

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: Community Ditch Defendant-counterclaimants file attached exhibit in conjunction with argument in opposition to U.S. motion for protective order.

NUMBER OF PAGES: 5

DATE OF FILING: February 4, 2013

**FILING OF EXHIBIT:
ALLOCATION OF WATER UNDER COLORADO RIVER COMPACTS**

In connection with the United States motion for protective order concerning other claims by the U.S., and as part of the ongoing joint discovery being pursued by defendants, the Community Ditch Defendant-counterclaimants submit the following exhibit:

ALLOCATION OF WATER UNDER COLORADO RIVER COMPACTS

This illustrates the legal allocation of the waters of the Colorado River basin by operation of the Colorado River Compact of 1922, NMSA § 72-15-5 and the Upper Basin Compact of 1948, NMSA § 72-15-16.

D-

These matters are germane to several critical issues of mixed fact and law which the defendants are attempting to pursue through discovery. Inter alia, the information will be used:

- to demonstrate how the waters of the Colorado are allocated by law;
- to disprove the plaintiffs claim that the settlement will reduce calls on the San Juan River to once every 20 years or so;
- to demonstrate that the 2012 BOR study refutes the 2007 hydrologic determination that there is enough water in the Colorado River system to accommodate the proposed settlement; and
- to demonstrate that what happens elsewhere on the Colorado River system directly determines how much water New Mexico can take from the San Juan River.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2013, 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: wnavajointerse@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.

ALLOCATION OF WATER UNDER COLORADO RIVER COMPACTS

CC - Colorado River Compact of 1922, NMSA §72-15-5.

UB - Upper Basin Compact of 1948, NMSA §72-15-16.

ANNUAL "NATURAL" OR "VIRGIN" FLOW in acre-feet¹

	10,000,000	12,500,000	13,700,000	15,000,000
<i>less</i>				
Priority for Lower Basin ² CC Art. III (d)	7,500,000	7,500,000	7,500,000	7,500,000
½ of obligation to Mexico 1944 Treaty; CC Art. III (c)	750,000	750,000	750,000	750,000
Arizona's share of Upper Basin UB Art. III (a) (1)	50,000	50,000	50,000	50,000
UPPER BASIN REMAINDER	1,700,000	4,200,000	5,400,000	6,700,000
New Mexico's 11.25% share ³ UB Art. III (a) (2)	191,250	472,500	607,500	753,750
<i>less</i>				
Navajo settlement claim (depletion) ⁴	325,670	325,670	325,670	325,670
Required water for endangered species at Bluff UT ⁵	759,293	759,293	759,293	759,293
Jicarilla settlement claim	32,000	32,000	32,000	32,000
Ute Mountain Ute claim	?	?	?	?
Other U.S. claims for nat. parks, forests, etc	?	?	?	?
Evaporation, etc.	?	?	?	?
New Mexico Deficit	(925,713)	(644,463)	(509,463)	(363,213)
AVAILABLE FOR CONSUMPTION IN NEW MEXICO by non-Indians⁶	none	none	none	none

Projected figures, annualized.

NOTES 2/4/13

1. "Natural" or "virgin" flow is the hypothetical flow that would occur naturally if there were no human diversions, depletions, dams, or impoundments. UB Art. II(n). Natural flow no longer exists. The hypothetical natural flow at a given point, such as Lees Ferry, is greater than the actual flow measured by stream gauges.

The 1922 Colorado River Compact assumed a natural flow of approximately 15,000,000 acre-feet. The latest modeling in the 2012 Study projects a long term average of 13,700,000 acre-feet, with periods of drought extending for many years, punctuated by an occasional wet year. TR-B, page B-66.

2. The Colorado River Compact requires the states of the Upper Basin collectively to deliver 75,000,000 acre-feet at Lees Ferry, just below Lake Powell, during each 10 year period, rolling forward. The Compact divided the estimated annual flow of 15,000,000 acre-feet in half, giving 7,500,000 acre-feet to the Lower Basin and 7,500,000 acre-feet to the Upper Basin. But the Lower Basin received priority for its water.

3. New Mexico is entitled to an 11.25% share of the water available for the entire Upper Basin, rather than a percentage share of the San Juan River, or a fixed amount from the San Juan.

4. The amounts in the proposed settlement are 606,660 acre-feet of diversion and 325,670 acre-feet of depletion. Since the water for NIIP is diverted at Navajo Reservoir and pumped up the hill to NIIP, the diverted water is not available in the San Juan River for many miles, even assuming that there is return flow. Therefore the 325,670 depletion figure drastically understates the drying effects on the river below Navajo Dam.

5. The Colorado River Basin Water Supply and Demand Study of December 12, 2012 shows a required minimum base flow of at least 500 cfs to at least 1,000 cfs, so a midpoint of 750 cfs is used for the calculation. In addition, larger pulses of water are required in the springtime. (Due to ambiguity in the report descriptions of the springtime pulses, a small downward adjustment in this calculation might be appropriate.) TR_D Appendix 3, pages D3-9, D3-10.

Bluff, Utah is used as a proxy for 3 measuring stations in Utah. Bluff is downstream from New Mexico, so any required water for endangered species cannot be consumed in New Mexico. This is unlike the silvery minnow in the Rio Grande, where the instream flow can be used farther downstream within New Mexico.

The U.S. claims the right to adjust the amounts for endangered species up or down, in its sole discretion, and the court has no jurisdiction or authority to review its decisions.

6. Under all natural flow scenarios, satisfying the demands for compact compliance and Indian tribes and endangered species would leave no San Juan River water available for use by non-Indians in New Mexico. Every scenario shows large deficits, in excess of 300,000 acre-feet, even without factoring in the Ute Mtn Ute claims or the claims of the U.S. for national parks, national forests, etc. Evaporative losses are also not included.

Reservoir storage and shortage sharing agreements do not solve these deficits. The alleged protections in the proposed settlement cannot cure the deficits that would be caused by the settlement itself, i.e. 606,660 acre-feet of diversion and 325,670 of depletion, and the water required for endangered species.

In a given year, there would be no water available from the San Juan River for any non-Indian use (irrigation, domestic, or municipal) unless the natural flow in the Upper Basin exceeded 18,200,000 acre-feet. However, this would be a rare occurrence, and the accumulated rolling deficit to the Lower Basin would have to be satisfied first.

7. All figures are subject to change and revision, depending upon the results of discovery.

8. All parties are invited to offer suggestions and comments for improving this analysis.