

Description AB-07-1

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
IN THE DISTRICT COURT

STATE OF NEW MEXICO, ex rel. STATE ENGINEER,
Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, et al.

Defendant.

and

THE JICARILLA APACHE TRIBE

and the NAVAJO NATION,

Defendant-Intervenors,

and

COMMUNITY DITCH DEFENDANTS

Counter-Defendants

JUDGE: JAMES J WECHSLER

TYPE OF PROCEEDINGS: Discovery Conference

FOR THE PLAINTIFF: VARIOUS

FOR THE DEFENDANT: VARIOUS

MONITOR: LORESSA BACHERT

MACHINE TYPE: FTR GOLD REPORTER

LEGEND:

D - Defendant's Atty

DEF - Defendant

DEX - Direct Exam

EX - Exhibit

J - Judge

M - Monitor

P - Plaintiff's Atty

PLA - Plaintiff

W - Witness

Date

1/9/2013 **Location** Courtroom3

<u>Time</u>	<u>Speake</u>	
<u>9:04:17 AM</u>	J	CALLS CASE
<u>9:04:46 AM</u>		PRESENT AT COA AND BY TELECONFERENCE WITH AZTEC
<u>9:05:05 AM</u>	COUNSEL	ENTRIES OF APPEARANCE IN AZTEC
<u>9:06:08 AM</u>	COUNSEL	ENTRIES OF APPEARANCE AT COA
<u>9:07:31 AM</u>	COUNSEL	ON TELEPHONE
<u>9:08:15 AM</u>	J	EXPLAINING HOW HEARING WILL PROCEED
<u>9:09:07 AM</u>	TULLY	WOULD LIKE TO BRING TO ATTENTION OF COURT, IN PARTICULAR REFER TO RULES OF CIVIL PROCEDURE 1-089.1
<u>9:09:57 AM</u>		TALKING ABOUT RULES REGARDING COUNSEL REPRESENTING FROM OUT OF STATE (NON-ADMITTED COUNSEL)
<u>9:11:34 AM</u>		NM COUNSEL MUST SIGN THE FIRST PLEADING
<u>9:11:46 AM</u>		I HAVE CONTACTED STATE BAR OF NM
<u>9:11:58 AM</u>		NONE OF COUNSEL FOR UNITED STATES OF AMERICA ARE REGISTERED, REQUESTING THAT COUNSEL NOT BEING ALLOWED TO PARTICIPATE
<u>9:12:49 AM</u>	J	HAVE HEARD YOUR POSITION
<u>9:12:59 AM</u>	GUARINO	POSITION SEEMS ABSURD
<u>9:13:44 AM</u>		I AM A MEMBER OF THE NM BAR
<u>9:13:56 AM</u>		FIRST WE HAVE HEARD OF THIS, HEARING HAS BEEN SET FOR SOME TIME
<u>9:14:34 AM</u>		ASK COURT TO DISREGARD
<u>9:14:55 AM</u>		POSITION IS WITHOUT MERIT
<u>9:15:13 AM</u>		NEVER BEEN AN ISSUE RAISED WITH THE US PARTICIPATING
<u>9:15:29 AM</u>	TULLY	WE ONLY BECAME INVOLVED IN THIS CASE RECENTLY
<u>9:16:01 AM</u>		DOES NOT MAKE ANY DIFFERENCE THAT THEY HAVE PARTICIPATED FOREVER
<u>9:16:11 AM</u>		ACCORDING TO THE STATE BAR OF NM WHEN I TALKED TO THEM YESTERDAY, MR GUARINO IS NOT LICENSED TO PRACTICE IN NM NEITHER IS...
<u>9:16:24 AM</u>		THESE RULES HAVE BEEN IN PLACE FOR MANY YEARS, SINCE 1986
<u>9:16:42 AM</u>		TO CLAIM THAT BECAUSE THEY HAVE APPEARED IN THIS ACTION FOR A LONG PERIOD OF TIME MEANS THAT THERE HAS BEEN A WAIVER BY MY CLIENTS OF THIS PARTICULAR MATTER. THAT IS NOT TRUE
<u>9:16:56 AM</u>		ANY TIME WE CAN BRING FORWARD THE JURISDICTION OF THIS COURT AS WELL AS THE ATTORNEYS THAT ARE LICENSED TO PARTICIPATE IN THIS COURT IN THE STATE OF NM
<u>9:17:13 AM</u>		THERE IS A VIOLATION OF THE RULES OF CIVIL PROCEDURE AND THE RULES GOVERNING THE NM BAR

<u>9:17:57 AM</u>		CAN APPRECIATE MR GUARINO IS UPSET WITH ME FOR NO ADVANCE NOTICE, NOTHING THAT COULD HAVE BEEN DONE
<u>9:18:36 AM</u>	J	TALKING ABOUT WHY TULLY SHOULD HAVE FILED A FORMAL MOTION
<u>9:19:04 AM</u>		I AM NOT PREPARED TO MAKE A RULING ON IT AT THIS MOMENT
<u>9:19:14 AM</u>		AN APPROPRIATE MOTION WOULD HAVE ENABLED THE PARTIES AND THE COURT TO BETTER ADDRESS THE ISSUE
<u>9:19:40 AM</u>	GUARIN O	FOR BEING A NEW KID ON THE BLOCK HE SHOULD BE A LITTLE MORE CAREFUL ON THE MOTIONS THAT HE IS TRYING TO RAISE. THERE IS A FEDERAL STATUE THAT SPECIFICALLY SAYS THAT THE UNITED STATES THROUGH THE ATTORNEY GENERAL AND HIS DELIGATES ARE PERMITTED TO GO INTO ANY COURT IN THE UNITED STATES. THAT INCLUDES STATE COURT
<u>9:20:04 AM</u>		THE UNITED STATES IS NOT REQUIRED TO ASSOCIATE WITH LOCAL COUNSEL, IS NOT REQUIRED TO PAY FEES...
<u>9:20:35 AM</u>		COURT SHOULD DISREGARD AT THIS POINT
<u>9:20:50 AM</u>	J	THIS IS A NEW ONE ON ME, I AM NOT PREPARED TO RULE ON IT
<u>9:21:05 AM</u>	J-TULLY	MR TULLY LETS GO THROUGH THE MOTION PRACTICE
<u>9:21:37 AM</u>		IF YOU FILE A WRITTEN MOTION THEN THE US WILL NEED TO RESPOND TO IT
<u>9:22:06 AM</u>	TULLY	WILL FILE A MOTION CONTINUING OBJECTION
<u>9:22:17 AM</u>	J	OBJECTION NOTED, TAKING UNDER ADVISEMENT, WILL ADDRESS WHEN MOTION FORMALLY BEFORE THE COURT
<u>9:22:46 AM</u>	GUARIN O	COURT HAD ASKED US TO OUTLINE WHERE WE ARE AT ON STATUS OF DISCOVERY
<u>9:23:46 AM</u>		RECEIVED A NUMBER OF FILINGS IN DECEMBER
<u>9:24:10 AM</u>		NOTICED A NUMBER OF NEW WITNESSES IDENTIFIED
<u>9:24:48 AM</u>		TRYING TO IDENTIFY OPINIONS OF EXPERT WITNESSES
<u>9:25:17 AM</u>		RESPECT TO OTHER NON-SETTLING PARTIES THERE HAVE BEEN A NUMBER OF REQUESTS
<u>9:26:19 AM</u>		WITH RESPECT TO DISCOVERY PROPOUNDED
<u>9:27:14 AM</u>		TALKING ABOUT DISCOVERY REQUESTS RESPONSES
<u>9:27:40 AM</u>		WE ANTICIPATE IN THE NEXT COUPLE OF WEEKS WE WILL BE SCHEDULING A NUMBER OF DEPOSITIONS
<u>9:28:11 AM</u>		HAVE MADE THE DECISION TO ONLY DEPOSE THOSE IDENTIFIED AS EXPERT WITNESSES. NOT TRYING TO DEPOSE EVERYBODY
<u>9:29:13 AM</u>	J	AT THIS POINT WANT STATUS OF DISCOVERY ARE YOU ADDRESSING THE COURT ON BEHALF OF ALL THE SETTLING PARTIES
<u>9:29:40 AM</u>		TURN TO NON-SETTLING PARTIES, ASKING FOR STATUS REPORT
<u>9:30:04 AM</u>	GUARIN O	CLARIFYING THAT WE ARE GOING TO DESPOSE OTHER THAN EXPERT WITNESSES

<u>9:30:40 AM</u>	MARK SHERRI DAN	HAVE HAD DISCUSSIONS WITH SETTLING PARTIES ABOUT POTENTIAL WITNESSES
<u>9:31:38 AM</u>		WE HAVE IDENTIFIED 3 POTENTIAL EXPERT WITNESSES
<u>9:32:01 AM</u>		HAVING REVIEW THE COURTS ORDER REGARDING THE STANDARD OF PROOF
<u>9:32:30 AM</u>		TALKING ABOUT WHAT IDENTIFIED EXPERTS WOULD BE TESTIFYING ABOUT
<u>9:32:57 AM</u>		OUR UNDERSTANDING THAT PRINCIPLE WITNESS WOULD BE MR WHIPPLE
<u>9:33:35 AM</u>		WITNESS SHOEMAKER WOULD TESTIFY TO REBUT
<u>9:34:00 AM</u>		MR RANKIN FROM OUR FIRM HAS BEEN REVIEWING MATERIALS
<u>9:34:25 AM</u>		WANT TO APPRISE THE COURT IS INSUFFICIENT
<u>9:35:22 AM</u>		HAVE NOT SEEN A PIA STUDY
<u>9:35:35 AM</u>		WE HAVE 2 EXPERTS
<u>9:36:30 AM</u>		HAVE BEEN COMPILING AND EXTRACTING DOCUMENTS THAT WE THINK ARE RELEVANT
<u>9:37:11 AM</u>	J	HAVE YOU SUBMITTED THAT DISCOVERY
<u>9:37:22 AM</u>	SHERRI DAN	RESPONSE
<u>9:37:43 AM</u>	J	THAT IS THE POINT I AM GETTING TO. SO WE ARE AT THE POINT WHERE I ASSUME WHERE YOU ARE WORKING WITH THE SETTLING PARTIES IN ORDER TO GET THIS INFORMATION
<u>9:38:00 AM</u>	SHERID AN	WE HAVE NO INTEREST IN DELAYING THE SITUATION. THEY OUGHT TO TELL US WHAT THEIR EXPERTS ARE GOING TO SAY
<u>9:38:35 AM</u>	GUARIN O	IN RESPONSE TO MR SHERIDANS COMMENTS, I DO NOT AGREE WITH ANYTHING THAT HE HAS JUST DESCRIBED. AGAIN THIS IS THE FIRST HAVE HEARD THAT WE HAVE NOT PROVIDED THEM OR THERE IS SOMETHING DEFICIENT WITH WHAT WE HAVE PROVIDED THEM
<u>9:39:42 AM</u>		FIRST HEARD THAT REPORTS ARE INSUFFICIENT
<u>9:40:05 AM</u>		THEY GIVE NO OPINION ABOUT WHAT THEY ARE GOING TO FOCUS ON
<u>9:40:40 AM</u>		THEY HAVE HAD THOSE REPORTS THROUGHOUT 2012
<u>9:40:59 AM</u>		WE THINK THAT WE HAVE PROVIDED EVERYTHING
<u>9:41:21 AM</u>	J	IN TERMS OF WHERE WE ARE GOING, IF THERE IS A BREWING DISPUTE I WOULD LIKE THE PARTIES TO CONFER AND DISCUSS THAT
<u>9:41:56 AM</u>		I WAS NOT ANTICIPATING FOR THE COURT TO BE DECIDING UNIDENTIFIED ISSUES
<u>9:42:26 AM</u>		DO NOT NEED THE INTENSE ARGUMENT THAT THIS IS MOVING INTO
<u>9:42:41 AM</u>		NEED TO TALK AMOUNG YOURSELVES
<u>9:43:04 AM</u>	JOHN UTTON	WITH RESPECT TO THE INFORMATION FROM MR WHIPPLE
<u>9:43:29 AM</u>		THE STATE HAS SUBMITTED 2 LENGTHY REPORTS
<u>9:43:57 AM</u>		DO NOT UNDERSTAND HOW THEY CAN SAY THEY DO NOT UDERSTAND WHAT HIS VIEWS ARE

<u>9:44:12 AM</u>	J	DO NOT WANT TO GO INTO THIS NOW
<u>9:44:28 AM</u>		HAVE MADE IT CLEAR THAT I WILL BE AVAILABLE FOR DISPUTES
<u>9:44:53 AM</u>	MARSH ALL	I AGREE WITH WHAT MR GUARINO SAID ON 2 ISSUES
<u>9:45:32 AM</u>		WE HAVE UNTIL JAN 14TH TO FILE RESPONSES
<u>9:45:48 AM</u>		I DO OBJECT TO THE SETTLING PARTIES REFERRING TO MY CLIENTS AS THE MARSHALL INTERESTS, EXPLAINS
<u>9:46:41 AM</u>		THIS IS JOINT DISCOVERY AND WOULD HOPE THEY WOULD FIND SOME OTHER TERMINOLOGY
<u>9:46:57 AM</u>	J	WOULD LIKE TO ADDRESS THAT NOW
<u>9:47:13 AM</u>		THAT MAKES SENSE DO NOT
<u>9:47:29 AM</u>	ARIANN E SING ER	I HAVE NO OBJECTION I WOULD ASK THAT MR MARSHALL REFER TO THE UNITED STATES AND THE NAVAJO NATION AS DEFENDANTS AND NOT AS PLAINTIFFS
<u>9:48:03 AM</u>		THE SECOND ISSUES MR GUARINO ADDRESSED WAS THE NIIP INTERROGATORIES
<u>9:48:21 AM</u>		THE COURT DIRECTED US TO PROPOUND THE DISCOVERY IN INTERROGATORY FORM
<u>9:48:35 AM</u>	MARSH ALL	WE VERY RECENTLY RECEIVED RESPONSES
<u>9:48:52 AM</u>		THERE ARE VER FEW IF ANY NARRATIVE ANSWERS
<u>9:49:10 AM</u>		THAT IS ISSUE #2 THE NIIP INTERROGATORIES
<u>9:49:13 AM</u>		ISSUE #3 IS WE NEED TO FLAG FOR THE COURT SOME NEW DISCOVERY ISSUES WHICH SURFACED IN DECEMBER OF THIS YEAR
<u>9:49:39 AM</u>		TALKING ABOUT STUDY RELEASED 12-12-2012
<u>9:49:54 AM</u>		THIS STUDY WHICH WAS COMMANDED BY CONGRESS IS 1701 PAGES LONG AND 68.4 MB
<u>9:50:18 AM</u>		TODAY WANT TO EXPLAIN WHY THIS IS REALLY IMPORTANT BECAUSE WE ARE GOING TO HAVE TO DEAL WITH IT IN DISCOVERY
<u>9:50:37 AM</u>	J	TURN TO NEXT ITEM I WANTED TO DISCUSS, REPORT ON DEPOSITIVE MOTIONS THAT THE PARTIES ARE CONSIDERING
<u>9:50:55 AM</u>		TO GET ON THE TABLE FOR MANAGEMENT PURPOSES WHAT MOTIONS ARE BEING CONSIDERED AT THIS POINT
<u>9:51:16 AM</u>		TO EXTENT THAT YOU HAVE MOTIONS IN MIND, BRING TO COURTS ATTENTION NOW I WOULD LIKE TO START DIGESTING THEM MYSELF
<u>9:51:37 AM</u>	J- SETTLI NG PARTIE S	DO YOU HAVE ANY MOTIONS IN MIND, NOT BINDING
<u>9:51:57 AM</u>	POLLAC K	OUR UNDERSTANDING WAS WE HAVE OUTSTANDING MOTION FOR ENTRY OF THE SETTLEMENT DECREES

<u>9:52:19 AM</u>		WE UNDERSTOOD FROM THE LAST DISCOVERY CONFERENCE THAT OTHER DISPOSITIVE MOTIONS THAT MIGHT BE BROUGHT WOULD BE BROUGHT PURSUANT TO THE SCHEDULING ORDER THAT THE COURT ISSUED
<u>9:52:32 AM</u>		WE HAVE NO OTHER MOTIONS AT THIS TIME
<u>9:52:45 AM</u>	CASSA NDRA MALON E	UNDER THE BROAD UMBRELLA OF A MOTION FOR SUMMARY JUDGEMENT THAT THE PROPOSED SETTLEMENT DOES NOT MEET THE STANDARDS REQUIRED. POSSIBLE TOPICS UNDER THAT WOULD BE THE PIA ANALYSIS
<u>9:53:28 AM</u>	ADAM RANKIN	GENERALLY WE ARE THINKING THAT RIGHT NOW THAT ANY DISPOSITIVE MOTIONS WE WOULD FILE WOULD FOLLOW FROM OUR OBJECTIONS AND RESPONSES TO THE SETTLEMENT AGREEMENT INCLUDING AN ISSUE REGARDING THE PRIORITY DATE FOR SOME OF THE IRRIGATION PROJECTS THAT DO NOT LINE UP WITH THE 1868 CLAIM
<u>9:54:11 AM</u>	JOLENE MCCAL EB	SJWC AT THIS POINT IS CONSIDERING FILING DISPOSITIVE MOTIONS ON THE ISSUES ADDRESSED BY MS MALONE AND MR RANKIN AND IN ADDITION TO THAT ISSUE THAT THE NAVAJO SETTLEMENT AWARDS WATER TO THE NAVAJO NATION THAT CONFLICTS WITH THE SJWC PREEXISTING RIGHTS UNDER ITS PENDING APPLICATION #4818
<u>9:54:54 AM</u>	VICTOR MARSH ALL	ANTICIPATE THERE WILL BE A GREAT NUMBER OF POTENTIALLY OR PARTIALLY DISPOSITIVE SUMMARY JUDGMENT MOTIONS WHICH WILL BE FILED AND WE WILL BE FILING SEVERAL OF THEM
<u>9:55:35 AM</u>		TALKING ABOUT SUMMARY JUDGMENT
<u>9:55:44 AM</u>		THERE ARE ISSUES OF FACT HERE WHICH ARE NOT SUCCEPTABLE TO SUMMARY JUDGMENT DEPENDING ON DISCOVERY. BENEFICIAL USE IS ONE OF THEM UNDER THE JICARILLA APACHE 10TH CIRCUIT CASE AND NM LAW CITED IN THAT CASE, BENEFICIAL USE IS A QUESTION OF FACT IT IS NOT A QUESTION OF LAW
<u>9:56:18 AM</u>		THE KINDS OF MOTIONS THAT WE INTEND TO FILE ARE SET FORTH IN BOLD PRINT IN THE HEADINGS IN OUR ANSWER, OBJECTIONS AND COUNTERCLAIMS
<u>9:57:11 AM</u>		WE ARE GOING TO BE ASKING THE COURT TO DO A VERY CAREFUL READING OF THE WINTERS CASES THEMSELVES
<u>9:57:29 AM</u>		ON PAGE 4, THE HISTORY OF OUR CONSTITUTION IS VERY CLEAR THAT CONGRESS APPROVED PRIOR APPROPRIATION AND BENEFICIAL USE AS PART OF NM'S ADMISSION TO THE UNION IN 1911
<u>9:58:07 AM</u>		GOING THROUGH... TO PAGE 11 PARAGRAPH 42 THE PROPOSED AGREEMENT VIOLATES THE 1922 COLORADO RIVER COMPACT
<u>9:58:28 AM</u>		WE THINK THERE ARE A WHOLE HOST OF ISSUES WHICH WE HAVE SPECIFIED HERE WHERE IT IS INCONSISTENT WITH THE AGREEMENT AMONG THE STATES AND WHICH WAS APPROVED AND PUT INTO FEDERAL LAW BY THE UNITED STATES ITSELF

<u>9:59:04 AM</u>		BENEFICIAL USE IS THE MEASURE, THE LIMIT, AND THE BASIS OF WATER. THAT COMES FROM THE 1902 FEDERAL RECLAMATION ACT
<u>10:00:02 AM</u>		THE PROPOSED AGREEMENT VIOLATES STATE EX REL PARK VS. JOHNSON
<u>10:00:42 AM</u>		THEY HAVE SAID IN THEIR BRIEFS THAT THIS COURT DOES NOT HAVE JURISDICTION OVER THEM AND CERTAIN ASPECTS OF THIS CASE
<u>10:01:15 AM</u>		PARA 81 THIS IS WHERE WE RAISE WHAT WE CALL THE WINTER ??
<u>10:01:59 AM</u>		WE DID GET AN ANSWER FROM THEM THAT THOSE PERMIT APPLICATIONS UNDER WHICH THEY ARE CLAIMING WATER HAVE NEVER BEEN PUBLISHED
<u>10:02:36 AM</u>		THEY HAVE ADMITTED THAT IT WAS NEVER PUBLISHED SO THAT IS PROBABLY RIPE FOR SUMMARY JUDGMENT
<u>10:02:39 AM</u>		PARA 100, NIIP IS A WASTE OF WATER, NOT A BENEFICIAL USE. THAT IS A QUESTION OF FACT. BUT WE THINK UNDER THE UNDISPUTED FACT NIIP IS NOT A BENEFICIAL USE
<u>10:02:58 AM</u>		THERE IS NOT ENOUGH WATER IN THE COLORADO RIVER SYSTEM. THIS GOES TO MR WHIPPLES WORK. IT ALSO GOES TO HIS RECLAMATION STUDY OF LAST MONTH
<u>10:03:27 AM</u>		THE CONDITIONS THEMSELVES THAT ARE WRITTEN INTO LEGISLATION HAVE NOT BEEN MET, UNDERNEATH IT ALL IS THE QUESTION OF LEGAL AUTHORITY
<u>10:03:42 AM</u>		THE UNITED STATES CONGRESS DOES NOT HAVE THE AUTHORITY TO COMENDEER OR TO TAKE NM'S WATER. THE ONLY POSSIBLE EXCEPTION IS THE WINTERS DOCTRINE WHERE THEY MAYBE RESERVED SOME WATER
<u>10:04:12 AM</u>		THE AUTHORIZATION OF NAVAJO DAM AND THE COLORADO RIVER STORAGE PROJECT DID NOT REPEAL 2 COLORADO RIVER COMPACTS
<u>10:04:38 AM</u>		UNDER OUR CONSTITUTION AS APPROVED BY CONGRESS THE WATER OF NM BELONGS TO THE PEOPLE WHO APPROPRIATED. IT DOES NOT BELONG TO THE GOVERNMENT
<u>10:04:58 AM</u>		WE ADOPT AND INCORPORATE THE OBJECTIONS WHICH MR UTTON RAISED AGAINST THE UTE MOUNTAIN UTE CLAIM
<u>10:05:17 AM</u>	SETH FULLERTON	AT THIS TIME THE ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY AND THE CITY OF ESPANOLA DO NOT PLAN TO FILE ANY DISPOSITIVE MOTIONS
<u>10:05:46 AM</u>	GARY RISLEY	AS WE ARE LOOKING AT ISSUES WE WILL BE ADDRESSING IN DISPOSITIVE PHASE OBVIOUSLY THERE IS THE QUESTION OF THE NATURE OF THE MOTION ORIGINALLY FILED IN THIS SUBPROCEEDING. WE DO NOT AGREE THAT IT IS ADEQUATE TO SERVE AS A DISPOSITIVE MOTION SO THAT WILL BE ADDRESSED
<u>10:06:24 AM</u>		CONTRARY TO STATEMENT Y MR POLLACK

10:06:26 AM	J	PLEASE REPEAT WHAT YOU JUST SAID
10:06:44 AM	RISLEY	WITH REGARD TO THE NATURE OF THE CLAIM OF THE FILINGS THAT HAVE BEEN MADE AS TO THEIR EVIDENTUARY STATUS, WE THINK THAT IS GOING TO BE LITIGATED
10:07:06 AM		THE PIA ISSUE, AGAIN I WOULD DISAGREE WITH THE STATEMENT THAT THEY HAVE PRODUCED PIA WITH REGARD TO THE CORE AREA THAT WE ARE TALKING ABOUT ON THE SAN JUAN
10:07:19 AM		HAVE BEEN TOLD BY ONE OF THE ATTORNEYS THAT THEY HAD NOT DONE A PIA ANALYSIS PRIOR TO ENTERING INTO THIS AGREEMENT
10:08:00 AM	RICK TULLY	FIND OURSELVES WAY BEHIND EVERYBODY ELSE IN THIS MANNER
10:08:31 AM		ALL CAN DO IS INFORM THE COURT WE WILL PROBABLY JUST HAVE TO JOIN IN ANY OF THE OTHER NON-SETTLING MOTIONS OR DISPOSITIVE MOTIONS
10:08:53 AM		DO NOT BELIEVE THAT DISPOSITIVE MOTIONS SHOULD BE CONSIDERED OR ADDRESSED OR EVEN FILED UNTIL SUCH A TIME AS THE PARTIES ARE SATISFIED THAT DISCOVERY HAS BEEN COMPLETED ENOUGH
10:09:28 AM	GARY HORNER	AM A LITTLE CONCERNED ABOUT LAYING OUT THE STRATEGY AT THIS POINT
10:10:22 AM		I AM CURRENTLY WORKING ON A MOTION THAT HAS TO DO WITH THE AUTHORITY OR LACK OF AUTHORITY WITH REGARD TO FEDERAL LAW STATE LAW STATE PERMITS AND FEDERAL CONTRACTS AS A BASIS FOR THE SETTLEMENT OR ANY OF THE WATER RIGHTS FOR THE NN
10:11:09 AM		IN 1998 I FILED A MOTION WITH REGARD TO THE JICARILLA SETTLEMENT TO CANCEL THE BUREAU OF RECLAMATION PERMITS. I WOULD LIKE TO DO SOMETHING LIKE THAT AGAIN
10:12:36 AM		IN THE SETTLEMENT ITSELF AND THE PROPOSED DECREES THERE IS QUITE A BIT OF INFORMATION REGARDING THE ADMINISTRATION OF THE RIVERS AND DIRECT FLOW
10:12:59 AM		THEY HAVE PUT SIMILAR THINGS LIKE THAT IN THEIR ACTIVE WATER RESOURCE MANAGEMENT RULES WHICH TO ME ARE ILLEGAL AND THEY ARE TRYING TO PUT THEM IN AN ORDER HERE TO TRY TO ESTABLISH SOME SORT OF BASIS FOR THEM
10:13:45 AM		I HAVE BEEN ARGUING THAT HARM IS NOT RELEVANT PRIMARILY FOR THE BENEFIT OF TO ME THE OTHER NON-SETTLING PARTIES... BUT WHEN YOU LOOK AT WHERE THEY ARE GOING AND WHAT THEY ARE INTENDING TO DO WITH THESE ADMINISTRATIVE PROVISIONS AND THIS DIRECT FLOW CONCEPT
10:15:26 AM		AND PUTS THEM IN A POSITION WHERE THEY HAVE TO PAY THE NN FOR THE WATER THAT THEY ARE CURRENTLY USING
10:15:51 AM		ADDRESS WATER RIGHTS OF THE FEDERAL GOVERNMENT IN THE BASIN WHICH WAS WHY THE CASE WAS FILED IN 1975

10:17:13 AM		ONE OF THE BIG ISSUES IS THE AVAILABILITY OF WATER FOR THE NN WHICH GETS BACK TO THE HARM ISSUE
10:18:55 AM		TALKING ABOUT HYDROGRAPHIC SURVEY
10:20:10 AM		WOULD LIKE TO FILE A MOTION FOR SUMMARY JUDGMENT
10:21:07 AM		SETTLEMENT AND PROPOSED DECREES SHOULD BE REJECTED WITHOUT GOING TO COURT
10:21:25 AM		THESE MOTIONS SHOULD HAVE BEEN ADDRESSED YEARS AGO
10:22:18 AM		THE SCHED FOR DISPOSITIVE MOTION IS GOING TO BE INADEQUATE
10:22:46 AM		DO NOT BELIEVE ENOUGH TIME IN CURRENT SCHEDULE
10:23:06 AM	ROBERT OXFORD	PROBABLY WILL BE JOINING IN ON DISPOSITIVE MOTIONS BUT MAY BE A TIME WHERE I FEEL I MUST INTERJECT MY MOTIONS ABOUT THE PERMITS
10:27:08 AM	J	THERE IS SOME OVERLAP, WOULD LIKE TO FIND A WAY TO STREAMLINE AND AVOID OVERLAP
10:29:36 AM		10 MINUTE BREAK
10:29:42 AM	MARSHALL	HAVE TO LEAVE AT 12:15
10:29:58 AM	J	DO NOT SEE ANY PROBLEM
10:30:06 AM		HAVE 1 ISSUE TO ADDRESS IT HAS BEEN BRIEFED. I WILL HEAR YOUR ARGUMENTS AND ADDRESS THAT I MAY HAVE
10:30:18 AM	MARSHALL	WANT TO GET INTO COLORADO RIVER STUDY ISSUES. I WANTED TO GIVE SOME MATERIALS TO THE COURT
10:30:40 AM	J	IS THAT SOMETHING YOU NEED TO RAISE WITH THE COURT
10:30:52 AM	MARSHALL	YES I DO, EXPLAINS
10:31:05 AM	J	RECESS
10:43:12 AM	J	BACK ON THE RECORD
10:43:21 AM		STATE HAS FILED MOTION TO DISMISS COUNTER-CLAIM
10:43:38 AM	ARIANNE SINGER	STATE HAD FILED MOTION TO DISMISS THE ANSWER AND COUNTERCLAIM IN THE THE OBJECTS AND COUNTER CLAIM FILED BY THE COMMUNITY DITCH DEFENDANTS FOR FAILURE TO STATE A CLAIM UPON RELIEF CAN BE GRANTED
10:44:11 AM		THIS IS A SUBPROCEEDING ON THE NN WATER RIGHT CLAIM AND INTER SE ON THAT CLAIM ONLY BY THE NN. THERE ARE NO OTHER CLAIMS BEFORE THE COURT IN THIS SUBPROCEEDING
10:44:25 AM	J	WHAT IS PROBLEM WITH ANSWER
10:44:36 AM	SINGER	FIRST THE STATEMENT OF CLAIMS HAS NOT ACUTALLY BEEN FILED BY THE US. THOSE WERE ADDITIONAL DISCLOSURES THAT WERE ORDERED BY THE SPECIAL MASTER FOR THE US TO MAKE SO THAT OTHER PARTIES HAD AN OPPORTUNITY TO EVALUATE THE MERITS OF THE SETTLEMENT AGAINST A POTENTIAL CLAIM TO BE FILED BY THE UNITED STATES

10:44:47 AM		ONLY PLAINTIFF IN THIS CASE IS THE ST OF NM
10:45:01 AM		THAT IS THE ONLY CLAIM IT IS ONLY AGAINST THE ST OF NM
10:45:13 AM		THERE IS NO COUNTER-CLAIM BECAUSE IT IS NOT A CLAIM AGAINST ANYBODY ELSE
10:45:49 AM	MARSH ALL	THIS IS AN INTER-SE PROCEEDING THAT MEANS AMONG THE PARTIES TO THIS PROCEEDING TO ESTABLISH THE CLAIMS OF THE NN AS AGAINST EVERYBODY ELSE IN THE BASIN
10:46:24 AM		THE 3 SETTLING PARTIES ARE THE PLAINTIFFS IN THIS INTER SE CASE
10:46:38 AM	J	I UNDERSTAND HOW YOUR CHARACTERIZE IT THAT WAY
10:46:42 AM		THAT IS THE WAY IT IS UNDER THE RULES OF CIVIL PROCEDURE. IF YOU ARE TALKING ABOUT THIS SUBPROCEEDING OR THE INTER SE PROCEEDING IN THIS CASE THERE IS AN ALIGNMENT WHICH IS ABSOLUTELY CLEAR BOTH FUNCTIONALLY AND UNDER THE RULES OF CIVIL PROCEDURE WHICH ARE THE RULES THAT GOVERN THIS PROCEEDING
10:46:55 AM		JOINTLY THE 3 OF THEM FILED THIS ACTION TO OBTAIN A DECREE THAT THE RIGHTS OF THE NN ARE 606000 ACRE FEET AND THAT THEY HAVE CERTAIN PRIORITIES IN ADVANCE OF MY CLIENTS AND MANY OTHERS
10:48:38 AM		WE ARE SAYING THEY DO NOT HAVE THOSE AMOUNTS, AND THEY DO NOT HAVE THOSE PRIORITIES
10:49:24 AM		TALKING ABOUT ANSWER OBJECTION AND COUNTERCLAIM
10:51:24 AM	J	WANTED I AM LOOKING AT IN PARTICULAR THAT I WANTED TO DRAW YOUR ATTENTION TO AND SEE YOUR RESPONSE WAS ... MY QUESTION IS WHY IS THIS PROCEEDING WHICH IS AN INTER SE PROCEEDING NOT GOVERNED BY THE PREVIOUS ORDERS OF THE COURT THAT DESIGNATE THE MANNER IN WHICH THE ISSUES WILL BE RAISED AND PRESENTED TO THE COURT
10:52:16 AM	MARSH ALL	THE ANSWER IS BECAUSE OF RULE 71.2b1
10:53:17 AM	J	I AM NOT SURE I AGREE WITH YOU ON THAT
10:53:26 AM	MARSH ALL	THE ANSWER IS BOTH FORMALLY AND IN REAL TERMS THE NN IS THE REAL PARTY PLAINTIFF IN INTEREST
10:53:41 AM		THE UNITED STATES IS A TRUSTEE FOR THE NN AND ARE ASSERTING CLAIMS ON THEIR BEHALF
10:53:58 AM		THE STATE ENGINEER IS A PLAINTIFF BECAUSE THEY ARE SAYING GIVE THIS WATER TO THE NN
10:54:23 AM	J	WHAT IS THE DIFFERENCE IF THE COURT IS GOING TO ADDRESS THE ISSUES, WHAT IS THE DIFFERENCE
10:54:43 AM	MARSH ALL	THE DIFFERENCE IS AND ONE OF THE PROBLEMS IN THIS CASE IS BEFORE WE GOT INVOLVED THEY DECIDED TO DEEM THEMSELVES SETTLING PARTIES AND US NON-SETTLING PARTIES
10:55:08 AM		THE CONCRETE DIFFERENCE IS

10:55:54 AM		THEY HAVE ALREADY ADMITTED THAT THE PERMIT WAS NEVER PUBLISHED... THAT INVALID PERMIT HAS BEEN USED FOR 50 YEARS TO SHUT OUT MY CLIENTS
10:56:22 AM		WE ARE ENTITLED TO AS COUNTER-CLAIMANTS IF WE PROVE AT TRIAL THAT IT WAS NOT PUBLISHED THERE IS NOT ENOUGH WATER IN THE RIVER ETC
10:56:31 AM		WE ARE ENTITLED TO A DECREE VINDICATING AND ENFORCING OUR RIGHTS
10:56:44 AM	J	THE AUTHORITY FOR THAT IS?
10:56:53 AM	MARSH ALL	THE MCCARRAN AMENDMENT WHERE CONGRESS SAID WHEN IT COMES TO WATER ADJUDICATIONS IN THE WEST WE ARE NOT GOING TO HAVE ANY OF THIS SOVEREIGN AMUNITY BUSINESS
10:57:09 AM		THE MCCARREN AMENDMENT IS A WAIVER OF...
10:57:21 AM	J	QUESTION
10:57:29 AM	MARSH ALL	WE HAVE SUPERIOR RIGHTS
10:57:34 AM		IT HAS TO BE DETERMINED NOW BECAUSE IT IS THE FLIP SIDE OF THE COIN
10:57:57 AM	J	YOU RAISE A QUESTION THAT HAS PEAKED MY INTEREST, I DO NOT LOOK AT IT IN THE SAME WAY THAT YOU LOOK AT IT IN TERMS OF THE RULES
10:58:20 AM		WHAT HAS PEAKED MY INTEREST IS THE IDEA OF HOW DO WE DEAL WITH PRECLUSIVE EFFECT
10:59:15 AM		I THINK THAT IS WHAT YOU ARE GETING AT IN YOUR COUNTER-CLAIM
10:59:27 AM	MARSH ALL	WHAT WE THINK CAN AND SHOULD HAPPEN AS A PRACTICAL MATTER
11:01:24 AM		THIS IS A CUMPOLSURY COUNTER-CLAIM SO WE MUST PRESENT IN THIS ACTION NOW
11:01:52 AM		NOTHING IN THE WATER RULES THAT SAYS YOU CAN HEAR WHAT THEY HAVE TO SAY AND NOT HEAR WHAT WE HAVE TO SAY
11:02:24 AM		WE ARE ENTITLED TO A DECREE
11:02:35 AM		WE AGREE THEY ARE ENTITLED TO SOME WATER
11:03:13 AM	J	THIS PROCEEDING AS IT HAS BEEN SERVED AND NOTICED IS #1 WITH RESPECT TO THE SETTLEMENT AGREEMENT
11:03:35 AM		SO IF THAT IS THE ISSUE THAT IS THE FOCUS OF THIS STAGE OF THIS PROCEEDING WHERE DO WE GET IN THE OTHER THE DECREING WINTERS RIGHTS DOCTRINE
11:04:00 AM	MARSH ALL	THAT NOTICE IF YOU READ IT THAT WAY TO EXCLUDE EVERYTHING ELSE IS A VIOLATION OF DUE PROCESS AND THE RULES OF CIVIL PROCEDURE
11:04:13 AM		THE MEANINGFUL TIME IS NOW BEFORE YOU APPROVE OR DO NOT APPROVE THAT SETTLEMENT AGREEMENT BEACUSE AFTER THAT IT IS GAME OVER
11:04:26 AM	J	IT IS NOT GAME OVER IF THE SETTLEMENT OR AGREEMENT IS NOT APPROVED
11:04:42 AM	MARSH ALL	TALKING ABOUT THE PURPOSE OF COUNTERCALIM
11:05:08 AM	J	I AM LOOKING AT PAGE 37, PRAYERS FOR RELIEF

11:05:58 AM	MARSH ALL	I AM NOT AWARE OF ANY CIVIL CASE UNDER THE RULES OF CIVIL PROCEDURE WHERE A COURT HAS SAID WE ARE GOING TO HEAR JUST FROM THE PLAINTIFFS AND NOT FROM THE DEFENDANTS
11:06:13 AM	J	THERE HAS BEEN AN ELABORATE SET UP IN THIS PROCEEDING WHERE THE NON-SETTLING PARTIES TO SET FORTH OBJECTIONS
11:07:01 AM		THE RULES OF CIVIL PROCEDURE ONE OF THEM SAYS A FINAL JUDGMENT SHALL AWARD WHATEVER RELIEF A PARTY IS ENTITLED TO WHETHER IT IS PRAYED FOR OR NOT
11:07:14 AM	MARSH ALL	WE ARE ENTITLED TO AN END TO THIS CHARADE ABOUT THESE PERMITS THAT WERE NEVER PUBLISHED
11:07:26 AM		ONE OTHER PROVISION THERE WHICH SAYS ... WE WANT THE COURT TO ORDER THE BOR AND THE UNITED STATES GOVERNMENT TO OPERATE THE RIVER...SO THAT MY CLIENTS GET THE WATER THAT THEY ARE LEGALLY ENTITLED TO
11:08:08 AM	J	IS IT THE ? OF THIS COURT TO MAKE THAT RULING TO ADMINISTER THE RIVER OR IS IT THE PROVINCE OF THE STATE ENGINEER
11:10:26 AM		ALL WE HAVE EVER HEARD IS EXPEDITED INTER-SE
11:10:31 AM	J	I THINK 71.2 IS THE AUTHORITY THAT THEY ARE ASSERTING
11:10:51 AM	MARSH ALL	THE WATER RULES ARE IN ADDITION TO THE RULES OF CIVIL PROCEDURE
11:11:10 AM	J	READING FROM RULE
11:11:34 AM	MARSH ALL	UNDER THE RULES OF CIVIL PROCEDURE OF COURSE YOUR HONOR AS A DISTRICT JUDGE HAS ALL SORT OF DISGRESSION AND LATITUDE ABOUT HOW TO HANDLE THINGS. THE COURT HAS NO DISCRESSION UNDER THE RULES TO DENY A PROPERLY DRAWN COUNTERCLAIM AND SAY WE WILL GET TO THAT LATER
11:12:20 AM		GIVING AN EXAMPLES OF WHY IMPORTANT NOW
11:14:26 AM		NEVER SEEN A CASE WHERE THE PLAINTIFFS GOT TOGETHER WITH THE COURT AND DECIDED HOW THE CASE WAS GOING TO BE HANDLED AND WHOS CLAIMS WERE GOING TO BE HEARD BEFORE THE DEFENDANTS WERE EVEN JOINED INTO THE CASE
11:14:57 AM		WE ARE ENTITLED TO OUR COUNTERCLAIM
11:16:34 AM	J	NOT SURE THAT I UNDERSTAND YOUR COUNTERCLAIM, WHAT IT IS YOU ARE SEEKING
11:16:52 AM	MARSH ALL	EXPLAINING WHAT THEY ARE SEEKING IN COUNTERCLAIM
11:19:15 AM		THE OTHER THING WE WANT IS THAT THEY BE ORDERED TO CONFER WITH US
11:19:33 AM	J	IS A COUNTERCLAIM NECESSARY FOR THAT
11:19:40 AM	MARSH ALL	YES EXPLAINING
11:20:53 AM		TALKING ABOUT DEC 2013 DEADLINE
11:21:52 AM		THERE ARE SOLUTIONS BUT THEY DO NOT INCLUDE TOSsing OUT THE COUNTERCLAIM

11:22:01 AM	SINGER	THERE IS ONLY ONE COMPLAINT IN THIS CASE
11:22:39 AM		TALKING ABOUT THE LA PLATA AND NOTICES OF CLAIMS FILED THOSE ARE NOT COMPLAINTS
11:23:20 AM		THOSE ARE THE ONLY CLAIMS BEFORE THE COURT
11:23:31 AM		ENFORCEMENT OF WATER RIGHTS IS NOT THE SUBJECT OF A WATER RIGHTS ADJUDICATION, IT IS TO DETERMINE THE ELEMENTS OF A WATER RIGHT IN THE STREAM SYSTEM
11:23:49 AM		WHEN IT GETS TIME TO DO MR MARSHALLS CLIENTS THEY WILL BE ASKED TO FILE NOC'S
11:24:07 AM		WHAT MR MARSHALL IS CHARACTERIZING AS A COUNTERCLAIM ARE REALLY DEFENSES TO THE NN'S WATER RIGHT CLAIM
11:24:29 AM		WE ARE NOT DETERMINING HIS CLAIMANTS WATER RIGHTS HERE
11:24:45 AM	J	WITH RESPECT TO THE NN CLAIMS AND...THERE ARE GOING TO BE ISSUES THAT ARE GOING TO BE ADDRESSED ASSUMING WE GO TO TRIAL BY WAY OF SUMMARY JUDGMENT
11:25:27 AM		IF THE COURT DETERMINES THAT THE SETTLEMENT AGREEMENT DOES NOT MEET THE STANDARDS THAT HAVE BEEN SET FORTH WE GO THEN TO THE NEXT STAGE
11:26:13 AM		I THINK THAT IS WHAT MR MARSHALL IS GETTING AT
11:26:33 AM	SINGER	I DO NOT UNDERSTAND, I NEED AN ILLUSTRATION OF WHAT KIND OF ISSUE COULD BE DECIDED HERE THAT ...
11:26:50 AM	J	SUPPOSE THERE IS A DETERMINATION THAT WILL PRECLUDE THE SETTLEMENT AGREEMENT
11:27:57 AM	SINGER	YOU HAVE ALL THE PARTIES BEFORE YOU, THAT WAS THE POINT OF THE EXPEDITED INTER SE
11:28:14 AM		THE CLAIMS BEFORE THE COURT HAVE A BINDING EFFECT ON EVERYBODY
11:28:48 AM		DO NOT UNDERSTAND HOW THEY ARE ONE-SIDED
11:29:16 AM		THIS COURT IS NOT AWARDING WATER RIGHTS
11:29:26 AM		THE POINT IS TO DETERMINE EXISTING WATER RIGHTS
11:30:32 AM		WE ARE NOT GRANTING ANYTHING NEW
11:31:22 AM		THERE WILL BE A TIME FOR HIM TO RAISE HIS CLAIMS
11:32:05 AM	STANLEY POLL ACK	WANT TO ADDRESS THE QUESTION THE COURT ASKED RELATIVE TO THE PRECLUSIVE EFFECT
11:32:45 AM		THERE WILL BE NO PRECLUSIVE EFFECT FROM ENTERING THE DECREE VISA VI THE COMMUNITY DITCH DEFENDANTS THERE WILL BE NO PRECLUSIVE EFFECT AGAINST THOSE FOLKS
11:33:07 AM		WE ARE NOT HERE TO DETERMINE WHETHER NAVAJO IS SENIOR OR JR TO THEM WE ARE JUST HERE TO DETERMINE WHAT THE NAVAJO RIGHTS ARE
11:33:39 AM		WHEN WE STARTED THIS INTER SE THERE WAS A SUGGESTION THAT THERE WOULD BE A LIMITED MERITS BASED REVIEW

11:34:16 AM	J	RESPONSE
11:35:10 AM		I AM NOT MAKING ANY RULING NOW
11:35:39 AM		GOING TO SUGGEST AS FAR AS FACTUAL...
11:35:49 AM	POLLACK	I WAS GOING TO SUGGEST AS FAR AS THE FACTUAL ISSUES THAT THERE OUGHT NOT TO BE A PRECLUSIVE EFFECT BECAUSE IN THE ORDERS OF THE COURT IF THE SETTLEMENT DECREES ARE DENIED THEN THE NN HAS THE ABILITY TO AMEND THE STATEMENT OF CLAIMS AS DOES THE US
11:36:25 AM	MARSHALL	RESPONSE
11:37:05 AM	MARSHALL	RESPONSE, AS TO PRECLUSIVE EFFECT
11:38:01 AM		ONCE YOU DEVIATE FROM THE RULES OF CIVIL PROCEDURE
11:38:35 AM	J	WILL GIVE SOME THOUGHT WILL RESERVE FINAL JUDGMENT
11:40:26 AM		PROCEDURES HAVE BEEN ESTABLISHED
11:40:47 AM		YOUR DOCUMENT SETS FORTH OBJECTIONS
11:41:16 AM		IN THAT RESPECT I DO NOT THINK IT IS APPROPRIATE TO DISMISS
11:42:10 AM		WILL ENTER AN ORDER THAT MAY EXPAND ON THOSE THOUGHTS
11:42:40 AM	MARSHALL	WE THINK THIS IS A SIMPLE CASE OF PARTY REALIGNMENT THAT THE DISTRICT COURT HAS TO DO
11:42:51 AM		TURN TO THE NEW DISCOVERY ISSUES. HANDING COURT EXERPTS FROM BOR DEPARTMENT OF INTERIOR STUDY
11:43:05 AM	GUARINO	OBJECTION
11:43:28 AM	J	THE ISSUE THAT I HAVE I DO NOT KNOW IF I WANT TO LOOK AT THIS BECAUSE I DO NOT WANT TO BE INVOLVED AT LOOKING AT EVIDENCE
11:43:43 AM		IF YOU HAVE ANY DISCOVERY QUESTION
11:44:07 AM	MARSHALL	CONTINUES, THIS IS NOT EVIDENCE. WE ARE NOT SUBMITTING THIS...
11:44:44 AM		IS THERE ENOUGH WATER IN THE RIVER, MR WHIPPLE SAID IN 2007 YES THERE IS ENOUGH WATER
11:44:53 AM	GUARINO	RENEW OBJECTION
11:45:34 AM	J	I DO NOT KNOW WHERE THIS IS GOING
11:45:50 AM	SINGER	ASK TO ADDRESS WITH US FIRST
11:50:56 AM	SINGER	OBJECTION
11:51:24 AM	GUARINO	ADDS TO OBJECTION
11:51:37 AM	J	I THINK WHAT MR MARSHALL IS DOING IS APPRISING THE COURT OF HOW HE INTENDS TO PROCEED
11:52:12 AM		RETURNS EXHIBITS TO MR MARSHALL
11:52:23 AM	MARSHALL	I WILL FILE THIS

11:52:45 AM	J	DIRECTION TO MR MARSHALL
11:53:37 AM	MARSH ALL	EXPLAINS THAT HE HAS DONE THAT
11:54:13 AM		I WILL FILE THE MOTION AND WE WILL DEAL WITH IT THEN
11:54:26 AM	J	TALKING ABOUT LENGTH OF HEARING
11:54:59 AM		EXPLAINS DID NOT THINK HEARING WOULD GO SO LONG
11:55:34 AM		ADJOURNED