

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED

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

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

Plaintiff,

vs.

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

Defendants.

**AB-07-1**

Claims of Navajo Nation

No. CV 75-184

Honorable James J. Wechsler

Presiding Judge

**DESCRIPTIVE SUMMARY:** The Community Ditch Defendant-Counterclaims respond by pointing out that the motion is moot, and that the Navajo Nation and the United States have failed to bring the court's attention to controlling authority: *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) .

**NUMBER OF PAGES:** 3 + 22 (copy of case)

**DATE OF FILING:** November 16, 2012

**RESPONSE BY COMMUNITY DITCH DEFENDANT-COUNTERCLAIMANTS  
TO THE NAVAJO NATION'S MOOT MOTION FOR PROTECTIVE ORDER,  
AND NOTICE OF CONTROLLING AUTHORITY**

1. The Navajo Nation filed a motion for protective order which the court indicated at the hearing October 25, 2012 was moot, because the Navajo Nation is in the process of producing additional reports concerning NIIP. The court also indicated that the larger issues raised by the Navajo Nation will be addressed by appropriate legal motions and briefs, rather than as merely a discovery issue.

2. The Navajo Nation and the United States have failed to bring to the court's attention controlling authority on the legal points which they are attempting to argue.

The controlling authority is *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) and the various authorities cited therein. The controlling authorities cited in *Jicarilla Apache* include the following: the beneficial use requirement in New Mexico's 1912 Constitution; the identical beneficial use requirement in the Reclamation Act of 1902, § 8; the prohibition against the waste of water in *State ex rel. Erickson v. McLean*, 62 N.M. 264, 308 P.2d 983 (1957) and *Kaiser Steel v. W.S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).

A highlighted copy of the case is attached for the convenience of the court and the parties. *Inter alia*, *Jicarilla Apache* and the authorities therein establish the following rules of law that control the present adjudication:

A. Beneficial use and the avoidance of waste is an absolute requirement of both the New Mexico Constitution of 1912 and the Reclamation Act of 1902, which both state that "beneficial use shall be the basis, the measure, and the limit of the right" to use water. *Jicarilla Apache* at 1133-34.

B. The beneficial use requirement applies to Bureau of Reclamation projects, including the San Juan Chama Project and the Navajo irrigation projects, authorized by 43 U.S.C. § 615ii, and the Elephant Butte project. *Id.* at 1140.

C. The determination of beneficial use is a question of fact. *Id.* at 1133; *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 95 N.M. 560, 624 P.2d 502 (1981).

D. The fact that Congress has authorized a particular project does not establish a beneficial use. *Jicarilla Apache* at 1136-46.

E. The fact that the BOR has entered into a contract does not establish a beneficial use. *Id.*

F. The Colorado River Storage Project Act does not create a beneficial use. *Id.* at 1138-40.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

Victor R. Marshall  
Attorneys for San Juan Agricultural Water Users  
Association; Hammond Conservancy District;  
Bloomfield Irrigation District; various ditches; and  
various members thereof.  
12509 Oakland NE  
Albuquerque, NM 87122  
505-332-9400 / 505-332-3793 FAX

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2012, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of said document to an email sent to the following list server: [wrvajointerse@nmcourts.gov](mailto:wrvajointerse@nmcourts.gov).

/s/ Victor R. Marshall

Victor R. Marshall, Esq.