

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 FOR ORDER DECLARING
CONFIDENTIALITY AGREEMENT VOID**

COMES NOW Gary L. Horner, in propria persona (hereinafter referred to in the first person), and hereby moves the Court for an order declaring all signed copies of the attached document entitled "Acknowledgment of Confidentiality and Disclaimer CONFIDENTIAL BRIEFING" (hereinafter referred to as the "Confidentiality Agreement") void.

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

1) Attached hereto, please find a copy of a Memo from Jay Burnham, City Attorney (City of Farmington) to Councilor Mary Fischer, dated April 8, 2004 (hereinafter referred to as the "Memo"). Said Memo is hereby incorporated herein by reference.

2) Attached to said Memo, please find: an unsigned copy of the subject Confidentiality Agreement (said Confidentiality Agreement is hereby incorporated

Motion to Void
Confidentiality Agreement

herein by reference); and a copy of Rule 11-408 NMRA.

3) As indicated in said Memo, a meeting was held on April 1, 2004, in the Executive Conference Room at the Farmington City Hall. Said Meeting was called and hosted by Jim Dunlap and John Whipple of the New Mexico Interstate Stream Commission. Said meeting was called for the purpose of briefing local elected officials about some of the proposed changes to the proposed Navajo Water Rights Settlement that were then being currently negotiated between the State and the Navajo Nation. Those in attendance were told that they must sign the subject Confidentiality Agreement in order to remain in the room.

4) As indicated in said Memo, those in attendance were told that they could only relay the information obtained at said meeting to their respective boards, commissions or other governing bodies in one-on-one sessions, or in a closed meeting, and then only if all in attendance also signed the same Confidentiality Agreement beforehand.

5) Apparently, all attending said meeting signed copies of said Confidentiality Agreement, and as indicated in said Memo, all of those attending on behalf of the City of Farmington signed copies of said Confidentiality Agreement.

6) Pursuant to the last paragraph of said Memo, Mr. Burnham offers to brief the Mayor and City Council members either separately, or the entire Council, on the condition that each sign a copy of said Confidentiality Agreement.

7) I understand that Ms. Fischer has taken the position that she will not

sign said such Confidentiality Agreement, and that several other Farmington City Council members have taken the same position. In that regard, I understand that to date the matters discussed at said April 1st meeting have not been presented to either Ms. Fischer or a meeting of the entire Farmington City Council.

8) As indicated in the subject Memo, those signing a copy of said Confidentiality Agreement perceived such Confidentiality Agreement to, in essence, be a vow of silence, in that such signers could not speak to others of matters learned at the subject meeting, unless such others similarly took such a vow of silence. In fact, attorneys signing such Confidentiality Agreement understood that they could not even speak to their clients unless such clients also signed such Confidentiality Agreement. Specifically, Mr. Burnham, Farmington City Attorney, perceived that said Confidentiality Agreement prevented him from informing even his clients, the Farmington City Council, of the matters discussed, unless each Council member also signed a Confidentiality Agreement. Mr. Burnham apparently believed that if a City Councilor did sign such Confidentiality Agreement, such City Councilor would then be precluded from discussing such matters with their constituents.

9) Within said Confidentiality Agreement, the only authority cited as a basis for said Confidentiality Agreement was that

“the information received or discussed as part of the briefing by representatives of the State of New Mexico on April ____, 2004, regarding pending settlement issues between the State of New Mexico and the Navajo Nation in the San Juan stream adjudication, State of New Mexico v. United States, No. 75-134 [sic], San Juan County, New Mexico, are confidential and shall be treated as compromise negotiations under Rule of Evidence 408.” Emphasis added.

10) Said Confidentiality Agreement further provides that

“Except for the provisions of Rule of Evidence 408, the terms of this Acknowledgment of Confidentiality and Disclaimer shall terminate once a revised proposed settlement agreement has been released hereafter.”

11) Rule of Evidence 408 (Rule 11-408 NMRA) provides

“Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it was presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay or proving an effort to obstruct a criminal investigation or prosecution.”

12) Hypothetically, said Rule 408 could at some point be invoked in

litigation between the State of New Mexico and the Navajo Nation to preclude the admission of evidence related to compromise negotiations between said parties.

However, it is clear that such hypothetical invocation of said Rule 408 is in no manner dependent upon the signing of the subject Confidentiality Agreement, or any other agreement between the parties.

13) However, of more significance here is the fact that said Rule 408 provides no basis whatsoever for the subject Confidentiality Agreement. While the State and the Navajo Nation may desire to negotiate in secret, said Rule 408 provides no basis for secret, or confidential, negotiations.

14) The subject Navajo Water Rights Settlement will certainly affect all other water rights owners in the San Juan Basin. In fact, I understand that the

extent of the water rights being negotiated according to said Settlement are so far in excess of current Navajo water uses, and that the priority dates to be granted are senior to all other water rights in the San Juan Basin, taken in conjunction with the reoperation of Navajo Dam and the proposed administration of the waters of the San Juan Basin by the Office of the State Engineer ("OSE") is such that all existing non-Indian water rights in the San Juan Basin may be lost. Any water rights available in the San Juan Basin may ultimately end up belonging to the Indian Tribes, and anyone using water may ultimately be required to pay the Indians for such use. It is easy to understand why the Navajo Nation would want to negotiate in secret and minimize, to the maximum extent possible, any public involvement or any opportunity for others to disrupt the Settlement process. It is much less clear why the State would also want to minimize public involvement in such Settlement process.

15) The water issues in the San Juan Basin have become so complex and so threatening, that most people will probably never understand what has transpired, just that for some unknown reason, at some point in the not too distant future, water may no longer flow down their ditch or out of their tap, or perhaps simply that they may no longer be able to afford to irrigate their fields, maintain their landscaping or take showers. Negotiating the subject Settlement in secret without adequate public involvement is very bad policy.

16) In that regard, this Court has repeatedly and emphatically stated that

the public should be involved, or at least informed as to the status and progress of the subject Settlement negotiations. In response, attorneys for the State and the Navajo Nation have repeatedly told the Court of their extensive efforts to inform the public of the status of such Settlement negotiations. However, the truth of the State and the Navajo Nation's ongoing efforts, to minimize public scrutiny of the subject Settlement negotiations, is exemplified by the subject Confidentiality Agreement.

17) Said Confidentiality Agreement is void as against public policy.

"In general, parties are free to contract as they see fit, provided that the contract does not impose obligations that are contrary to public policy. However, a contract or contractual provision that violates public policy is invalid, unenforceable, void, and without legal effect, to the extent of the conflict. Thus, parties may not contract to contravene a state's public policy or to circumvent or disregard a statutory prohibition based on public policy." 17A Am Jur 2d, Contracts § 237, pp. 240-241. Emphasis added. Footnotes omitted.

"Courts may decline to enforce, will not enforce, or will not recognize contracts that violate public policy." 17A Am Jur 2d, Contracts § 238, p. 241. Footnotes omitted.

"The determination of public policy, the violation of which by contract will render the contract unenforceable, is made by reference to the laws and legal precedents. Specifically, public policy, may be expressed by:

- "● constitution
- "● statute
- "● administrative regulation
- "● judicial decision
- "● a court's expression of the policy of common law
- "● acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals, and general welfare
- "● long government practice
- "● obvious ethical or moral standards
- "● treaties" 17A Am Jur 2d, Contracts § 241, pp. 243-244. Emphasis added.

Footnotes omitted.

"The view has been followed that courts have a duty to refuse to enforce a contract that is contrary to public policy. In this regard, it has been stated that courts must not be timid in voiding agreements which tend to injure the public good or contravene some established interest of society." 17A Am Jur 2d, Contracts § 243, p. 245. Emphasis added.

Footnotes omitted.

“To strike down a contract on public policy grounds, a court must conclude that the preservation of the general public welfare outweighs the weighty societal interest in the freedom of contract. Whether the agreement is contrary to public policy depends upon the particular facts and circumstances of the case. Courts apply a strict test and hold that contracts should be voided on public policy grounds only if the challenged agreement or provision is—

- patently offensive to the public good.
- of clear and certain illegality.
- clearly and unmistakably repugnant to the public interest.
- expressly contrary to public policy.
- injurious to the interests of the public, or in contravention of some established interest of society or some public statute.
- against good morals or tends to interfere with public welfare.” 17A Am Jur 2d, Contracts § 244, p. 247. Emphasis added. Footnotes omitted.

“Equity and natural justice invalidate contracts which, by their nature, tend to weaken public confidence in the integrity of public service. Thus, as a general rule, contracts injuriously affecting public or government service are invalid. Court’s explain that an officer’s duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity.” 17A Am Jur 2d, Contracts § 266, p. 263. Emphasis added. Footnotes omitted.

“The law frowns upon an act or agreement on the part of a fiduciary which places interest in antagonism to duty, or tends to that result. Accordingly, a fiduciary is generally not permitted to enter into a private agreement that may interfere with the duties prescribed by law. Moreover, an agreement to commit a breach of trust or confidence is dishonest and illegal and will not be enforced.

“According to the Restatement Second, Contracts a promise by a fiduciary to violate his or her fiduciary duty or a promise that tends to induce violation is unenforceable on grounds of public policy. Similarly, an agreement where the object or necessary tendency is to place a person owing duties to third persons in a position where he or she is under obligations inconsistent with such duties is void, even though in fact it has no bad effect.” 17A Am Jur 2d, Contracts § 271, pp. 266-267. Emphasis added. Footnotes omitted.

“A contract will generally be held void and unenforceable where the object of the parties is to perpetuate a fraud upon third persons or upon the public.” 17A Am Jur 2d, Contracts § 273, pp. 267-268. Emphasis added. Footnotes omitted.

“A contract that is void as against public policy or statute cannot be made valid by ratification.” 17A Am Jur 2d, Contracts § 307, pp. 295-296. Footnotes omitted.

18) The State’s (Interstate Stream Commissions’s) requirement that people sign such Confidentiality Agreement demonstrates their disdain for the public and

their contempt for the Court.

19) The State's attorney's representations to the Court, of their extensive efforts to involve the public with respect to such matters, therefore, represent fraudulent misrepresentations to the Court.

20) The State is doing much more than simply trying to keep the Navajo Water Rights Settlement negotiation secret. The State also proposes procedures in the present matter that would keep the subfile negotiations, and entry of a subfile order, with the Navajo Nation secret. Then, the State seeks federal legislation that would prevent affected third persons from ever being able to challenge, in the present matter, or any other forum, the loss of their water rights, by virtue of the give away of hundreds of thousands of acre-feet of never before used water rights to the Navajo Nation, pursuant to the subject Navajo Settlement. (Please refer to the MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT which is filed concurrently herewith. Said Motion is hereby incorporated herein by reference.)

21) Those attorneys signing said Confidentiality Agreement, and then subsequently requiring their clients to sign such Confidentiality Agreement before discussing the subject matters with their clients, breached their most fundamental duties of loyalty to, and communications with, their clients.

22) 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.

WHEREFORE, I respectfully request of the Court an order that:

- 1) The subject Confidentiality Agreement be declared void; and
- 2) For such other and further relief as the Court may deem appropriate.

GARY L. HORNER, Esq., In Propria Persona
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June 23, 2004

Date

CERTIFICATE OF MAILING

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