

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 JUN 20 AM 10: 27

STATE OF NEW MEXICO STATE OF NEW MEXICO
SAN JUAN COUNTY
THE ELEVENTH JUDICIAL DISTRICT COURT

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

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants.

D-1116 CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

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

NAME OF PARTY: The Navajo Nation.

DESCRIPTIVE SUMMARY: The Navajo Nation submits a copy of the unpublished opinion in *New Mexico, ex rel., Reynolds v. Lewis, et al.*, Chaves County District Court (July 11, 1989) referred to at the hearing on June 12, 2013.

NUMBER OF PAGES: 14, including 12-page exhibit.

DATE OF FILING: Mailed on June 18, 2013.

THE NAVAJO NATION'S NOTICE OF SUPPLEMENTAL AUTHORITY

The Navajo Nation provides a copy (attached as Exhibit A) of the unpublished Final Judgment in *New Mexico, ex rel., Reynolds v. Lewis, et al.*, Nos. 20294 and 2260 (Chaves County Dist. Ct. July 11, 1989). This decision was cited in the *Joint Memorandum of the Navajo Nation and United States in Support of the Settlement Motion* (filed Apr. 15, 2013) at 30. Counsel for the Navajo Nation also discussed the decision during the recent hearing on June 12, 2013.

The language of interest to this Court, quoted in the Joint Memorandum and discussed at the hearing, is found at page 9, ¶¶ 13 – 18 of the Final Judgment:

A permanent homeland for [an Indian Tribe] requires development of present and future use of water. [] A permanent homeland for [an Indian Tribe] requires water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the “arts

of civilization. [] Self-sufficiency of [an Indian Tribe] on their reservation requires multiple and varied used of water for recreation, agriculture, domestic, stock, commercial, industrial, and other uses for the “arts of civilization.”

Respectfully submitted this 18th day of June, 2013.

NAVAJO NATION



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CERTIFICATE OF SERVICE

I certify that on this 18th day of June, an electronic version of *The Navajo Nation's Notice of Supplemental Authority* was served by electronic mail to: wrtavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the list of parties identified on the *Notice of Amended Service List* (filed Feb. 25, 2013).



Stanley M. Pollack

IN THE DISTRICT COURT OF CHAVES COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO, ex rel.
S.E. REYNOLDS, State Engineer,
and PECOS VALLEY ARTESIAN
CONSERVANCY DISTRICT

Plaintiffs,

vs.

L.T. LEWIS, et al.,
UNITED STATES OF AMERICA,

Defendants,

MESCALERO APACHE TRIBE,

Defendant-Intervenor

and

STATE OF NEW MEXICO, ex rel.
S.E. REYNOLDS, State Engineer,
and PECOS VALLEY ARTESIAN
CONSERVANCY DISTRICT,

Plaintiffs,

vs.

HAGERMAN CANAL, CO., et al.,

Defendants.

ENDORSED COPY:
ORIGINAL FILED DISTRICT COURT
JUL 11 1989

GEORGIA FERRIN, CLERK

Nos. 20294 and 22600
CONSOLIDATED

RIO HONDO SECTION

MESCALERO SECTION

FINAL JUDGMENT

This suit to adjudicate rights to surface and ground waters of the Pecos River stream system in accordance with the provisions of Sections 72-4-15 through 72-4-19 NMSA 1978 Comp. was initiated by the filing of a Petition on April 9, 1956 by the State of New Mexico and Pecos Valley Artesian Conservancy District. The United States of America was made a Defendant pursuant to the McCarran Amendment, 43 U.S.C. Sec. 666 and Decision of the New Mexico Supreme Court, State of New Mexico v. Lewis, et al., 88 N.M. 636, 545 P.2d 1014 (1976), and by subsequent Order of the District Court of March 15, 1976. The Mescalero Apache Tribe was permitted to intervene as a

Defendant by Order of December 9, 1977. All claimants to the waters of the Pecos River stream system have had full opportunity and notice pursuant to the Court's Order of September 23, 1986 to contest the water claims of the United States and Tribe. Trial was held with the State of New Mexico on March 3 - April 2, 1986, and August 27 - 28, 1986. Trial was held with all water claimants to the Pecos River stream system on November 16 - December 8, 1987. All evidence of the parties having been received into the record and the Court being fully advised in the premises, the Court hereby enters this Final Judgment on the water claims of the Mescalero Apache Tribe and the United States on behalf of said Tribe to the Rio Hondo stream system.

FINDINGS OF FACT

1. The aboriginal title of the Mescalero Apache Tribe remains today in the present Reservation lands.
2. There is no evidence of Mescalero Apache Tribe aboriginal use of water.
3. On July 1, 1852, the United States, the Mescalero Apache Indian Tribe, and others entered into a treaty which was ratified by the United States Senate in 1853.
4. This 1852 treaty was a peace and amity treaty. The treaty expressly did not designate a reservation of land.
5. Numerous actions of federal government officials between 1852 and 1873 established that the 1852 treaty was not intended to be a treaty of reservation. There were suggestions that the Mescalero Apaches be placed on reservations in areas outside of the White and Sacramento Mountains. The reservations included the Fort Thorne Reservation, and reservations on the Rio Felix, Gila River, and Rio Penasco. The Bosque Redondo was established as a permanent reservation for the Mescaleros by Executive Order dated January 15, 1864, and subsequently abandoned and restored to the public domain.
6. The Mescalero Apache Reservation was created by five executive orders beginning in 1873: The Executive Order of May 29, 1873; the Executive Order of February 4, 1874; the Executive Order of October 20, 1875; the Executive Order of May 19, 1882; and the Executive Order of March 24, 1883.
7. The first Executive Order of May 29, 1873, withdrew land from the public domain for the purpose of providing arable land and grazing lands for a Mescalero Apache Reservation. When the reservation boundaries were originally designated in 1873, there was a specific intent on the part of federal officials to protect

the agricultural economy and water supply of non-Indian farmers who had settled the arable lands along the Rio Ruidoso valleys prior to 1873. In 1873, the Rio Bonito, Rio Hondo and Rio Ruidoso valley were occupied by settlers. These lands and the appurtenant water appropriated by those settlers were not available for a reservation. In response to these Indian/non-Indian land use conflicts, all of the irrigated lands along Rio Ruidoso were expressly excluded from the 1873 Executive Order reservation.

8. None of the arable lands of the United States' and Mescalero Apache Tribe's proposed projects lie within the 1873 Executive Order Reservation boundaries.

9. On February 8, 1874, an Executive Order withdrew land from the public domain for the purpose of adding arable land and grazing land to the reservation. All of the arable lands along the Rio Ruidoso were excluded from the reservation by the 1874 Executive Order to protect the agricultural economy and water supply of non-Indian farmers who had settled the arable land along the Rio Ruidoso prior to 1873.

10. Only small amounts of arable lands of the United States' and Mescalero Apache Tribes' proposed projects are within the 1874 Executive Order boundaries.

11. On October 20, 1875, an Executive Order withdrew land from the public domain for the purpose of providing the reservation with grazing acreage. A portion of the Rio Tularosa Valley that had been settled by non-Indians was inadvertently included within the reservation. Despite recommendations to the contrary, an express decision was made not to withdraw arable lands along the Rio Ruidoso settled by non-Indians for the use of the Indian Reservation in the 1875 Executive Order. There were no subsequent attempts to include irrigable lands along the Rio Ruidoso in the reservation.

12. On May 19, 1882, an Executive Order withdrew land from the public domain for the purpose of providing grazing land to the reservation. Contiguous unsettled arable land along the Rio Penasco was passed up in favor of additional grazing acreage. Two major areas of arable land were deleted from the reservation and returned to the public domain by the 1882 Executive Order. In response to non-Indian mining interests, the arable land along the Rio Bonito that was reserved by the 1873 and 1874 Executive Orders was deleted from the reservation and returned to the public domain. The arable land in the Rio Tularosa Valley that had been reserved by the 1875 Executive Order was deleted from the reservation and returned to the public domain because it was occupied by non-Indian settlers prior to 1875.

13. On March 24, 1883, an Executive Order withdrew land from the public domain for the purpose of providing more arable land for the reservation. Specifically, this boundary adjustment was made to correct a prior surveying error so that the Indian farms at Three Rivers would be included in the reservation. These farms had been unintentionally excluded by the 1882 Executive Order.

14. Approximately ten percent of the Rio Ruidoso watershed (from its headwaters to its confluence with the Rio Bonito) is located within the boundaries of the Mescalero Apache Reservation.

15. The vast majority of the lands proposed for the Rinconada and Pajarita Projects are in the 1875 Executive Order land withdrawal.

16. The lands identified by the United States and Tribe for irrigation in the Pajarita unit are arable and irrigable.

17. The lands identified by the United States and Tribe in the Rinconada area for irrigation are arable.

18. The lands identified by the United States and Tribe for irrigation of a golf course at Carrizo are arable and irrigable.

19. There was more land in irrigation along the Rio Ruidoso in 1873 than is irrigated today. Currently, there is an insufficient surface flow in the Rio Ruidoso to meet existing irrigation needs for pre-1873 priorities. The Rio Ruidoso, the Rio Hondo, and the Rio Bonito are water short as evidenced by the reliance on supplemental wells in the stream system. During critical irrigation months, the river stream is extremely water short.

20. There is an inadequate water supply available for the "included" acres of the Rinconada project, even assuming that the entire surface flow of the Rio Ruidoso at the boundary of the reservation is available for diversion and is not subject to appropriation by downstream users with prior rights.

21. Rather than assessing the lack of water during critical irrigation months, the United States and Tribe analyze shortages on an annual average basis. In conducting an operational analysis, neither yearly nor monthly figures reveal the usable divertable flows. Analysis of water availability based upon annual or monthly averages disguises flood flows and overstates actual water availability. The most accurate analysis is based on daily flows. There is no "average" surface stream flow in the Rio Ruidoso as a matter of fact.

22. No water supply exists for either the "omitted acres" of the Rinconada/Carrizo unit or the "omitted acres" of the Pajarita unit.

23-24. The existing uses, together with the future needs for domestic, recreational, and other non-agricultural uses for water by the Mescalero Apache Tribe, total 2,322.4 acre-feet diversion per year.

25. The proposed diversion by the United States and Tribe of surface water out of the Rio Ruidoso watershed would upset the hydrologic balance of the Rio Ruidoso stream system, reducing the amount of surface water available in the stream to recharge the alluvium of the stream bed and/or to enter the hydrological stream of the Roswell Basin as underflow or floodflow.

26. In applying a benefit-cost analysis is used to quantify federal reserved water rights, it is necessary to follow commonly accepted, standard economic procedures. When a benefit-cost analysis is used to establish property rights in water rights litigation, the analysis is subject to distortion and bias.

27. Every benefit-cost analysis has three distinguishing characteristics: 1) all benefits and costs are included regardless of to whom they accrue; 2) benefits are measured by consumer willingness to pay; 3) costs are measured by opportunity costs, which may differ from project expenditures.

28. No special rules apply to an economic feasibility analysis for determining whether a proposed Indian water project will reflect a benefit-cost ratio greater than one. In deviating from standard economic procedures, the United States and Tribe biased their benefit cost analysis in favor of economic feasibility of the project.

29. In an economic feasibility analysis, particularly in the field of water resources, there are impacts that go beyond the immediate investing entity and the beneficiaries for whom they are designed. Thus, an economic feasibility analysis should not be restricted by political boundaries. The United States and Tribe claim benefits for products moved off the reservation, but fail to consider costs that accrue beyond the reservation boundary. This approach biases the outcome of the analysis in favor of economic feasibility.

30. An economic analysis is based on the concept of opportunity cost. The foregone benefits of users that would be incurred are relevant external opportunity costs that should be considered under a properly constituted economic feasibility study. The United States and Tribe did not consider these costs.

31. The economic analyses submitted by the United States and Tribe omit numerous off-reservation economic costs, including lost agricultural production along the Lower Rio Ruidoso, fishery losses, property devaluation, and the costs of constructing alternative municipal water supplies.

32. With respect to the Rinconada Project, the United States and Tribe analyzed capital costs as if the project were to be developed primarily for recreation purposes. They attributed all costs to recreation, except for incremental costs essential for irrigation. They assigned approximately 75% of the water costs on the Rinconada to recreation even though 68% of the water is to be utilized for agriculture. The result of this division of costs between recreation and agriculture, as calculated by the United States and Tribe makes the cost per acre of agricultural development appear lower than it would be. It is also the equivalent of using recreational benefits to justify a reserved rights award under a practicable irrigable acreage analysis. This is improper, because each component of a project must be evaluated on its own merits, and costs must be assigned proportionately.

33. The United States' and Tribe's analysis of the Rinconada project in effect rejects practicably irrigable acreage as the basis of their claims. It substitutes recreation as the primary purpose of the proposed project in order to create a justifiable capital cost for agriculture.

34. Under generally accepted standards for economic feasibility analyses, both the Rinconada and Pajarita developments proposed by the United States and Tribe are infeasible. Even making all favorable assumptions, and not including off-reservation costs, the projects would not return sufficient funds to pay for their construction, maintenance, replacement and operation costs.

35. The United States' and Tribe's reliance on specialty crops for both projects does not comport with appropriate economic procedures which consider the proper ratio of specialty to basic crops.

36. The United States' and Tribe's analysis of markets for specialty crops was inadequate and failed to follow generally accepted evaluation criteria. Given the production conditions existing on the reservation, including water supply issues, the Mescalero Reservation has no comparative market advantage over existing supplying regions.

37. The United States' and Tribe's methods of calculating crop yields for both projects do not conform to appropriate economic procedures. Thus, the proposed

crop yields are greatly overstated and unrealistic compared to what other commercial producers realize.

38. The physical constraints of the terrain, the geographical location of the Reservation, and the variety and selection of crops dictate high quality, top level management. The United States and Tribe failed to budget sufficiently for this necessity.

39. The United States and Tribe failed to specifically or adequately quantify the risks inherent in both projects related to weather, markets, labor, insects, disease, and all other risks that go along with agricultural production.

40. The United States and Tribe have overstated accomplishment rates and understated costs of machinery equipment.

41. Crop budgets must include factors such as storage, transportation, quality adjustments, supply and demand, seasonal price differences, and market structure in order to define accurately proposed prices and production costs. The United States and Tribe failed to include all of these factors in their crop budgets for both projects.

42. The accounting system used by the United States and Tribe does not totally account for the costs of establishment and maintenance of the various crops in their net benefit analyses for the projects.

43. Sound economic theory requires a detailed analysis of the labor cost component in project development, and limits the benefits which can be claimed for labor. The United States and Tribe failed to perform that analysis and therefore understated the costs for both projects.

44. The Rinconada project as proposed is undercosted by almost 12 million dollars. The United States' and Tribe's analysis of the water delivery system for the unit is an incomplete "reconnaissance-level" study. It is inadequate to permit a proper assessment of the project feasibility as relates to the tunnels, pipelines and dams and pumpback system designed to supply water to the project.

45. The Mescalero Apache Tribe has successfully diversified its non-agricultural economic interests and pursuits. The continued prosperity of the Tribe and a successful economic utilization of its lands are not dependent on the proposed agricultural development in the Pajarita and Rinconada projects.

CONCLUSIONS OF LAW

1. This Court has personal jurisdiction over all claimants to the use of water of the Pecos River System within the territorial boundaries of the State of New Mexico.
2. The Court has subject matter jurisdiction over this case.
3. All claimants with rights to the use of water of the Pecos River System have standing to contest and participate in hearings involving the claims for rights to the use of water filed by the United States on behalf of the Mescalero Apache Tribe.
4. Notice of the opportunity to contest the claims to the use of water filed by the United States on behalf of the Mescalero Apache Tribe, present evidence and be heard was provided by personal service and notice of publication to all claimants to the use of water of the Pecos River System within the territorial boundaries of the State of New Mexico.
5. The judgment of this Court is final and binding on the State of New Mexico and all claimants to the use of the waters of the Pecos River System within the State of New Mexico.
6. The United States established on behalf of the Mescalero Apache Tribe a right to the use of water from the surface water and related groundwater of the Rio Hondo and its tributaries for present and future uses of the Mescalero Apache Tribe.
7. The Mescalero Apache Tribe holds aboriginal title to its present-day Reservation.
8. Aboriginal Indian title derives from exclusive and prolonged occupancy and use of a resource. There is no aboriginal priority date under which federal reserved water rights for the Mescaleros can attach.
9. Aboriginal title is not a property right, but provides only a right of occupancy as against the United States until such time as the right is extinguished.
10. Congress has the right and power to extinguish Indian aboriginal title.
11. All waters arising on the public domain out of which the Mescalero Apache Reservation was first designated in 1873 were severed from the public domain by acts of Congress beginning in 1866.
12. The United States holds title in trust for the Mescalero Apache Tribe to the quantity of water awarded.

13. A purpose for the reservation of water rights for the Mescalero Apache Tribe was to make the Tribe self-sufficient.

14. Self-sufficiency of the Mescalero Apache Tribe on a reduced land base or reserve requires development of present and future uses of available water.

15. A purpose of reserving water rights for the Mescalero Apache Tribe was to provide a permanent homeland for them.

16. A permanent homeland for the Mescalero Apache Tribe requires development of present and future use of water.

17. A permanent homeland for the Mescalero Apache Tribe requires water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the "arts of civilization".

18. Self-sufficiency of the Mescalero Apache Tribe on their Reservation requires multiple and varied uses of water for recreation, agriculture, domestic, stock, commercial, industrial and other uses for the "arts of Civilization".

19. Equitable Estoppel is not an appropriate principle in the adjudication of the Mescalero Apache Tribe rights to the use of water.

20. Balancing of equities is not to be considered in the quantification of the Mescalero Apache Tribe rights to the use of water.

21. Quantification of the rights of the Mescalero Apache Tribe to the use of water is governed exclusively by federal law.

22. Practicable irrigable acreage is the appropriate method of quantification of the future agricultural water right for the Mescalero Apache Tribe.

23-24. The 2,322.4 acre-feet diversion of water per year for the existing uses and future needs for domestic, recreational, and other non-agricultural uses on the Mescalero Reservation is necessary to meet the purposes of the Mescalero Apache Reservation and is a valid right.

25. Priority of the right to the use of water by the Mescalero Apache Tribe is governed exclusively by federal law.

26. The 1852 Treaty was one of peace and amity between the United States and the various tribes which constituted the Apache Nation. In express terms it did not establish a reservation for the Mescalero Apache Tribe. As a matter of law, the treaty cannot be used as the basis for any federal reserved water right.

27. The Mescalero Apache Reservation was first established by the federal government in the Executive Order of May 29, 1873, which reserved specific lands for the Mescaleros. Until that time, no water was impliedly reserved for the Mescalero Apache Reservation.

28. The Winters or federal water rights doctrine stands for the proposition that when the federal government withdraws its land from the public domain and reserves it for a federal purpose, the government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. Under the Winters Doctrine, the federal government, not the Indians, implicitly reserves the water rights. Federal reserved rights can arise only in water unappropriated as of the date of the withdrawal of lands from the public domain.

29. The priority of lands withdrawn by Executive Order is the date of the reservation; if there are successive withdrawals of land, there are successive priority dates relating to the specific lands withdrawn.

30. Federal reserved water rights can be implied only to the extent needed to satisfy the contemporaneous purposes for which lands were withdrawn; if there are successive withdrawals, reserved water rights can be implied only to the extent needed to satisfy the purposes of each withdrawal.

31. When there is an expressed intent to exclude land and appurtenant water from a reservation a contrary intent cannot be implied.

32. Federal reserved rights can arise only in water unappropriated as of the date of the withdrawal of lands from the public domain.

33. The method of quantifying federal reserved rights is not necessarily the same for all reservations.

34. If practicably irrigable acreage method of quantification is appropriate in this case, the United States and Tribe have failed to sustain their burden of proof. The proposed Rinconada and Pajarita projects are not economically feasible, nor is there sufficient water available to supply the proposed Rinconada project.

35. A proper benefit-cost analysis required to determine practicably irrigable acreage takes into account all of the benefits and all of the costs regardless of the costs to whom they accrue. Such an analysis must be conducted according to generally accepted economic principles which are consistently applied.

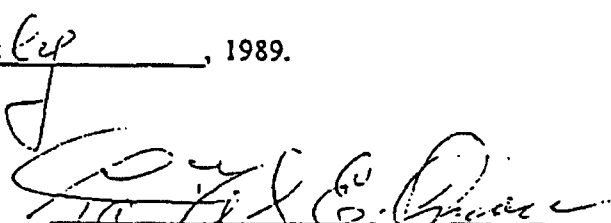
36. Recreation is not a permissible use under a practicably irrigable acreage analysis.

37. Recreation is a permissible use, but the benefits therefrom cannot be used to bolster the economic feasibility analysis for an agricultural project.

38. Once quantified, the water rights awarded may be put to any use.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the above Findings and Conclusions define the water rights of the United States on behalf of the Mescalero Apache Tribe and of the Mescalero Apache Tribe in the surface and ground waters of the Rio Hondo stream system. This is the final judgment of the District Court on the water rights of the United States on behalf of the Mescalero Apache Tribe and of the Tribe in the Rio Hondo stream system.

DATED this 10th day of December, 1989.


LaFel E. Oman
District Judge Pro Tempore

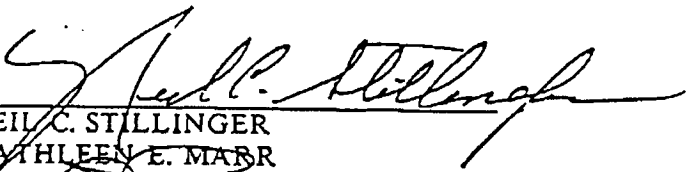
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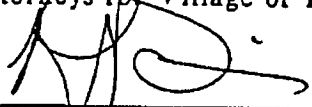
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