat. 249), making it clear that Congress intended that state and local interests were to be provided with only <u>storage space</u> in such projects. The purpose of said Act was declared to be "An act defining the interest of local public agencies in water reservoirs constructed by the

Government which have been financed partially by such agencies." Said Pub. L. 88-140 has been codified at 43 U.S.C. § 390c. - f. 43 U.S.C. § 390c. [**Water reservoirs; interest of States and local agencies in storage space**] provides:

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

Further, apparently in recognition of the confusion that may have existed as to what rights were actually being acquired by such state and local interests in such federal projects, pursuant to said Public Law 88-140, Congress specifically authorized the revision of any existing leases and agreements to evidence that only storage space was provided pursuant to such leases and agreements. In that regard, 43 U.S.C. § 390f. [**Revision of leases or agreements to evidence conversion of rights to use of storage rights**] specifically provides:

> "Upon application of any affected local interest its existing lease or agreement with the Government will be revised to evidence the conversion of its rights to the use of the storage as prescribed in sections 390c to 390f of this title." [TITLE 43 - PUBLIC LANDS; CHAPTER 12 - RECLAMATION AND IRRIGATION OF LANDS BY FEDERAL GOVERNMENT; SUBCHAPTER I - GENERAL PROVISIONS; Sec. 390f. Revision of leases or agreements to evidence conversion of rights to use of storage rights; SOURCE- (Pub. L. 88-140, Sec. 4, Oct. 16, 1963, 77 Stat. 250.)] Emphasis added.

In that regard, Congress itself has made clear that with respect to federal water projects, the U.S. is only providing storage and delivery facilities, the U.S. is not acquiring and allocating water rights or the right to use water to contractors.

Therefore, it is absolutely clear that the Navajo Nation never acquired any form of water right from the United States, pursuant to the Public Law 87-483 or the subject NIIP contract, basically because the United States itself never acquired any right to the subject water, except for

the right to store and deliver such water. The only right acquired by the Navajo Nation pursuant to Public Law 87-483 or said Contract was the right to storage space in the particular reservoirs and structures, and perhaps the right to use a certain portion of the capacity of the subject delivery facilities. Any water right with respect to the subject water must be acquired by the Navajo Nation pursuant to New Mexico law (appropriation). In fact, the Settling Parties clearly understand this concept, and that is precisely what they are attempting to accomplish in this adjudication suit pursuant to the present *inter se* proceeding.

Therefore, while Pub. L. 87-483 authorized the construction of the NIIP Project; § 11 of said Pub. L. 87-483 simply cannot stand, which provides that:

> "No person shall have . . . the use for any purpose . . . of water stored in Navajo Reservoir or of any other waters . . . originating above Navajo Reservoir . . . except under contract . . . ." with the United States.

That is, in spite of any of the Settling Parties assertions to the contrary, the United States did not acquire the right to all of the unused water supply available in the San Juan Basin in New Mexico pursuant to § 11 of Public Law 87-483; and more specifically, the Navajo Nation's water rights for NIIP were not defined or established pursuant to § 2 of Public Law 87-483.

Further, as set forth in considerably greater detail pursuant to Horner's Brief re Federal Law, Permits and Contracts, the United States Supreme Court in *California v. United States*, 438 U.S. 645, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978), made absolutely clear that: neither the water, nor the water rights associated with a federal reclamation project ever become vested in the United States; the appropriation of water, for federal water projects under the Reclamation Act of 1902, was made not for the use of the federal government, but, for the use of the land owners; the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works; and the federal government was and remained simply a

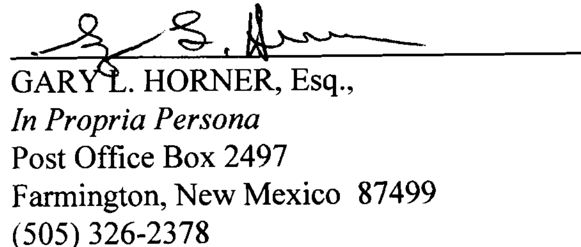
carrier and distributor of the water, with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.

The *California* Court specifically noted that:

> **"federal legislation could not 'override state laws in respect to the general subject of reclamation.' '[E]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters."** *California*, 438 U.S. 663, 98 S.Ct. 2995. Emphasis added. Citations omitted.

You cannot get much more clear than that.

Respectfully, submitted by:



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May 24, 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 24th 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 __24th__ day of May, 2013.

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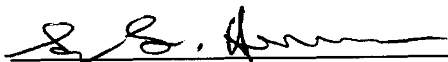

GARY L. HORNER