

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 MAY 24 PM 1:43

STATE OF NEW MEXICO, *ex rel.*,
STATE ENGINEER,

D-1116-CV-75-184
Honorable James J. Wechsler
Presiding Judge

Plaintiffs,

v.

San Juan River Adjudication

THE UNITED STATES OF AMERICA et al.,

Cause No. AB-07-1
Claims of the Navajo Nation

Defendants.

DESCRIPTIVE SUMMARY: Defendants B Square Ranch, LLC et al.'s Consolidated Reply to Settling Parties' Responses in Opposition to Motion that Settling Party Navajo Nation Waived and Relinquished Its Winters Rights when NIIP was Built

NAME OF PARTY: Defendants B Square Ranch, LLC et al.

NUMBER OF PAGES: 2 (Certificate of Service) and 9 (Consolidated Reply)

DATE OF FILING: May 24, 2013 by electronic service and with Court Clerk.

DEFENDANTS B SQUARE RANCH, LLC ET AL.'s
CONSOLIDATED REPLY TO RESPONSE BY NAVAJO NATION
AND UNITED STATES AND TO CONSOLIDATED RESPONSE BY
STATE OF NEW MEXICO IN OPPOSITION TO MOTION THAT SETTLING
PARTY NAVAJO NATION WAIVED AND RELINQUISHED ITS WINTERS
RIGHTS WHEN NAVAJO INDIAN IRRIGATION PROJECT WAS BUILT

Pursuant to the Third Amended Order Granting Motions to Extend Deadlines and Setting Schedule Governing Discovery and Remaining Proceedings filed March 15, 2013 ("Third Amended Order"), the Navajo Nation and the United States filed a Response in Opposition to the Summary Judgment Motions of Objectors and the State of New Mexico filed a separate Consolidated Response to Motions filed by certain

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Defendants on April 15, 2013 (collectively "Settling Parties' Responses to Summary Judgment Motions").

Defendants B Square Ranch, LLC et al. are hereby filing a Consolidated Reply to Settling Parties' Responses to the summary judgment motion filed April 15, 2013 by Defendants B Square Ranch, LLC et al. for entry of an order and judgment in the above-styled action that the Settling Party Navajo Nation (formerly known as the Navajo Tribe of Indians) waived and relinquished its rights under the "Winters Rights Doctrine" as consideration for the building of the Navajo Indian Irrigation Project ("NIIP").

The "Winters Rights Doctrine" is the decision rendered by the United States Supreme Court that, if the treaty or agreement establishing an Indian reservation did not expressly reserve water to Indians when the lands in the reservation were practically valueless, then there was an implied reservation of water to the Indians for the purposes of irrigation. Henry Winters et al. vs. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908)

INTRODUCTION

For purposes of this Consolidated Reply, Defendants B Square Ranch, LLC et al. agree with the following statements and legal authority cited in the Settling Parties' Responses to Summary Judgment Motion:

-The above-styled action is an expedited *inter se* proceeding attempting to resolve the water rights claims of the Navajo Nation within the San Juan River Basin adjudication.

-The only water rights claims in the above-styled action are those of the Navajo Nation, and the only issue is the adjudication of the Navajo Nation's water rights by entry of the Proposed Decrees.

-The scope of the above-styled action is to determine the elements of the Navajo Nation's water rights.

-The purpose of an adjudication of water rights is for the Court to recognize water rights that already exist in a stream system, and not to grant new appropriations.

-Summary judgment can be granted only when the moving party is entitled to judgment as a matter of law upon clear and undisputed facts.

-In a summary judgment proceeding, the facts must refer with particularity to those portions of the record upon which the moving party relies.

-The party moving for summary judgment must make a prima facie showing and come forward with evidence to establish the facts in question.

-Once a prima facie showing is made by the moving party that such party is entitled to summary judgment, the burden shifts to the other party to show at least a reasonable doubt (not a slight doubt) of the existence of genuine factual issues and the moving party is not entitled to summary judgment.

-Hearsay that would be inadmissible at trial is not sufficient evidence of facts and cannot be admitted as showing summary judgment evidence.

-The briefs and the arguments of counsel are not evidence upon which a trial court can rely in a summary judgment proceeding.

CONSOLIDATED RESPONSE BY STATE OF NEW MEXICO

In its Consolidated Response to Defendants B Square Ranch, LLC et al.'s motion for summary judgment that the Settling Party Navajo Nation waived and relinquished its rights under the "Winters Rights Doctrine" as consideration for the building of NIIP, the State of New Mexico argues that Defendants B Square Ranch, LLC et al.'s motion consisted of hearsay, opinions, misrepresentations of the law, and conjecture. Further, the State of New Mexico argues that Defendants B Square Ranch, LLC et al. did not come forward with competent and admissible evidence to support its motion.

Pages 9, 10 and 11 of Defendants B Square Ranch, LLC et al.'s motion for summary judgment that the Settling Party Navajo Nation waived and relinquished its rights under the Winters Rights Doctrine contain three separately identified and numbered "Undisputed Facts". These Undisputed Facts show that the Navajo Nation knowingly, voluntarily and intentionally relinquished and waived its reserved water

rights under the Winters Rights Doctrine in exchange for the NIIP to be built. The relinquishment and waiver of these water rights occurred in 1960, 1961 and 1964, the time period immediately before and after the authorization of NIIP in the Navajo Indian Irrigation Project-Public Law 87-483 approved by the President on June 13, 1962 ("NIIP Act").

The motion by Defendants B Square Ranch LLC et al. that Navajo Nation knowingly, voluntarily and intentionally relinquished and waived its reserved water rights under the Winters Rights Doctrine included a concise statement of all the material facts as to which these Defendants contend no genuine issue of fact exists. This motion also numbered the Undisputed Facts and referred with particularity to the portions of the record upon which Defendants B Square Ranch LLC et al. relies. See Exhibits "A", "B" and "C" attached to Defendants B Square Ranch, LLC et al.'s summary judgment motion filed April 15, 2013.

Through these three Undisputed Facts, Defendants B Square Ranch LLC et al. made a prima facie showing and they came forward with evidence that the Navajo Nation knowingly, voluntarily and intentionally relinquished and waived its reserved water rights under the Winters Rights Doctrine in exchange for the Navajo Indian Irrigation Project to be built.

Once Defendants B Square Ranch LLC et al. made its prima facie showing that it was entitled to summary judgment, the burden shifted to the State of New Mexico, the Navajo Nation and the United States ("Settling Parties") to show at least a reasonable doubt (not a slight doubt) of the existence of a genuine factual issue and that Defendants B Square Ranch LLC et al. were not entitled to summary judgment.

In its Consolidated Response, the State of New Mexico did not provide a concise statement of all the material facts as to which the State of New Mexico contends a genuine issue of fact exists concerning the relinquishment and waiver of the Navajo Nation's reserved water rights under the Winters Rights Doctrine. Further, the State of New Mexico did not number each fact in dispute; it did not refer with particularity to the portions of the record upon which it relied, and it did not state the number of Defendants B Square Ranch, LLC et al.'s facts that were disputed.

Therefore, under Rule 1-056 (D), "Summary Judgment", the statements in Defendants B Square Ranch, LLC et al. motion for summary judgment that the Navajo Nation knowingly, voluntarily and intentionally relinquished and waived its reserved water rights under the Winters Rights Doctrine are deemed admitted since they were not specifically controverted by the State of New Mexico.

RESPONSE BY NAVAJO NATION AND UNITED STATES

In its Response to Defendants B Square Ranch, LLC et al.'s motion for summary judgment that the Navajo Nation waived and relinquished its rights under the Winters Rights Doctrine as consideration for the building of NIIP, the Navajo Nation and the United States argue that Defendants B Square Ranch, LLC et al.'s motion can be condensed to an assertion that federal reserved water rights to Indian tribes are unfair to non-Indian water users, and the Court should only consider the Navajo Nation's claims in a manner consistent with state law. The Navajo Nation and the United States also argue that Defendants B Square Ranch, LLC et al. go so far as to deny the very existence of Indian federal reserved rights also known as the Winters Rights Doctrine.

Defendants B Square Ranch, LLC et al.'s motion for summary judgment makes no assertions that federal reserved water rights to Indian tribes are unfair to non-Indian

water users; that the Court should only consider the Navajo Nation's claims in a manner consistent with state law; and that Defendants B Square Ranch, LLC et al. deny the very existence of Indian federal reserved rights also known as the Winters Rights Doctrine.

The Navajo Nation and United States further argue that Defendants B Square Ranch, LLC et al. did not come forward with competent and admissible evidence to support its motion. For their reply to this argument, Defendants B Square Ranch, LLC et al. incorporate and adopt by reference their reply to the same argument made in the preceding section entitled "Consolidated Response by State of New Mexico".

The Navajo Nation and the United States also argue that no provision of the NIIP Act authorizing the construction of NIIP purports to waive the federal reserved rights of the Navajo Nation. The Navajo Nation and the United States further argue the express language of the NIIP Act is clear, and the Court does not need to look any further to determine legislative intent.

The Navajo Nation and United States did not provide a copy of the NIIP Act to their Response for the Court to review to determine the accuracy and veracity of their arguments. The brief (Response) and the arguments of counsel for the Navajo Nation and United States are not evidence upon which this Court can rely in the summary judgment motion brought by Defendants B Square Ranch, LLC et al.

The Navajo Nation and the United States in their Response also argue that any **congressional** waiver or relinquishment of tribal property rights held in trust by the United States must be clear, express, unambiguous and cannot be implied. Defendants B Square Ranch, LLC et al.'s summary judgment motion concerns the relinquishment

and waiver by the **Navajo Nation** of its reserved water rights under the Winters Rights Doctrine. Defendants B Square Ranch, LLC et al.'s motion does not concern the waiver or relinquishment by the **United States Congress** of tribal property rights held in trust by the United States.

The relinquishment and waiver of the reserved water rights under the Winters Rights Doctrine by the **Navajo Nation** is clear, express, not ambiguous and not implied as shown by the evidence, statements or representations by the Navajo Nation, through its authorized representatives, in the section entitled "Undisputed Facts" of Defendants B Square Ranch, LLC et al.'s motion for summary judgment filed April 15, 2013.

The Navajo Nation and United States in their Response argue that Defendants B Square Ranch, LLC et al.'s summary judgment motion is based on two public statements of officials of the Navajo Nation that is only a small fragment of the legislative history of the NIIP Act.

The Navajo Nation and United States in their Response did not provide copies of the legislative history or relevant portions of the legislative history of the NIIP Act controverting Defendants B Square Ranch, LLC et al.'s summary judgment motion for the Court to review to determine the accuracy and veracity of their argument. The brief (Response) and the arguments of counsel for the Navajo Nation and United States are not evidence upon which this Court can rely in the summary judgment motion brought by Defendants B Square Ranch, LLC et al.

The Response of the Navajo Nation and United States also argues Defendants B Square Ranch, LLC et al.'s motion is based on a provision from a draft of a water

delivery contract between the United States and the Navajo Nation that was never executed by the parties.

The Navajo Nation and United States did not provide any evidence for the Court to review to determine the accuracy and veracity that this provision was not included in a contract between the United States and Navajo Nation. Further, the Navajo Nation and United States did not provide any evidence that there was never a contract executed by these parties. The brief (Response) and the arguments of counsel for the Navajo Nation and United States are not evidence upon which this Court can rely in the summary judgment motion brought by Defendants B Square Ranch, LLC et al.

Finally, the Navajo Nation and United States state that the text of the draft contract cannot be relied upon by the Court that the Navajo Nation waived or relinquished anything, much less its water claims under the Winters Rights Doctrine.

The following is Undisputed Fact #3 of Defendants B Square Ranch, LLC et al.'s motion:

"3. "g. Priority Claims-The Navajo Tribe hereby waives any claims it may have to project waters, including prior rights therein, based upon judicial construction of Navajo Tribe rights through application of the principles of the case of Winters vs. United States (207 U.S. 564) and agrees to the apportionment and distribution of available project waters as provided in this contract."

The above-quoted language in Undisputed Fact #3 was included in the contract attached as Exhibit A to the Resolution of the Navajo Tribal Council dated March 2, 1964. For the Court's reference, copies of the Resolution and Contract are attached to Defendants B Square Ranch, LLC et al.'s summary judgment motion as Exhibit "C".

The Resolution of the Navajo Tribal Council dated March 2, 1964 (CMA-14-64) was approved approximately 1-1/2 years after the NIIP Act was approved on June 13, 1962.

Paragraph 2 of the Resolution dated March 2, 1964 states in relevant part as follows:

"2. The Chairman of the Navajo Tribal Council is hereby authorized to execute on behalf of the Navajo Tribe a contract with the United States as called for in the Act of June 13, 1962, substantially in the form of the draft of January 25, 1964, attached hereto and marked Exhibit A. ..."

The Navajo Nation and United States argue that the text of Exhibit A to the Resolution of the Navajo Tribal Council dated March 2, 1964 cannot be relied upon that the Navajo Nation waived or relinquished anything, much less its claims to water under the Winters Rights Doctrine. This argument is unsubstantiated and should be disregarded. Further, the arguments of counsel for the Navajo Nation and United States are not evidence upon which this Court can rely in the summary judgment motion brought by Defendants B Square Ranch, LLC et al.

WHEREFORE, Defendants B Square Ranch, LLC et al. pray for the entry of an appropriate order and judgment granting their Motion that Settling Party Navajo Nation waived and relinquished its Winters Rights when the Navajo Indian Irrigation Project was approved, and for such other relief as the Court deems just and proper.

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