

Mayor and Council, normally I give my legal advice to you without written notes in front of me. Tonight, I take a different approach to the presentation of my counsel. The matter before you is of such significance that I have taken the unusual step of drafting my comments beforehand.

Mr. Marshall presented to you his and the Town Manager's analysis of the JPA creating the CAP Entity. I completely agree with them that the JPA before you is a fatally flawed document. More than that, I believe that any public entity that signs on to it opens itself to uncalculated risks and costs, with only a remote prospect of gain.

I would first mention the quorum issues that Mr. Marshall described. The JPA does not limit the number of memberships available, nor provide for any qualifications of membership other than being a public agency. Thus, there may be entities with no financial resources or expertise to contribute. Yet, their vote is equal to a deep pocket entity with far more ability and economic resources. A combination of those empty-pocketed members can, as a majority of a quorum, bind the whole to substantial economic commitments. Further, that group may well end up in charge of making allocations of water to member users, an area ripe for favoritism and controversy. Signing a document that doesn't identify your potential partners, nor place any prerequisites on the quality of such partners is ill advised.

The JPA is requiring the CAP entity to enter into an undrafted New Mexico Unit Contract with the federal government for a large and complex design, construct, operate and maintenance contract. When entering such a contract, understanding how it's going to be paid for is vital. Especially when the obligations are described as perpetual. We note that both the ISC and the State of New Mexico have no financial obligations regarding the New Mexico Unit project beyond what is provided by the Federal Government. The JPA doesn't authorize the CAP Entity to issue bonds or the power to tax. Yet, there is no business plan or due diligence which would allow the prospective signatories to the JPA to foresee whether the federal allocations will be sufficient to permit the project. The Town has been asking the ISC for such business plan since 2004 to no avail. Starting a business without adequate financial resources, projected costs, and a market analysis is a recipe for disaster.

So, when the federal money runs out, where is the money to come from? It won't be from the State or the ISC. It won't be from the federal government which specifically advises the parties as to the limits of its contributions. And, in the absence of any identifiable customer base, it will not be from revenues. The remaining source would be contributions from the members of the JPA group, and in reality, only those that have deep pockets and a tax base.

Now, there are some parties who believe they will be protected from liability by putting language into the JPA purporting to give discretion to the JPA member as to funding. The signatory is told that it needs to fund only to the extent that it deems appropriate. It gives the illusion of no potential of local liability. I disagree.

The signatories to this JPA are warranting to the ISC, to each other, and to the Federal Government that they have, individually as well as collectively, the ability to design, construct, operate, maintain and repair the NM Unit project. Warranty means a promise that can be enforced. Ability means more than the ability to contract with a third party. It implies the economic ability to accomplish the duties. Further, the proposed New Mexico Unit contract will have provisions requiring the CAP entity to fully indemnify the federal government for any claims made against either party. You can't make a warranty that you can and will do everything that you commit to, then add a provision that says that, in one's own discretion, you don't have to pay for it. You can't promise to indemnify the federal government and then say there's discretion not to perform. In law, it's called contracting in bad faith. Recall that in New Mexico Statutes, it is a crime to write a check when you have insufficient funds to cover the check, or know that you won't have the funds when the check clears.

The specific risk of potential of unlimited indemnity opens the opportunity for huge liability. Moreover, offering such unlimited indemnity is illegal for a county or municipality to offer, and is likewise probably illegal for the CAP entity as well.

So, what is likely to happen when the federal government demands reimbursement for payments made to the Gila Indian Community for exchange water, or a contractor demands payment for services rendered or makes a claim for indemnity? What happens when the contractor remains unpaid? What happens when the sheriff shows up with a writ of execution for a court judgment against the entity, and the Chair of the CAP entity turns up his palms to the sky and says, sorry, we have no money? Since the CAP entity has no powers under the JPA to issue bonds, borrow money, or make assessments, the Chair, presumably would call on the wealthiest of the members and asks for contribution, to which the municipality or county would respond by asserting that it has the discretion of not funding the CAP entity as per Section III (f) of the JPA. So, the CAP entity is insolvent, but is that the end of the game for the federal government, the contractor, or the judgment creditor? I think not.

The creditor will go to Court and name the individual members of the CAP entity as defendants. The member will defend, relying on the same "we've got discretion not to pay" provision, except that a Court will likely consider certain factors beyond the JPA language, including the initial misrepresentations of the CAP

entity members who warranted and promised, individually and collectively, that each had the economic ability and expertise to perform under the contract, in perpetuity. In sympathy to the creditor and in the interests of justice, the Court will have the prerogative to decide for itself as “to what extent” the county or municipality is able to contribute. After all, the JPA gives guidance to the court of what financial resources are available to the county or municipality, including the issuance of bonds, the levy of taxes, and assessments. This possibility is not remote, but likely if the project runs into economic difficulty. Especially in the case of a creditor extending goods and services in good faith to an entity that has misrepresented so many material facts, or a federal government that is being denied its indemnity.

There exists another illusory promise of the CAP entity signatories who promise that they shall put the water to beneficial use. If Grant County signs on to the JPA, it will be representing that it will be a beneficial user of the water. In the last hundred years, the County has not invested a dime in water wells, distribution systems, or water rights. And, with Silver City and the mining district municipalities providing water to about 24,000 of the 29,000 people in the County, where is their customer base to justify such beneficial use? So the promise by our County to put the water to beneficial use is another material misrepresentation making this agreement even more distasteful.

I suggest that this Council accept the work of Mr. Marshall, the Town Manager and his staff as being the Town’s due diligence. In my opinion, the JPA is filled with misrepresentations regarding the ability to pay, to put the water to beneficial use, and to have the broad abilities to accomplish all the undertakings. In contract law, a court will set aside a contract where one side has misrepresented material facts. When the misrepresentation is deliberate with an intent to induce another to contract, the matter moves from contract law to fraud, and at its most extreme, criminal fraud. For the local public official that knowingly and deliberately enters into an agreement that he or she knows to contain deliberate misrepresentations, it is, in my opinion, conduct that may be considered official malfeasance. Accordingly, as Town Attorney I most strongly advise this Council to refrain from entering this JPA.