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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO ex rel.**

3 **STATE ENGINEER,**

4 Plaintiff-Appellee,

5 v.

NO. A-1-CA-33437

6 **UNITED STATES OF AMERICA,**

7 Defendant-Appellee,

8 v.

9 **NAVAJO NATION,**

10 Defendant-Intervenor-Appellee,

11 v.

12 **GARY HORNER,**

13 Defendant-Appellant.

14 **APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY**

15 **James J. Wechsler, District Judge**

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1 **MEMORANDUM OPINION**

2 **BLACK, Judge.**

3 **Factual and Procedural Background**

4 {1} In light of the Navajo Nation’s potential claim for the majority of water in the
5 San Juan River Basin, the State of New Mexico initiated a general stream adjudication
6 to determine the water rights of the major claimants to water from that surface water
7 system in 1975. The United States asserted claims as trustee for the Navajo Nation and
8 the Navajo Nation intervened on its own behalf. Following years of litigation, the
9 State entered into settlement negotiations with the Navajo Nation and the United
10 States during the 1990s. The State proposed a blueprint for a settlement and held
11 public meetings in Farmington and Bloomfield seeking input from the non-Indian
12 water users. In response to substantial public input, the State revised its settlement
13 proposals.

14 {2} In 2005, following more than a decade of negotiation, the Navajo Nation, the
15 United States of America, and the State of New Mexico reached an agreement settling
16 the Navajo Nation’s claims to water in the San Juan River Basin (the Settlement).
17 Federal legislation to approve and implement the Settlement agreement was enacted

1 by Congress in 2009 under the Omnibus Public Land Management Act of 2009, Pub.
2 L. No. 111-11, § 10301, 123 Stat. 991 (2009) (Northwestern New Mexico Rural
3 Water Projects Act), and signed by the President. The New Mexico Legislature then
4 appropriated \$50 million to pay New Mexico's cost of the Settlement and authorized
5 the New Mexico State Engineer to bring a suit seeking judicial approval on the State's
6 share of the water. *See* NMSA 1978, § 72-1-12 (2005); State of New Mexico, Office
7 of the State Engineer, 2017 Indian Water Rights Settlement Fund Report, 3-4 (2017),
8 [https://www.nmlegis.gov/handouts/IAC%20112717%20Item%206%20Office](https://www.nmlegis.gov/handouts/IAC%20112717%20Item%206%20Office%20of%20the%20State%20Engineer%202017%20Indian%20Water%20Rights%20Settlement%20Fund%20Report.pdf)
9 [%20of%20the%20State%20Engineer%202017%20Indian%20Water%20Rights%2](https://www.nmlegis.gov/handouts/IAC%20112717%20Item%206%20Office%20of%20the%20State%20Engineer%202017%20Indian%20Water%20Rights%20Settlement%20Fund%20Report.pdf)
10 [0Settlement%20Fund%20Report.pdf](https://www.nmlegis.gov/handouts/IAC%20112717%20Item%206%20Office%20of%20the%20State%20Engineer%202017%20Indian%20Water%20Rights%20Settlement%20Fund%20Report.pdf); *see also* United States Department of the
11 Interior Bureau of Reclamation, Navajo-Gallup Water Supply Project: Cost Share
12 Agreement Between the United States and the State of New Mexico, 11 (2011),
13 <http://www.ose.state.nm.us/Legal/settlements/NNWRS/NavajoSettlement/NGWSP>
14 [-OriginalCostShareAgreement.pdf](http://www.ose.state.nm.us/Legal/settlements/NNWRS/NavajoSettlement/NGWSP-OriginalCostShareAgreement.pdf).

15 {3} In the subsequent suit, the settling parties asked the San Juan County District
16 Court to approve the water rights previously allocated in congressional legislation for
17 the Navajo Indian Irrigation Project (NIIP), Fruitland-Cambridge Irrigation Project,
18 Hogback-Cudei Irrigation Project, Navajo Gallup Water Supply Project (NGWSP),
19 Animas-La Plata Project (ALP), San Juan River municipal and industrial uses,

1 reserved groundwater, and rights based on stock, irrigation, and recreational uses as
2 of January 1, 2011. Others with an interest in the Settlement were invited into this
3 inter se proceeding through widely distributed radio announcements, newspaper
4 notices, and over 19,000 first class letters to those water rights holders who had title
5 of record.

6 {4} At the initiation of the proceedings, the district court imposed an unusually
7 stringent evidentiary burden on the settling parties to prove the Settlement was fair,
8 adequate, and reasonable as well as in the public interest.¹ After giving all other water
9 rights claimants in the Basin notice and an opportunity to conduct discovery as well
10 as to file dispositive motions in accordance with Rule 1-071.2 NMRA, the district
11 court entered its order granting the settlement motion for entry of partial final decrees
12 describing the water rights of the Navajo Nation. The Court then entered the partial
13 final judgment and decree of the water rights of the Navajo Nation, and the
14 supplemental partial final judgment and decree of the water rights of the Navajo
15 Nation. The non-settling parties objected to several terms of the Settlement Agreement

16 ¹Normally in an inter se proceeding, the parties objecting to settlement have the
17 burden to prove the settlement is not fair, adequate, or reasonable. *See State ex rel.*
18 *State Eng'r v. Aamodt*, 582 F. Supp. 2d 1313, 1317 (D.N.M. 2007); *In re Crow Water*
19 *Compact*, 2015 MT 217, ¶ 28, 382 Mont. 46, 354 P.3d 1217. In the present case the
20 district court shifted this burden to proponents of the Settlement. Moreover, the
21 district court did not require those challenging the Settlement to make a showing that
22 it would affect their rights, as is usually required. *See State ex rel. Office of State*
23 *Eng'r v. Lewis*, 2007-NMCA-008, ¶ 16, 141 N.M. 1, 150 P.3d 375.

1 and to the inter se procedures adopted by the district court. After full briefing and
2 argument the district court rejected the objections and issued its order approving the
3 settlement agreement and proposed decrees (the Settlement). The district court
4 concluded that the Settlement was fair, adequate, reasonable, and consistent with the
5 public interest as well as all applicable laws.

6 {5} Although they have several issues in common, the non-settling parties have
7 consistently refused to consolidate their appeals, so it will be necessary to address
8 their claims in three separate opinions. To the extent Defendant herein, Gary Horner,
9 advances arguments virtually identical to those advanced by the other defendants, this
10 Court will dispose of those issues by reference to its previously filed opinions in the
11 related San Juan adjudications.

12 **I. Indian Tribes Are Not Required to Prove Immediate Beneficial Use to**
13 **Quantify and Preserve Their Water Rights**

14 {6} Defendant Horner initially argues that “[s]tate law limits water rights to existing
15 beneficial uses.” Treaty rights of Indians are “not a grant of rights to the Indians, but
16 a grant of right from them,—a reservation of those not granted.” *United States v.*
17 *Winans*, 198 U.S. 371, 381 (1905). “Trust obligations to Native Americans were
18 enshrined in reserved water rights that exist without exercise and may be asserted as
19 prior and more senior to allocated state water rights.” Sally Fairfax, Helen Ingram, &
20 Leigh Raymond, *Historical Evolution & Future of Natural Resources Law & Policy*,

1 *The Evolution of Natural Resources Law & Policy* 19 (Lawrence MacDonnell &
2 Sarah F. Bates eds., 2010). As we explained in *Navajo Nation v. San Juan*
3 *Agricultural Water Users Ass’n*, ___-NMCA-___, ¶ 16, ___ P.3d ___ (No. A-1-CA-
4 33535), an Indian tribe’s federal reserved water rights cannot be lost under state
5 theories of failure to perfect by beneficial use. *See Arizona v. San Carlos Apache*
6 *Tribe of Ariz.*, 463 U.S. 545, 574 (1983) (“[F]ederal law issues . . . should be
7 performed by federal rather than state courts whenever possible.”). New Mexico state
8 law does not control water allocated to the Navajo Nation by the United States.

9 {7} This disposes of several points of Defendant’s appeal, to-wit:

10 [(1) s]tate law limits water rights to existing beneficial uses; [(2) t]he
11 New Mexico Court of Appeals has established that the federal reserved
12 rights doctrine must be construed narrowly; [(3) t]he State of New
13 Mexico has acknowledged that Indian tribes are not entitled to water
14 rights for future uses; [(4) g]enerally, negotiated water rights settlements
15 are inappropriate and violate the Constitution and laws of New Mexico²;
16 [(5)] New Mexico law requires that water rights be determined
17 by hydrographic surveys³; [(6) t]he Navajo [Nation] Settlement . . .

16 ²This argument also ignores the fact that New Mexico has recognized and
17 participated in several tribal water settlements. *See* Jicarilla Apache Tribe Water
18 Rights Settlement Act, Pub. L. No. 102-441, § 2, 106 Stat. 2237 (1992); The Claims
19 Resolution Act of 2010, Pub. L. 111-291, §§ 501, 601, 124 Stat. 3064 (Taos Pueblo
20 Indian Water Rights Settlement Act and Aamodt Litigation Settlement Act). More
21 specifically, the Legislature set aside funds for this and other settlements. Section 72-
22 1-12.

23 ³Both the State and the district court relied on the hydrographic survey
24 conducted by the United States. This is standard and acceptable practice in New
25 Mexico water law, and Defendant offers no admissible evidence to rebut this survey.

1 violates the [New Mexico Constitution] doctrine of separation of
2 powers.⁴

3 {8} This Court agrees with Defendant that whatever its viability generally, the State
4 pueblo water rights doctrine is totally inapplicable to this case. We do not agree,
5 however, that the New Mexico Supreme Court abolished federally reserved water
6 rights in *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 1, 135 N.M.
7 375, 89 P.3d 47. *See* U.S. Const. art. VI (federal law supremacy clause). Indeed,
8 Defendant admits, “since such rights are federal reserved rights they are not subject
9 to state law.” Moreover, as discussed in the *San Juan Agricultural Water Users Ass’n*
10 case, even if it could be presumed that State law had some applicability herein, it
11 would be preempted by federal law. *See* ___-NMCA-___, ¶ 14.

12 {9} More fundamentally, Defendant’s statement that “there really exists no federal
13 reserved right for Indian tribes for future uses” is clearly in error. In *United States v.*
14 *Ahtanum Irrigation District*, 236 F.2d 321, 327 (9th Cir. 1956), the Ninth Circuit went
15 back to its 1908 precedent, *Conrad Inv. Co. v. United States*, 161 F. 829 (9th Cir.
16 1908), to again flatly reject the concept that Indian water allocations are frozen in
17 time:

23 NMSA 1978, § 72-4-16 (1919).

20 ⁴This argument was thoroughly discussed in *San Juan Agricultural Water Users*
21 *Ass’n*, ___-NMCA-___, ¶¶ 9-13.

1 It is plain from our decision in the *Conrad Inv. Co.* case, that the
2 paramount right of the Indians to the waters of Ahtanum Creek was not
3 limited to the use of the Indians at any given date but this right extended
4 to the ultimate needs of the Indians as those needs and requirements
5 should grow to keep pace with the development of Indian agriculture
6 upon the reservation. Some effort is made here to assert that the
7 reservation of waters for the benefit of the Indians must be limited to the
8 amount or quantity actually used beneficially by the Indians within some
9 period of time or within what the court might find to be a reasonable
10 time. . . . Nothing in the *Winters*[*v. United States*, 207 U.S. 564 (1908)]
11 case or in any other decided case lends any support to such an argument.
12 As indicated, exactly the contrary was held in the *Conrad Inv. Co.* case[.]

13 *Ahtanum Irrigation Dist.*, 236 F.2d at 327 (citations omitted).

14 {10} Nor does logic support Defendant's time-limited rights theory. From the earliest
15 reservations, the courts recognized that even if the United States Government could
16 persuade tribes to adopt irrigated farming, they would clearly have to learn to apply
17 this more agrarian lifestyle to often barren desert. Inherent in the learning curve would
18 be trying various forms of irrigation such that tribal water allocations clearly could not
19 be fixed at the time a reservation was created. *See United States v. Walker River*
20 *Irrigation Dist.*, 104 F.2d 334, 339 (9th Cir. 1939).

21 **II. A Viable Reservation Homeland Has Long Been a Recognized Criterion**
22 **in Indian Water Law Cases**

23 {11} Defendant argues, as did the defendants in the *San Juan Agricultural Water*
24 *Users Ass'n* case, that the district court impermissibly allocated water to the Navajo
25 Nation based on the need to make their homeland viable now and in the future.

1 Defendant maintains, “[f]ederal reserved rights are limited to the minimal needs of a
2 tribe, and do not include water rights for future uses.” While it is true many of the
3 early cases focused on the amount of water to provide a tribe an agricultural existence,
4 recent judicial trends appear to recognize reservation allocations should not be limited
5 to only an amount of water sufficient to support the pastoral life contemplated in the
6 nineteenth century, but rather, calculated to provide the tribes sufficient water to allow
7 them a moderate living in the twentieth century and thereafter. Indeed, several
8 opinions specifically refer to the reservation goal of providing sufficient water to
9 sustain a “permanent home.” *See, e.g., Winters*, 207 U.S. at 565; *Agua Caliente Band*
10 *of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1270 (9th Cir.
11 2017). The Navajo Nation Treaty of 1868 returned them to a portion of their ancestral
12 territory as their “permanent home,” the very language at issue in the *Winters* case.
13 *Treaty with the Navajo*, art. 13, June 1, 1868, 15 Stat. 667.

14 {12} Nor is Defendant’s argument advanced by his analysis of the *Winters* doctrine.
15 This Court can agree with Defendant that the rigid and hard to apply “practicably
16 irrigable acreage” (PIA) standard is no longer the only appropriate measure of Native
17 aboriginal or reservation-based water rights. The Court also agrees with Defendant
18 that *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*,
19 443 U.S. 658, 686 (1979), requires an allocation of natural resources sufficient “to

1 provide the Indians with a livelihood—that is to say, a moderate living.” Again this
2 focuses on adapting the reservations to changing conditions. Barbara A. Cosens, *The*
3 *Measure of Indian Water Rights: The Arizona Homeland Standard, Gila River*
4 *Adjudication*, 42 Nat. Resources J. 835, 853 (2002).

5 {13} As this Court explained in *San Juan Agricultural Water Users Ass’n*, the district
6 court employed appropriately these more modern and flexible guidelines, rather than
7 a strict PIA standard, in reaching its decision herein. *See* ___-NMCA-___, ¶¶ 24-27.
8 The district court’s decision therefore is not an abuse of discretion.

9 **III. Defendant Fails to Cite Evidence That the Settlement Is Not Fair,**
10 **Adequate, Reasonable, and Consistent With the Public Interest**

11 {14} Given Defendant’s failure to comprehend the federal law that governs the
12 Indian water rights involved, this Court could simply ignore his grumbling about how
13 the non-Indians have senior appropriation rights and “the [Office of the State
14 Engineer] agreed to bundling up all of the undeveloped and unused water supply to
15 give to the Navajos.” However, these arguments are not only based on erroneous legal
16 principles but on a misinterpretation or misrepresentation of the facts in this case so
17 must be addressed.

18 {15} Defendant admits “in the case of the Navajo Nation, such upper limit, based on
19 the PIA standard, would be well in excess of all of the water available, due to the
20 enormous size of the Navajo [Nation] Reservation.” Since the Navajo Nation might

1 well be entitled to all the water in the San Juan Basin if the trial had proceeded,
2 eliminating this risk was prudent advocacy for the State and benefits all users in the
3 Basin. See Reid Peyton Chambers & John E. Echohawk, *Implementing the Winters*
4 *Doctrine of Indian Reserved Water Rights: Producing Indian Water & Economic*
5 *Development Without Injuring Non-Indian Water Users*, 27 Gonz. L. Rev. 447 (1991-
6 92). The Settlement substantially limits the Navajo Nation’s potentially disruptive
7 claims to water rights in the San Juan Basin by adjudicating the Navajo Nation’s water
8 rights in a reduced amount to be exercised almost entirely under a junior priority date
9 and with shortage sharing and other conditions to protect other water rights in the
10 stream system.

11 {16} The district court explicitly contrasted the amount of water the potential trial
12 evidence would allow the Navajo Nation with the amount contained in the Settlement
13 saying the former

14 establishes a reasonable basis for a potential claim for a total diversion
15 of 920,745 afy and a total corresponding depletion of 591,401 afy. The
16 Proposed Decrees, in contrast, limit total diversions to 635,729 afy, and
17 total depletions to 334,542 afy. These limitations result in less diversion
18 and consumptive use of water by the Navajo Nation in the Basin and
19 ultimately reduce impacts on junior water users.

20 (Footnote omitted.)

21 {17} Indeed, as the district court found, “the total amount of water in the Settlement
22 Agreement is less than the Navajo Nation’s current[] federally authorized rights to

1 water pursuant to the 1962 NIIP Act and the long-established Hogback-Cudei and
2 Fruitland-Cambridge irrigation projects.” As important as the Navajo Nation’s
3 agreement to take a substantially reduced amount of total water is their agreement to
4 have the majority of their water, almost 90 percent, allocated on a priority date of
5 1955 or later. This is more than a century later than its Reservation treaty.

6 {18} The Settlement also includes numerous other specific mitigating provisions as
7 well. For example, when the direct flow of the San Juan River is insufficient to supply
8 direct-flow diverters in New Mexico, the Navajo Nation is required to make up to
9 12,000 afy of water available to service its reserved rights for Shiprock municipal uses
10 and the Hogback-Cudei and Fruitland-Cambridge irrigation projects prior to making
11 a call for priority administration of the river system. This reduces the risk of shortage
12 to direct-flow users.

13 **CONCLUSION**

14 {19} For the reasons stated, the district court’s decision is affirmed.

15 {20} **IT IS SO ORDERED.**

16
17

BRUCE D. BLACK, Judge Pro Tem

1 **WE CONCUR:**

2 _____
3 **LINDA M. VANZI, Chief Judge**

4 _____
5 **J. MILES HANISEE, Judge**