

SJ-17
Navajo Sett

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel. State Engineer,
Plaintiff - Appellee,

vs.

UNITED STATES OF AMERICA,

Defendant - Appellee,

and

NAVAJO NATION,

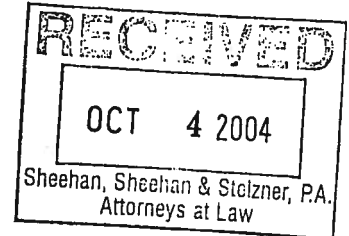
Intervenor (Defendant) - Appellee,

vs.

No. _____

GARY L. HORNER,

Intervenor (Defendant) - Appellant.



INTERLOCUTORY APPEAL

FROM THE ELEVENTH JUDICIAL DISTRICT COURT OF SAN JUAN COUNTY

Rozier E. Sanchez, Eleventh Judicial District Judge *pro tempore*,

by Designation of the Chief Justice of the Supreme Court

APPLICATION FOR INTERLOCUTORY APPEAL

(Pursuant to Rule 12-203 NMRA)

Respectfully submitted by:

GARY L. HORNER, Esq., *In propria persona*

Intervenor (Defendant) - Appellant

(hereinafter referred to in the first person, or as "Appellant")

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Application for
Interlocutory Appeal

I. STATEMENT OF THE FACTS NECESSARY TO AN UNDERSTANDING OF THE CONTROLLING QUESTION OF LAW DETERMINED BY THE ORDER OF THE DISTRICT COURT

The subject matter is a general stream adjudication suit with respect to the waters of the San Juan Basin in New Mexico. The subject complaint was filed in the District Court of San Juan County by the New Mexico State Engineer on March 13, 1975.

Most of the non-Indian and non-federal water rights in the San Juan Basin in New Mexico were adjudicated in 1948 pursuant to the Echo Ditch Decree. It appears that in 1948, the Echo Ditch Court did not believe it had jurisdiction over federal or Indian water rights. However, pursuant to the passage of the McCarran Amendment (43 U.S.C. § 666, 1952), it became clear that state courts do have jurisdiction over the adjudication of federal and Indian water rights.

Between 1955 and 1968, the state engineer issued several permits to the United States Bureau of Reclamation ("BOR") with respect to the waters of the San Juan Basin in an aggregate amount of more than 1,500,000 acre-feet per year ("afy"). By way of comparison, New Mexico's right to the use San Juan Basin water is limited to perhaps 838,000 afy pursuant to interstate compacts. The BOR would further limit New Mexico's use of such waters to 669,000 afy based upon their interpretation of said compacts.

Currently, the total use of San Juan Basin water in New Mexico amounts to

approximately 400,000 afy. Included within said amount is approximately 100,000 afy diverted from the headwaters of the San Juan River in Colorado into the Rio Grande Basin through the San Juan-Chama Project facilities. Also included within said New Mexico uses, is approximately 180,000 afy diverted from the San Juan River at Navajo Dam for the NIIP Project.

One of the above mentioned BOR permits relates to the Navajo Indian Irrigation Project ("NIIP"), and was issued in an amount of 630,000 afy. Further, the BOR has entered into a contract with the Navajo Nation, with respect to NIIP in an amount of 508,000 afy. The point is that the federal and Indian claims in the San Juan Basin have become substantial.

For some time, certain Navajo Nation officials have publicly claimed the right to every drop of water in the San Juan Basin, that is, not merely every drop of New Mexico's share of the waters of the San Juan Basin, but every drop of water in the entire San Juan Basin.

Apparently, said vast Navajo water rights claims were premised upon the concept of federal reserved water rights (sometimes referred to as the *Winters* Doctrine¹), and more specifically, upon the concept of "practically irrigable acreage" ("PIA"),² based upon the enormous size of the Navajo Reservation. Further, the

¹ *Winters v. United States*, 207 US 564, 52 L ed 340, 28 S Ct 207 (1908).

² *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963).

Navajo Nation asserts that, pursuant to the *Winters* Doctrine, its water rights should have a priority date of 1868 (which essentially predates all other water rights in the San Juan Basin in New Mexico), and that such water rights cannot be lost due to non-use.

Thus, the present stream adjudication suit was filed in 1975 primarily for the purpose of determining the federal and Indian water rights in the San Juan Basin. To date, the water rights of the Navajo Nation have not been adjudicated, or otherwise determined or quantified.

Accordingly, the State of New Mexico and the Navajo Nation have been negotiating in secret for several years with respect to the determination of the water rights of the Navajo Nation.

On December 5, 2003, the State of New Mexico and the Navajo Nation publicly released a set of documents regarding the Navajo Water Rights Settlement for the first time. The release of said documents was accomplished primarily by publishing them on the website of the Office of the State Engineer ("OSE"). At such time, the Executive Summary associated with said proposed Settlement, published on said website, indicated that the public had until January 15, 2004 to comment on said documents, and that the State of New Mexico and the Navajo Nation intended to execute said Settlement by February 2004.

Said Settlement documents included the proposed Navajo Water Rights

Settlement Agreement itself, as well as, a proposed Partial Final Decree to be entered in the subject Adjudication suit (said Partial Final Decree was appended to said Settlement Agreement as Appendix 1); a proposed Settlement Act to be passed by Congress (said Settlement Act was appended to said Settlement Agreement as Appendix 2); and a Settlement Contract to be entered into between the United States and the Navajo Nation (said Settlement Contract was appended to said Settlement Agreement as Appendix 3). Further, pursuant to said Executive Summary, said Parties expressed that they hoped to have said proposed federal legislation introduced in Congress by March 1, 2004.

Said Executive Summary stated that it was expected that said Settlement Agreement and Settlement Contract would be executed by the United States Secretary of the Interior upon passage of the Settlement Act into law. Also, after passage of the Settlement Act, the proposed Partial Final Decree would be submitted to the San Juan River Adjudication Court, with a request that it be made final and binding upon all claimants in the Adjudication.

In this regard, the Settling Parties propose to use what they refer to as an "expedited *inter se*" procedure in the Adjudication Court. The Settling Parties envision filing of a joint motion for a Partial Final Decree which would initiate an expedited *inter se* procedure, whereby the Adjudication Court would consider solely the issue of the Partial Final Decree of the water rights of the Navajo Nation. The

expedited *inter se* process envisioned by the Settling Parties would result in a final determination of the Navajo Nation water rights and such final determination would be binding upon all other water users.

This expedited *inter se* process could occur many years before other water users have their water rights finally determined in what has become known as the "*inter se*" phase of the adjudication process. When the *inter se* portion of the adjudication process is conducted, with respect to all other water users, the water rights of the Navajo Nation would not be subject to consideration or challenge because they would have been previously finally determined pursuant to the subject "*inter se*" procedure.

The Navajo Settlement, as published, would establish the right of the Navajo Nation to divert more than 600,000 afy from the San Juan Basin. This compares to the Navajo Nation's current total annual diversions from the San Juan Basin in New Mexico of approximately 200,000 to 250,000 afy. Therefore, the Navajo Settlement would grant the Navajo Nation the right to divert as much as 400,000 afy over and above their current uses.

The Navajo Settlement provides that such water rights would never be subject to forfeiture for non-use. The Navajo Settlement would grant the Navajo Nation the right to use such water on the Navajo Reservation for any purpose. The Navajo Settlement would grant the right to lease their excess water to any water

user off of the Navajo Reservation. Further, the Navajo Settlement opens the door for the Navajo Nation to lease their excess water to water users outside the state of New Mexico. Accordingly, the Navajo Settlement does not require the Navajo Nation to show any beneficial use with respect to the subject water right, and no hydrographic survey would ever be performed regarding said water right before said water right would be adjudicated in the Adjudication Court.

Said proposed Settlement Act provided for the appropriation of approximately \$871,000,000 for water projects on the Navajo Reservation. But of more significance here, said Settlement Act also sets forth the quantity of water right to be adjudicated to the Navajo Nation, as well as the fact that such water right cannot be lost due to nonuse, and the right to market such water off of the Reservation.

On June 23, 2004, I filed a Motion to Enjoin the Execution of the Navajo Water Rights Settlement ("Motion to Enjoin"). On September 17, 2004, the Court entered an Order denying said Motion to Enjoin. The present Application seeks permission for an interlocutory appeal with respect to said Order.

The essence of the Motion to Enjoin is that:

1. 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,³ because the judiciary has exclusive jurisdiction over the adjudication of water rights.⁴
2. There is no authority for the partial final decree and expedited *inter se* procedure set forth in the Navajo Settlement.⁵
 3. Identical standards must be used to determine each individual water right, the failure to do so is patently unfair and improper.⁶
 4. A hydrographic survey must be completed with respect to Navajo water uses before any Navajo water rights may be determined in the present matter.⁷
 5. 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.⁸

³ N. M. Const., Art. III, § 1; 1971 Op. Att'y Gen No. 71-23

⁴ § 72-4-17 NMSA 1978; *W. S. Ranch Company v. Kaiser Steel Corporation*, 79 N.M. 65, 439 P.2d 714 (1968)

⁵ *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959); *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 508 P.2d 577 (1973); *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, 99 N.M. 699, 663 P.2d 358 (1983); Violation of due process

⁶ *State ex rel. Reynolds v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967)

⁷ *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959)

⁸ N.M. Const., Art. XVI, § 3 [**Beneficial use.**] provides

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

6. There is 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.
7. Review of an executed Navajo Settlement by the adjudication Court will provide no realistic opportunity to address the issues presented.⁹
8. The execution of the Navajo Settlement would cause irreparable harm to all other water users in the San Juan Basin.

Said Motion to Enjoin sets forth how the Navajo Settlement, taken in conjunction with the operation of the Animas-La Plata Project, the reoperation of Navajo Dam and the currently proposed administration of the waters of the San Juan Basin by the state engineer, could essentially result in the loss of all privately owned, previously adjudicated, water rights in the San Juan Basin. Said Motion to Enjoin further sets forth how it appears that the Navajo Settlement is designed to create the situation where all existing San Juan Basin water users would be required to obtain contracts with the Navajo Nation (and other Indian tribes) for their existing uses of water, at whatever terms the Navajo Nation should choose to dictate.

Said Motion to Enjoin further argues that, if the Navajo Nation is successful in establishing the right to market its waters out-of-state, San Juan Basin water

⁹ U.S. Const., Article VI, paragraph 2. (Supremacy Clause)

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 their 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.

As structured, the Navajo Settlement Agreement is the premise upon which the Settlement Act is based. Further, said Settlement Act must be passed by Congress before the Partial Final Decree is presented to the Adjudication Court.

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.¹⁰ 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

¹⁰ 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."

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 the Adjudication Court is to ever review the water rights issues presented by the Navajo Settlement, the execution of the Navajo Settlement must be enjoined.

On July 9, 2004 a revised draft of the Navajo Settlement Act was released by the state of New Mexico and the Navajo Nation. Said revised draft has the same problems previously described and several new ones, such as, it would dictate how the San Juan Basin would be administered by the State Engineer, how certain other water rights would be adjudicated in the Adjudication Court, and would in essence prevent the transfer of existing previously adjudicated, but currently unused, water rights between other water users in the San Juan Basin. Further, the federal appropriations for Navajo Nation water projects has increased to more than \$1,000,000,000.

The Adjudication Court directed that the Parties submit written briefs regarding said Motion to Enjoin by August 13, 2004. The Adjudication Court appeared to be primarily concerned about the implications of the *Winters* Doctrine. Accordingly, on August 13, 2004 I submitted GARY HORNER'S BRIEF REGARDING MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO

WATER RIGHTS SETTLEMENT. Pursuant to said Brief, I demonstrated that the PIA standard was not an appropriate standard for determining Indian water rights¹¹ and that the courts had limited Indian federally reserved water rights to only their “minimal needs.”¹² Any additional Indian water rights must be acquired according to state law.¹³

A hearing was conducted on August 20, 2004 to consider said Motion to Enjoin. Subsequently, the Adjudication Court denied said Motion to Enjoin by Order entered September 17, 2004. (A copy of said Order is attached hereto.)

In essence the Adjudication Court decided that movants did not face an imminent threat of irreparable harm because the Navajo Settlement is not binding on third parties until the Partial Final Decree is entered; and that movants have an adequate remedy at law because the subject issues can be addressed in the above described expedited *inter se* process. Pursuant to said Order, the Court went on to preserve the issues raised until said expedited *inter se* proceeding and further certified this matter for interlocutory appeal.

¹¹ *In re the General Adjudication of all Rights to Use Water in the Gila River System and Source*, 201 Ariz. 307, 35 P.3d 68 (2001) (referred to as “Gila V”)

¹² *Cappaert v. United States*, 426 U.S. 128, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), cert. Denied sub nom., *Oregon v. United States*, 467 U.S. 1252, 104 S.Ct. 3536, 82 L.Ed.2d 841 (1984); *Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235 (1993)

¹³ *United States v. New Mexico*, 438 U.S. 696, 98 S.Ct. 3012, 57 L.Ed.2d 1052 (1978)

Said Order raises two primary issues: first, whether movants face an imminent threat of irreparable injury; and second, whether the preservation and consideration of the issues raised in the Motion to Enjoin until the expedited *inter se* proceeding represents an adequate remedy at law.

Regarding the first issue, the state engineer proposes to administer the waters of the San Juan Basin next year. A water master has already been appointed for such purpose. The state engineer has proposed a set of regulations for the administration of the waters of the state entitled "Active Water Resource Management" ("AWRM") regulations. Pursuant to said AWRM, the state engineer grants unto himself and the water master an unfettered discretion to administer the waters of the state on just about any basis they should desire. Included within said AWRM is the concept of "replacement plans" that appear to be designed for the very purpose of facilitating the contracts between the Navajo Nation and other water users. Said replacement plans would become effective immediately upon approval of the state engineer without any regard to the normal statutory water right transfer procedures. Accordingly, movants will face the threat of irreparable harm immediately upon the execution of the Navajo Settlement and the administration of the waters of the San Juan Basin.

Regarding the second issue, I have clearly set out that upon the passage of the Settlement Act by Congress, the Adjudication Court will be deprived of the

authority to consider the issues raised in the Motion to Enjoin by virtue of the Supremacy clause of the United States Constitution, and possibly even the doctrine of preemption. By the time the subject Partial Final Decree is presented to the Adjudication Court in the expedited *inter se* procedure, the Adjudication Court will have no authority to do anything but approve the subject Partial Final Decree.

Therefore, the only possible time to consider the issues raised pursuant to the Motion to Enjoin, will be before the subject Settlement Act is passed by Congress.

II. STATEMENT OF THE CONTROLLING QUESTION OF LAW DETERMINED BY THE ORDER OF THE DISTRICT COURT

The primary assertion presented by the Motion to Enjoin is that the execution of the Navajo Settlement should be enjoined and the water rights of the Navajo Nation should be determined by hydrographic survey.

The controlling question of law as presented by the subject Order is whether the preservation of the issues raised by the subject Motion to Enjoin, until the expedited *inter se* proceeding, represents an adequate remedy at law.

III. STATEMENT OF THE REASONS WHY A SUBSTANTIAL GROUND EXISTS FOR A DIFFERENCE OF OPINION ON THE CONTROLLING QUESTION OF LAW

Pursuant to the subject Order, the Adjudication Court decided that the subject Motion to Enjoin should be denied because the preservation of the issues raised by the subject Motion to Enjoin, until the expedited *inter se* proceeding, represents an adequate remedy at law.

Appellant asserts that the preservation of such issues until the *inter se* phase of the proceeding does not represent an adequate remedy at law, because the Adjudication Court will be deprived of the discretion to review such issues at such time, by virtue of the Supremacy Clause of the United States Constitution, due to the anticipated passage of the subject Settlement Act by Congress prior to the expedited *inter se* proceeding.

Even the Adjudication Court recognized, and so stated in the subject Order, that a substantial ground exists for a difference of opinion on the controlling question of law and that an immediate appeal from said Order may materially advance the ultimate termination of the litigation.

IV. STATEMENT OF THE REASONS WHY AN IMMEDIATE APPEAL MAY MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

First, without an immediate appeal, the issues raised pursuant to the subject Motion to Enjoin will never be able to be heard and determined by the Adjudication Court due to the anticipated passage of the Settlement Act and the implications of

the Supremacy Clause of the United States Constitution as discussed herein above.

Second, the subject Motion to Enjoin and associated Brief assert that the granting of hundreds of thousands of acre feet of water to the Navajo Nation over and above their existing uses, without any showing of beneficial use, that will not be subject to loss for nonuse, that may result in the loss of all other water rights in the San Juan Basin, is patently unfair and improper, especially when considering that the water rights of all other users are to be determined by hydrographic survey. In order to be remotely fair, the water rights of the Navajo Nation must be determined based upon the application of the same standards applied to the determination of all other water rights. In that regard, the water rights of the Navajo Nation must be determined by hydrographic survey, rather than by settlement.

The Settlement Act associated with the July 9, 2004 draft of the Navajo Settlement provides that the Partial Final Decree must be entered in the Adjudication Court by December 31, 2015. It is clear that based upon the subject Order many years may pass before the subject Partial Final Decree is entered by the Adjudication Court.

If the issue as to whether the water rights of the Navajo Nation should be determined by hydrographic survey, as opposed to by settlement, is ever considered by the Adjudication Court, and if it is determined at such time that the settlement

process is improper and that the water rights of the Navajo Nation should be determined by hydrographic survey, many years and enormous effort pursuing the Navajo Settlement would have been completely wasted.


In that regard, the determination as to whether the water rights of the Navajo Nation should be determined by settlement or by hydrographic survey should be considered now, and an immediate appeal of the subject Order may materially advance the termination of the litigation by many years.

V. PRAYER FOR RELIEF

By this Application, I seek an order permitting an interlocutory appeal of the subject September 17, 2004 Order of the Adjudication Court.

By this appeal, I seek the reversal of the Adjudication Court's Order denying the subject Motion to Enjoin the Execution of the Navajo Water Rights Settlement, and such other and further relief as is deemed appropriate by the Court.

Respectfully submitted,



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October 2, 2004

Date

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Application for
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GARY L. HORNER

STATE OF NEW MEXICO

COUNTY OF SAN JUAN

ELEVENTH JUDICIAL DISTRICT COURT

FILED
DISTRICT COURT
SAN JUAN COUNTY
NM

2004 SEP 17 A 10:40

STATE OF NEW MEXICO on
Relation of the State Engineer

Plaintiff,

vs

D-1116-CV-7500184

UNITED STATES OF AMERICA. et al.

Defendants

vs

JICARILLA APACHE NATION &
NAVAJO NATION

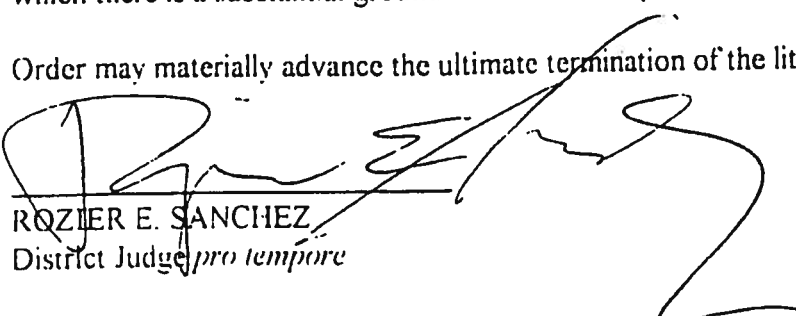
Intervenors

For the foregoing reasons, the Court concludes that the appropriate time for the Court to consider the issues raised by the Motions as well as additional motions or objections that may be filed relating to the Settlement Agreement, is in the *inter se* proceedings to be commenced for the express purpose of determining whether the Court should enter the Partial Final Decree adopting the terms of the Settlement Agreement.

IT IS THEREFORE ORDERED that the above Motions be and the same are hereby denied.

IT IS FURTHER ORDERED that all issues raised in the Motion Hearing on August 20, 2004 be preserved for presentation during an Expedited *inter se* proceeding after the parties to the Settlement Agreement have filed their Motion requesting that the Court enter a Partial Final Decree.

IT IS FURTHER ORDERED that the present Order does not practically dispose of the merits of the Action and the Court believes that this Order involves a controlling question of law as to which there is a substantial ground for difference opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation.



ROZIER E. SANCHEZ
District Judge *pro tempore*

sjdec