

Bounds, Lewis, San Juan Agri. Water Users Assoc.

State ex rel. State Eng'r v. United States, 2018-NMCA-053, 425 P.3d 723

After more than a decade of negotiation, the Navajo Nation, the United States, and the State of New Mexico reached an agreement settling the Navajo Nation's claims to water in a river basin. The parties filed suit seeking approval of the settlement, and others with an interest in the settlement agreement were invited into the proceeding.

The Court of Appeals, Black, J., held that:

- 1 federal preemption disposed of non-settling parties' arguments that New Mexican legislature was required to approve the settlement and that agreement did not provide for all of the Navajo Nation's needs;
  - 2 state legislature was not required to approve settlement agreement;
  - 3 *Indian water rights are proprietary rights, and reserved water rights have a priority date, the date of the creation of the reservation, but they are not dependent on the application of water to beneficial use;*
  - 4 Reclamation Act of 1902 did not constrain the use of water on the Navajo Reservation;
  - 5 non-settling parties' cross-claims were properly treated as objections to settlement;
  - 6 measures taken by the state to provide notice satisfied the requirements of due process; and
  - 7 trial court did not abuse its discretion in limiting time for discovery.
- Affirmed.

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Although the state has an interest in regulating water within its boundaries, it lacks any ownership claim in such water.

Appellants argue inter alia that the Settlement violates the New Mexico Constitution's separation of powers. This is based on the premise that Governor Richardson lacked the power to sign the Settlement without prior legislative approval. They further contend that through the Settlement, Governor Richardson attempted to infringe the plenary jurisdiction of the New Mexico Courts under Article VI of the New Mexico Constitution.

This contention, like Appellants' entire appeal, is based on a failure to understand the nature of the relationship between Indian nations and the United States government as well as the structure of federalism. *It is compounded by a misconception of New Mexico water law procedure and the role of the New Mexico State Engineer.* We explain.

67{11} **First**, *water is a commodity that can move in interstate commerce, and \*730 does so as the San Juan River crosses several state boundaries. Thus, it is ultimately subject to the control of the federal, not the state, government.* See *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661, 667, 670, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974); cf. *City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 597 F.Supp. 694, 704 (D.N.M. 1984) (stating that a state may not impermissibly burden transfer of interstate water). *Although the state has an interest in regulating water within its boundaries, it lacks any ownership claim in such water.* *Virginia v. Maryland*, 540 U.S. 56, 74 n.9, 124 S.Ct. 598, 157 L.Ed.2d 461 (2003) (noting that federal common law governs

interstate bodies of water, ensuring that water is equitably apportioned between states and that no state harms another's interest).

**Second**, *the creation of an Indian reservation generally involves the reduction and definition of a tribe's traditional homelands in return for a guarantee of permanent and protected territory.* See *Winters v. United States*, 207 U.S. 564, 576, 28 S.Ct. 207, 52 L.Ed. 340 (1908). Indian tribes thus have a proprietary interest in waters recognized by federal reservation treaties. ...

**Third**, *intergovernmental agreements are particularly useful because they provide benefits beyond what "ordinary state regulation" allows.* New Mexico's entry into the congressionally sanctioned intergovernmental agreement as part of the Settlement involved herein reinforces federal preemption of state control over the Navajo Nation's portion of the waters of the San Juan.

*Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, *aff'g* 2011-NMCA-011, 149 N.M. 484, 252 P.3d 708

*State ex rel. State Eng'r v. Lewis*, 2007-NMCA-008, 141 N.M. 1, 150 P.3d 375.

*State ex rel. Off. of State Eng'r v. Lewis*, 2007-NMCA-008, 141 N.M. 1, 150 P.3d 375

Appellants' flagship contentions are that the settlement agreement violates the doctrine of prior appropriation adopted in Article XVI, Section 2 of the New Mexico Constitution and required in Article IX of the Compact....Appellants argue that New Mexico cases and the Compact adhere to, and New Mexico's adjudication statutes implement, the Constitution's prior appropriation doctrine and, therefore, adjudication of water rights has always required and still requires application of priority enforcement through a priority call. Appellants emphasize that, in spite of the Constitution, Compact, statutes, and case law, New Mexico failed and refused to enforce priority rights in the Pecos River throughout the twentieth century, up to the present. ... Appellants condemn the "new river management machinery (the [2003]Settlement Agreement), that not only ignores priority enforcement but explicitly waives and prohibits it." The settlement agreement provision to which Appellants refer as waiving and prohibiting priority enforcement ...

As we have indicated, we read the compliance statute to unmistakably intend, if not to some degree mandate, that a particular process of augmentation and public funding be implemented to attempt to fulfill the State's Compact obligations and at the same time supply adequate surface water to those holding downstream, senior rights. We must assume that the Legislature was aware of the prior appropriation doctrine. By its silence as to strict priority enforcement and its express intent to attempt resolution through land and water rights purchases using public funding, we also read the compliance statute as intending the land and water rights purchases, and perhaps other actions, to be a first response to the shortage and Compact compliance concerns, rather than resort to a priority call as a first or exclusive response. The enactment of the compliance statute is correctly to be read as a clear signal that the Legislature and governmental players wanted to create a solution other than a priority call as the first and only response. As we discuss, this does not in and of itself abrogate the system of priority

enforcement.

We therefore view Appellants' direct constitutional attacks on the settlement agreement and decree to be, in effect, subsurface, indirect constitutional attacks on the authorizing legislation. ... "[A]n act of the Legislature will not be declared unconstitutional in a doubtful case, and if possible, it will be so construed as to uphold it." Yeo, 34 N.M. at 625, 286 P. at 976.

*We see no reason to read Article XVI, Section 2 of the Constitution and Article IX of the Compact to require a priority call as the first and only, and thus exclusive, response to water shortage concerns.* Rather, we think it reasonable to construe these provisions to permit a certain flexibility within the prior appropriation doctrine in attempting to resolve the longstanding Pecos River water issues. We do not find in the language of the Constitution or the Compact an exclusive right to a priority call. The relevant provisions do not by their terms require strict priority enforcement through a priority call when senior water rights are supplied their adjudicated water entitlement by other reasonable and acceptable management methods.

*Thus, although priority calls have been and continue to be on the table to protect senior users' rights, such a fixed and strict administration is not designated in the Constitution or laws of New Mexico as the sole or exclusive means to resolve water shortages where senior users can be protected by other means.* Reynolds (1983) did not address this issue and did not rule otherwise.