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 plaintiff-settling parties have filed a motion to dismiss the counterclaim filed against them in this inter se proceeding. The motion has no support in fact or law. The motion is contrary to Rules 8, 12, 54 and 71.2. The motion is simply another attempt to prevent water rights owners from presenting their side of the case to the court.

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COMMUNITY DITCH DEFENDANTS' RESPONSE TO MOTION TO DISMISS COUNTERCLAIM

Without citing any legal authority whatsoever, the state engineer has moved under Rule 1-012(B)(6) to dismiss the counterclaim filed by the Community Ditch Defendants. The United States and the Navajo Nation have joined in that motion, also without citing any case or statute in support of the motion.

1. The motion does not meet the legal, procedural, and factual standards imposed by Rule 1-012(B)(6).

The dismissal of a counterclaim is subject to the same legal standards and procedures which apply to the dismissal of a complaint. For purposes of a 12(B)(6) motion, the allegations of the counterclaim are taken as true, as well as all inferences from the

allegations. *Financial Indem. Co. v. Cordoba*, 2012-NMCA-016, ¶ 16, 271 P.3d 768 (district court erred in dismissing counterclaim because the counterclaim was based on documents which eventually might have been ruled inadmissible in evidence). A counterclaim can be dismissed only if there is no conceivable set of facts under which the counterclaimant would be entitled to relief. The allegations of the 39-page counterclaim are not subject to dismissal under Rule 1-012(B), or for that matter under Rule 1-056. *See* Paragraph 5 below.

2. The counterclaim is compulsory under Rule 1-013(A).

The circumstances of this case compel the Community Ditch Defendants to assert their counterclaim in this proceeding. Rule 1-013(A) reads as follows:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out ot the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

The jurisdictional exception does not apply in this case, where this court already has jurisdiction over the United States, the Navajo Nation, and the State of New Mexico by virtue of the McCarran Amendment.[1] Furthermore, the U.S., the Navajo Nation and the state engineer have invoked and subjected themselves to the jurisdiction of this court, by seeking a judgment in their favor from this court that would give the Navajo Nation water rights as against all of the other water rights holders in the San Juan Basin, including but not limited to the Community Ditch Defendant-Counterclaimants. By seeking an adjudication

[1] The United States continues to argue that this court has no jurisdiction over it. The court should require the United States to explain its rejection of the court's authority, because it appears that the United States is laying the groundwork to ignore the court's orders if it does not like them.

of the Navajo Nation's water rights relative to other water users in the basin, the plaintiffs have subjected themselves to an adjudication of the other side of the controversy, which is set forth in the counterclaim.

The counterclaim simply presents the flip side of this controversy, for the very first time. The three settling party plaintiffs are upset at the very idea of a counterclaim, because they have managed to monopolize this adjudication for decades. For the very first time, after more than 37 years of litigation, other water rights users have finally been given the opportunity to prove that the Navajo Nation is not entitled to 606,000 acre-feet of water from the San Juan River, and to show why other water users have water rights which are superior in amount and priority to the Navajo claims. The adjudication of relative amounts and priorities is the essence of any inter se proceeding. An inter se allows – and requires – competing claimants to prove the priority and the amount of their water rights relative to other water users.

Judges should remind themselves of the admonition that "every case has two sides." UJI 13-110: "Last, there are at least two sides to every lawsuit. It is important that you keep an open mind and not decide any part of the case until the entire case has been completed and submitted to you." *See also* UJI 13-302D on claims and counterclaims. A counterclaim is entitled to the same weight as a complaint.

> Challenges to the sufficiency of a counterclaim . . . are subject to the same rules as when they are directed toward an original complaint. The allegations in the pleading being attacked are taken as true and the motion will be denied if there is any possible theory upon which relief ultimately might be granted.

6 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 1407, at 38 (2d ed. 1990).

There are far more than two sides to this particular case. The Navajo Nation has presented its side of the case, arguing that its water rights are superior to the water rights of the Community Ditch Defendants. Now the Community Ditch Defendants are presenting their side of the case, showing that they have water rights which are superior to the defective claims asserted by the Navajos. Likewise almost all of the "nonsettling parties" have vested water rights that are entitled to judicial protection against impairment by the U.S. and the Navajo Nation.

The Community Ditch Defendants have water rights claims which were decreed by the court in the Echo Ditch Decree. *See* Counterclaim ¶ 92. So a counterclaim is the only way the defendants can protect their rights against collateral attack by the Navajo Nation and the United States.[2]

As far as jurisdiction over the parties and the subject matter, this court appears to be the only tribunal which can acquire jurisdiction over the U.S., the Navajo Nation, and the State of New Mexico. Therefore the counterclaim is compulsory. It must be asserted in this proceeding, because "[f]ailure to plead a compulsory counterclaim bars a later action on that claim." *Bentz v. Peterson,* 107 N.M. 597, 601, 762 P.2d 259, 263 (Ct. App. 1988); *see also Financial Indemnity* at ¶ 17.

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[2] The state engineer was a party to the Echo Ditch Decree and is bound by it, as a matter of *res judicata*, collateral estoppel, and law of the case. *See* Counterclaim ¶ 92. This will be a topic for later briefing.

3. On the merits, the Community Ditch Defendants are entitled to relief against the Navajo Nation and the U.S. and the state engineer, so the Rules of Civil Procedure give the Community Ditch Counterclaimants the right to seek a judgment against the three governments.

Rule 1-013 is not the only Rule of Civil Procedure which applies to this situation. Rule 1-054(C) states that "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." *See also* Rule 1-008(F): "All pleadings shall be so construed as to do substantial justice." These rules carry out the overarching purpose of the Rules of Civil Procedure: to award every party the relief to which a party is entitled under the facts and the law.

4. By definition, an inter se proceeding cannot be a one-sided proceeding.

The three governments make an utterly bizarre argument. They claim that the court can only hear the claims of the Navajo Nation as against the community ditches, but not the claims of the community ditches back against the Navajo Nation. Their argument contradicts the very definition of inter se, and the plain text of the inter se rule itself.

According to Rule 1-071.2(B)(1), "An expedited *inter se* proceeding is a proceeding in which a water rights claim is resolved in a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978 both as between the plaintiff and the defendant and as among the defendant and other water rights claimants." In Latin, "inter se" or "inter sese" mean "among themselves."

5. The counterclaim alleges facts and law which preclude dismissal under Rule 1-012 or Rule 1-056.

For purposes of Rule 1-012, and for purposes of argument, the court must take the factual allegations of the counterclaim as true, along with the inferences therefrom. The

counterclaim also cites and quotes numerous federal and state laws which are violated by the proposed agreement.

For purposes of analysis, let us suppose that the counterclaimants prove the following points of fact and law set forth in the counterclaim:

- NIIP is a waste of water, not a beneficial use. Counterclaim ¶ 100.

(Beneficial use is a question of fact. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981); *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 95 N.M. 560,624 P.2d 502 (1981).)

- Beneficial use and avoidance of waste are required by the Reclamation Act of 1902, the Colorado River Compact, the Upper Basin Compact, the Colorado River Storage Act, and the Constitution of New Mexico as approved by Congress in 1912. Counterclaim ¶¶ 12, 42, 55; *Jicarilla Apache*, 657 F.2d at 1133-34; *State ex rel. Erickson v. McLean*, 62 N.M. 264, 308 P.2d 983 (1957); *Kaiser Steel v. W. S. Ranch Co.*, 81 N.M. 414, 467 P.2d 986 (1970).
- 606,000 acre-feet of water is far more than the minimum needed to meet the needs of approximately 40,000 Navajos who live on the reservation in New Mexico. Counterclaim ¶ 142.
- The Navajo population on the reservation is declining, not growing.
- The United States and the Navajo Nation do not have valid permits, because there permit applications were never published as required by statute. (On December 3, 2012, the state engineer and the Navajo Nation admitted that the permits were not published.)

- For a variety of reasons, NIIP is not practicably irrigable acreage. (PIA is a question of fact. *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 203-10, 861 P.2d 235, 244-51 (Ct. App. 1993).)

- An acre-foot of water weighs more than 2,700,000 pounds. Thus it is uneconomic to pump large volumes of water up a vertical lift of almost 350 feet to irrigate crops at NIIP. Counterclaim ¶ 102.

- If the Navajos were awarded all this water, they would have the right to export it to Nevada, Arizona, and California. *Id.* ¶¶ 121-128.

- The 2007 hydrographic determination was scientifically incorrect. *Id.* ¶ 113. There is not enough water in the Colorado River system to accommodate all the existing claims in New Mexico, plus 606,000 acre-feet of Navajo claims. *Id.* ¶¶ 113-120. (The 2007 hydrologic determination has been contradicted by a more recent and more thorough analysis performed by the United States itself: Colorado River Water Supply & Demand Study, released in December 2012.)

If the counterclaimants establish some or all of the foregoing points, then the Navajos do not have a valid claim for 606,000 acre-feet of water, and the court must enter judgment accordingly. *See* Prayer for Relief in the Counterclaim, which asks the court "To order the plaintiffs to administer and operate the San Juan River system to provide sufficient 'wet' water to satisfy the water rights of the community ditch defendant-counterclaimants without diminution while this case, and Case No. 75-184 are pending." *Id.* ¶ 188.

Yet the three governments are arguing that the counterclaimants are not entitled to relief under their counterclaim, even if the counterclaimants prove that their water rights are

superior to those of the Navajo. According to the plaintiffs, this inter se proceeding is entirely one sided: if the plaintiffs prove their case, they win, but if the counterclaimants prove their case, the counterclaimants cannot win.

Such a notion is antithetical to the very concept of an inter se, which establishes water rights in relation to each other. If the court were to rule that a counterclaim can be excluded under Rule 1-071.2, then water rights owners would stampede to the courthouse to start inter se proceedings, just to deprive their opponents of the right to file counterclaims. Such a ruling would precipitate inter se filings in the Middle Rio Grande, because who could pass up the opportunity to file a one sided case?

6. The proof for the objections is the same as the proof for the counterclaim.

There is no meaningful distinction between the proof which supports the objections and the proof which supports the counterclaim. The Community Ditch Defendants will present the same evidence on both. The Rules of Civil Procedure recognize that there is no neat division between an answer and counterclaim, because there is always a large overlap between the two. This is why Rule 1-008(C) provides that "When a party has mistakenly designated a defense is a counterclaim or counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation."

7. This proceeding necessarily encompasses the underlying merits of the Navajo water claims.

In order to obtain judicial approval of the "settlement," the court has ruled that the settling parties have the burden of proving that the settlement is a compromise which gives them less water than they are entitled to, under the law and the facts.

8. A district judge does not have "discretion" to ignore or suspend the Rules of Civil Procedure or the Rules of Evidence.

In their motion to dismiss the counterclaim, the three governments have deliberately ignored the applicable Rules of Civil Procedure, including Rules 1-008, 1-012(B), 1-013, 1-054, and 1-071.2. Now that the applicable rules have been quoted to them, the three governments will probably fall back on an arm-waving argument that a judge has discretion in how to handle a case. That argument would be legally erroneous, because a District Court judge does not have discretion to ignore or suspend the Rules of Civil Procedure or the Rules of Evidence. A judge cannot pick and choose which Rules of Civil Procedure to follow, because all of the Rules of Civil Procedure work together. Likewise, the court cannot follow selected Rules of Evidence while ignoring others.

The three governments have never reconciled themselves to the court orders requiring them to actually litigate and prove their claims. For example, *see* The United States' Motion for Reconsideration of the Court's Order of November 30, 2012, which the U.S. filed on December 14, 2012. In that filing, the United States argues for the umpteenth time that a settlement is a settlement, *ergo* no litigation is necessary. And the U.S. argues yet again that its statement of claims is somehow self proving, so the Rules of Evidence need not apply. This is *ipse dixit* reasoning of the first magnitude, and the court has already rejected it. Yet the settling parties persist in repeating these rejected arguments over and over again.

This unsupported motion to dismiss is more of the same backsliding. The three governments claim that the court can only adjudicate their side of the case, but not the other side of the case. That is impossible. And it is contrary to the Rules of Civil Procedure, including the inter se rule itself.

Respectfully submitted,

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By /s/ Victor R. Marshall

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 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: wrnavajointerse@nmcourts.gov and to the filing list referred to in paragraph 8 of the court's November 19, 2012 Corrected Order.

/s/ Victor R. Marshall
Victor R. Marshall, Esq.