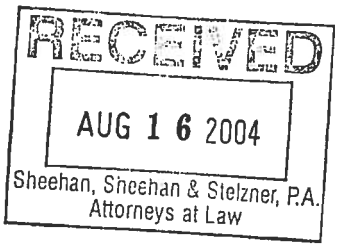
SJ-17
Navajo Settle

COPY

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO



STATE OF NEW MEXICO ex rel.
State Engineer,

Plaintiff

v.

THE UNITED STATES OF AMERICA,
et al.,

Defendants

and

THE JICARILLA APACHE NATION and
THE NAVAJO NATION,
Defendants-Interveners.

CV-75-184-1

SAN JUAN RIVER GENERAL
STREAM ADJUDICATION

THE NAVAJO NATION'S RESPONSE TO SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION'S MOTION TO RESTRAIN PLAINTIFF FROM APPROVING AND EXECUTING THE PROPOSED SETTLEMENT AGREEMENT

The Navajo Nation submits the following response[1] in opposition to the motion filed by the San Juan Agricultural Water Users Association (SJAWUA) to restrain Plaintiff from approving and executing a proposed settlement agreement with the Navajo Nation concerning the settlement of the Nation's claims in this adjudication.

INTRODUCTION

The Navajo Nation and the State of New Mexico have engaged in settlement discussions for the past several years to determine if a settlement could be reached concerning the Nation's claims to the use of water in the San Juan River basin in New Mexico. Last December the Navajo Nation and the State of New Mexico announced that they reached a tentative agreement that would settle

[1] This response is made pursuant to the Court's directive to file briefs concerning SJAWUA's motion within one week of the hearing, subsequently scheduled for August 20, 2004. It is unclear whether responses to the motions filed by Mr. Horner are also to be filed. Since Mr. Horner's motion is substantially similar to the motion filed by SJAWUA and is defective for the same reasons cited in this response, this response should be considered as a response to Mr. Horner in the event the court determines that Mr. Horner's motions require a response.

motion to restrain the execution of a settlement agreement between the State and the largest water user in the basin clearly violates public policy and the court's express desire to expedite this adjudication.

CONCLUSION

The San Juan Agricultural Water Users Association offers no factual or legal bases in support of its request to enjoin the execution of a proposed settlement agreement between the State and the Navajo Nation. The motion is without merit and should be denied.

Respectfully submitted this 13th day of June 2004.

NAVAJO NATION DEPARTMENT OF JUSTICE

s/Stanley M. Pollack signed original

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing THE NAVAJO NATION'S RESPONSE TO SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION'S MOTION TO RESTRAIN PLAINTIFF FROM APPROVING AND EXECUTING THE PROPOSED SETTLEMENT AGREEMENT was served on all counsel and parties of record by placing same in the United States mail, first class postage prepaid, this 13th day of August 2004.

s/Stanley M. Pollack signed original

Stanley M. Pollack

the Navajo Nation's claims in the basin and thus resolve the Navajo claims in this adjudication. The tentative agreement was reflected in a package of documents consisting of a proposed Settlement Agreement and three appendices: (1) a proposed Partial Final Decree for entry with this court concerning the water rights of the Navajo Nation, (2) a proposed Settlement Bill for introduction before Congress to authorize the construction of various water projects for the Navajo Nation, and (3) a proposed Water Delivery Contract to authorize the delivery of water by the Secretary of the Interior for the authorized water projects. The Nation and the State solicited comments from the public and from interested parties concerning the proposed settlement. Numerous comments were received, including comments from water users within the SJAWUA, and representatives of the Nation and State met with representatives of the SJAWUA on numerous occasions to discuss their concerns about the proposed settlement.

In response to the comments received, the Nation and State revised the proposed Settlement Agreement, including the appendices, and released another version of the proposed settlement documents in early July. The proposed documents expressly state that approval by the principals for the executing parties, namely the Navajo Nation Council and the Interstate Stream Commission, are required for the Settlement Agreement to become effective. The proposed Settlement Agreement also clearly states that the proposed Partial Final Decree of the Water Rights of the Navajo Nation will not become effective until numerous conditions are satisfied and then only after entry by this court. The proposed decree does not purport to settle the water rights of any party to the San Juan River adjudication other than those of the Navajo Nation. The procedure envisioned in the proposed Settlement Agreement requires the Navajo Nation, the United States and the State of New Mexico (the settling parties) to jointly file a motion with this court for entry of the Partial Final Decree, but only after this court adopts expedited *inter se* procedures appropriate for the entry of the decree. Rather than wait for the settling parties to file a motion with the court for entry of the Partial Final

Decree, the SJAWUA seeks extraordinary relief for an order "restraining Plaintiff from approving and executing the proposed Settlement Agreement." Motion to Restrain at 1. SJAWUA[2] does not request any specific relief in the form of a restraining order, preliminary injunction or permanent injunction. Nor does SJAWUA make a showing of irreparable harm, lack of adequate remedy at law, or likelihood of success on the merits concerning the fairness of the settlement. Since this court has no basis to restrain the efforts of the State of New Mexico to reach a settlement with the Navajo Nation concerning the Navajo water rights in this adjudication, the merits of the settlement are beyond the inquiry of the court as this time and will not be addressed in this response.

ARGUMENT

I. The Court Should Not Allow Any Party To Interfere In A Subfile Proceeding Between The State Of New Mexico And An Individual Water Claimant.

The New Mexico Supreme Court has explicitly endorsed a two-phase approach to general stream adjudications in New Mexico with "the first phase adjudicating the rights as between the claimants and the State and the second phase adjudicating the rights as between the claimants inter sese. *See* State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist., 99 N.M. 699, 700, 663 P.2.358, 359 (1983)." State ex rel. Martinez v. Lewis, 116 N.M. 194, 205, 861 P.2d 235, 246 (1993). The statutory bases for general stream adjudications is set forth at NMSA 1978, §§ 72-4-17 and 72-4-19 (1965). *See* State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist., 99 N.M. 699, 700, 663 P.2.358, 359 (1983), State ex rel. Reynolds v. Sharp, 66 N.M. 192, 344 P.2d 943 (1959).

Upon completion of a hydrographic survey, each water user identified through the survey is joined in the adjudication. NMSA 1978, § 72-4-17. The State Engineer will create a subfile for each of the water uses identified and will make offers of judgment to each individual water user. If the

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[2] This court has previously recognized that SWAWUA, an association of water users but not water user in its own right, is not a claimant in the adjudication. SWAWUA has not sought to intervene in the adjudication.

State and the water user reach agreement as to the attributes of the proposed water right of the water user, the first phase of the adjudication with respect to that water user is complete. A decree containing the final attributes of that water right may be entered only after all other water users have the opportunity to contest the proposed water right *inter se*. *Id.* The *inter se* challenge constitutes the second phase of the adjudication.

In this instance, the rights of the Navajo Nation are being addressed as one large "subfile." Negotiations concerning this "subfile"occurred between representatives of the State, the Nation and the United States, acting in its trust capacity for the Navajo Nation. As in the case of any other subfile proceeding, the State is offering to the Navajo Nation, a large water user, certain attributes of its water rights through a proposed settlement. If the proposed settlement is executed by the President of the Navajo Nation, on behalf of the Nation, and the Governor of New Mexico, on behalf of the State, the first phase of the adjudication of the Navajo rights will be complete. No other party to this adjudication is party to the subfile discussion, nor is any other party bound by the terms of any settlement agreement. It is axiomatic that a party that is not signatory to a settlement agreement cannot be bound by that agreement. The attributes of the Navajo Nation's water rights will not become final until all other water users in basin have an opportunity to challenge those rights *inter se* and only after the court enters a final decree concerning those rights.

SJAWUA offers no authority for the proposition that any party[3] to this adjudication may intervene in a subfile proceeding for any purpose, including to propound discovery or to enjoin the execution of a settlement agreement between the State and any other water user. At the July 26, 2004 hearing, the State announced that the hydrographic survey for the La Plata River is near completion and the State anticipates that offers of judgment will be made to individual water users

[3] See f.n. 2, *supra*.

on the La Plata River in the near future. It is conceivable that the water rights of the La Plata water users could adversely affect the water rights of the Navajo Nation and other water users.[4] No other water user, including the Navajo Nation, has the right to intervene in or otherwise enjoin the State from making offers of judgment to water users on the La Plata River. SJAWUA offers no authority to participate in the subfile proceedings of the Navajo Nation because there is no authority.

II. The SJAWUA Has Not Shown Irreparable Injury for Which There Is No Adequate and Complete Remedy at Law.

Injunctive relief may be granted only for the purpose of preventing threatened injury. *Ingram v. Phillips Petroleum Co.*, 259 F. Supp. 176 (D.N.M. 1966). An injunction is a harsh and drastic remedy which should issue only in extreme cases of pressing necessity and only when there has been a showing of irreparable injury for which there is no adequate and complete remedy at law. *Hill v. Community of Damien of Molokai*, 911 P.2d 861, 121 N.M. 353, *rehearing denied*; *Padilla v. Lawrence*, 685 P.2d 964, 101 N.M. 556, *certiorari denied* 863 P.2d 1341, 101 N.M. 419 (1984); *Kennedy v. Bond*, 460 P.2d 809, 80 N.M. 734 (1969).

A. No Showing of Irreparable Injury.

In this instance there is no pressing necessity for an injunction. SJAWUA has not demonstrated any irreparable injury for which there is no adequate and complete remedy at law. In this instance, the allegation of injury made by SJAWUA is simply that

> It would be unfair to cause this matter to wait until the expedited *inter se* process. Movant may be able to show the Plaintiff and other parties and persons that the proposed Settlement is not a fair settlement. Thus, irreparable harm to Movant and others will result if the proposed Settlement Agreement is approved and signed by Plaintiff prior to the opportunity for Movant to make this analysis.

Motion at 2. SJAWUA does not allege that the settlement is unfair. The only injury alleged by

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[4] Curiously, neither the SJAWUA nor any other water user has attempted to enjoin the State from making offers of judgment to the non-Indian water users on the La Plata River even though these water rights could adversely affect the rights of other water users.

SJAWUA is that it will have to "wait" for the *inter se* process. Mere inconvenience is generally not considered grounds for an injunction. *General Atomic Co. v. Felter*, 560 P.2d 541, 90 N.M. 120, *reversed* 98 S.Ct. 76, 434 U.S. 12, 54 L.Ed.2d 199 (1977).

SJAWUA alleges that it may be able to show the settlement is unfair.[5] *Id.* The proposed agreement does not and could not attempt to quantify the water rights of SJAWUA or any of its members. Moreover, SJAWUA is not a party to the agreement nor is the State purporting to execute a settlement agreement on behalf of SJAWUA or any other water user. Whether the State signs the settlement agreement before or after SJAWUA has an opportunity to make an analysis is irrelevant since SJAWUA is not a party to the agreement. In short, SJAWUA would not suffer injury by execution of the settlement agreement, let alone irreparable harm.

B. No Showing of Inadequate Remedy at Law.

Even if the proposed settlement is unfair and the execution of the settlement agreement were somehow injurious to SJAWUA, the movant has made no showing that it has no inadequate and complete remedy at law. Indeed, SJAWUA does not bother to allege the absence of an adequate and complete remedy at law because it concedes such a remedy exists through the *inter se* process. Pursuant to 72-4-19 (NMSA 1985) the final decree will describe the attributes of the Navajo Nation's water rights, not the proposed settlement agreement. SJAWUA and all other water users will have the opportunity to contest the water rights of the Navajo Nation through the *inter se* phase of the adjudication. The *inter se* phase provides an adequate and complete remedy to address the concerns of SJAWUA.

III. SJAWUA Makes No Showing That it Is Likely to Prevail on the Merits.

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[5] SJAWUA's motion does not consider that the settlement may be fair, only that it may be able to show that the settlement is not fair. Thus, SJAWUA concludes that the settlement is not fair despite SJAWUA's assertion that it has been unable to make an analysis of the settlement.

In order to obtain extraordinary relief in the form of a preliminary injunction or restraining order a party mush show that it is likely to prevail on the underlying merits. *McClendon v. City of Albuquerque*, 272 F.Supp. 2d 1250 (D.N.M. 2003). SJAWUA seeks extraordinary preliminary relief without any showing that is likely to prevail on the merits or that the equity of granting a preliminary injunction weigh heavily and compellingly in its favor. *See O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170 (10th Cir. 2003). In fact, in this instance SJAWUA does not even allege that the proposed settlement is unfair, only that it may be unfair. Moreover, even if the proposed settlement were unfair, implicit in SJAWUA's motion is the allegation that somehow this court would approve an unfair settlement after the *inter se* phase.[6] In short, SJAWUA makes no showing that it is likely to prevail in this matter or that the court is not likely to consider its objections during the *inter se* phase.

IV. The Court Has No Authority to Restrain the Execution of Settlement Agreements among the Parties.

SJAWUA cites no authority for the court to enjoin the execution of a settlement agreement among the parties, nor does such authority exist.

V. The Relief Requested by SJAWUA Violates Public Policy.

There are strong public policy considerations concerning the need to promote settlements. It is the policy of law and the State of New Mexico to favor settlement agreements. *See e.g., Navajo Tribe of Indians v. Hanosh Chevrolet-Buick, Inc.*, 749 P.2d 90 (N.M. 1988); *Ambassador Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, 690 P.2d 1022 (N.M.1984). Moreover, this court has expressed its desire on several occasions to see this adjudication proceed more expeditiously. SJAWUA's

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[6] Ironically, SJAWUA seeks the court to exercise sound discretion in consideration of the motion for extraordinary relief, *see Cunningham v. Gross*, 699 P.2d 1075, 102 N.M. 723 (1985), yet questions the ability of the court to exercise its sound discretion after the *inter se* phase and implies that the Court would approve an unfair settlement.