ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.
v.
THE JICARILLA APACHE TRIBE and the NAVAJO NATION,
Defendant-Intervenors.

No.: D-1116-CV-75-184
SAN JUAN RIVER
ADJUDICATION SUIT

LA PLATA RIVER SECTION

GARY L. HORNER'S RESPONSE TO THE "STATE OF NEW MEXICO'S MOTION FOR ENTRY OF (1) SCHEDULING AND PROCEDURAL ORDER FOR ADJUDICATION OF SURFACE WATER RIGHTS CLAIMS FOR DOMESTIC AND STOCK WATERING PURPOSES WITHIN THE LA PLATA RIVER SECTION; AND (2) ORDER TO SHOW CAUSE"

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), in response to the STATE OF NEW MEXICO'S MOTION FOR ENTRY OF (1) SCHEDULING AND PROCEDURAL ORDER FOR ADJUDICATION OF SURFACE WATER RIGHTS CLAIMS FOR DOMESTIC AND STOCK WATERING PURPOSES WITHIN THE LA PLATA RIVER SECTION; AND (2) ORDER TO SHOW CAUSE, filed in the present matter on January 16, 2019. (Hereinafter referred to as the subject "Motion".)

Pursuant to the subject Motion, the State acknowledges that the 1948 Decree granted water rights for domestic and stock watering purposes, over and above their surface water irrigation rights, to all water right owners within the Basin. Specifically, the subject Motion states:

"The 1948 Echo Ditch Decree adjudicated a right to use surface water for domestic and stock purposes as an 'Additional Right' to each irrigation ditch in the San Juan River Stream System, and to each of the landowners and water users under the ditch:

" 'Additional Rights: In addition to the waters diverted for irrigation of lands, this ditch and the land owners and water users thereunder have the subsisting vested right to demand, divert, receive and use such amount and amounts of waters as are from time to time beneficially needed and required, for domestic and stock watering purposes.'

"Echo Ditch Decree at p. 90, *The Echo Ditch Company, et al. v. The McDermott Ditch Company, et al.,* 37cv01690 (emphasis added)." Motion, pp. 2-3.

However, now, pursuant to the subject Motion, and the State's associated proposed Procedural Order and Order to Show Cause, the State proposes to take away all of such previously adjudicated domestic and stock water rights in one fell swoop, with no citation to authority of any kind for such action.

As indicated above, pursuant to the 1948 Decree, such domestic and stock watering rights were adjudicated as "additional" rights, that is, over and above the water rights for irrigation purposes, as specifically set forth in the 1948 Decree.

As indicated in the subject Motion, all of the more recent "Consent Orders" entered with respect to the La Plata subfiles contain a paragraph that states:

" 'Claims Excluded from This Consent Order:'

"Any claim(s) relating to the subsisting vested right to demand, divert, and receive and use such amount and amounts of waters, as are from time to time beneficially needed and required, for domestic and stock watering purposes, as described in the *Echo Ditch Decree.*" Motion, p. 2.

That is, all of the more recent subfile "Consent Orders" did not determine water rights for domestic and stock water purposes, but, rather, left the determination of any such domestic and stock watering rights to some indefinite future point in time.

Now, pursuant to the subject Motion, the State proposes to strike such paragraph (excluding claims for domestic and stock water rights), and simply:

"Amend the purpose of use section under the heading 'IRRIGATED LANDS (Surface Water Only)' to add the additional purposes of use, as follows:

"**Purpose of Use: IRRIGATION, DOMESTIC, AND STOCK WATERING.**" Motion, p. 2.

Accordingly, the State proposes to eliminate such domestic and stock watering rights, as rights in addition to each landowners' irrigation rights, and proposes that such domestic and stock watering rights may only exist within each landowners' irrigation rights. The effect of such proposal would be that while each landowner may use its irrigation rights for domestic and stock watering purposes, each landowner would lose their previously adjudicated right to use surface water for domestic and stock watering purposes over and above their irrigation rights. That is, pursuant to the State's proposal, every landowner would completely lose its existing, previously adjudicated, right to domestic and stock watering (over and above their irrigation rights), unless each such landowner assumes the burden of coming forward and proving such domestic and stock watering rights in accordance with the needlessly complex show cause procedure proposed by the State. Further, this would be the case, even though the State appeared to recognize the existence of such domestic and stock watering rights as additional rights, when it induced each landowner to sign each such consent order, which, in every instance, included the above referenced exclusionary clause.

It appears that one of the primary purposes of the subject Motion is to inappropriately shift the burden of proving the validity of a (domestic or stock watering) water right from the State to each individual water user. In that regard, the subject Motion states:

> " 'The burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right.' United States vs. A&R Productions [Zuni Adj.], August 28, 2014 *Order* at pp. 2-3 (Doc. No. 2985) (quoting *State v. Aamodt,* No. Civ. 66cv6639 MV/VVPL, Subfile PM-67833, Doc. 8119 at 6 (D.N.M. Feb. 24, 2014) (unpublished) (citing *Pecos Valley Artesian Conservancy*

Dist. v. Peters, [1948-NMSC-022, 52 N.M. 148] 193 P.2d 418, 421-22 (N.M. 1948))." Motion, p. 7.

I strongly dispute such notion. First, both the Zuni Adjudication and the Aamodt Adjudication Orders were made in the United States District (trial) Court, and neither of them has any precedential value here. On the other hand, the *Pecos Valley* case was a New Mexico Supreme Court case. However, *Pecos Valley* was not a general stream adjudication case, and the State was not even a party. In *Pecos Valley*, the Pecos Valley Artesian Conservancy District sought to enjoin the use of a well owned by Peters. In *Pecos Valley*, there was considerable discussion about the burdens of the parties. The issue was not simply the quantity of water that Peters was using (which Peters did prove), but, whether Peters' use of such water impaired the rights of other water users in the District. This means that also at issue were such things as: whether the Roswell Artesian Basin was fully appropriated; the total amount of water used by other users in the District; how much water was in the aquifer; how fast was the aquifer recharging; and how much water was being wasted by abandoned and leaking wells. The *Pecos Valley* Court's analysis was actually pretty messy. However, *Pecos Valley* did say that:

> "Ordinarily one who asserts a fact in his pleading that must be proved to establish a cause of action, has the burden to prove it." *Pecos Valley* at 420.

In that regard, in *Pecos Valley*, the initial burden of proof must be placed on the District which sought to enjoin Peters' use. Similarly, in the present case, the initial burden of proof must be placed on the State which, pursuant to the subject Motion, seeks to eliminate all previously adjudicated domestic and stock watering rights as an additional water rights over and above irrigation water rights.

Ultimately, the *Pecos Valley* Court ruled in favor of Peters stating that:

"The appellant [District] did not make a prima facie case, and we are not able to say that the trial court erred in dismissing the bill."

Pecos Valley never said that "The burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right." In that regard, *Pecos Valley* does not support either of the subject Zuni or Aamodt adjudication Orders. *Pecos Valley* did say that:

"It follows that appellant [District] must have proved the quantity of water legally appropriated by its water users; and the quantity within their appropriations now necessary for their reasonable use. If appellant introduced substantial evidence to prove these facts, the burden of proof then shifted to appellee [Peters] to establish that there is surplus water which he may beneficially use." *Pecos Valley*, p. 421.

This is problematic in several respects. Primarily, the *Pecos Valley* Court determined that if the District met its initial burden, Peters must establish that there was surplus water which he may beneficially use. This would be an essentially impossible burden to be placed on a single water user.

In *Pecos Valley*, Justice Sadler's specially concurring opinion, noted that the Court's stated burden placed on the *District* was an essentially impossible burden to meet. Specifically, Justice Sadler stated:

"It should be said, however, that a practical application of the rule will preclude injunctive relief against unlawful raids on the existing water supply of any artesian basin. This is so because of the sheer expense to a plaintiff of making the hydrographic survey and furnishing the proof essential in establishing the prima facie case necessary to shift the burden to subsequent appropriator of showing there is a surplus. Until the plaintiff has made out his prima facie case, he will not be entitled to enjoin.

"{41} It requires but a moment's reflection to satisfy the mind that the foregoing observation is true. In a suit to adjudicate the waters of the Cimarron river pending for many years in the district court of Colfax County in which the present Chief Justice while judge of the fifth judicial district by designation sat as trial judge there were approximately two hundred and fifty defendants. The actual trial consumed nearly two months. It was a statutory suit to adjudicate waters of the Cimarron stream system

brought by the Attorney General under authority of the act hereinafter referred to. Under the rule this day approved on where the burden of proof lies, if an individual water user from that stream instead of the state had instituted suit against a subsequent appropriator, who happened to be without right and a trespasser because there was no surplus water subject to appropriation, before having injunctive relief what must he do?

"{42} First, he would have to guage the stream over a period of years to ascertain and prove the quantity of water subject to appropriation. Having done so, he would then have to survey, or cause to be surveyed, every acre of land of the 250 appropriators using water from the stream and establish by proof what a reasonable use of water thereon would demand. In the event such proof showed no surplus, then *and only then*, he might enjoin; otherwise not. The cost of such a procedure would run literally into thousands of dollars. No litigant with sound reason would undertake it. Nevertheless, this seems a difficulty inhering in the very nature of the litigation and one which the legislature alone can remedy. It presents an issue almost as difficult to establish as if one alive today were called upon to prove himself a lineal descendant of Adam.

"{43} Our legislature evidently sensed and attempted, although inadequately, to alleviate this burden when it enacted as a part of L.1907, c. 49 (Secs. 18 to 21), provision for hydrographic surveys of stream systems in New Mexico appropriating several thousand dollars to cover the cost thereof, and *163 authorizing suits by the Attorney General to adjudicate the waters of any stream system, directing the cost of same including that of the hydrographic survey, to be taxed against the private parties to such suits in proportion to the water rights allotted. See 1941 Comp., Secs. 77–401 to 77–411. Resort to this statute, in most instances, for an adjudication of the waters of an entire stream system or artesian basin, would seem to furnish the only escape from an otherwise impossible burden." *Pecos Valley*, at 427.

In *Pecos Valley* the Court determined that the District had not met its burden to prove "the quantity of water legally appropriated by its water users; and the quantity within their appropriations now necessary for their reasonable use." It is not at all clear that the District must have necessarily provided hydrographic surveys to meet such burden. However, if the District had met such burden, it appears the burden on Peters to prove that surplus water existed for his use would be an impossible burden for Peters to meet, because it would be Peters' burden to provide the hydrographic surveys to prove that surplus waters existed.

Bottom line here, *Pecos Valley* simply never stated that: "The burden of proof with

respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right." Rather, Justice Sadler's concurring opinion makes clear that in an adjudication suit, the burden to provide the necessary hydrographic surveys falls squarely on the State.

Further, the State appears to recognize that the total amount of water involved in the subject domestic and stock water claims is minimal. (Motion, p. 2.) Such "additional" water rights for domestic and stock water have been in existence since the 1948 Decree, and I am aware of no problems or complaints created by such domestic and stock water rights since 1948. Therefore, it is not clear why the State would make the subject proposal, except to further diminish the existing and previously adjudicated water rights of honest and hard-working water users. Rather, it appears that this entire issue of domestic and stock watering water rights could be reasonably put to rest by simply amending each subfile consent order to include the "additional" language of the 1948 Decree; or even more simply by just entering a global order recognizing domestic and stock watering rights as an "addition" to all of the surface irrigation water rights within the La Plata Section.

This problem is further compounded by the fact that if all of the water rights within the Basin are to be determined by the same standards, it will be necessary to apply the subject proposed procedures (if approved by the Court) throughout the remaining river sections of the Basin. However, the water users of the remaining river sections have not yet been joined as parties to this matter, and therefore, will have no opportunity whatsoever to even consider these proposed procedures that will ultimately affect their water rights.

Another problem with the State's proposal is the proposed notice. The State proposes to

provide notice to each water rights holder within the La Plata Section, but, only after the State's proposed procedural and show cause orders have been entered. In that regard, the State proposes to make no effort to inform landowners now, so that they might have the opportunity to come forward and object to the State's proposal before such orders are entered. Such proposed notice procedure represents an obvious violation of the due process rights of every water user in the Basin.

My understanding is that during the subject adjudication process of the water rights within the La Plata Section, the State has been unrelenting in its efforts to minimize the water rights, previously awarded pursuant to the 1948 Decree; while at the same time the State has been negotiating water rights with respect to other large water users (most notably the Navajo Nation) for hundreds of thousands of acre-feet per year in excess of their current uses, or even their reasonably foreseeable future uses. This would appear to be a stark violation of the state engineer's duty and obligation to protect existing, previously adjudicated, water rights. *State ex rel. Reynolds v. W.S. Ranch*, 1961-NMSC-061, 69 N.M. 169, 364 P.2d 1036, ¶ 8; *City of Albuquerque v. Reynolds*, 1962-NMSC-173, 71 N.M. 428, 379 P.2d 73, ¶ 32; *Bounds v. State*, 2011-NMCA-011, 149 N.M. 484 (2010), 252 P.3d 708, ¶ 5.

CONCLUSION

For the foregoing reasons, I respectfully request that the subject Motion be denied.

Respectfully, submitted by:

/s/ Gary L. Horner
GARY L. HORNER, Esq., *In Propria Persona*
Post Office Box 2497
Farmington, New Mexico 87499
(505) 326-2378

January 31, 2019
Date

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I HEREBY CERTIFY that a true copy of the foregoing was served on the parties and Claimants in the present matter, by attaching a copy of said document to an email sent to the following email list server(s) maintained by the Court, this 31st day of January, 2019:

sanjuanwater@nmcourts.gov

/s/ Gary L. Horner
GARY L. HORNER