

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.*)
STATE ENGINEER,)
)
Plaintiffs,)
)
v.)
)
THE UNITED STATES OF AMERICA)
et al.,)
)
Defendants.)
_____)

CASE NO. CV-75-184
ROZIER E. SANCHEZ
District Judge, *pro tempore*

SAN JUAN RIVER BASIN
ADJUDICATION

**BRIEF OF THE LA PLATA VALLEY ACEQUIA ASSOCIATION
IN OPPOSITION TO THE JOINT MOTION FOR ORDER
GOVERNING INITIAL PROCEDURES FOR ENTRY OF A
PARTIAL FINAL JUDGMENT AND DECREE OF THE
WATER RIGHTS OF THE NAVAJO NATION**

NOW COMES the La Plata Valley Acequia Association (hereafter "La Plata") and files its objections to the proposed procedures for entry of a partial final judgment and decree of the water rights of the Navajo Nation. The joint motion was filed by the United States of America, the State of New Mexico *ex rel.*, the State Engineer, and the Navajo Nation. These parties will be collectively referred to as ("Settling Parties"). La Plata would respectfully state the following:

La Plata is an association of ditches located on the La Plata River in New Mexico. The purpose of the Association is to represent the interests of those ditches and their respective members in this adjudication.

It must be emphasized that the purpose of this response is to object to portions of the *procedure* proposed and not the settlement itself. Any concerns regarding the settlement itself will be addressed at the appropriate time pursuant to the order entered by the Court.

The primary objections of La Plata to the proposed procedure can be summarized as follows:

1. The burden of proving whether the settlement should be approved has been misplaced in the Settling Parties' motion;
2. The hydrographic survey of the Navajo Nation should not be cancelled as requested by the Settling Parties; and
3. All of the claimed rights of the Navajos and the Navajo Nation should be determined at one time, which is contrary to the request of the Settling Parties.

I. THE APPROPRIATE BURDEN OF PROOF

The Settling Parties seek to have the Court create a presumption that their settlement is fair and just and in the best interest of the public, and seeks to require anyone objecting to the same to prove to the contrary. The proposed language in the order as they would have it would require an objecting individual to "state with particularity, what aspects of the proposed decree are objectionable and specifically how you will be harmed if the Court enters the decree as proposed." (Joint Motion Memorandum, page 12). In light of the nature of the proposed settlement, the quantity of the water involved, the priority dates asserted, and the impact upon thousands of water rights users and holders, the burden to establish the fairness and justness of the settlement should fall upon the Settling Parties. This position is consistent with historic case law.

The standard proposed by the Settling Parties is very similar to that utilized in class-action lawsuit settlements. Notice is sent out, and the members of the class receive an outline of the terms, but that is where the similarity ends. Contrary to class-action suits, the proposed settlement action is not for the benefit of the members of the class; instead, the roles are reversed and a single party is the beneficiary of the settlement. In a class-action, members of the class have an option to opt out; of course, no such option exists in this litigation. (See Rule 1-023 NMRA.)

Further, in a class action, the class representative has the burden of proving the settlement is just and fair *for the class*. In this scenario, the Settling Parties seek to force the thousands of non-Indian users to prove a negative: that the settlement is *not* fair and just and that it would negative impact the individual class member. This is contrary to the general practice in these types of cases and dumps the traditional notions of due process and fairness on their head. The Settling Parties should bear the burden of proof through an evidentiary hearing, in which the parties must establish that the settlement is just and fair (that there is a reasonable, objective and empirical basis for the terms of the settlement, and that it will not harm the class of other water users).

Placing the burden of proof to prove up the settlement on the Settling Parties is consistent with the rules that are generally applied to proceedings before the State Engineer's office. In those proceedings, the *Movant* must establish that there is no impairment of existing rights and that the proposed action is not detrimental to the public welfare. (Office of the State Engineer website: Rules and Regulations Governing the Appropriation and Use of Ground Water in New Mexico, Rules and Regulations Governing the Appropriation and Use of Surface Water in New Mexico.)

While it is understood that the rights being considered in the settlement are federal reserved rights under the *Winters* doctrine (*Winters v. United States*, 207 U.S. 564, 1908), the fundamental principals adopted by the Office of the State Engineer for its hearings on appropriation of water apply equally to this litigation. The Settling Parties need to prove that there is a reasonable basis for the amount of water being awarded under the settlement, and that the priority given to the water can be reasonably justified. In addition, the Settling Parties must establish what impairment of other users, if any, will occur and that the settlement will not be detrimental to the public interests.

The Settling Parties ask the Court to *presume* that each of the criteria mentioned in the previous paragraph are met unless an individual rebuts them. One cannot indulge in such presumptions when over one-half of the available water in the San Juan Basin is being adjudicated to one party in the suit. It is interesting that the Settling Parties' cited case law is contrary to the position that they ask the Court to approve. The standard of review quoted as the "appropriate standard of review" is whether the settlement is "fair, adequate, and reasonable, and consistent with the public interest and applicable law." (Settling Parties Memorandum, page 9.) The burden to establish these elements is appropriately placed on the Settling Parties to be established through an evidentiary hearing. Each of the cases listed on page 11 of the Settling Parties' Memorandum expressly state or imply that it is the Settling Parties' burden to prove up the settlement, not the burden of other litigants to prove that it should not be accepted.

Further, requiring the Settling Parties to establish the fairness of the settlement is appropriate because the Settling Parties are in possession of *all* the relevant information. Only the Settling Parties can establish that the amount of water being awarded to the Navajo

Nation is not some fictional figure drawn out of the air, the basis for the appropriation date of the water, and other essential facts that are necessary to determine the fairness, justness, and reasonableness of the settlement.

Throughout this litigation, the Settling Parties have resisted all efforts to obtain discovery regarding the basis of the settlement terms, arguing that no settlement existed at the time the requests were made. Now such a settlement exists, and it would be beyond the financial means of any individual to prepare his own studies, evaluations, and other research with regard to a proposal this massive, and it would also be a duplication of effort and a waste of resources. Basically the Settling Parties' position is that their settlement is presumed valid, they are in possession of all the information for which they probably have spent over a million taxpayer dollars to obtain, which they argue they should not have to present to the Court in an evidentiary hearing, and they seek to require any individuals affected by the settlement to develop their own information at their own considerable expense. Such a process is not justice; it is a procedure used in the courts of dictators.

II. THE HYDROGRAPHIC SURVEY

One critical source of information necessary to establish the reasonableness of the settlement has not even been accomplished to date: the Hydrographic Survey. On numerous occasions, the OSE attorneys have stood before this Court and argued with great passion that no adjudication process could be started or completed without a hydrographic survey. Presently, however, the Settling Parties now ask that this Court eliminate the Court-ordered production of such a survey for the Navajo Nation. What then is the basis of the award to the Navajo Nation? How are the uses identified under the *Winters* doctrine determined? The hydrographic survey, indicating present and potential future uses of the water, must be

accomplished in order to determine the validity of the amounts of water to be awarded. The request to eliminate the survey should be denied.

III. ALL NAVAJO CLAIMS SHOULD BE ADJUDICATED AT ONE TIME

It is La Plata's position that *all* Navajo claims should be established in a single proceeding. The request for separate proceedings for some Navajo claims should be denied.

While the claims identified by the Settling Parties to be excluded from the settlement appear to be *de minimus*, there can be no assurance that they will remain at that status. If the claims are truly *de minimus*, they can be wrapped up as part of the hydrographic survey which has already been ordered by the Court. The thousands of other water users of the San Juan Basin should not be kept at risk of further Navajo claims, which possibly could become claims of substance, after this *inter se* proceeding.

IV. CONCLUSION

The Settling Parties argue that the Court should adopt their position due to the deadline imposed by the enabling legislation. While this deadline does justify an expedited *inter se* proceeding, justice should not be sacrificed upon the altar of such an artificial deadline. All parties should strive to meet the deadline, but La Plata is confident that Congress would extend that deadline if substantial progress is being made towards completing the settlement process.

In fact, the Legislative deadline argues that the burden of proving up the settlement terms as being fair, just, and reasonable should lie with the Settling Parties since they are in possession of all the necessary information to establish the appropriateness of the settlement.

The members of the La Plata Valley Acequia Association would request that the Court place the burden upon the Settling Parties to prove, at an evidentiary hearing, the fairness,

justness, and reasonableness of the settlement, deny their request for the Settling Parties to cancel the requirement for a hydrographic survey, and require that all Navajo claims be included in the settlement that has been proposed.

Respectfully submitted,
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