SJ-17

6/23/04

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff,
v.

No. CV 75-184

UNITED STATES OF AMERICA, et al.,
Defendants.

SAN JUAN RIVER
ADJUDICATION SUIT

MOTION TO ENJOIN
THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT

COMES NOW Gary L. Horner, in propria persona (hereinafter referred to in the first person), and hereby moves the Court to enjoin the execution of the Navajo Water Rights Settlement (hereinafter referred to as the "Navajo Settlement").

Concurrence of opposing counsel was not sought or requested with respect to the present Motion, due to the excessive time and expense of contacting the numerous attorneys, parties and interested persons involved in the present matter.

As and for good cause for said Motion, I state:

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I. Introduction.

The purpose of a water rights adjudication suit is the determination of all water rights within a particular river basin or stream system, more specifically, to determine all of the water rights relative to one another. The point is to determine the relative water rights, such that in times when the available water supply is insufficient to satisfy all water uses, a determination can be made as to who will be allowed to receive water, and who will not.

The basic facts associated with each claim to the use of water could be gathered separately, but the final decree in an adjudication suit must necessarily involve all of the water rights in the particular area and the relative weight to be given to each water right.

In New Mexico, the doctrine of prior appropriation is set forth in the Constitution, and the relative weight of each such water right is determined by the date each water use was first put to beneficial use (priority date).[1] The point of all of this is that the facts associated with a particular water claim have no real meaning until such time as all of the relative claims are determined and compared to the available water supply.

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[1] N.M. Const. Article XVI, Sec. 2 [**Appropriation of water.**] provides
"The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." Emphasis added.

The Navajo Nation, the State of New Mexico and the United States (hereinafter referred to as the "Settling Parties") propose to determine the water rights of the Navajo Nation within the State of New Mexico by settlement (hereinafter referred to as the "Navajo Settlement"). The negotiations with respect to the Navajo Settlement are apparently conducted between the Settling Parties in secret, and apparently such negotiations continue at this time. However, on December 5, 2003, the Settling Parties released a draft version of the proposed documents. Such documents consist of:

1) SAN JUAN RIVER BASIN IN NEW MEXICO - NAVAJO NATION WATER RIGHTS SETTLEMENT - **EXECUTIVE SUMMARY**;

2) SAN JUAN RIVER BASIN IN NEW MEXICO - NAVAJO NATION **WATER RIGHTS SETTLEMENT AGREEMENT**;

3) APPENDIX 1 - Entitled in the present matter - **PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION**;

4) APPENDIX 2 - **A BILL**;

5) APPENDIX 3 - **Contract Between the United States and the Navajo Nation**;

6) SAN JUAN RIVER BASIN IN NEW MEXICO - NAVAJO NATION WATER RIGHTS SETTLEMENT - **DEPLETION SCHEDULE**; and

7) STATE OF NEW MEXICO **SCHEDULE OF ANTICIPATED UPPER**

BASIN DEPLETIONS.

All of said documents are hereby incorporated herein by reference. A copy of each such document will be attached to this Motion, as filed with the Court. Further, a copy of each document will be attached to this Motion in .pdf format with respect to the transmission of this Motion by email. However, due to the voluminous nature of such documents, and the expense involved, such documents will not be attached to this Motion, as mailed according to the Certificate of Service included with this Motion. Said documents can be downloaded from the Office of the State Engineer (hereinafter referred to as "OSE") website at:

http://www.ose.state.nm.us

then click on "Hot Topics,"

then click on "Proposed Water Rights Settlement Agreement for the San Juan Basin."

The Navajo Settlement provides for review by this Court and entry of the subject Partial Final Decree in the present matter. Further, the Settling Parties intend that such Partial Final Decree become immediately binding on all water users in the Basin, and that such Partial Final Decree not be subject to any type of further challenge (at least after the passage of thirty days from entry).

However, said Partial Final Decree has not been submitted for the Court's consideration to date, and such submission by the Settling Parties should not be expected until after the federal legislation, set forth in the Navajo Settlement, has

been passed by Congress. Said federal legislation sets forth, among other things, the specific water rights provided in the Navajo Settlement.

Unfortunately, once the Navajo Settlement is submitted to the Court, enormous political pressure will be exerted upon the Court for the immediate entry of the Partial Final Decree. When the Partial Final Decree is finally presented to this Court, the Settling Parties can be expected to argue, if necessary, that due to the passage of the federal legislation the Court's only authority (and in fact, duty and obligation) will be to merely ratify the Navajo Settlement by entering the Partial Final Decree, based upon the Supremacy Clause of the United States Constitution. The Settling Parties may also argue that the general adjudication statutes of this State will have been completely preempted by the such federal legislation. The Settling Parties will probably argue that there is no room whatsoever for the Court to actually consider and decide any of the issues presented by the Navajo Settlement.

In short, once the Navajo Settlement is executed: this Court will have no authority to consider any issue presented by the Navajo Settlement; the entire concept underlining the adjudication of water rights in New Mexico will be completely undermined; all non-Indian water rights in the San Juan Basin will probably be lost; and the community and culture we have come to know in the San Juan Basin will simply cease to exist.

II. The execution of the Navajo Settlement, by the executive branch of the State of New Mexico, would violate the Constitutional doctrine of separation of powers, because the judiciary has exclusive jurisdiction over the adjudication of water rights.

Currently, the Navajo Settlement is formatted such that it will be entered into by, and signed on behalf of, the State of New Mexico by: the Governor; the Attorney General; the Chairman of the Interstate Stream Commission; and the State Engineer, all of whom are officials within the executive branch of government.

However, the exclusive jurisdiction for the determination of water rights has been given to the judiciary, therefore the separation of powers doctrine forbids the executive branch of government from granting any such rights. Further, no other authority exists for the state engineer to determine or adjudicate water rights by settlement or by any other manner.

Section 72-4-17 NMSA 1978 (1997 Repl.) [**Suits for determination of water rights; parties; hydrographic survey; jurisdiction; unknown claimants.**] provides in pertinent part:

> "In any suit for the determination of a right to use the waters of any stream system, all those who claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. When any such suit has been filed the court shall, by its order duly entered, direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided in this article, in order to obtain all data necessary to the determination of the rights involved. Money heretofore spent on hydrographic surveys by the state engineer, but not assessed against the water users on the effective date of this act, shall not be assessed against the water users. The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved; and may submit any question of fact arising therein to a jury or to one or more

> referees, at its discretion; and the attorney general may bring suit as provided in Section 72-4-15 NMSA 1978 in any court having jurisdiction over any part of the stream system, which shall likewise have exclusive jurisdiction for such purposes . . . ." Emphasis added.

The New Mexico Supreme Court has determined that the courts have the exclusive jurisdiction to adjudicate water rights.

> "[U]nder our laws, only the courts are given the power and authority to adjudicate water rights. See also *Public Service Company v. Reynolds*, 68 N.M. 54, 358 P.2d 621 (1960)" *State ex rel. Reynolds v. Lewis*, 84 N.M. 768 at 772, 508 P.2d 577 (1973).

In *W. S. Ranch Company v. Kaiser Steel Corporation*, 79 N.M. 65, 439 P.2d 714 (1968), the New Mexico Supreme Court considered whether the validity of a claimed water right is an issue to be considered in transfer applications before the state engineer, where such water rights had been previously adjudicated.

The *W.S. Ranch* Court stated that

> "Does the adjudication decree take the place of proof of the amount of water actually applied to beneficial use by a junior appropriator? It is our considered judgment that the adjudication decree is proof of the nature and extent of the rights sought to be transferred. The adjudication court determined that the water had been applied to beneficial use, thus satisfying the constitutional and statutory requirements. The state engineer could not do else than accept the court's decree. Were it otherwise, the engineer could, in effect, overrule, amend or revise an adjudication decree. This of course, would offend not only the constitution but our statutes and decisional law." *W. S. Ranch* at pp. 66-67. Emphasis added.

Further, in 1971, the New Mexico Attorney General issued an opinion with respect to a question regarding proposed legislation that would increase the duty of water for irrigation for established water rights to compensate for carriage losses within an artesian basin. The Attorney General opined that such legislation would be unconstitutional on several grounds, including the separation of powers.

Specifically, the Attorney General stated that

> "Where exclusive jurisdiction has been given to the judiciary to determine water rights, it is the opinion of this office that the separation of powers doctrine forbids the Legislature from granting any such rights. Therefore, the grant of water rights contained in House Bill 82 is unconstitutional." 1971 Op. Att'y Gen No. 71-23.

The New Mexico Constitution, Article III, Section 1, reads as follows:

> "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers belonging to either of the others, except as in this Constitution otherwise expressly directed or permitted."

Therefore, it is clear that the jurisdiction to adjudicate, or determine, water rights lies exclusively with the courts. As set forth hereinafter, the execution of the Navajo Settlement would virtually preclude the fair adjudication of the waters of the San Juan Basin by this Court. The execution of the Navajo Settlement by the State, as provided therein, would violate the doctrine of separation of powers.

III. There is no authority for the partial final decree and expedited *inter se* procedure set forth in the Navajo Settlement.

The Settling Parties intend, pursuant to the Navajo Settlement, that a "Partial Final Decree" will be entered at some point in the present matter with respect to the water rights of the Navajo Nation. In fact, the particular "PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION" is incorporated into the Navajo Settlement as Exhibit 1 attached thereto. Further, the Settling Parties anticipate that a hearing will be held in the present matter to consider said Partial Final Decree. The Settling Parties generally refer to such hearing as an "expedited *inter se*" (hearing or proceeding).

The Partial Final Decree as intended by the Settling Parties: will be partial, in the sense that, such decree will finally determine the water rights of a single entity, the Navajo Nation (and no other water user) (in this sense, the Partial Final Decree bears the characteristics of what is otherwise being referred to in the present matter as a "sub-file order"); will be binding on all other water users in the basin; will be final, in the sense that, it will not be appealable (at least after the passage of thirty days from entry); and will not be subject to challenge in any subsequent "*inter se*" proceedings.[2]

The "expedited *inter se*" proceeding, as intended by the Settling Parties: would occur shortly after the Settling Parties move the entry of the subject Partial Final Decree; would consider only the water rights of the Navajo Nation; could occur long before most other water rights in the basin are determined; would not consider that much of the waters had never been put to beneficial use; would not consider that the Navajo Settlement has no basis in any law; would not consider the quantity or timing of water actually available in the basin; would represent the mere ratification by the Court of the Navajo Settlement; and, would result in all water users in the basin being bound by such Partial Final Decree.

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[2] The Navajo Settlement provides at Section 3.3 Entry of the Partial Final Decree.
"The Parties then shall file a joint motion with the Court in the San Juan River Adjudication for entry of the Partial Final Decree. The joint motion shall request Court approval of procedures to make the Partial Final Decree final and binding on all claimants to the waters of the San Juan River Basin in New Mexico." Navajo Settlement, p. 5. Emphasis added.

Confusing the issue, the terms "partial final decree," "*inter se*," and even "expedited *inter se*" have been used before in different contexts.[3] Unfortunately, such (ambiguous) terms have found their way into the decades long New Mexico water rights adjudication suits. Questions often arise in such lengthy suits as to whether particular orders or decrees are partial, or final, especially with regard to whether such orders or decrees are "final" for purposes of appeal.

However, the concepts of "partial final decree" and expedited "*inter se*," as intended by the Settling Parties, have no basis in any law, and have never been approved, or even considered, by the New Mexico appellate courts. But, most significantly, such concepts, as intended by the Settling Parties, completely undermine the basic principles of the fair determination of the relative water rights of all of the water rights owners within a basin

A. *State v. Sharp.*

In *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959), the New Mexico Supreme Court approved a procedure used by the trial court in a water rights adjudication suit whereby a step by step (township by township) process was utilized for determining facts associated with individual water rights owners, with a final hearing at the end of the adjudication suit to fix the relative priorities of the

[3] Black's Law Dictionary, Fifth Edition, defines "*inter-se* or *inter-sese*" as "Among or between themselves; used to distinguish rights or duties between two or more parties from their rights or duties to others."

individual water rights owners.

In *Sharp*, Mack Sharp appealed an order of the trial court that limited his right to irrigate to 120 acres, instead of some larger amount. One question considered therein was whether such order, regarding an individual water rights owner, was "final" for purposes of appeal (by such owner). Regarding the issue of finality, with respect to an order determining the water rights of an individual owner, the *Sharp* Court held that

> "insofar as it covers the matters included therein, namely, the amount, purpose, periods, place of use and specific tract of land to which it was appurtenant, it was final and nothing remained for the final decree except to incorporate the same and fix the priority." *Sharp* at 196-197.

It should be noted that in *Sharp*, neither the term "partial final" nor "*inter se*" were used. However, the *Sharp* court approved the concepts of the step by step procedure, the final comprehensive hearing to fix priorities, and the final appealable nature of interim orders with respect to individual water right determinations. It should be noted that the *Sharp* Court considered only whether such interim orders were appealable by the affected individual water rights owner. The *Sharp* Court did not consider whether such interim orders were appealable by affected third parties.

It is clear that the *Sharp* Court was contemplating that a hearing will be held at a future date where the relative rights of all the various water rights holders in the basin will be collectively considered and determined. Accordingly, the priority date of each such water right cannot be fixed with respect to the various

water rights holders until such future hearing.

The significance of such future hearing must not be underestimated. It must be understood that a particular water right only has value in a context where the availability of the water is known, the relative priority dates of each water right is known and where the total quantity of water rights which are senior to any particular water right are known.

Thus, the step by step procedure authorized by the *Sharp* Court amounts to the preliminary inventory of the various water rights claims and a preliminary determination of the validity of such claims. Such procedure leaves for the future the final determination of the total availability of water in particular basin, the priority date of each individual water right and the relative rights of all the involved water rights holders.

B. *State v. Lewis.*

In *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 508 P.2d 577 (1973), the term "partial final judgment and decree" was being used in reference to the "final" decree, virtually at the end of a water rights adjudication suit. The term "partial" was apparently used because the trial court intended to retain jurisdiction with respect to certain issues that may remain to be decided, such as the water rights of the United States, although said "partial final judgment and decree" incorporated all of the water rights of all of the individual owners, as well as the fixing of their

relative priorities.

In *Lewis*, the New Mexico Supreme Court considered the contention raised by the State of New Mexico that:

> "the partial final judgment and decree was a valid and final judgment adjudicating the duty of water at three-acre feet [sic] per annum at the well, and the trial court erred by readjudicating the duty of water." *State ex rel. Reynolds v. Lewis*, 84 N.M. 768 at 771. Emphasis added.

The *Lewis* Court stated:

> "The partial final judgment and decree confirmed and approved the sub-file orders adjudicating the water rights of the defendants; it required the defendants to install measuring devices to measure diversion from wells; required appointment of a water master by the state engineer; retained jurisdiction to determine water rights of the United States and other defendants who may be made parties, and to enter such supplementary orders as might be necessary for enforcement of the court's decree." *State ex rel. Reynolds v. Lewis*, at 770.

The *Lewis*, Court held that

> "the partial final decree was not a complete adjudication of all of the rights of the parties involved, particularly since the record herein indicates that the parties were denied the opportunity to present evidence as to the proper measure of the duty of water." *State ex rel. Reynolds v. Lewis*, at 774. Emphasis added.

Therefore, the *Lewis* Court held that the "partial final judgment and decree" was "final" in the sense that it was appealable, but was not "final," in the sense that certain issues remained to be determined, and was, therefore, still modifiable.

It should be noted that in *Lewis*, the term "*inter se*" was still not being used.

C. *State v. Pecos Valley.*

In *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, 99 N.M. 699, 663 P.2d 358 (1983), the term "contest *inter se*" was used with respect to

individual water rights owners contesting matters in relation to each other within the context of a final hearing (or process) in a water rights adjudication suit. Further, the term "*inter se*" was used in reference to the general process of contesting relative priorities between individual water rights owners, although "the term "*inter se*" was not used as a specific name for such final hearing. In *Pecos Valley*, the term "expedited priority administration" was used. Also, in *Pecos Valley*, although the term "expedited *inter se*" was not used, the concept may have been born. However, the concept of "expedited *inter se*," as used by the Settling Parties in the present matter, was not approved, or even remotely considered, by the *Pecos Valley* Court.

In *Pecos Valley*, the Court stated that:

> "The order from which the parties to this adjudication have appealed modifies the usual adjudication procedure. Typically, following the adjudication of the rights of each claimant as against the state, the court provides an opportunity for contest *inter se* of any individually adjudicated rights before a final decree is entered that adopts each of the individual decrees and appoints a watermaster to administer the interrelated rights as shortage necessitates. The order in the instant case will permit the court to enjoin water users with priorities junior to January 1, 1947, to show cause in individual proceedings why their uses should not be enjoined pursuant to Article XVI, Section 2 of the New Mexico Constitution. Such injunctions are subject to the rights of each user to contest *inter se* the rights adjudicated for use through and by means of the Carlsbad project and are also subject to the rights of each user to establish that his use of the public waters of the Pecos River stream system should not be terminated to satisfy the senior rights adjudicated for use through the Carlsbad project. The order appoints a watermaster to administer such orders of injunction as may be entered by the court in the proceedings which will be held pursuant to the order."
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> * * *
>
> "The appellants contend that the court abused its discretion because the procedure adopted violates their rights to due process. Appellants' position is that there can be no administration of junior rights as against senior rights until the priorities of those rights have been fixed *inter se* and that this cannot be done until the court has held a single, final hearing and entered a comprehensive decree fixing the conflicting priorities. We agree that there can be no administration of junior rights as against senior rights until the parties

have had an opportunity to contest priorities *inter se.* We do not agree that such administration must await the filing of a final decree. There is nothing in the statute which precludes the administration of water rights prior to the time of filing of the final decree in the office of the State Engineer. § 72-4-19." *Pecos Valley* at 700-701. Emphasis added.

The *Pecos Valley* Court approved the trial court's proposed procedure noting that:

"In the procedure proposed by the state and adopted by the trial court in this case, there is no denial of due process. While expediting priority administration, the procedure affords each defendant the opportunity to establish his priority and to contest the priority of the Carlsbad Irrigation District. The court will first determine which junior rights must, without question, be terminated to satisfy the senior rights of the Carlsbad Irrigation District, the United States, or the individual water users served by the District. Then the court will adjudicate all of the stream system priorities in reverse order, simultaneously ordering each junior user to show cause why his rights should not be terminated to satisfy such senior rights. In effect, the *inter se* portion of the suit will proceed simultaneously with the individual determinations, giving each junior user the opportunity to contest the priority or any other aspect of the senior water rights, to assert his own priority and to raise any defenses which would preclude termination of his right to satisfy the senior rights." Emphasis added.

* * *

"The procedure adopted by the trial court below does not violate the appellants' rights to due process, as they will be afforded opportunity to contest priorities before any decree is adopted with respect to the rights of the Carlsbad Irrigation District." *Pecos Valley* at 701. Emphasis added.

Thus, in *Pecos Valley* the Court specifically refers to the right of each user to "contest *inter se*" the rights adjudicated to others. Also, said Court specifically refers to the "*inter se*" portion of the suit (as that portion where such individual water rights owners may contest the rights of others). Further, said Court specifically referred to "expedited priority administration" with respect to the need to administer the waters of the Pecos River before a "final" decree is entered by the trial court.

The *Pecos Valley* Court did not specifically use the terms "partial final decree" or "expedited *inter se.*" Yet, it can be understood how the term "expedited

inter se" could be used to describe the procedure approved by the *Pecos Valley* Court where:

> "The court will first determine which junior rights must, without question, be terminated to satisfy the senior rights of the Carlsbad Irrigation District, the United States, or the individual water users served by the District. Then the court will adjudicate all of the stream system priorities in reverse order, simultaneously ordering each junior user to show cause why his rights should not be terminated to satisfy such senior rights. In effect, the *inter se* portion of the suit will proceed simultaneously with the individual determinations, giving each junior user the opportunity to contest the priority or any other aspect of the senior water rights, to assert his own priority and to raise any defenses which would preclude termination of his right to satisfy the senior rights." *Pecos Valley* at 701. Emphasis added.

However, the concept of an "expedited *inter se*" as derived from *Pecos Valley* bears no relationship to the "expedited *inter se*" procedure proposed by the Settling Parties in the present matter.

In *Pecos Valley*, all of the rights of each user had been determined and the trial court was preparing to terminate junior waters rights in favor of senior rights.

It must be understood that in order to determine that junior water rights need to be terminated, such determination can only be made with the knowledge that there is not sufficient water available to meet all of the water rights being considered. That means, in *Pecos Valley*, the availability of water had also been determined before attempting to implement the "expedited *inter se*" procedure. Here, the question of the availability of water in the San Juan Basin is not currently known.

Therefore, before the "expedited *inter se*" procedure derived from *Pecos Valley* could be considered in the present case: the availability of water in the San Juan

Basin must be determined; all of the water rights in the San Juan Basin must be inventoried and determined; and priorities must be assigned to each water right.

The application of an "expedited *inter se*" procedure is especially inappropriate here, where: the Partial Final Decree would establish water rights for the Navajo Nation in excess of 600,000 acre-feet; much of such right has never been previously used, is not contemplated being used in the immediate future and carries a priority that pre-dates nearly all other water users in the basin; and such "new" (additional) water rights are to be established in a basin that has been considered to be fully appropriated for decades.

Therefore, the subject Partial Final Decree cannot be entered herein until such matters have first been determined.

D. The "expedited *inter se*" procedure proposed by the Settling Parties would violate the very essence of the *Pecos Valley* procedure.

The Settling Parties intend that the subject Partial Final Decree, entered pursuant to the expedited *inter se* proceeding, will determine the rights of the Navajos as against, and will become binding upon, every other water user in the San Juan Basin. Therefore, the Settling Parties intend that once the subject Partial Final Decree is entered, no water right holder in the San Juan Basin will ever get the opportunity to address the adverse impacts said Decree will have on his use of water.

Pecos Valley never remotely considered the preliminary determination of more than 600,000 acre-feet of an unsubstantiated federal reserved right with a priority date senior to nearly all other water users as against all other water users in the Basin.

If at some point in the present proceeding it should be determined that all of the available water in the Basin has previously been appropriated, as has been the position of the state engineer for decades, the granting of the subject "new" Navajo water rights could possibly result in the loss of hundreds of thousands of acre-feet of water rights of existing non-Indian water rights holders, who are currently using such water.

Further, the present "expedited *inter se*" proceeding would result in the loss of the ability to use such water by current water holders without such water holders actually understanding that the present proceeding has eliminated, or may eventually eliminate, their right to use such water. Without the determination of the total water available in the Basin and the determination of the total amount of water rights senior to any particular water rights holder, it will be impossible for any individual water rights holder to know and understand the impact on themselves of the subject Partial Final Decree.

Thus, it is clear that the present "expedited *inter se*" proceeding is a far cry from the procedure considered and approved by the *Pecos Valley* Court. *Pecos Valley* provides no legal authority for the "expedited *inter se*" proceeding proposed here

where a future federal reserved water right for an Indian tribe is to be determined with a priority dating back to the creation of the subject Indian Reservation.

E. The "expedited *inter se*" procedure proposed by the Settling Parties would clearly violate the due process rights of all other water users in the San Juan Basin.

Even the parties to this adjudication have not figured out the significance of the proposed Partial Final Decree on their water rights. The present situation is very complex with issues including federal water projects, federal reclamation law, federal reserved rights, Indian rights, *Winter's* rights, federal reserved rights subordinated to contract rights, expedited *inter se* proceedings, Colorado River Compacts, the Endangered Species Act, Section 7 consultations on the Animas-La Plata Project and associated Biological Opinion and Reasonable and Prudent Alternative, the future of the NIIP project, Navajo rights in general, the amount of water available, and the total amount of water rights claimed in the Basin being completely unknown to any party (including the state engineer). The best water lawyers in the country would have their hands full here. The local municipal and industrial users are in over their heads. The state engineer is flying by the seat of his pants. And, the individual farmers and water users do not have a prayer.

In *Pecos Valley* the Court determined that the expedited *inter se* procedure proposed did not violate due process rights, in that, all affected parties would have the opportunity to contest priorities before any decree was entered. However, here,

it is not simply the priorities between the relative water rights owners that are at issue; here, every aspect of the Navajo water rights are at issue: the priority, amount, purpose, periods and place of use, are all at issue.

Further, here, the availability of water in the basin is at issue. The total number of water rights claimed, permitted, adjudicated or otherwise existing (or reserved rights yet to be established) are not known. The total amount of water rights that are senior to any particular water user are not known. Whether or not the subject Navajo water rights, the unknown Ute water rights, and/or the unknown United States water rights will cause any adverse impact on existing water users cannot yet be determined. Most significantly, it is not known whether the subject decree of Navajo water rights will ultimately cause existing non-Indian water rights to be terminated.

However, in *Pecos Valley*, the availability of water was known, all water rights were known, all adverse impacts were known, and even those individuals who were to lose water rights were specifically notified of such fact before any water rights were to be adjudicated *inter se*, and thus, before any final (partial or otherwise) decree was entered. In *Pecos Valley*, the Court held there was no denial of due process. Here, the situation is so different that the entry of the subject Partial Final Decree as currently proposed constitutes a denial of the due process rights of every water right holder in the San Juan Basin.

Due process must require not only that an individual have an opportunity

for his day in court, but also that he must comprehend the issues and risks involved in the proceeding so that he might be able to make an informed decision as to the level of effort he should necessarily commit to defend himself.

IV. Identical standards must be used to determine each individual water right, the failure to do so is patently unfair and improper.

Where a common set of standards is used to determine each individual claim to the use of water, little room is left for disputes between individual claimants. However, any difference in the standards used to determine individual water rights, will obviously create the legitimate basis for disputes between individual water rights claimants.

For instance, the determination of how much water is available affects all claimants, as does any attempt to apportion the available water supply between claimants on any basis other than on a strict priority date basis. Disputes can be expected from any claimant regarding the determination of the available water supply and the apportionment of such water on any basis other than strict priority administration.

In *State ex rel. Reynolds v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967) the Supreme Court considered a matter in which two separate water adjudication suits had been consolidated (identified therein as the "Lewis case" and the "Hagerman case"). Prior to the consolidation of the two separate suits, the priority dates in

each suit had been determined based upon two separate standards.[4]

The *Allman* Court held that

> "It would seem self evident that if relative priorities 'one toward the other' were open for determination before the final decree was entered, it would necessarily follow that the determination of the various rights would be made by application of identical standards and rules. That a different result might be encountered in separate lawsuits is conceivable. However, where all rights are being adjudicated in one lawsuit, as here, after consolidation, the application of different standards in determining the relative priorities is patently unfair and improper. We do not see how on the face of appellants' motions it could be determined that they were without merit. This being true, as already observed, they should have been permitted to present such proof as was pertinent to establish the relative priorities of their claims as related to those of the Canal Company. The refusal to permit them to do so was reversible error." *Allman* at 4. Emphasis added.

In the present matter, a hydrographic survey is contemplated to determine the water rights of non-Indians. In many, if not most, cases such non-Indian water rights have been previously adjudicated. Hydrographic surveys were properly conducted with respect to such previous adjudications. Therefore, an additional hydrographic survey is not actually required with respect to such non-Indian, previously adjudicated, water rights. All that would be required is the adoption of

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[4] The *Allman* Court stated that
"whereas the water rights decreed to appellants in the Lewis case carried a priority date as of the commencement of the well being adjudicated, without consideration being given to whether the right should have an earlier priority by virtue of the doctrine of relation back, the well rights adjudicated to Hagerman Canal Company carried a priority date related back to the commencement of the ditch whereby the beneficial use was accomplished.

"It is appellants' theory that they were denied their day in court because not permitted to establish the priority date of their wells as the time when water was first applied to the land. There can be no doubt that due process requires all who may be bound or affected by a decree are entitled to notice and hearing, so that they may have their day in court. *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P. 2d 73 (1963). The appellants should have been given a full opportunity to establish the doctrine of relation back in showing a priority date to be that of an original appropriation of water from the same source as that of their wells. *Templeton v. Pecos Valley Artesian Conservancy District*, supra [65 N.M. 59, 332 P.2d 465 (1958)]; *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 !961." *State ex rel. Reynolds v. Allman*, 78 N.M. 2-3. Emphasis added.

the previous adjudication decree in the present matter. From there, all that would be required would be the identification of the current owners of such water rights.

The only purpose for a hydrographic survey, with respect to such previously adjudicated water rights, is the determination of currently unused, but previously adjudicated water rights. Therefore, the sole purpose of performing hydrographic surveys with respect to previously adjudicated water rights is the elimination of as many of said previously adjudicated water rights as possible.

By contrast, the water rights of the Navajo Nation are proposed to be determined pursuant to the subject Navajo Settlement, no hydrographic survey is even contemplated prior to the execution of the Navajo Settlement. Further, the Settling Parties intend that any hydrographic survey that may be conducted in the future with respect to Navajo lands will have little bearing, and represent no basis or limitation, with respect to the bulk of the water rights to be acquired pursuant to the Navajo Settlement.

The Navajo Settlement would grant water rights to the Navajo Nation to hundreds of thousands of acre-feet of water with respect to which the Navajo Nation has never used, and cannot even speculate as to any reasonably foreseeable use, on Navajo lands.

Whereas, the State proposes a hydrographic survey for the purpose of eliminating currently unused water rights for non-Indians, the Settling Parties intend that the water rights to be acquired pursuant to the Navajo Settlement

would never be subject to loss for non-use.

Whereas, the OSE is currently impeding the attempts of non-Indian water rights owners to sell or lease their currently unused water rights, one of the primary facets of the Navajo Settlement is to allow and facilitate the Navajo Nation to market (lease) its vast quantities of never before used water rights to off-reservation (and perhaps out-of-state) entities.

Whereas, non-Indians are required to utilize an exhaustive OSE process with respect to the marketing of their water rights (by sale or lease), the Indians are not being required to follow such procedures, even with respect to leasing their water rights to entities outside the boundaries of their reservations.

Whereas, the priority dates associated with the water rights of non-Indians must be established based upon when such water was first put to beneficial use, the Navajo Settlement establishes priority dates based upon when Navajo Reservation was created, with no regard as to when such water was first, or ever, put to beneficial use.

It is plain to see that vastly different standards are being employed to determine water rights in the present matter. The use of such different standards creates the legitimate basis for disputes in each instance. As stated in *Allman*, the use of such different standards is patently unfair and improper.

V. A hydrographic survey must be completed with respect to Navajo water

uses before any Navajo water rights may be determined in the present matter.

There is no authority for the decree of hundreds of thousands of acre-feet of water rights to a claimant without a hydrographic survey. In fact, in *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959) the New Mexico Supreme Court reaffirmed that:

> "It is true that no decree declaring 'the priority, amount, purpose, periods and place of use * * * the specific tracts of land to which it shall be appurtenant, together with other necessary conditions to define the right and its priority' as required by [72-4-19 NMSA 1978], can be entered . . . until hydrographic surveys thereon have been completed and all parties impleaded, at which time it is contemplated a further hearing to determine the relative rights of the parties, toward the other, will be held." *State ex rel. Reynolds v. Sharp*, at 196. Emphasis added.

VI. There is no authority for the decree of hundreds of thousands of acre-feet of water rights to a claimant without any showing of application of such water to beneficial use.

The Navajo Settlement would grant hundreds of thousands of acre-feet of water rights to the Navajo Nation without any showing that such water has ever been applied to beneficial use. Indeed, it is clear that hundreds of thousands of acre-feet of such water rights have never been applied to beneficial use.

The New Mexico Constitution, Article XVI, Sec. 3 [**Beneficial use.**] provides

> "Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

Therefore, the Navajo Settlement is a clear and flagrant violation of the beneficial use provision of the New Mexico Constitution.

VII. There is simply no authority (state or federal) for granting water rights to an Indian Tribe whose only purpose for such water is to market such water off of the reservation.

The Navajo Settlement would allow the Navajo Nation to market the unused water acquired thereunder to entities off of the Navajo Reservation. The proposed federal legislation incorporated within the Navajo Settlement provides for the Navajo Nation's right to "use the water supply under its water rights outside the boundaries of its lands" (A Bill, Sec. 302 (a)(6)). Said proposed legislation also provides that

> "When water made available for uses in the State of New Mexico under the Settlement Contract approved by this title is not being used by the Navajo Nation, the Nation may subcontract with third parties . . . ." (A Bill, Sec.305 (a)).

Further, said proposed legislation provides for such subcontracts with a maximum term of 99 years (A Bill, Sec. 305 (b)), and suggests the possibility of such subcontracts with out-of-state entities (A Bill, Sec. 305 (a)).

There is simply no authority (state or federal) for granting water rights to the Navajo Nation where the only purpose for such water is to market such water off of the reservation; that is, until the federal legislation associated with the Navajo Settlement is passed by Congress.

VIII. The Navajo Settlement negotiations are conducted in secret and comments from third parties are disregarded.

Currently, negotiations regarding the Navajo Settlement are conducted in

secret and little information is provided to other water users regarding the progress of such negotiations. Further, the procedures suggested by the OSE in the present matter would provide that an offer of judgment, based upon the Navajo Settlement, would also be conducted in secret.

On December 5, 2003, draft versions of the Navajo Settlement and associated documents were released to the public with instructions that interested parties had thirty days to comment on such documents. Obviously, thirty days was entirely too short for a meaningful review of such a complex matter. Regardless, numerous comments and objections were submitted.

Unfortunately, in the context of negotiations for the Navajo Settlement, the submitted comments have no weight and are not at all likely to receive any significant consideration. Those submitting comments and objections are not parties to the Navajo Settlement, and their concurrence or approval is not required.

The Settling Parties must expect that the Navajo Settlement will not be well received by others, and must have steeled themselves with respect to criticism before the draft documents were ever released. Accordingly, the comments and objections submitted can be expected to be completely disregarded. Thus, the submission of such comments and suggestions is entirely an exercise in futility.

Therefore, anyone wishing to seriously raise any issues with respect to the Navajo Settlement must seek some forum other than simply addressing such issues to the Settling Parties for their consideration.

IX. Review of an executed Navajo Settlement by this Court will provide no realistic opportunity to address the issues presented.

The Navajo Settlement provides for review and entry of the subject Partial Final Decree in this Court, and that the Partial Final Decree become immediately binding on all water users in the Basin upon entry. However, said Partial Final Decree has not been submitted for the Court's consideration to date. Further, such submission should not even be expected until after the Navajo Settlement has been executed and the associated federal legislation passed by Congress.[5]

At that point, the issue of the Navajo water rights will be inextricably tied to the federal appropriation of approximately $1,000,000,000 (that is, one billion dollars) for the benefit of the Navajo Nation. Accordingly, massive political pressure can be expected from the Settling Parties.

Said proposed federal legislation is premised upon the execution of the Navajo Settlement (A Bill, Sec.302 (a)(3) & (5), 302 (b)(1), Sec. 303, Sec. 308 (a)(1)).

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[5] The Executive Summary associated with the Navajo Settlement provides:
"It is anticipated that the continuing negotiations could result in execution of a Settlement Agreement in February 2004 and introduction of a Settlement Act to Congress by March 1, 2004. Execution of the Settlement Agreement and the Settlement Contract by the United States Secretary of the Interior would be expected to occur upon passage of the Settlement Act into law. Also after passage of the Act, a Joint Hydrographic Survey would be conducted by the United States and the State of New Mexico to identify rights of the Navajo Nation to historic and existing irrigation, recreation and livestock uses on Navajo lands in areas tributary to the San Juan River and rights acquired by the Nation under state law. After completion of a Joint Hydrographic Survey report, the Partial Final Decree would be completed and a joint motion would be submitted to the court in the San Juan River Adjudication requesting that the Partial Final Decree be made final and binding on all claimants in the Adjudication. The proposed Settlement Agreement would require that: (1) the Settlement Act be enacted into law by October 31, 2006; (2) the Joint Hydrographic Survey report be completed by September 30, 2008; (3) the Partial Final Decree be entered by the Court in the San Juan River Adjudication by December 31, 2010; and (4) the project construction and funding milestones be achieved by the specified completion dates." Executive Summary, p. 9

Said legislation provides that no appropriations made under such Act shall be expended until a partial final decree is entered in the present matter (A Bill, Sec. 306 (e)(1), see also Sec. 308 (a)(10)).

Said proposed legislation sets forth, among other things, the specific water rights provided in the Navajo Settlement (A Bill, Sec. 304 (a)), as well as, the Navajo Nation's right to "use the water supply under its water rights outside the boundaries of its lands" (A Bill, Sec. 302 (a)(6)). Said proposed legislation also provides that

> "When water made available for uses in the State of New Mexico under the Settlement Contract approved by this title is not being used by the Navajo Nation, the Nation may subcontract with third parties . . . ." (A Bill, Sec.305 (a)).

Further, said proposed legislation provides for subcontracts with a maximum term of 99 years (A Bill, Sec. 305 (b)), and suggests the possibility of such subcontracts with out-of-state entities (A Bill, Sec. 305 (a)).

When the Partial Final Decree is finally presented to this Court, the Settling Parties can be expected to argue, if necessary, that due to the passage of the federal legislation the Court's only authority (and in fact, duty and obligation) will be to merely ratify the Navajo Settlement by entering the Partial Final Decree, based upon the Supremacy Clause of the United States Constitution.[6] The Settling

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[6] U.S. Const., Article VI, paragraph 2, (Supremacy Clause), provides

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Parties may also argue that the general adjudication statutes of this State will have been completely preempted by the such federal legislation. The Settling Parties will probably be arguing that there is no room whatsoever for the Court to actually consider and decide any of the issues presented by the Navajo Settlement.

Therefore, any adverse consequences flowing from the Navajo Settlement will in essence be set in stone upon its execution. If this Court is to ever review the water rights issues presented by the Navajo Settlement, the execution of the Navajo Settlement must be enjoined.

X. The execution of the Navajo Settlement would cause irreparable harm to all other water users in the San Juan Basin.

Only relatively minor opposition has been voiced regarding the Navajo Settlement to date. (Although hundreds of pages of comments and objections have been submitted to the OSE regarding the Navajo Settlement since the draft documents were released in December 2003.) This is probably due to the fact that the subject Settlement is so complex that it is barely understood (even by the Settling Parties). Certainly, the Settling Parties constantly assure everyone else that the Navajo Settlement will not impair existing water rights.

Unfortunately, it appears that the Navajo Settlement will severely impact existing water rights, so severely in fact, that all existing non-Indian water rights

may be lost. (It appears that the Settling Parties may actually understand and intend this fact, their statements to the contrary notwithstanding.) But, even more unfortunate is the fact that, due to the intended structure of the Navajo Settlement (Partial Final Decree and expedited *inter se*), non-Indians may find themselves with no recourse during the final *inter se* proceeding when their own water rights are being terminated.

One major factor that is extremely important in a final decree of water rights (especially when considering the fact that existing water rights may be terminated thereby) is the determination of the water available to satisfy such water rights.

Limitations on the availability of water can be a function of many factors, including, but not limited to: the natural variability of flows in an unregulated stream; variable precipitation (or drought); consumptive use restrictions pursuant to interstate compacts; the downstream water delivery requirements pursuant to interstate compacts; out-of-state upstream uses; and the operational schemes of regulating structures (dams).

In the San Juan Basin in New Mexico, the availability of water has not historically been a significant problem (with the exception of the La Plata River Basin which has historically been characterized by insufficient natural, unregulated flows, probably compounded by the possible over use of water by upstream users in Colorado). The San Juan River Basin produces an average of approximately 2,000,000 acre feet per year. New Mexico's portion of such water

should be calculated to be approximately 838,000 acre-feet per year, based upon the Colorado River Compact (1922) and the Upper Colorado River Basin Compact (1948).

In the 1950's and 60's, the New Mexico State Engineer granted various permits to the United States Bureau of Reclamation ("BOR") in total amounts exceeding 1,500,000 acre-feet per year. Since that time: the Navajo Dam and Reservoir were constructed (approximately 1,700,000 acre-feet storage capacity); the State Engineer has essentially denied all other permits to appropriate water in the San Juan Basin; and the total water use in the San Juan Basin in New Mexico has rarely exceeded 400,000 acre-feet per year (including approximately 100,000 acre-feet per year for the San Juan-Chama Project and 180,000 acre-feet per year for the Navajo Indian Irrigation Project ("NIIP")). A few low flow years have produced a certain amount of stress on the unregulated Animas River, but generally, matters have been handled respectfully, with a spirit of cooperation.

It appears that historically the State Engineer has had little concern about matters in the San Juan Basin, because of the very ample water supply, compared to other areas of the state. Water users in the San Juan Basin have come to take a reliable water supply for granted.

However, matters are changing drastically in the San Juan Basin, at a very alarming rate.

First, the BOR has unilaterally decided that New Mexico's share of the San

Juan Basin waters should be approximately 669,000 acre-feet per year, because the entire upper Basin's share should be reduced from 7,500,000 acre-feet per year to 6,000,000 acre-feet per year (pursuant to the BOR's interpretation of the Colorado River Compact).

Then, the BOR has apparently decided that of said New Mexico share, New Mexico should contribute approximately 60,000 acre-feet per year toward evaporation losses at Lake Powell.

Then, the construction of the Animas-La Plata Project on the Animas River near Durango, Colorado, while appearing to provide the possibility of storage for downstream users, actually threatens current flows by pumping water out of the River during periods of high use (for storage in its off-stream Ridges Basin Reservoir; no spring runoff will be captured or pumped).

Then, comes the Reoperation of Navajo Dam. Based theoretically on the need to mitigate the impacts on endangered fish species caused by the construction of the Animas-La Plata Project, the reoperation of Navajo Dam is designed to mimic the natural hydrogaph; that is, high flows will be released from Navajo Dam during the spring runoff and flows will be drastically reduced during the summer high use season. The benefits of Navajo Dam and Reservoir (an on-stream reservoir with the ability to capture the spring runoff for the benefit of downstream users) to local water users (other than perhaps BOR contractors) is being eliminated, or at least minimized.

When considering the design and operation of the Animas-La Plata Project and the reoperation of Navajo Dam, the following significant factors are observed:

- Both are designed to allow the spring runoff to escape, without capture for use by water users in New Mexico;
- Each project will severely restrict the water available for use by New Mexico water users during the summer high use period;
- The reduced availability of water created by the two projects appears to be designed to eliminate significant quantities of current existing water uses, and all future uses, of water in New Mexico;
- All of the San Juan Basin water, that flows unused through New Mexico, will be stored for the benefit of, and use by, the Lower Basin in Lake Powell and Lake Mead (24,322,000 and 27,377,000 acre-feet live storage capacity respectively, for a combined total of 51,699,000 acre-feet live storage capacity);
- Similar flow patterns, and use restrictions, are being imposed across the entire Upper Colorado River Basin;
- No similar flow patterns or use restrictions are being imposed within the Lower Colorado River Basin states;
- Water no longer flows from the Colorado River into the Gulf of California; that is, all of the water produced within the entire Colorado River Basin is currently being used;

- The Lower Colorado River Basin states need, or at least want, more water from the Colorado River;
- The only way the Lower Colorado River Basin states can get more water from the Colorado River is if the Upper Colorado River Basin states use less water;
- No water is used from the Colorado River within the Lower Colorado River Basin, except by virtue of a contract with the BOR (United States Secretary of the Interior); and
- Years of such reoperated flow patterns through Navajo Dam have shown no significant benefit to the endangered fish.

Therefore, the only reasonable conclusion to be drawn from the reoperation of Navajo Dam and the design and proposed operational schemes of the Animas-La Plata Project, is that such projects are not designed and operated for the benefit of the endangered fish, rather, such projects are designed to minimize the use of water in New Mexico (and the entire Upper Basin) to facilitate the delivery of larger quantities of water to the Lower Basin for the use therein (or at the very least, to prevent to the maximum extent possible any additional uses of water within the Upper Basin).

Next, comes the Jicarilla and Navajo Water Rights Settlements where huge amounts of water rights are to be given to the Indian Tribes, regardless of the fact that such Tribes have never used such water and have no foreseeable use for such water. Such Settlements are made worse by the fact that the Indians are being

granted the right to market or lease such water off of the reservation.

Next, comes the present adjudication suit which is being driven by the OSE to eliminate all unused previously adjudicated water rights.

Next, the BOR has decided that it cannot operate the Navajo Reservoir below an elevation of 5,990 feet above sea level, the level of the NIIP diversion structure. At 5,990 feet elevation there still remains 661,800 acre-feet of water contained in Navajo Reservoir. This decision reduces the available active storage capacity in the Reservoir to 1,038,200 acre-feet (1,700,000 - 661,800; a reduction of 39%).

Finally, the OSE has appointed and hired a water master for the San Juan Basin and announced that the San Juan Basin will be one of the first areas in New Mexico in which the waters will be administered (someone will be cut off), beginning next year (2005).

All of a sudden things start looking particularly bleak in the San Juan Basin, that is, if you are paying close enough attention. Unfortunately, most water users have a very hard time comprehending there is a problem, primarily because: they have come to enjoy such a reliable water supply in the past; they really do not understand all of the things that are going on; and when they do ask the State Engineer, the Interstate Stream Commission, the San Juan Water Commission, the Indians, the BOR or their elected officials, about what is going on, they are repeatedly reassured that there is nothing to worry about, their senior water rights will be protected.

The reoperation of Navajo Dam presents one of the most serious issues. Said reoperation contemplates high spring flows and drastically reduced flows during the rest of the year. The basic high spring flow consists of a ramp up (gradually increasing flow rate) to 5,000 cubic feet per second ("cfs") over a period of three weeks, holding such 5,000 cfs for a period of three weeks, and then a ramp down over another period of three weeks. The flows they are trying to achieve through the endangered fish's critical habitat are between 8,000 and 10,000 cfs during the spring runoff.[7]

In quantitative terms, one such 5,000 cfs spring release amounts to the release of more than 400,000 acre-feet of water. Said 400,000 acre-feet release: is equal to New Mexico's entire current use of San Juan Basin water for an entire year (including the San Juan-Chama and NIIP Projects); represents 40% of the active storage capacity of the Reservoir; and such water will simply flow right by New Mexico users, without New Mexican's being able to use such water, while such water will be stored in Lake Powell and Lake Mead for use by the Lower Colorado River Basin states (Arizona, California and Nevada).

However, the target base flows associated with the reoperation of Navajo Dam are even worse. The reoperation of Navajo Dam contemplates base flow

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[7] The critical habitat for the endangered fish has been determined to be the San Juan River from the confluence with the Animas River to Lake Powell. However, flows through the critical habitat are primarily measured using gauging stations at or below Shiprock, New Mexico since little water use exists below Shiprock. To achieve such high flows through the critical habitat, far in excess of the Navajo Dam releases, requires significant contributions from the Animas River.

releases from Navajo Dam of 250 cfs during the remainder of the year (at all times other than during the high spring release). However, the target base flows through the critical habitat are 500 to 1,000 cfs. Obviously, to achieve a flow of 500 cfs through the critical habitat, when only 250 cfs is released from Navajo Dam, requires a significant contribution from the Animas River.

However, the Animas River flows themselves are severely threatened by the Animas-La Plata Project, and quickly increasing water uses in Colorado. The operating criteria established for the Animas-La Plata Project provide: that no water will pumped from the River into their Reservoir during the spring runoff (for the stated purpose of maximizing flows through the critical habitat); and for a minimum bypass flow of 225 cfs during the summer months (160 cfs during the fall, and 125 cfs during the winter). That is, during the summer, pumping out of the Animas River, and into Ridges Basin Reservoir, will be limited as necessary to allow at least 225 cfs to flow past the pumping plant, for use downstream. But, it should be noted that the total previously adjudicated diversions from the Animas River in New Mexico are approximately 1,000 cfs.

Currently, water is used (depleted) along the San Juan River in New Mexico, below Navajo Dam, during the summer months, at a rate of about 500 cfs (determined from USGS gauging stations). The rate of use of water along the Animas River, between the Colorado State line and the confluence with the San Juan River, is about 300 cfs. Thus, water is used below Navajo Dam (including the

Animas River, but not including the La Plata River, water use above Navajo Dam, the San Juan-Chama or NIIP Projects) at a combined rate of about 800 cfs during the summer.

Therefore, in order to satisfy all of the current uses, and the endangered fish requirements, below the Dam, 1,300 cfs must flow into the system (San Juan use, 500 cfs; Animas use, 300 cfs; and fish requirement flowing out below Shiprock, 500 cfs). However, as indicated above the operating criteria for the Navajo Dam would release only 250 cfs, and the Animas-La Plata Project would allow only 225 cfs to flow into the system, for a combined total of less than 500 cfs, while the fish are required to have 500 cfs flowing out of the system. That means there is no room whatsoever for <u>any</u> use in the San Juan Basin below Navajo Dam.

Both the BOR and the OSE will say that is not what is going on at all. They will say that in fact the BOR is necessarily increasing the releases from Navajo Dam in order to cover all of the uses along the San Juan River and maintain the 500 cfs target base flow for the fish below Shiprock. They will say if they reduced the flows to the levels described above, current water users would continue to use the water and the fish (flows) would take the entire hit, completely undermining their stated purpose for the reduced flows in the first place.

In reality, the only way the Navajo Dam and Animas-La Plata Projects can be operated as described above is if someone comes in and forcibly cuts off water users in the San Juan Basin. Currently, the BOR does not have the authority to

cut off any water user (other than perhaps its contractors), but a state appointed water master does. Further, we see the OSE has hired a water master, and that it intends to administer the waters of the San Juan Basin next year.

Unfortunately, we also see the OSE taking the position that it cannot tell the BOR how to operate a federal project.[8] Therefore, if the BOR should choose to operate its projects such that all water uses (and fish flows) cannot be met, the OSE position would be that it must cut off water users, in order to protect fish flows, rather than simply requiring the BOR to increase releases.

The reoperation of Navajo Dam essentially presumes that the fish have a higher right to the water than any existing water user. Apparently, the OSE perceives such a higher right, otherwise, there would be no need for a water master. However, such right for the fish has never been established, certainly not in the present matter.

As described above, without the appointment of a water master, and the administration of the system by the OSE, the BOR must necessarily cover all of the uses and no one will be cut off. But, with the appointment of a water master, and the administration of the waters of the San Juan Basin by the OSE, all water users below Navajo Dam are subject to being cut off.

Hopefully, by now it can be seen that in this environment, where: the

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[8] I assert that the OSE does have the authority to control the release of water from federal projects,. However, it appears that the OSE has denied, and never asserted, such authority for the entire history of the State.

availability of water is severely restricted, and completely controlled by the BOR; the OSE is administering the waters of the Basin (cutting people off) to enforce never established rights in favor of the fish; the OSE has granted hundreds of thousands of acre-feet of water rights to the Indians with priority dates senior to all non-Indians; all non-Indian water rights can easily be lost.

It is easy to see why many water users cannot see these things coming, especially when nearly everyone they ask in a position of authority assures them there is no problem. But, a telltale sign is the fact that certain large water users with relatively junior water rights are currently making contracts with the Indians for water, and the OSE's currently proposed Active Water Resource Management Rules ("AWRM;" regarding the administration of the waters of the state) are designed to protect such contracts. Te result will be that such large junior water right users with Indian contracts will receive water, while those who thought they owned senior water rights will be the ones cutoff, regardless of the assurances of those in positions of authority to the contrary.

Further, such Navajo Settlement was, and is currently, being negotiated in secret, and the procedures proposed by the OSE in the present matter would allow them to negotiate a subfile order in secret. Also, the proposed AWRM rules would allow the OSE to administer the San Juan Basin based upon such subfile order, without a final decree in the present matter.

Further, the reduced flows caused by the reoperation of Navajo Dam, and the

operational criteria of the Animas-La Plata Project, provide enormous leverage for the Navajo Nation with respect to leasing senior water rights, established pursuant to the Navajo Settlement, to existing non-Indian water users in the San Juan Basin. San Juan Basin water users will be required to pay the Indians for the use of the water with respect to which they currently own (senior) rights. It seems elementary that when the Indians own all rights to the water in the Basin, the rates to be charged will be so high that most will not be able to afford such use

Unfortunately, if the Navajo Nation is successful in establishing the right to market its waters out-of-state, San Juan Basin water users will not be able to afford to lease such water at all, in an open market that includes Las Vegas, Los Angeles, San Diego, Phoenix and Tucson (and even Albuquerque, Santa Fe and El Paso). In that regard, San Juan Basin water users will not only lose there water rights, they will also entirely lose the water. The San Juan River valley will soon look like the surrounding desert, and the local economy, community and culture can be expected to collapse.

Further, the Navajo Settlement incorporates the use of a Partial Final Decree and an expedited *inter se* procedure. The intended result of the Settling Parties is that the Partial Final Decree: will be approved relatively early in the present matter; will become final and binding upon all water users in the San Juan Basin; will not be subject to challenge, because the federal legislation associated with the Navajo Settlement will undermine the authority of this Court; will no longer be

appealable after thirty days from its approval; and will not be subject to further attack in any future *inter se* proceeding in the present matter.

The point of all of this is that most non-Indian water users will lose their water rights, and they will never know what hit them. When, and if, they ever do figure it out, it will be too late.

Of the utmost significance is the fact that, the Navajo Settlement is not about the Navajo Nation's need for more water rights, rather, it is simply about money.

No one has ever denied the Navajos the right to divert water from the San Juan River, in fact, the OSE has always taken the position that it is has no jurisdiction on the Navajo Reservation. The Navajo Nation has always diverted and used whatever it wanted. Any unmet water needs on the Navajo Reservation are not the result of a lack of water rights, or water use restrictions imposed by any authority. Rather, any unmet water needs on the Reservation are simply the result of the lack of funds or political priorities.

The outrageous games being played, with respect to water in the San Juan Basin, are mind boggling. There are many more that I have not even touched upon in this Motion. While I think I can understand the motives of the Indians, the BOR, and even the power plants; for the life of me, I cannot figure out: **what on earth is the State thinking?**

Therefore, the execution of the Navajo Settlement would cause irreparable harm to all other water users in the San Juan Basin. If there is any hope

whatsoever of a fair determination of water rights in the present matter, the execution of the Navajo Settlement must be enjoined, as a mere starting point.

XI. Prayer for Relief.

WHEREFORE, I respectfully request of this Court an order:

1) For a preliminary injunction enjoining the State of New Mexico, the Navajo Nation, the United States, or any person with knowledge of the subject preliminary injunction, from entering into, or otherwise causing to be executed, said Navajo Settlement, or any revised or amended version of such Navajo Settlement, until further order of the Court;

2) Invalidating any such Navajo Settlement that may have been entered into or executed; and

3) For such other and further relief as the Court deems appropriate.

June 23, 2004

GARY L. HORNER, Esq., In Propria Persona
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Date

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true copy of the foregoing was mailed or

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