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 UTE MOUNTAIN UTE TRIBE'S ANSWER BRIEF OPPOSING NON-SETTLING PARTIES' DISPOSITIVE MOTIONS

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 UTE MOUNTAIN UTE TRIBE'S ANSWER BRIEF OPPOSING NON-SETTLING PARTIES' DISPOSITIVE MOTIONS.**

3. Descriptive summary of the relief sought: **This document represents Mr. Horner's reply to the UTE MOUNTAIN UTE TRIBE'S ANSWER BRIEF OPPOSING NON-SETTLING PARTIES' DISPOSITIVE MOTIONS.**

4: Number of pages of the present document: **24 (including 3 pages of Exhibits)**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), and respectfully replies to the UTE MOUNTAIN UTE TRIBE'S ANSWER BRIEF OPPOSING NON-SETTLING PARTIES' DISPOSITIVE MOTIONS, which was filed in the present matter on May 9, 2013 ("UMUT Response to Dispositive Motions").

As and for good cause for said Reply I state:

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I. Introduction.

I do not intend to minimize the efforts that the Ute Mountain Ute Tribe ("UMUT") has made pursuant to the UMUT Response to Dispositive Motions. It appears that the UMUT has put significant effort into said Response. However, most of the arguments presented pursuant to the UMUT Response to Dispositive Motions, have already been addressed pursuant to my other recent filings in the present matter. Therefore, due to a lack of time, please refer to:

1) 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") (Horner's Motion re Reserved Rights is hereby incorporated herein by reference), 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 also filed in the present matter on November 8, 2012 ("Horner's Brief re Reserved Rights") (Horner's Brief re Reserved Rights is hereby incorporated herein by reference);

2) 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, which was filed in the present matter on April 15, 2013 ("Horner's Motion re Federal Law, Permits and Contracts") (Horner's Motion re Federal Law, Permits and Contracts is hereby incorporated herein by reference), and GARY L. HORNER'S BRIEF IN SUPPORT OF 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, which was also filed in the present matter on April 15, 2013 ("Horner's Brief re Federal Law, Permits and Contracts") (Horner's Brief re Federal Law, Permits and Contracts is hereby incorporated herein by reference);

3) 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, which was filed in the present matter on April 15, 2013 ("Horner's Motion for Summary Judgment") (Horner's Motion for Summary Judgment is hereby incorporated herein by reference), and GARY L. HORNER'S MEMORANDUM IN SUPPORT OF 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, which was also filed in the present matter on April 15, 2013 ("Horner's Memo re Summary Judgment") (Horner's Memo re Summary Judgment is hereby incorporated herein by reference);

4) GARY L. HORNER'S RESPONSE TO THE STATE OF NEW MEXICO'S MEMORANDUM IN SUPPORT OF SETTLEMENT MOTION FOR ENTRY OF PARTIAL FINAL DECREES, which was filed in the present matter on May 10, 2013 ("Horner's Response to State's Memo re Settlement Motion") (Horner's Response to State's Memo re Settlement Motion is hereby incorporated herein by reference);

5) GARY L. HORNER'S RESPONSE TO THE JOINT MEMORANDUM OF THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT OF THE SETTLEMENT

MOTION, which was filed in the present matter on May 10, 2013 ("Horner's Response to NN & US Memo re Settlement Motion") (Horner's Response to NN & US Memo re Settlement Motion is hereby incorporated herein by reference);

6) GARY L. HORNER'S REPLY TO THE STATE'S CONSOLIDATED RESPONSE TO MOTIONS FILED BY COMMUNITY DITCH DEFENDANTS, GARY L. HORNER, ROBERT E. OXFORD AND DEFENDANTS B SQUARE RANCH, LLC ET AL ON APRIL 15, 2013, which is being filed concurrently herewith ("Horner's Reply to State's Response 4/15/2013 Motions") ("Horner's Reply to State's Response 4/15/2013 Motions is hereby incorporated herein by reference);

7) GARY L. HORNER'S REPLY TO THE RESPONSE OF THE NAVAJO NATION AND UNITED STATES IN OPPOSITION TO THE SUMMARY JUDGMENT MOTIONS OF OBJECTORS, which is being filed concurrently herewith ("Horner's Reply to NN & US Response re Sum Judgment") ("Horner's Reply to NN & US Response re Sum Judgment is hereby incorporated herein by reference); and

8) GARY L. HORNER'S REPLY TO THE UNITED STATES' RESPONSE TO MOTIONS SEEKING TO INVALIDATE BUREAU OF RECLAMATION WATER RIGHTS, which is being filed concurrently herewith ("Horner's Reply to US Response re US Water Rights") ("Horner's Reply to US Response re US Water Rights is hereby incorporated herein by reference).

However, there are a few points made by UMUT that need to be addressed here.

II. The UMUT wants to avoid completely the consideration of the law with respect to federal reserved water rights for Indian Tribes, and the underlying legal and factual bases

for the Navajo Settlement and Proposed Decrees.

At Section II of the UMUT Brief re Dispositive Motions, the UMUT argues that:

"The *Winters* Doctrine is Based on Long-Established Law that Provides a Coherent, Fair, and Workable Framework for Approving Settlements Establishing Indian Water Rights."

Specifically, the UMUT argues that:

"If granted, the Non-Settling Parties' Dispositive Motions would lead to the wholesale rejection of binding United States Supreme Court precedent and subsequent judicial authority that has provided a sound and workable legal basis for the resolution of Indian water rights claims for more than a century.

"A. Federal Substantive Law Controls the Determination of Federal Reserved Water Rights for Tribes

"In his Dispositive Motions, Mr. Horner argues, among other things, that 'trying to determine the water rights of Indian tribes based upon some sort of concept of federal reserved water rights is a complete disaster' and that this Court should determine the Navajo Nation's water rights under state law (based upon a hydrographic survey of existing uses). Mem. in Supp. of Horner Mot. App. Leg. Std. 25; Mem. in Supp. of Horner Mot. Summ. J. 134. *See also* Oxford Mot. Summ, J. 3-4 (suggesting that water rights decreed to the Hogback-Cudei Irrigation Project have been lost under New Mexico state law for non-use). The simple rejoinder to this argument is that both the United States Supreme Court and the New Mexico Court of Appeals have ruled that federal law (and not state law) controls the determination of federal Indian reserved rights to water. *See, e.g., Arizona v. San Carlos Apache Tribe,* 463 U.S. 545, 571 (1983) ('State courts, as much as federal courts, have a solemn obligation to follow federal law. Moreover, 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.'); *State ex Rel. Martinez v. Lewis,* 116 N.M. 194, 203, 861 P.2d 235, 244 (Ct. App. 1993) *('Lewis').*

"Accordingly, this Court must reject all Non-Settling Parties' arguments that urge the Court to require the Navajo Nation to perfect its water rights using state law.

"B. The *Winters* Doctrine is Settled Law, and Does Not Support the Non-Settling Parties' Legal Arguments

"Several of the Non-Settling Parties' Dispositive Briefs urge this Court to develop new and highly restrictive legal standards for establishing and quantifying federal reserved Indian water rights claims. *See, e.g.,* CDD Per Capita Mot. Summ. J. (arguing for this Court to adopt a new quantification analysis based on the per capita water use of Navajo tribal members on the Navajo reservation in New Mexico); Mem. in Supp. of Horner Mot. App. Leg. Std. 36 (arguing for this Court to quantify federal reserved rights using a state-based, hydrographic survey analysis); *id.* at 54 (asking this Court to adopt a narrow 'minimal needs' standard that does not include rights for future uses). However, it is well established under United States Supreme Court and a large body of state and federal case law that, under the *Winters* doctrine, Tribes have federal reserved water rights to fulfill the purposes for which their reservations were established. *See, e.g., Winters v. United States,* 207 U.S. 564 (1908); *New Mexico ex rel. State Engineer v. Commissioner of Public Lands,* 2009-NMCA-004, ¶ 14, 145 N.M. 433, 200 P.3d 86 *('Commissioner of Public Lands')* (describing the *Winters* doctrine).

"State and federal courts tasked with quantifying federal reserved water rights of Tribes have adopted varying standards for quantifying such rights. *Compare Arizona v. California,* 373 U.S. 546, 601 (1963) *overruled on other grounds by California v. United States,* 438 U.S. 645 (1978) (applying a practicably irrigated acreage standard), *with Colville Confederated Tribes v. Walton,* 647 F.2d 42, 47-8 (9th Cir. 1981) (applying a practicably irrigated acreage standard, but also providing water to maintain a fishery resource to ensure that the federal reserved water right provided maintained a permanent homeland for the Colville Confederated Tribes). *See also Commissioner of Public Lands,* 2009-NMCA-004, 13 (citing *United States v. Washington,* 375 F. Supp. 2d 1050, 1066 (W.D. Wash. 2005) to note that the quantity of

water impliedly reserved in an Indian reservation under a treaty was 'a factual issue to be determined at trial'). Although the exact method of quantification can vary according to facts developed at trial for each Tribe, both state and federal courts have consistently quantified water rights sufficient to fulfill the purposes of the Indian reservation, including the present and future needs of the Indian Reservation. *See, e.g., Arizona v. California,* 373 U.S. at 600; *In re Gila River Sys. & Source,* 35 P.3d 68, 72-3 (Ariz. 2001); *Colville Confederated Tribes v. Walton,* 647 F.2d at 47-8.

"Neither the Community Ditch Defendants' 'per capita' quantification argument nor Horner's arguments against allocating Tribes water for future use has any support in the law implementing the *Winters* doctrine. *See id.; see also Arizona v. California,* 373 U.S. at 600-1 (rejecting a non-Tribal attempt to assert a population-based quantification method); *In re Gila River Sys. & Source,* 35 P.3d at 80 (allowing for the 'use [of] population evidence in conjunction with other factors in quantifying a tribe's *Winters* rights,' but explicitly prohibiting the use of population data as the only factor in a quantification analysis).

"Accordingly, this Court should reject the Non-Settling Parties' crabbed interpretation of the applicable law. The Settlement Agreement, which enables parties in this case to avoid the risks of litigating these issues, is fully consistent with the law applicable to federal Indian reserved water rights claims.

"C. Well-Established Federal Law Provides a Fair Standard for Quantifying Indian Water Rights

"Several of the Settling Parties' Dispositive Briefs misapply this Court's legal standard for evaluating the 'fairness' of the Settlement Agreement and urge this Court to evaluate the 'fairness' of the underlying body of law—along with New Mexico's prior appropriation water system—that allows Indians to exercise their senior priority water rights without perfecting such rights by beneficial use. *See* Oxford Mot. Summ. 3. 3; Mem. in Supp. of Horner Mot. Summ. 3. 133-34; Mem. in Supp. of Horner Mot. App. Leg. Std. 36. In doing so, the Non-Settling Parties rely on a policy argument for disregarding the *Winters* doctrine, the validity of property rights predicated on federal law, and the State of New Mexico's administration of water rights by priority date.

"Because the *Winters* doctrine has been implemented by federal statutes and affirmed by the United States Supreme Court, along with numerous state and federal court cases, there is no need for this Court to address the Settling Parties' arguments against approving a settlement agreement that establishes a fair and orderly process for administering water rights by priority date. To the extent that this Court finds the fairness of the law relevant to the approval determination, the UMUT urges this Court to consider that all three Tribes participating in the San Juan River General Stream Adjudication share the historic deprivation of the ability to use aboriginal water and land resources, non-Indian development of water resources previously used by Tribal people, and unequal access to the benefits of federal development of storage and infrastructure projects. All three Tribes sought to address this history of land and water development policies through water settlements that provide the water necessary for the Tribes to survive and develop their economies, while at the same time providing some protection to existing non-Indian water uses. *See* Settlement Agreement and Proposed Decrees; Jicarilla Apache Tribe Water Rights Settlement Act, Pub. Law. No. 102-441, 106 Stat. 2237 (1992); Colorado Ute Indian Water Rights Settlement Act of 1988, Pub. Law. No. 100-585, 102 Stat. 2973 (1988) (as amended) (approving the UMUT's water rights settlement within the State of Colorado)." UMUT Brief re Dispositive Motions, pp. 7-12. Footnotes omitted.

A. It is critical for the Court to determine in the present matter just what is the applicable legal standard with respect to the determination of federal reserved water rights.

Pursuant to Horner's Motion re Reserved Rights, I seek a determination of the legal standard for the determination of federal reserved water rights for Indian Tribes. The UMUT

Brief re Dispositive Motions underscores the need for such a determination. As indicated above, the UMUT repeatedly asserts that the *Winters'* Doctrine is settled law, and that not only is there no need for the determination of a standard regarding federal reserved rights, but that this Court should not undertake such a determination.

Nowhere does the UMUT describe how federal reserved water rights should be determined. In fact, the UMUT in essence shows how each court is left to its own devices in each case to decide how federal reserved water rights should be determined. This is the problem with the concept of federal reserved rights.

Ultimately, the UMUT argues that water rights for Indian Tribes should be determined by settlement, wherein the issue of federal reserved rights for each Indian Tribe should be negotiated. Then, the UMUT argues that the Court should avoid adjudicating the underlying legal and factual basis of the settlements. It sounds like a good deal for the Indian Tribes, but, not such a good deal for other water users.

Pursuant to Horner's Motion re Federal Reserved Rights, I have shown what the law actually is regarding federal reserved rights. However, the UMUT unwittingly describes hoe in every case, the Indians want to ignore such law, and negotiate their way to a better deal. Therefore, it is critical for the Court to determine in the present matter just what is the applicable legal standard with respect to the determination of federal reserved water rights.

B. The Court must consider the underlying legal and factual bases for the Navajo Settlement and Proposed Decrees.

The UMUT argues strenuously and repeatedly that the Court should avoid adjudicating the underlying legal and factual bases for the Navajo Settlement and Proposed Decrees. In fact,

the reason that the UMUT (and the Settling Parties) want to avoid the consideration of the underlying legal and factual bases for the Navajo Settlement is that there is no legitimate underlying legal and factual bases for the Navajo Settlement.

The entire concept of the subject expedited *inter se* proceeding is that the Proposed Decrees would bind every other water user in the Basin. 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.
>
> "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. 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." *Miami*, at 442.

* * *

"A party potentially prejudiced by a decree has a right to a judicial determination of the merits of his objection. . . . Those who seek affirmative remedial goals that would adversely affect other parties must demonstrate the propriety of such relief." *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: a nonconsenting party may not be subjected to a permanent injunction without a trial on the merits of his case.[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.

"FN1. 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

* * *

"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.

"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, 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.[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.

"FN8. 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.

The standard for approving the Navajo Settlement and Proposed Decrees have previously

been meticulously litigated in the present matter over a period of more than two and one-half years. Pursuant to the AMENDED ORDER ESTABLISHING THE LEGAL STANDARDS FOR EVALUATING THE PROPOSED DECREES AND RESPECTIVE BURDENS OF PROOF, entered in the present matter on April 19, 2012 ("Order re Legal Standards"), the Court has already 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.

Therefore, the Court has already determined that the Navajo Settlement and Proposed Decrees: must be consistent with the public interest and the applicable law; must reduce or eliminate impacts on other water users; and must provide for less than the potential claims that secured at trial. That means that the Settling Parties must prove that the Navajo Nation is "entitled" to the water rights of the Navajo Settlement and Proposed Decrees. Accordingly, the Court must consider the underlying legal and factual bases for the Navajo Settlement and Proposed Decrees.

C. The only argument for awarding water rights for future uses to Indian Tribes,

is that they cannot ever obtain any additional water rights; but, there is no legitimate basis for such argument.

As indicated above, the UMUT argues that pursuant to the *Winters'* Doctrine, Indian Tribes are entitled to water rights for future uses. Such argument appears to be the primary argument Indian Tribes use in their water rights negotiating sessions, and how they are able to parlay weak positions into very good deals. However, pursuant to Horner's Motion re Reserved Rights, I have demonstrated that, in fact, federal reserved water rights do not include water rights for future uses.

In a Solicitor's Opinion, dated May 12, 1925, regarding the "Extent of Indian Water Rights" for the Blackfeet Tribe, the Solicitor considered the issue of water rights for the future uses of said Tribe. (A copy of said Opinion is attached hereto as Exhibit 1.) The Solicitor could find no authority for water rights for future uses, but noted that water rights for future uses would be consistent with *Winters*. The interesting part of said opinion, is the last paragraph which states:

> "If the amount of water to be allowed to these Indians now could be hereafter increased from time to time as their ability to use it grew larger, there might be force in the contention that the 40,000 acres should be left out of the present consideration, but both their present and their prospective needs must be protected by the agreement, because it is evident that Congress intended that the agreement should be a final determination of the entire rights of the Indians and that therefore there could be no future adjustments notwithstanding the fact that changed conditions may hereafter call loudly for the use of additional water by the Indians. In conclusion I am constrained to inform you that in my opinion the amount of water set apart for the Indians should be such as would reasonably enable them either now or hereafter to reclaim and successfully to cultivate the entire irrigable area of their lands."

Accordingly, probably the most significant argument for water rights for the future needs of Indian Tribes is that the determination of their water rights is a final determination of such rights for all time. That is, after such determination, the water rights of the Indian Tribe can never be increased, therefore, they need sufficient water rights to satisfy all of their future needs.

However, the problem with such reasoning is glaringly apparent. That is, there is simply

no reason why a determination of Indian water rights should ever preclude their acquisition of additional water rights in the future, as their needs may require. In fact, in the present case, the Navajo Settlement and Proposed Decrees not only do not preclude the acquisition of additional water rights for the Navajo Nation, but the Navajo Settlement and Proposed Decrees specifically call for the acquisition of additional water rights for the Navajo Nation.

If the Indians were considered to be just like anyone else, they could acquire the water rights they need for their current needs in a water rights adjudication suit, just like anyone else. Then, as their water needs increase in the future, they could acquire additional water rights to meet their increased needs, just like anyone else. If that were to be the case, the Indians' water rights could be acquired and adjudicated under state beneficial use and prior appropriation laws, just like anyone else. The whole problem of reserved water rights for Indian Tribes would just go away.

In the present matter, the Navajo Nation is already far and away the largest water user in the Basin. There simply is no legitimate basis for awarding to the Navajo Nation water rights of more than 600,000 af/y, 400,000 af/y of water above their current uses, when they cannot show any reasonably foreseeable use for such additional water other than to sell it to others (and then to require other existing water users to buy water from the Navajo Nation in order to continue to use any of their existing water rights.)

D. The Navajo Settlement and Proposed Decrees violate the equal protection clauses of the United States and New Mexico Constitutions.

The UMUT's arguments above point out an additional problematic issue. Specifically, the UMUT argues (above) that:

> "all three Tribes participating in the San Juan River General Stream Adjudication share the historic deprivation of the ability to use aboriginal water and land resources, non-Indian development of water resources previously used by Tribal people, and unequal access to the benefits of federal development of storage and infrastructure projects. All three Tribes sought to address this history of land and water development policies through water settlements that provide the water necessary for the Tribes to survive and develop their economies, while at the same time providing some protection to existing non-Indian water uses."

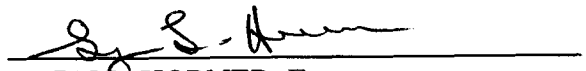
First, not only is such argument vitriolic, but, it is getting really old and annoying. The UMUT specifically argues that non-Indians are using the water resources previously used by the Indians. That is complete nonsense. However, such and similar arguments appear to have worked well for the Indians throughout history, and appear to be their trump card (the "Race Card") in all negotiations. Then, the UMUT argues that Indians have "unequal access to the benefits of federal development of storage and infrastructure projects." More nonsense. The Navajo Nation is far and away the largest beneficiary of federal storage and infrastructure projects in the Basin, perhaps in the State - and the Navajo Nation got it all for free.

The issue the UMUT raises is disparate treatment of a class (Indians). That hints at an alleged violation of the equal protection clauses of the United States and New Mexico Constitutions. In reality, the disparate treatment, or the violation of the equal protection clauses of both Constitutions, is the award to the Navajo Nation, pursuant to the Navajo Settlement and Proposed Decrees, of as much as 400,000 af/y more water rights than the Navajo Nation has ever used before, when they cannot show any reasonably foreseeable use for such additional water other than to sell it to others (and then to require other existing water users to buy water from the Navajo Nation in order to continue to use any of their existing water rights.)

III. Conclusion.

Someone needs to straighten out this mess.

Respectfully, submitted by:



May 24, 2013
Date

GARY E. HORNER, Esq.,
In Propria Persona
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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 E. HORNER

Exhibit 1

Attached to:

GARY L. HORNER'S REPLY TO THE UTE MOUNTAIN UTE TRIBE'S ANSWER BRIEF OPPOSING NON-SETTLING PARTIES' DISPOSITIVE MOTIONS

Filed May 24, 2013

EXTENT OF INDIAN WATER RIGHTS

M–15849 *May 12, 1925.*

The Honorable,
The Secretary of the Interior.

MY DEAR MR. SECRETARY:

The question submitted for my opinion thereon, at the instance of the Commissioner of Indian Affairs, is as to the extent to which the right to use the waters of certain creeks should be asserted for the benefit of the Blackfeet Indians.

It appears that, independent of the State laws, these Indians collectively hold the dominant right to the use of so much of the waters of these creeks as would be reasonably necessary to the irrigation of the arid area of their lands, and that all the waters thereof not so needed are subject to appropriation by other persons under the laws of Montana. Appropriation of these waters is now being claimed by the Toole County and the Cut Bank irrigation districts.

For the purpose of effecting an amicable adjustment of the adverse claims thus arising, Congress passed the act of February 26, 1923 (42 Stat. 1289), which authorized the Secretary of the Interior to enter into an agreement with the districts "to fix the extent of the prior right of the Indians residing, and entitled to reside on the Blackfeet Indian Reservation, collectively, to the waters' mentioned.

The extent to which the Indians are entitled to this water, is, of course, to be controlled by the character and area of those parts of their lands on which it could be beneficially used for irrigation, and after the making and completion of the necessary investigations and estimates it was reported that that area, including scattered tracts, embraced 119,550 acres and would require an annual diversion of 284,300 acre-feet.

After a report of these estimates had received departmental approval, representatives of one of the districts mentioned questioned its correctness on the ground that the duty of water is placed too high, and for the further reason that the Indians are not now capable of profitably irrigating certain lands which embrace 40,000 acres, because of the character of the lands.

It was stated in the Indian Office letter requesting my opinion that:

> "The question, therefore, is whether or not the Act of February 26, 1923, permits of a construction of the nature contended for by the Toole County representatives, which is to the effect that only those lands should be included in the irrigable area which the Indians may irrigate or whether or not there should be included, as has been contended by this Bureau, all the lands actually susceptible of irrigation. The Toole County representatives take the position that this 40,000 acres may be feasible of irrigation by a white man but that the Indians are not educated to the point where they will irrigate same. The position assumed by the Bureau is that the Act contemplated the fixing for all times the ultimate irrigation needs of the Indians".

I fail to find anything in the statute mentioned which furnishes an answer to the question submitted. While that act recognizes the prior right of the Indians, it makes no reference whatever to the extent of that right. The prior right of these Indians to the use of this water was not conferred but merely recognized by that act. That right had its origin in the treaty ratified by the act of May 1, 1888 (25 Stat. 113), under which the Blackfeet Indians and Indians on other similar reservations acquired the right to lands themselves. The lands now held by the Indians under that treaty were formerly a part of a very much larger area which they had the right to occupy, an area far in excess of their needs, which was reduced by the treaty mentioned. The act ratifying the treaty provided for the allotment of lands in the reduced area in severalty to individual Indians in order to help them, as they declared in the treaty, "to obtain the means to enable them to become self-supporting as a pastoral and agricultural people, and to educate their children in the paths of civilization".

The courts have twice interpreted that act of 1888 and the treaty in so far as they concern the rights of the Indians to the use of water, once in *Mintern* v. *United States* (207 U.S. 564), and again in *Conrad Investment Company* v. *United States* (161 Fed. 829). In each of these cases it was held that inasmuch as the treaty was entered into before the admission of the Territory of Montana into the Union, Congress had the power to reserve, and did reserve the waters in this and a similar reservation for the use of the Indians for irrigation purposes, and thus exempted such waters from the operation of the State laws later enacted to control the appropriation of waters.

In the Conrad case the court made a declaration which is helpful in the present consideration when it said:

> "What amount of water will be required for these purposes may not be determined with absolute accuracy at this time; but the policy of

Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs, 1917-1974, vol. I, pp. 143-144.

the government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the Winters Case."

It was natural and entirely reasonable that the court should hold that the prospective needs of the Indians as well as their present needs should control in determining the amount of water to which the Indians were entitled. Congress recognizes the fact that the needs for water by those untutored aborigines who were then inclined and desired to change themselves into "a pastoral and agricultural people" would grow larger as time went on and they developed and took on greater ability as agriculturalists; and it will not do now to say that they are not entitled to water for the irrigation of the 40,000 acres referred to because they have not yet reached the point in their development where they can use that water as profitably as a white man could use it.

If the amount of water to be allowed to these Indians now could be hereafter increased from time to time as their ability to use it grew larger, there might be force in the contention that the 40,000 acres should be left out of the present consideration, but both their present and their prospective needs must be protected by the agreement, because it is evident that Congress intended that the agreement should be a final determination of the entire rights of the Indians and that therefore there could be no future adjustments notwithstanding the fact that changed conditions may hereafter call loudly for the use of additional water by the Indians.

In conclusion I am constrained to inform you that in my opinion the amount of water set apart for the Indians should be such as would reasonably enable them either now or hereafter to reclaim and successfully to cultivate the entire irrigable area of their lands.

C. EDWARD WRIGHT,
Acting Solicitor.

Approved: May 12, 1925.
JOHN H. EDWARDS, *Assistant Secretary.*