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

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER, Plaintiffs, v. THE UNITED STATES OF AMERICA) *et al.*, Defendants.	CASE NO. CV-75-184 HON. JAMES J. WESCHLER Presiding Judge SAN JUAN RIVER BASIN ADJUDICATION Claims of Navajo Nation Case No. AB-07-1

DESCRIPTIVE SUMMARY: LPAA Parties' file additional responses to the Navajo Nation's Motion for Protective Order and the Navajo Nation's Response to the Motion to Compel.

PARTIES: La Plata Valley Acequia Association; San Juan Development Corporation, MABE, LLC; North Star Mutual Domestic Water Association; Blanco Mutual Domestic Water Consumers & Mutual Sewage Works Association, Inc., Lloyd D. Ayliffe, and Patsy R. Ayliffe

NUMBER OF PAGES: 9

DATE OF FILING: November 16, 2012

LPAA PARTIES' ADDITIONAL RESPONSES TO THE NAVAJO NATION'S MOTION FOR PROTECTIVE ORDER AND RESPONSE OF THE NAVAJO NATION TO MOTION TO COMPEL

NOW COME the La Plata Acequia Association, San Juan Development Corporation, MABE, LLC, North Star Mutual Domestic Water Association; Blanco Mutual Domestic Water Consumers & Mutual Sewage Works Association, Inc., Lloyd D. Ayliffe, and Patsy R. Ayliffe, and any other individual for whom Gary Risley has filed an entry of appearance or for whom he is listed as attorney on notices of intent to participate previously filed in this matter (herein called the "LPAA Parties") by and through their attorney of record, Gary Risley of The Risley Law Firm, P.C., and respond to the

Motion For Protective Order And Response Of the Navajo Nation To Motion to Compel Concerning NIIP (the "Navajo Motion"). The LPAA Parties by way of argument and authority would state as follows:

Pursuant to the Court's prior instruction the parties who were not participants to the Settlement Agreement under consideration by the Court (the Non-Settling Parties), have cooperated with regard to their discovery requests. Therefore, the LPAA Parties, as a Non-Settling Party, have an interest in the outcome of this discovery motion ruling, and based upon that interest are submitting this brief.

The Navajo Motion should be denied for numerous reasons:

1. The Navajos have waived the arguments presented.
2. The Court has already ruled upon a similar objection to the production of the information regarding NAPI/NIIP. The Court has ruled so the law of the case does not allow the re-adjudication of this issue.
3. The arguments regarding the "Congressional determination" regarding NIIP are effectively an attempt to argue dispositive motion issues in the form of a protective order.
4. The Congressional determination argument is based upon flawed logic, erroneous suppositions, and the incorrect application of the law.
5. NIIP financial records will probably establish that farming the area is not economically viable.

1. Waiver of the Arguments Presented.

The Court in its Amended Scheduling Order set out a timeline for the discovery process. The Non-Settling Parties submitted timely discovery requests. The Settling Parties were required to state their objection to those requests on or before June 15, 2012. Instead of making any specific objections, improper broad objections were made. Some of those objections were made to the "Community Ditch" or "Marshall Parties", as that are

alternatively called, were with regard to financial information on NIIP and NAPI.

Despite the fact that only general objections were made, the Court heard arguments in a lengthy hearing on each of the objections. The objection set forth in the Navajo Motion was *not* one of the issues raised. The Court ruled against the Navajo objections with regard to the requested NAPI/NIIP information request. The argument made in the Navajo Motion has been waived. *United Nuclear Corp. v. General Atomic Co.* 96 N.M. 155, 629 P.2d 231 (1980), appeal dismissed 451 U.S. 901, 101 S.Ct. 1966, 68 L. Ed. 2d 231 289 (1981).

2. The Law of The Case

As stated above, the Court has already heard argument on this matter and it ruled against the Navajos. The Navajos are now seeking a third bite at the apple: 1. The original objections filed; 2. The additional stated objections at oral argument; and 3. After losing on the first two, now seek to advance yet another argument. The purpose of the law of the case doctrine is to prevent the continued re-adjudication of issues during the pendency of the lawsuit. *Cordova v. Larsen*, 2004–NMCA–087, ¶ 10, 136 N.M. 87, 94 P.3d 830. The Navajo Motion is barred under this doctrine.

3. Sneaking a Dispositive Motion in through the Backdoor

As presented in the Navajo Motion, the effect of a court ruling in favor of the Motion presented could result in determining the outcome of over 95% of the water at issue in the Settlement. The factual assumptions/assertions by the Navajos are more in the nature of a motion for summary judgment than that of a protective order. The issue is not a pure legal issue and requires the Court to review and ascertain facts. As part of their ever-continuing attempts to deprive the Non-Settling Parties of a full and fair adjudication of this Settlement on the merits, efforts to short-circuit the process are attempted. This Motion is such an attempt. A Summary Judgment should only be considered after the parties to the suit have had an opportunity to fully develop discovery and all relevant facts can be presented before the court. Rule of Civil

Procedure 1-056 F. (The Court has set a timetable for filing dispositive motions in its Amended Scheduling Order.)

Rule 1-026 B of the Rules of Civil Procedure states: "(1) in general. Parties may obtain discovery of *any* information, not privileged, *which is relevant to the subject matter involved in the action*. . . . A party responding to discovery requests *shall provide all non-privileged responsive information* then known to the party, subject to the limitation in these rules or as ordered by the court." (Emphasis added) There is no doubt that the amount of water being awarded to the Navajos under the Settlement is equal in amount to the NIIP/NAPI water and therefore is relevant to the subject matter involved in the action. It is expressly discussed in the proposed Settlement and in the technical reports.

The Navajos continue to urge that no changes be made to extend the Scheduling Order, yet they refuse to cooperate with already Court-ordered discovery in an attempt to run out the clock under the Scheduling Order. They should not be allowed to do so, and the Court should impose sanctions for their refusal to obey the Court's previous order.

4. **The Congressional Determination Argument Is Meritless**

The Navajos do an excellent job of setting up a strawman so that they knock it down. The claim is that the Court, by considering or evaluating the PIA status of NIIP, will be abrogating a federal law. Therefore, the argument goes, the so-called determination by Congress that NIIP is feasible is binding on the Court. The whole argument; however, is logically, legally, and factually flawed.

The first flaw to be considered is that the water discussed is *not* Navajo water. The water being utilized to irrigate NIIP is water stored and used under an Office of State Engineer permit with a 1955 priority and the Federal Government is the named party, not the Navajo Tribe. The Federal Government has *not* been adjudicated a water right; the permit is being utilized subject to *state* law (including the law of beneficial use); and the Federal Government is not claiming the water in Navajo Lake under an implied reservation for itself or as a Winters' Doctrine right for the

Navajos under the NIIP enabling legislation. The Congressional action simply allowed the United States to utilize the water it was holding under its state law permit for the NIIP project by authorizing the funds needed to construct the project and to deliver the water.

The Congressional determination as described by the Navajo brief on page 4 does not say that the NIIP is PIA. In fact, the statements referenced were made prior to the Supreme Court establishing the PIA standard in *Arizona v. California* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963). The history does not specify the project as built and operated is financially feasible, that all the land is suitable for economically sound crop production, and lists industrial and municipal purposes among the uses along with irrigation. Further, feasibility studies done in the late 1950s and early 1960s must yield to the reality of 30 years of failure of NIIP and NAPI to be economically viable without continuing on-going and massive government subsidies.

If, as it appears from the Navajos' arguments, that the Navajos waived their Winters' rights in exchange for NIIP (this is one of the fact issues to be determined by the Court), then the rights would be only for the project as built and the priority date of the water would be 1955. The Navajos in their brief, after all, are seeking to claim that somehow, without any express reference thereto, that a state law permit somehow was morphed into a Winters' Doctrine right by an Act of Congress. If that is the case, they must accept the whole statute as written, and the presumed effects thereof, and accept all the water for NIIP with a 1955 priority. One cannot blow hot and cold.

The Navajos declaration at the bottom of page 5 that: "As a matter of federal law, the water rights for NIIP have been determined, and a PIA analysis is inapposite' is flat out wrong. The Court by considering PIA issues with regard to NIIP, would not be overturning federal law or even the federal contract related to NIIP. Congress simply made a legislative determination that NIIP was a suitable program upon which to spend federal funds; much like the Federal Government determined that federal financing should be made available to Solyndra, Abound Solar, Beacon Energy, and nine more companies which have gone bankrupt shortly after receiving federal

dollars. Sadly, the rule is that if Congress wants to make bad decisions, based upon bad facts, and pour money down a hole, they may do so when it comes to appropriating money.

But, what would be the effect if the Court were to rule that none of the acreage of NIIP was PIA? *Nothing* would happen with regard to the statute, the contract, or current operations. The Federal Government could go supplying water, capital funds, and other support for NIIP, and let it keep on losing taxpayer money.

In mudding the water, the Navajos confuse case law wherein there is a direct attack upon an enacted statute based upon a claim that there is no factual basis to support the legislative factual determination in support of a statute. These actions are usually in regard to attacking the constitutionality of a statute.

In a direct attack upon the statute, a legislative fact-finding is given great deference with regard to supporting or sustaining the law. "'The determination of the * * * facts on which the validity of a statute depends is primarily for the legislature', subject to review usually only where manifestly arbitrary or unreasonable.' 16 C.J.S., Constitutional Law, § 151(3), p. 763." Quoted in *Bristol Development and Housing Authority v. Denton*. 198 Va. 171, 93 S.E.2d 288 (Virginia S.Ct. of Appeals, 1956).

So, if the Non-Settling Parties were *attacking the NIIP authorizing statute* in attempt to shut down the NIIP, the burden would be high, as noted above. But that is not the situation here. The Navajos have the burden of proving their claimed Winters' rights. *They must prove* that the land which is currently being utilized for the NIIP Project is PIA as defined by *Arizona v. California, supra,* and that they should receive enough water to serve it. The Navajos have identified the water being utilized for NIIP under a state permit by the Federal Government as the amount of water that should be set aside to serve the area currently covered by NIIP. In effect, they are saying that the title to the water being provided under the state permit for NIIP should be changed into the name of the Navajos under their Winters' claim and that the 1955 permit should be assigned an 1868 priority. Such an action finds no basis in the statute.

Yet, inexplicably, the Navajos admit that "*The Navajo Nation does not seek a water right for NIIP under a PIA theory.*" (Navajo brief, page 7) If that is the case, then the Court should immediately rule that the Settling Parties have failed in their burden of proof because they cannot establish that the settlement is less than the potential claims that could be secured at trial. (*Order Establishing The Legal Standards For Evaluation The Proposed Degrees and Respective Burdens of Proof* filed Feb 3, 2012.)

PIA is the standard in New Mexico. *New Mexico v. Lewis* 116 N.M. 194, 861 P.2d 235 (N.M. App. 1993). Without NIIP as a PIA claim, the settlement on its face greatly exceeds any amount that could be established as the Navajo's claims under the Winters' Doctrine. The NIIP authorization legislation did not alter in anyway the legal standard for determining implied reservations of water for use on Indian reservations, and as noted above, the statute passed prior to the U.S. Supreme Court establishing the PIA standard.

Again, Congress can authorize, within constitutional bounds, the use of the federal water held under state permit for such purposes as it sees fit, and can authorize the construction of NIIP, but that is all the statute is: Congressional authorization to sell or provide water and to build the project. There is no determination of Indian implied water rights contained in the statute.

5. The NIIP Project Financial Records Will Prove the Settling Parties Point

In the Navajos' alternative argument section ("B" on page 8), they state that even if PIA applies they should not have to provide the requested information. In trying to distinguish the *Lewis* case, they state that NAPI has enjoyed profitability for the past 6 years. In support of that argument, the Navajos state that the assets exceed liabilities by a little over $99 million. (Note this is a factual argument that should be made in a Summary Judgment motion at the appropriate time.)

It is clear that Navajo counsel's undergraduate degree was not a business degree. The information he quotes is *balance sheet* information, not *profit and loss* statement information. It is easy to have the value of your assets exceed your liabilities, or even grow, (this is listed as *Capital* on private company ledgers) when all of your capital costs have been paid for by the federal government, one does not

have to pay for the storage of the water used, the transportation of the water used, the water itself, the irrigation equipment used, the electricity to operate the system, etc.

The above-described information is not profit, however. Oversimplified, profit is the amount of money left over after taking one's gross receipts from operations and subtracting the costs of operating the business. *National Agr. College v. Lavenson* 55 N.M. 583, 587; 237 P.2d 925, 928 (1951).

In the past, the Navajo Nation has publically commented on the large losses continually being incurred at NAPI (reported in the Farmington Daily Times) and its continued attempts to make it profitable. The general reputation and understanding in the San Juan County community is that the losses have on occasion reached or exceeded $1 million a year in spite of the fact that the federal government picks up a substantial part of the tab.

So, yes, the financial records are relevant because part of "practicable" is whether or not the area known as NIIP can be farmed on an economic basis without a million or more dollars per year in federal subsidies.

CONCLUSION

The attempt by the Navajo Nation to avoid its Court-ordered obligation to supply the financial information requested is without merit. The issue was waived because it was not presented at the appropriate time, and the Court's prior ruling is the law of the case. The argument is premature from a dispositive motion situation, and there has been no Congressional determination that the Navajo Tribe is entitled to NIIP under its Winters' rights, and such a determination would not be binding on this Court if it had done so. Finally, the records are highly relevant to the subject matter of the litigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing LPAA Parties' Additional Responses to the Navajo Nation's Motion for Protective Order and Response of the Navajo Nation to Motion to Compel was served via email to the attorneys electing email service at: wrnavajointerse@nmcourts.gov and to the additional SJA email service list at approximately 4:15 ~~a.m./~~p.m. on this 16th day of November, 2012.

Gary Risley