



NAVAJO NATION DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL

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OFFICE OF THE
STATE ENGINEER
A.S.D. SANTA FE, NM

October 17, 2001

Thomas C. Turney, P.E.
New Mexico State Engineer
P.O. 25102
Santa Fe, NM 87504-5102

Re: San Juan Water Commission's Application to Appropriate Surface Water

Dear Mr. Turney:

The Navajo Nation is in receipt of a copy of the San Juan Water Commission's Application for Permit Pursuant to NMSA § 72-5-33 ("Application") and the accompanying letter filed with the Office of the State Engineer on January 29, 2001. Notwithstanding the fact that this matter has not been published pursuant to NMSA § 72-5-5(A), by this letter the Navajo Nation objects to the Application. The Application should be denied for several reasons.

As a preliminary matter, the State Engineer should take notice of the fact that the 1995 amendments to NMSA § 72-5-33 was drafted by and supported by the San Juan Water Commission ("Commission"). No applications have been made by any other entity under the provisions of this section since the legislation was intended to apply solely to the San Juan Water Commission. Therefore, any ambiguities concerning NMSA § 72-5-33, or any questions concerning its applicability to the proposed Application should be construed against the Commission.

- 1. The Animas-La Plata Project Has Not Been Deauthorized; Therefore, the Water Sought by the Commission Has Not Been Returned to the State of New Mexico Pursuant to NMSA § 72-5-33 .**

The San Juan Water Commission seeks to appropriate water pursuant to NMSA § 72-5-33; however, the provisions of that section specify that water withheld for federal reclamation projects becomes public water subject to general appropriation only if the planned federal reclamation project will not be constructed. The provisions of that section do not become effective unless "the United States Congress, the Secretary of the Interior or a court of competent jurisdiction, in a nonappealable final judgment, determines that the planned federal reclamation project will not be constructed." NMSA § 72-5-33(A)(2). None of those conditions have occurred. The Application is premised on the assumption that Congress deauthorized the features of the Animas-La Plata Project ("ALP") that would have utilized the 15,080 acre-feet per year. Opponents of ALP asked Congress to deauthorize the project as part of the Colorado Ute Water Rights Settlement Act of 2000; *S. 2508 and H.R. 4577*, approved December 15, 2000. Congress declined to deauthorize the project; indeed, the Commission concedes that Congress specifically noted that the authorized project facilities constitute the "Animas-La Plata Project." Since there has been no determination that the project "will not be constructed" pursuant to NMSA § 72-5-33(A)(2), the Application must be denied.

2. Portions of the Water Held by Permit No. 2883 Were Intended for the Navajo Nation.

The water held by Permit No. 2883 was designated for the Animas-La Plata Project. The San Juan Water Commission and the Navajo Nation were both intended beneficiaries of ALP as previously conceived and as authorized by Congress. In the project described in the 1996 Supplement to the Final Environmental Impact Statement for ALP, Navajo Nation was to receive 7600 acre-feet and the San Juan Water Commission was to receive 30,800 acre-feet of the annual project water supply. Under the modified ALP, as authorized by Congress, each of the participants agreed to reduce their water supply so that the overall project depletion would not exceed 57,100 acre-feet per year, the depletion previously approved by the U.S. Fish & Wildlife Service pursuant to its Biological Opinion dated October 25, 1991. As a result, the Navajo water supply was reduced to 4680 acre-feet, with an annual depletion of 2340 acre-feet. The water for the San Juan Water Commission was reduced to 20,800 acre-feet with an annual depletion of 10,400 acre-feet. Thus, at least 2920 acre-feet of the water remaining in Permit No. 2883 was reserved for the Navajo Nation. In addition, because the Navajo Nation's ALP water supply was reduced by a greater percentage than the supply for the San Juan Water Commission (38.42% versus 32.47%), the Navajo Nation should be entitled to a greater amount of the undeveloped water held by Permit No. 2883. The Commission should not be permitted to "grab" all the water remaining under Permit No. 2883.

3. The Proposed Appropriation Is Not Consistent with Permit No. 2883.

Permit No. 2883 authorizes the United States to appropriate 49,510 acre-feet per year to irrigate 20,600 acres of land as described in the Explanatory Statement attached to the original permit. The Commission's Application is for water to be used for "Municipal and Industrial purposes," inconsistent with the purpose of Permit No. 2883. NMSA § 72-5-33 does not authorize the entity seeking the appropriation to change the place and purpose of use of the water. Moreover, Permit No. 2883 limits the water supply to the Animas and La Plata Rivers. The proposed Application seeks to include the San Juan River as a water supply. NMSA § 72-5-33 does not authorize the application to change the water supply from the original permit.

4. The Commission has not Demonstrated a Need for the Proposed Application.

Neither the Application nor the accompanying letter make any reference to an actual need for the water sought to be appropriated. In fact, the Application states that the Commission "will hold the water rights described in this application until such time any Joint Powers Agreement signatory party demonstrates the need for a portion of this water." It is axiomatic that no application to appropriate water can be granted without a showing that the water will be put to beneficial use. N.M. Const., art. XVI § 3; *State ex rel. Erickson v. McLean*, 62 N.M. 264, 308 P.2d 982 (1957). Not only has the Commission failed to demonstrate a need for the water, the Commission will receive 20,800 acre-feet of additional water as a result of the recent legislation authorizing the construction of the Animas-La Plata Project. The proposed application is nothing more than an attempt to "grab" additional water. The Commission is not a municipality; nevertheless, municipalities are not entitled to water greatly in excess of their current needs. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981). The San Juan Water Commission's application is based on mere speculation, not on reasonable beneficial use.

5. The Proposed Appropriation is not Consistent with the Public Welfare of the State and the Conservation of Water within the State.

Notwithstanding the provisions of NMSA § 72-5-33(C)(2), the proposed appropriation is not consistent with the public welfare of the State and the conservation of water within the State. The Navajo Nation has substantial reserved, historical, and appropriative water rights to the San Juan River that have not been fully quantified. Settling the water rights of the Navajo Nation would provide certainty for water resource management in the San Juan Basin and would be otherwise beneficial to all water users in the basin, if not the State of New Mexico. Most Indian water settlements have been premised on the partial relinquishment of portions of the tribal entitlement in exchange for tribal water development utilizing the remaining undeveloped water supply. See generally Elizabeth Checchio & Bonnie R. Colby, *INDIAN WATER RIGHTS - NEGOTIATING THE FUTURE*, 1993; Peter W. Sly, *RESERVED WATER RIGHTS SETTLEMENT MANUAL*, 1988. This paradigm provides a mechanism for the protection of existing non-Indian water uses. The proposed Application would reduce the available supply of undeveloped water that could be used as part of a water rights settlement with the Navajo Nation. Thus, the proposed Application could hamper the ability to settle the water rights claims of the Navajo Nation, contrary to the public welfare of the State of New Mexico and the San Juan River basin.

In addition, the public welfare of the State and the conservation of water within the State would not be served by allowing the San Juan Water Commission to "hold the water rights . . . until such time any Joint Powers Agreement signatory party demonstrates the need for a portion of this water." Holding water rights for speculative purposes is contrary to N.M. Const., art. XVI § 3.

6. NMSA § 72-5-33 Unconstitutionally Deprives the State Engineer and the Court of Authority to Determine whether the Application is in the Public Welfare and Consistent with Water Conservation.

The State Engineer is charged with the responsibility to determine if a proposed application to appropriate water is in the public welfare of the state and not contrary to the conservation of water in the state. NMSA § 72-5-6. The provisions of NMSA § 72-5-33(C)(2) usurp the State Engineer of this authority by creating a presumption that such appropriation is consistent with the public welfare of the state and the conservation of water within the state. NMSA § 72-5-33(C)(2) violates N.M. Const., art. III by infringing on the power of the State Engineer to determine whether a proposed application to appropriate water is in the public welfare of the state and not contrary to the conservation of water in the state pursuant to NMSA § 72-5-6, or if such appropriation is consistent with the requirements of beneficial use pursuant to N.M. Const., art. XVI § 3.

Moreover, because all appeals to the district court from a decision of the State Engineer relating to water rights are heard *de novo* pursuant to N.M. Const., art. XVI § 5, the provisions of NMSA § 72-5-33(C)(2) usurp the authority of the courts to make determinations pursuant to NMSA § 72-5-6 and N.M. Const., art. XVI § 3. NMSA § 72-5-33(C)(2) is a legislatively created presumption intended to alter the rules of evidence and persuasion before the New Mexico courts. The New Mexico Supreme Court has made it clear that the Supreme Court, not the state legislature, has superintending control over the courts pursuant to N.M. Const., art. III and art. VI, § 3. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354, 1358 (1976).

In Arizona, the state legislature attempted to modify the state water code by mandating that certain water uses were presumed to be valid and that certain water rights filings were to be presumed as true. The Arizona Supreme Court struck down such legislative presumptions as unconstitutional infringements with the adjudicatory powers of the judicial branch. *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179, 194-97 (1999). The attempt by the New Mexico legislature to create presumptions under NMSA § 72-5-33 (C)(2) infringes with the adjudicatory power of the State Engineer and the New Mexico courts.

7. NMSA § 72-5-33(B) Violates the Equal Protection Provisions of the United States and New Mexico Constitutions by Giving First Preference to Water Users Who have Entered into Repayment Contracts with the United States.

The provisions of NMSA § 72-5-33(B)(1) state that first preference for any appropriation of "released water" shall be given to "water users who have contracted to receive such waters under a repayment contract with the United States." At the time this provision was enacted, the San Juan Water Commission was the only project beneficiary with a repayment contract for ALP water. More importantly, the Navajo Nation, another project beneficiary, did not have a repayment contract. Nor was it likely that the Navajo Nation or any other Indian tribe would have a repayment contract with the United States since the costs associated with the development of Indian water projects are generally deferrable or non-reimbursable to the United States. In this instance, that is exactly what Congress provided for in the recent legislation authorizing the construction of ALP. NMSA § 72-5-33(B)(1) gives clear preference to the San Juan Water Commission to appropriate this water over the Navajo Nation, in violation of Article XIV of the United States Constitution and Article II, § 18 of the Constitution of New Mexico.

8. NMSA § 72-5-33(B) Violates the Equal Protection Provisions of the United States and New Mexico Constitutions by Giving Priority Date Preference to Water Users Who have Entered into Repayment Contracts with the United States.

The provisions of NMSA § 72-5-33(B)(3) state that appropriation of water under that section "by water users under a repayment contract shall bear the priority date of the original notice to appropriate such water." Those entities without a repayment contract, such as the Navajo Nation, are not afforded this benefit. For the reasons stated above, this provision violates gives clear preference to the San Juan Water Commission to appropriate this water over other entities, including the Navajo Nation, in violation of Article XIV of the United States Constitution and Article II, § 18 of the Constitution of New Mexico.

9. The Provisions of NMSA § 72-5-33(D) Do Not Cure the Problems with the Proposed Application or the Statutory Provisions of NMSA § 72-5-33.

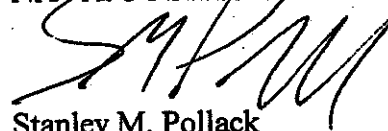
The provisions of NMSA § 72-5-33(D) state that nothing in that section "shall affect the water rights of any senior appropriators in New Mexico or any Indian tribe." As demonstrated above, the proposed application adversely affects the water rights of the Navajo Nation by giving the Commission an earlier priority date for its ALP water and by giving the Commission preferential access to the water subject to Permit No. 2883. It also adversely affects the interests of the Navajo Nation, and all other water users in the San Juan River basin, by making less water available for a settlement. The provisions of NMSA § 72-5-33(D) are merely pabulum that do not cure any of the objections stated herein.

Conclusion: For the above stated reasons, the application of the San Juan Water Commission should be denied.

The Navajo Nation reserves all rights to assert additional objections to the proposed application.

Respectfully submitted,

NAVAJO NATION DEPARTMENT OF JUSTICE



Stanley M. Pollack
Water Rights Counsel

xc: L. Randy Kirkpatrick, Executive Director
San Juan Water Commission
800 Municipal Drive
Farmington, NM 87401

STATE ENGINEER OFFICE
SANTA FE, N. M.

NOTICE OF INTENTION TO MAKE FORMAL APPLICATION FOR PERMIT

To Appropriate the Natural Public Surface Waters of the State of New Mexico

Page 2883 Filed in Book M-2 Appl. No. 2883

- Date of receipt of Notice of Intention May 1, 1956
(a) Formal application to be received on or before May 1, 1959
- Name of applicant State of New Mexico by S. E. Reynolds, State Engineer
Post Office Santa Fe County of Santa Fe State of New Mexico
- If applicant is a corporation give:
 - Date and place of organization of corporation _____
 - Amount of capital stock, \$ _____ (c) Amount paid in \$ _____
 - Names and addresses of directors _____

- Quantity of unappropriated water claimed (see note on back) 49,510 (on the land) acre-feet
(a) By direct diversion _____ sec. ft. _____ (b) by storage _____ acre-feet
(and, or)
(c) Direct diversion and storage as per planned Colorado-New Mexico, Animas - La Plata Project.

- Source of water supply (a) Name of stream or watercourse Animas and La Plata Rivers
(b) Which is a tributary of San Juan River

- Location of point of diversion or outlet from storage (if more than one, locate each):
_____ quarter of _____ quarter
of section _____ Township _____ Range _____ N. M. P. M.,
Points of diversion in Colorado and New Mexico.

- To be used for Full and supplemental irrigation purposes.
IRRIGATION AND DOMESTIC USE
(a) Number of acres to be irrigated 20,600
(b) Described as follows: In La Plata and Animas Valleys in San Juan County, New Mexico, as indicated in Animas - La Plata Project status report Bureau of Reclamation November 1954.

- MANUFACTURING, MINING, POWER AND LIKE PURPOSES
(a) Quantity of water _____ sec. ft. to be used for _____
(b) Power to be generated _____ horse power (c) conducted by _____

(give approximate size and description of conduit) _____ (length) _____
feet in length from a point in the _____ quarter of _____ quart
(locate point of diversion or outlet from storage)
section _____ Township _____ Range _____ N. M. P. M.
to a point where water will be returned to stream undiminished in quantity in the _____ quart
_____ quarter of section _____ Township _____
Range _____ (locate point of return)



8. Further description of proposed project of old works to be amended or enlarged hereby:

9. References:

I, _____ do solemnly swear that I have read the foregoing statements and that the same are true to the best of my knowledge and belief.

Claimant

[Signature]

Subscribed and sworn to before me this 1st day of May, A. D., 1956

My commission expires Jan 28, 1959

[Signature]
Notary Public.

Additional statements or explanations:

INSTRUCTIONS AND EXPLANATIONS FOR FILLING THIS FORM

(See Manual of Revised Rules and Regulations, Section on General Principles of Appropriation and Article on Notice of Intention.)

This form shall be made out in duplicate and shall be accompanied by a filing fee of \$10.00. If the application is to enlarge an existing project or to amend a permit, fill out this form to cover only the enlarged or amended portion, then state under Section 8 the data necessary to define the old works.

Section 1. This section to be filled out by the State Engineer.

Section 2. Fill in the name and address of the applicant.

Section 3. If the applicant is a corporation, company or firm, fill out blanks under section three. Give date of filing certificate of incorporation with the Corporation Commission.

Section 4. The quantity of water to be appropriated for irrigation purposes should be stated in acre-feet delivered on the land. The amount to be used wholly or in part by direct diversion shall be noted after (a); that to be used wholly or in part by storage, after (b). Under (c) give any additional information necessary to properly state or define the use.

Important: Except in the case of flood water projects, no direct diversion to the irrigated lands may be made at a rate greater than 1 second foot for each 70 acres. In no case may a right be acquired for more water than can be beneficially used upon the irrigated area.

Section 5. Each blank under this section shall be filled out.

Section 6. In a direct diversion project, or in the case of diversion to an off-channel reservoir, the point of diversion is the location of the canal headgates on the bank of the stream or water-course. If water is to be stored behind a dam across the stream itself, the point of diversion then becomes the location of the outlet gates from the reservoir.

If the point of diversion lies on unsurveyed lands, it should be described as nearly as possible by legal subdivision "as projected" from the nearest accepted government survey.

Section 7. State all the purposes for which the water is to be used. If for "Irrigation and Domestic Use" state under (a) the total number of acres to be irrigated; under (b) the location of lands to be irrigated. If for "Manufacturing, Mining, Power, or Like Purpose", fill out the statements under that heading. If water is to be used for several purposes, fill out all blanks referring to the different purposes.

Section 8. Give here any additional data necessary to describe the proposed works or old works to be amended or enlarged hereby.

Section 9. Give references of a bank and merchant with whom applicant does business or to whom he is known.

Claimant shall sign affidavit to above statements before a Notary Public or other proper official qualified to administer oaths.

Note: If additional space is necessary, use a separate sheet of paper and attach securely hereto.