**IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

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

Plaintiff-Appellee,

v.

Ct. App. No. 33535
See also
Nos. 33437, 33439, 33534
San Juan County
D-1116-CV-1975-00184, AB-07-1

THE UNITED STATES OF AMERICA,

Defendant-Appellee,

v.

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION; HAMMOND CONSERVANCY DISTRICT; BLOOMFIELD IRRIGATION DISTRICT; VARIOUS DITCHES AND VARIOUS MEMBERS THEREOF,

Defendant-Appellants,

v.

NAVAJO NATION,

Defendant-Intervenor-Appellee.

# ACEQUIAS' REPLY TO NAVAJO NATION AND UNITED STATES [Corrected Version]

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**Oral Argument Requested**

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## INTRODUCTORY NOTES

NOTE: To avoid repetition, the acequias have consolidated and organized their reply briefs to be read in the following order: (1) Navajo Nation and U.S.; (2) OSE; (3) San Juan Water Commission; (4) Ute Mountain Ute and Jicarilla Tribes; and (5) Gallup.
NOTE: Under each topic, the reply brief lists the corresponding numbered points in the BIC, with record citations showing that the issues were raised in the court below.
NOTE: Unless otherwise noted, all emphases are added and all statutory citations are to NMSA 1978.

## INTRODUCTION

All the parties to this appeal agree that federal law governs the quantification and award of implied reserve water rights to Indian tribes. The problem is that the lower court did not follow the law which the Supreme Court of the United States has established for quantifying Indian water rights. The lower court opted to reject those rules and adopt instead the amorphous criteria espoused by the Arizona Supreme Court in *In re General Adjudication [of the] Gila River*, 35 P.3d 68 (Ariz. 2001) (*"Gila V"*). **[RP 33754-58]**

*Gila V* is an aberration. It has been rejected by the federal courts, *see United States v. Washington*, 375 F. Supp. 2d 1050 (W.D. Wash. 2005). No other court has tried to use *Gila V* to quantify Indian water rights – until now.

In adopting *Gila V*, the lower court repudiated the practically irrigable acreage standard ("PIA") set by the U.S. Supreme Court in *Arizona v.*

*California*, 373 U.S. 545, 600-01 (1963), and reaffirmed at 460 U.S. 605, 615-28 (1983). During the summary judgment proceedings, the Navajo Nation and the United States admitted that the Navajo Indian Irrigation Project ("NIIP") is not PIA. **[RP 15291-22; 16947-56].** The court ignored this undisputed fact and awarded 506,000 acre-feet of water to NIIP anyway, in plain violation of *Arizona v. California*.

The lower court also rejected long established federal law requiring the beneficial use of water. **[RP 33803]** "**[B]eneficial use shall be the basis, the measure, and the limit of the right [to use water]".** Section 8 of the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388 (Jun. 17, 1902); *Winters v. United States*, 207 U.S. 564 (1908); and *Arizona v. California*.

The lower court refused to conform to the minimum needs doctrine which the Supreme Court established in *Cappaert v. United States*, 426 U.S. 128 (1976); *United States v. New Mexico*, 438 U.S. 696 (1978); *Mimbres Valley Irrigation Co. v. Salopek,* 1977-NMSC-039, 90 N.M. 410, 564 P.2d 615. **[RP 33782-83]**

The lower court felt strongly that *Gila V* is better than the approach taken by the United States Supreme Court. However,

> Lower court judges are certainly free to note their disagreement with a decision of this Court. But the "Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source."

*DIRECTV, Inc. v. Imburgia*, ___ U.S.___, 136 S. Ct. 463, 468 (2015).

New Mexico courts follow federal law in using the PIA standard to quantify reserved water rights for irrigation on Indian reservations. *State ex rel. Martinez v. Lewis*, 1993-NMCA-063, 116 N.M. 194, 861 P.2d 235 ("*Mescalero*"). However, the lower court jettisoned *Mescalero* when it decided to follow *Gila V* instead, because *Gila V* explicitly criticizes and rejects *Mescalero*. 38 P.3d at 78. The lower court had no authority to disregard *Mescalero* and other precedents from the New Mexico Supreme Court and Court of Appeals.

## STANDARD OF REVIEW

The lower court granted summary judgment against the acequias on all issues. Therefore this appeal is governed by the summary judgment standard, as the answer briefs concede. **[OSEAB 1]**; **[SJWCAB 4]**; **[NNAB 25]**. The lower court initially scheduled a trial for late August, 2013. **[RP 15412]**. On June 11 and 12, 2013, the court held a summary judgment hearing in which it heard argument by counsel, but no live witnesses. On July 12, 2013, the court

cancelled the trial, **[RP 177557]**, before the parties submitted their lists of witnesses and exhibits for trial. **[RP 15411]** The acequias were assembling exhibits and lining up witnesses to testify at trial, and preparing to cross-examine opposing witnesses, but that opportunity was taken away.

When the lower court has granted summary judgment, the appellate court does not review the evidence under the substantial evidence rule. Instead, it looks to see whether there were any disputed questions of facts. On appeal all factual inferences are resolved in favor of the parties against whom summary judgment was granted. *Gormley v. Coca-Cola Enterprises*, 2005-NMSC-003, ¶ 8, 137 N.M. 128, 109 P.3d 280; *Steiber v. Journal Publ'g Co.*, 1995-NMCA-068, ¶ 2, 120 N.M. 270. When there has been no trial, the substantial evidence standard does not apply, and the appellate court does not accept the appellees' version of disputed facts. In this appeal, factual questions are resolved in favor of the acequias.

Although the appellees give lip service to the summary judgment standard of review, they do not follow the rule in their answer briefs. Appellees recite their own view of the evidence, even though that evidence was disputed, not admissible, and never tested at trial. Summary judgment

proof must be admissible under the Rules of Evidence. *Zia Trust, Inc. v. Aragon*, 2011-NMCA-076, ¶ 13, 150 N.M. 354; Rule 1-056(E).

All the parties agree that the lower court's rulings of law are subject to *de novo* consideration on appeal.

*De novo* review is also required by the special provisions in N.M. Const. art. XVI, § 5 and NMSA 1978, § 72-7-1. These laws guarantee *de novo* review in water cases. These special provisions make clear that the State "Engineer's decision is entitled to no deference whatsoever." *Santa Fe Water Resource Alliance, LLC v. D'Antonio*, 2016-NMCA-035, ¶ 26. When the trial court denied the acequias a trial, the court deprived water owners of their constitutionally guaranteed right to *de novo* fact-finding. The constitutional guarantee encompasses any "decision, act or refusal to act of any state executive officer or body in matters relating to water rights". So Governor Richardson's action in signing the Richardson-Navajo agreement is subject to *de novo* fact-finding and review, as is the State Engineer's refusal to enforce existing state and federal water laws.

### A. The Navajo Nation and United States Are Asking This Court To Repudiate the PIA Standard and the Beneficial Use Requirement, contrary to *Arizona v. California*, 373 U.S. 546 (1963) and 460 U.S. 605 (1983), and other federal laws and cases.

[BIC POINTS 1,2,3,4,5; RAISED IN LOWER COURT RP 15291-322]

At the outset, it needs to be understood that the United States is not acting as a neutral and objective enforcer of federal law in this case. Instead, the United States is acting as an advocate and fiduciary for the Navajo Nation. *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). As advocates, the federal lawyers in this case have made whatever arguments they think will advance the interests of the Navajo Nation. They are asking this Court to depart from the federal and state law that governs water in the West, to increase the amount of water awarded to the Navajo Nation beyond the maximums allowed by *Winters*, *Arizona v. California*, *United States v. New Mexico,* and Section 8 of the Reclamation Act. This Court has no power to grant their wishes, because it is bound to obey the controlling authorities.

The Navajo Nation and the United States have seized upon this case as an opportunity to cast off the limitations imposed by the beneficial use requirement and the PIA (practicably irritable acreage) standard. They argue that beneficial use and PIA are rules that only apply under state law, but not under federal law.

That argument is plainly erroneous. PIA and beneficial use are bedrock rules of federal water law.

### 1. Any water awarded to an Indian tribe must meet the PIA and beneficial use requirements.

In *Winters*, the Supreme Court ruled that Congress impliedly reserved for Indians some water for beneficial use to irrigate lands along the Milk River. The *Winters* case remained largely dormant from 1908 until 1963, when the Supreme Court quantified and awarded water from the Colorado River system (of which the San Juan River is a part) for several Indian reservations in Arizona, California and Nevada. The Supreme Court reviewed prior appropriation and beneficial use under Western water law, the Colorado compacts, and the implied reservation of water for Indian tribes under *Winters*. **The Court defined "beneficial consumptive use" to mean "consumptive use measured by diversions less return flows, for a beneficial (nonwasteful) purpose."** *Arizona v. California*, 373 U.S. at 557 n.23.

The Supreme Court ruled that the amount of water reserved under *Winters* must be measured by the practicably irritable acreage on the reservations:

> How many Indians there will be [in the future] and what their future needs will be can only be guessed. **We have concluded, as did the Master, that the only feasible and fair way by which**

> **reserved water for the reservations can be measured is irrigable acreage**. The various acreages of irrigable land which the Master found to be on the different reservations we find to be reasonable.

373 U.S. at 600-01.

Advocates and commentators have criticized the PIA method from both sides, as too generous or not generous enugh. The Supreme Court has not been swayed. In 1983 the Court emphatically reaffirmed the PIA standard as "the only feasible and fair way by which reserved water for the reservations can be measured," *Arizona v. California*, 460 U.S. at 615-28. The Court explained once again, in greater detail, why PIA is the only standard for quantifying reserved water rights under *Winters*. The court stressed the certainty of the PIA standard, versus the guesswork inherent in other methods:

> The standard for quantifying the reserved water rights was also hotly contested by the States, who argued that the Master adapted a much too liberal measure. Our decision to rely upon the amount of practicably irrigable acreage contained within the Reservation constituted a rejection of Arizona's proposal that the quantity of water reserved should be measured by the Indian's "reasonably foreseeable needs," *i.e.,* by the number of Indians. **The practicably irrigable acreage standard was preferable because how many Indians there will be and what their future needs will be could "only be guessed," 373 U.S., at 601, 83 S. Ct., at 1498. By contrast, the irrigable acreage standard allowed a present water allocation that would be appropriate for future water needs.** 373 U.S., at 600-601, 83 S. Ct., at 1497-98. Therefore, with respect to the question of reserved rights for the Reservations, and the measurement of those rights, **the Indians, as represented by the United States, won what can be**

**described only as a complete victory**. A victory, it should be stressed, that was in part attributable to the Court's interest in a *fixed* calculation of future water needs.[italic emphasis in original]

* * *

**Certainty of rights is particularly important with respect to water rights in the Western United States. The development of that area of the United States would not have been possible without adequate water supplies in an otherwise water-scarce part of the country. *Colorado River Water Cons. District v. United States,* 424 U.S. 800, 804, 96 S. Ct. 1236, 1239, 47 L. Ed. 2d 483 (1976). The doctrine of prior appropriation, the prevailing law in the western states, is itself largely a product of the compelling need for certainty in the holding and use of water rights.**

Recalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case. A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to states of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system. **"In the arid parts of the West … claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams." *United States v. New Mexico,* 438 U.S. 696, 699, 98 S. Ct. 3012, 3013, 57 L. Ed. 2d 1052 (1978). If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *Id.,* at 705, 98 S. Ct., at 3016.**

* * *

We also fear that the urge to relitigate, once loosed, will not be easily cabined. The States have already indicated, if the issue were reopened, that the irrigable acreage standard itself should be

> reconsidered in light of our decisions in *United States v. New Mexico,* 438 U.S. 696, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978) and *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.,* 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979), and we are not persuaded that a defensible line can be drawn between the reasons for reopening this litigation advanced by the Tribes and the United States on the one hand and the States on the other.

460 U.S. at 617-25.

The United States Supreme Court has never changed its position that PIA is the sole method for quantifying Indian water rights. In 1988, the Supreme Court granted *certiorari* to review a decision of the Wyoming Supreme Court that used the PIA standard as the method to quantify Indian water rights, *In re General Adjudication [of the] Big Horn River System*, 753 P.2d 76, 100-01 (Wyo. 1988). An equally divided court affirmed the use of the PIA standard, *Wyoming v. United States*, 492 U.S. 406 (1989).

Therefore the PIA standard is binding on all federal and state courts as the only way to quantify reserved water rights for Indian reservations. The NNAB mischaracterizes the *Arizona v. California* decisions as holding that PIA is merely one way to quantify reserved rights, but the 1963 and 1983 decisions hold that PIA is the only way.

Inexplicably, the appellees managed to persuade the lower court to repudiate the PIA standard entirely. **[RP 33754-56]** Instead of following the

PIA standard as enunciated in *Arizona* and *Mescalero*, the lower court opted to adopt the approach espoused by the Arizona Supreme Court in *Gila V*, a decision which explicitly rejects both PIA and the *Mescalero* decision in particular.

The Navajo Nation and United States have been forced to ask this Court to repudiate the PIA standard because they admitted during the summary judgment proceedings that NIIP is not PIA. Their admission is fatal to their claim for 508,000 acre-feet for NIIP, because *Winters* and *Arizona* do not allow water rights to be awarded to a Indian tribe for an irrigation project which does not meet the PIA standard.

If litigants were free to debate whether PIA should be used to quantify all of the needs on an Indian reservation, they might debate the question, but that debate is irrelevant when it comes to awarding water for an irrigation project. *When it comes to irrigation projects, practicably irrigable acreage is the only possible standard*. If a project is not susceptible to sustained irrigation at reasonable cost, then the water is being wasted. This is why no case has ever held that water can be awarded for an irrigation project that fails the PIA test.

The Navajo Nation and United States were forced to admit that NIIP is not PIA because they were confronted by 50 years of actual experience. On

summary judgment, this admission is fatal because judicial precedent requires PIA.

NIIP is just another failed pork barrel project. Congress has refused to fund the completion of the project to 110,000 acres, **[RP 17757-58]**, but the Navajo still want the water to irrigate acreage that will never actually be irrigated.

If the inflated amount is awarded for NIIP, then the Navajo Nation will export that water to other states, because there is simply no way that 508,000 acre-feet of water can be put to beneficial use on the Navajo Reservation within New Mexico.

**Inexplicably, the lower court opinion never even mentions that the U.S. and the Navajo Nation admitted the undisputed fact that NIIP is not PIA.** This ultimate fact disposes of the Navajo water claim for NIIP, because the U.S. Supreme Court has prohibited the award of water for irrigation projects that fail the PIA test.

### 2. Ever since the Reclamation Act of 1902, federal statutes have prohibited the wasteful (non-beneficial) use of water, including the Colorado River Storage Act of 1956 and the NIIP Act of 1962.

The answer briefs argue that the beneficial use of water is only required by state law, not federal law. **[NNAB 5; OSEAB 12; JTAB 2]**

This argument is utterly fallacious, because beneficial use has been written into federal law since the Reclamation Act of 1902:

> Section 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right of the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and **beneficial use shall be the basis, the measure, and the limit of the right.**

32 Stat. at 390. *See California v. United States*, 438 U.S. 645, 663-70 (1978), discussed below, for the Supreme Court's explanation of the Reclamation Act and the meaning of section 8.

In many ways, the 1902 reclamation statute was ahead of its time; it recognized the conservation ethic and made it mandatory. In this way, the

statute is one of the very first conservation and environmental measures enacted by Congress.

To evade section 8, the Navajo Nation and the U.S. argue that it was impliedly repealed by passage of the bill authorizing the construction of NIIP. **[NNAB 45]**. However, section 8 remains in force, exactly as written above. The Colorado River Storage Act and the NIIP Act are implementations of the Reclamation Act, so they must comply with its substantive provisions.

To support their unprecedented contention that section 8 of the Reclamation Act is no longer operative, the U.S. and the Navajo Nation mis-cite *Morton v. Mancari*, 417 U.S. 535 (1974), three times. **[NNAB 40, 47, 50]** *Morton* actually refutes their argument, because *Morton* follows "the cardinal rule . . . that repeals by implication are not favored."

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.

417 U.S. at 551.

When Congress authorized the construction of reclamation projects like Navajo Dam and NIIP, it intended the projects to comply with the 1902 Act. If Congress had intended to exempt Navajo Dam and NIIP from the environmental requirements of section 8, it would have said so in the 1956 and

1962 statutes. When Congress exempts certain projects from earlier environment statutes, Congress writes an express exemption into the later statute. *See, e.g.*, 42 U.S.C. § 7412(i)(4) (provision for presidential exemption of federal buildings from the Clean Air Act); 42 U.S.C. § 5159 (certain FEMA actions exempted from National Environmental Policy Act).

There is also a problem of timing with the implied repealer argument, vis a vis the later case law from the Supreme Court. The Colorado River Storage Act was passed in 1956, and the NIIP act was passed in 1962. These acts could not have impliedly repealed the decisions of the Supreme Court which came later, like *Arizona v. California* in 1983.

### 3. The 1962 NIIP Act expressly states that it does not create any water rights.

[BIC POINT 5; RAISED IN LOWER COURT RP 16947-56]

The Navajo Nation and the U.S. assert that Congress created water rights for the Navajo Nation by passing the NIIP Act. This argument flies in the face of the statute itself. In section 13 of the NIIP Act, Congress expressly stated that it was not creating any water rights.

> **(c) No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by this Act**, . . .

Pub. L. 87-483, 76 Stat. 96, § 13(c) (Jun. 13, 1962) (*codified as* 43 U.S.C. § 615uu(c)).

Congress disclaimed any intention to create water rights because Congress understood that the Colorado River was already short of water to supply the demands of the 7 states that depend on it. It would have been foolhardy for Congress to try to create or grant new water rights in the basin, because that would have blown up the delicate water negotiations between the congressional delegations. Congress had no intention of creating reserved water rights for Indian tribes, because if the Colorado River is short of water, any water set aside for the Navajo Reservation would require a "gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators." *Arizona v. California*, 373 U.S. at 705; 460 U.S. at 620.

The NIIP Act is a public works construction bill, what is sometimes called a "pork barrel bill". It authorized water works, not water rights. It authorizes the construction of a water project, not the creation of water rights. As the Supreme Court said in *California v. United States*, 438 U.S. at 690:

> [Section 8 of the Reclamation Act] merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But **the**

**acquisition of water rights must not be confused with the operation of federal projects.**

So, what did Congress intend about water rights on the Navajo Reservation? Congress intended that water rights for the reservation would be acquired in the same manner as other water users: through prior appropriation and beneficial use, through use of existing water sources on the Reservation, or by purchase or lease. **"Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."** *United States v. New Mexico*, 438 U.S. at 700-01. If NIIP had qualified as PIA, and if it had put the water to beneficial use, then NIIP would have obtained water rights by prior appropriation and beneficial use.

Finally, the Navajo Nation and U.S. retreat to the fall back argument that NIIP must be somehow be entitled to 508,000 acre-feet of water because the project has already been [partly] built. There are several flaws in this argument.

- A non-beneficial use of water never creates a water right, no matter how long it continues. *State ex rel. Erickson v McLean*, 1957-NMSC-012, 62 N.M. 264, 308 P.2d 983; section 8 of the 1902 Act; *Arizona v. California* (consumptive use for beneficial (nonwasteful) purposes). In *Carangelo v.*

*ABCWUA*, 2014-NMCA-032, ¶ 7, 320 P.3d 492, this Court recently reaffirmed the fundamental rule that a person may not divert water if not to a beneficial use, "because under the New Mexico Constitution there can be no use of water that is not beneficial."

- The process of building and operating a reclamation project does not excuse it from the PIA requirement or the beneficial use limitation found in the Reclamation Act itself.

- The fact that a project may be built or partly built does not excuse it from the PIA requirement of *Arizona v. California*. Under the water laws in the West, no one gets to waste water – not the government, not an Indian tribe, not the State, and not a private water user.

- NIIP has not been fully constructed. Congress has refused to complete the project.

**4. The Navajo Nation is entitled to substantial amounts of water for projects that meet the PIA standards, and these amounts need to be quantified at trial.**

[BIC POINT 10 ; RAISED IN LOWER COURT RP 12208-09]

This Court cannot award any water for NIIP, because NIIP is not PIA. However, as the acequias stated in their BIC, the Navajo Nation will not be

left without water, because it is entitled to substantial amounts from other sources, including the following:

**a. Water for other irrigation projects which meet the PIA standard.** The Navajo Nation operates two large irrigation projects in the valley next to the San Juan River: the Fruitland-Cambridge Project and the Hogback-Cudei Project. These projects do not suffer from the same problem as NIIP, which is located on the mesa miles from the River itself. Because Fruitland-Cambridge and Hogback-Cudei are located close to the River, they can meet the PIA standard, at least in part. The Navajo Nation has claimed a total of 66,730 acre-feet per year for these projects. **[NNAB21.]** These numbers appear to be somewhat exaggerated, and they need to be proven at trial. However, the acequias do concede that the Navajo Nation has water rights for these projects, acquired by prior appropriation and beneficial use, with relatively early priority dates.

**b. Water based on aboriginal use.** The Navajo Nation claims water rights based on the doctrine of aboriginal use. **[NNAB 4]** Unlike rights claimed under *Winters*, aboriginal water rights must be based on actual continuous use "from time immemorial." Aboriginal claims are therefore "necessarily grounded upon evidentiary proof corroborating such historical

use." *Mescalero*, 1993-NMCA-063, ¶ 94 (Donnelly, J., citing *United States v. Santa Fe Pacific Railroad*, 314 US 339, 345 (1941)).

The acequias concede the possibility that the Navajo Nation might be entitled to some aboriginal water, depending on the evidence to be proved at trial. If such rights exist, they are relatively small, because historically very few Navajos irrigated lands from the San Juan River.

**c. Water sources within the boundaries of the Reservation that are under the exclusive control of the Navajo Nation**.

**d. Water rights that can be purchased or leased by the U.S. or the Nation.** The Colorado compacts explicitly state that the obligation to supply water to Indian reservations rests on the United States, not the signatory states. § 72-15-5, art. VII. To satisfy this federal obligation, **the U.S. and the Nation can buy existing water rights from other users on the San Juan River. The water is available, but the U.S. simply wants to avoid the expense of buying it.**[1]

The facts of this case are the polar opposite of the facts in *Winters*. In *Winters*, the Milk River had run dry because of upstream diversions, 207 U.S.

[1] This raises serious questions under the takings clause of the U.S. Constitution.

at 565, so there was no water available for purchase. *Winters* is an example of judicial implication by necessity, dire necessity, because the only way to supply "wet water" for the reservation was to imply an earlier priority date. There is no such necessity in the present case, because the San Juan River is running, not dry, and there are water rights which the U.S. can purchase to meet the reservation's needs, "in the same manner as any other public or private appropriator."

The quantification of implied federal reserved rights is always a fact intensive exercise, which depends on the particular geography and history of each reservation. In *Winters*, the United States had recognized a huge reservation called the Fort Belknap Indian Reservation, but the U.S. took away most of these lands and squeezed the tribe into a much smaller parcel along the Milk River, to make the Native Americans them into irrigators. Given these facts it was understandable that the Supreme Court recognized that the primary purpose of the reduced reservation was agriculture, which could not succeed without water from the Milk River.

By contrast, the United States kept expanding the Navajo Reservation to accommodate its primary purpose – to allow a traditional semi-nomadic way of life based on grazing and hunting.

## B. The Navajo Nation and the U.S. Are Asking This Court To Repudiate the Minimum Needs Doctrine established by *United States v. New Mexico*; *Salopek*; *Cappaert*; and *Arizona v. California*.

[BIC POINT 9; RAISED IN THE LOWER COURT RP 14478-83]

The Navajo Nation and U.S. have also jumped on this case as an opportunity to do away with the minimum needs restrictions which the United States Supreme Court has placed on the quantification of all federal reserve water rights, including *Winters* rights. See *Arizona v. California*, 373 U.S. at 600-601 (1983); *Cappaert*; *United States v. New Mexico*; and *Salopek*. The two governments persuaded the lower court to ignore these cases, and now they are asking this court to do the same. That is not an option, because these cases are controlling precedents.

The Navajo Nation and U.S. admitted that during the summary judgment process, the acequias moved for partial summary judgment to establish that the proposed decree would award the Navajo tribe more water than necessary to meet its minimum needs under these cases, with a list of undisputed facts. Motion for Partial Summary Judgment Concerning Minimum Needs. **[RP 14478-83]**. In response to the list of undisputed facts, the two governments did not dispute that the proposed judgment would award amounts which

> are significantly in excess of the minimum amount necessary to make a homeland for Navajo tribal members on the Navajo reservation in New Mexico. 646,640 acre-feet diversion would be an average of 15.35 acre-feet per person per year for the 42,127 Native Americans living on the reservation. 335,681 acre-feet depletion would mean an average per person consumption of 7.97 acre-feet per year by every Native American on the reservation in New Mexico.

**[RP 14479]**

The Navajo Nation and U.S. argued that these undisputed facts about minimum needs were legally irrelevant, immaterial, and out of bounds. **[RP 16438-39]**

On appeal, the two governments continue to argue that the minimum needs case law does not apply to the quantification of *Winters* rights on Indian reservations. **[NNAB 56]** That argument is clearly wrong, as a reading of the cases will demonstrate. The analysis in *United States v. New Mexico*, 438 U.S. at 700-01 (citing *Cappaert* and Arizona v. California) applies the minimum needs doctrine to Indian reservations:

> While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that **Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more."** *Cappaert v. United States*, 426 U.S. 128, 141, 96 S. Ct. 2062, 2071 (1976). *See Arizona v. California*, 373 U.S. 546, 600-01, 83 S. Ct.

> 1468, 1497-98 (1963); *United States v. District Court for Eagle County*, 401 U.S. 520, 523, 91 S. Ct. 998, 1001 (1971). Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.
>
> This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. *See California v. United States,* 438 U.S. 645, 653-70, 678-79, 98 S. Ct. 2985, 2990-98, 3002-03 (1978). Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. **Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.**

Remarkably, the lower court ruling does not obey or even acknowledge these Supreme Court rulings.

To evade *United States v. New Mexico*, the governments miscite and misquote *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), a Ninth Circuit

case about the Klamath Indians. **[NNAB 55-56]** *Adair* actually uses the minimum needs and primary/secondary purpose analysis set forth in *Cappaert* and *New Mexico*. 723 F.2d at 1408-09. And *Adair* deals with instream flow for fishing and hunting, not irrigation. *Id.* In any event, the Ninth Circuit would have no authority to depart from Supreme Court precedent, and Ninth Circuit decisions are not binding in New Mexico.

### C. In Quantifying Amounts Under *Winters*, the Court Must Consider the Water Supply That Is Already Available Within the Boundaries of the Reservation, under the Exclusive Control of the Tribe.

[BIC POINT 10; RAISED IN LOWER COURT RP 12208-09; NOT ADDRESSED BY THE LOWER COURT]

The Navajo Nation and U.S. argue that a court can award *Winters* rights without considering the amount of water that the tribe already has available within the reservation. **[NNAB 56]** This argument finds no support in the cases, and it is inconsistent with *Winters* itself.

During its analysis in *Winters*, the Supreme Court accepted the fact that "there are springs and streams on the reservation flowing about 2,900 inches of water," 207 U.S. at 576, but then determined that additional water was needed for irrigation. The Supreme Court and the trial court plainly did not ignore the water that was available on the reservation. Indeed, the availability of 2,900

inches from other sources may have been one of the reasons why *Winters* awarded only 5,000 inches from the Milk River, only half of the 10,000 inches claimed by the U.S. *Id.* at 566.

Under *Winters*, indigenous water supply cannot be ignored and set at zero, as if it does not exist. If this court were to accept this aggressive and erroneous argument by the U.S., then a tribe could seize water from a river shared with non-Indians, even if the tribe has enough stream water within the reservation to meet its needs.

## CONCLUSION

WHAT IS THE LEGAL BASIS FOR THE WATER RIGHTS CLAIMED BY THE NAVAJO NATION ?

- It cannot be the *Winters* line of cases, because they require PIA.
- It cannot be the Reclamation Act, because it requires beneficial use.
- It cannot be the NIIP act, because the statute explicitly states that it does not create any water rights.
- It cannot be *Gila V*.
- It cannot be the unilateral actions of the federal government. *Pueblo of Santa Ana*.

● It cannot be aboriginal rights, because those rights would be extremely small, if they exist at all.

● It cannot be the permits issued by the state engineer, because these permits do not exist.

● It cannot be Governor Richardson's signature, because he had no constitutional authority to bind the state to a water compact. *Clark v. Johnson*.

● It cannot be Governor Richardson's signature, because the water rights he signed away did not belong to him. The water rights belong to the public through prior appropriation and beneficial use.

● What about the water rights for the Cambridge-Fruitland and Hogback-Cudei projects? Yes, the Navajo Nation does possess substantial water rights for these projects, based on prior appropriation and beneficial use, subject to PIA limitations. These rights must be proved at trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2016, a true and correct copy of the foregoing was served on counsel for the *amici*, appellees, and the appellants by email.

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