

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: Motion to compel the State, the Navajo Nation and the United States to answer discovery about water losses from evaporation and other causes, like seepage. Evaporative losses from reservoirs are allocated under the Colorado Compacts, so they reduce the amount of water available from the San Juan River for consumption in the San Juan River Basin in New Mexico.
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**MOTION TO COMPEL RESPONSES TO DISCOVERY
ABOUT EVAPORATIVE AND OTHER LOSSES**

Pursuant to Rule 1-037 the Community Ditch Defendants move the court to compel each of the settling parties to answer the attached discovery concerning evaporative and other losses which reduce the amount of water available from the San Juan River for consumption in New Mexico.

The motion to compel is necessary because the Navajo Nation has claimed that interrogatory and document discovery ended thirty days before the March 1 date set by the court, and that the reservoirs are not located in New Mexico (mostly incorrect), and/or that

evaporative and other losses which reduce the San Juan water supply are not within the scope of discovery.

The information sought is plainly discoverable because the laws governing the San Juan River provide for the allocation of evaporative and other losses. The proposed settlement documents also contain provisions for the allocation of such losses.

For the convenience of the court some (but not all) of the operative provisions in the law of the river concerning evaporation and other losses are reprinted here:

§ 72-15-5. Colorado River Compact

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory states:

- (a) with respect to the waters of the Colorado river system not covered by the terms of this compact [this section];
- (b) over the meaning or performance of any of the terms of this compact;
- (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided;
- (d) as to the construction or operation of works within the Colorado river basin to be situated in two or more states, or to be constructed in one state for the benefit of another state; or
- (e) as to the diversion of water in one state for the benefit of another state; the governors of the states affected, upon the request of one of them, shall forthwith appoint commissioners with power to consider and adjust such claim or controversy, subject to ratification by the legislatures of the states so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested states.

§ 72-15-26. Upper Colorado River Basin Compact

ARTICLE V

- (a) All losses of water occurring from or as the result of the storage of water in reservoirs constructed prior to the signing of this compact shall be charged to the

state in which such reservoir or reservoirs are located. Water stored in reservoirs covered by this Paragraph (a) shall be for the exclusive use of and shall be charged to the state in which the reservoir or reservoirs are located.

(b) All losses of water occurring from or as the result of the storage of water in reservoirs constructed after the signing of this compact shall be charged as follows:

(1) if the commission finds that the reservoir is used, in whole or in part, to assist the states of the upper division in meeting their obligations to deliver water at Lee Ferry imposed by Article III of the Colorado River Compact, the commission shall make findings, which in no event shall be contrary to the laws of the United States of America under which any reservoir is constructed, as to the reservoir capacity allocated for that purpose. The whole or that proportion, as the case may be, of reservoir losses as found by the commission to be reasonably and properly chargeable to the reservoir or reservoir capacity utilized to assure deliveries at Lee Ferry shall be charged to the states of the upper division in the proportion which the consumptive use of water in each state of the upper division during the water year in which the charge is made bears to the total consumptive use of water in all states of the upper division during the same water year. Water stored in reservoirs or in reservoir capacity covered by this Subparagraph (b) (1) shall be for the common benefit of all of the states of the upper division;

(2) if the commission finds that the reservoir is used, in whole or in part, to supply water for use in a state of the upper division, the commission shall make findings, which in no event shall be contrary to the laws of the United States of America under which any reservoir is constructed, as to the reservoir or reservoir capacity utilized to supply water for use and the state in which such water will be used. The whole or that proportion, as the case may be, of reservoir losses as found by the commission to be reasonably and properly chargeable to the state in which such water will be used shall be borne by that state. As determined by the commission, water stored in reservoirs covered by this Subparagraph (b) (2) shall be earmarked for and charged to the state in which the water will be used.

(c) In the event the commission finds that a reservoir site is available both to assure deliveries at Lee Ferry and to store water for consumptive use in a state of the upper division, the storage of water for consumptive use shall be given preference. Any reservoir or reservoir capacity hereafter used to assure deliveries at Lee Ferry shall by order of the commission be used to store water for consumptive use in a state, provided the commission finds that such storage is reasonably necessary to permit such state to make the use of the water apportioned to it by this compact.

ARTICLE VI

The commission shall determine the quantity of the consumptive use of water, which use is apportioned by Article III hereof, for the upper basin and for each

state of the upper basin by the inflow-outflow method in terms of man-made depletions of the virgin flow at Lee Ferry, unless the commission, by unanimous action, shall adopt a different method of determination.

ARTICLE VII

The consumptive use of water by the United States of America or any of its agencies, instrumentalities or wards shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding or conveyance of water in one state for use in another shall be charged to such latter state.

ARTICLE XIV

Subject to the provisions of this compact, the consumptive use of the waters of the San Juan river and its tributaries is hereby apportioned between the states of Colorado and New Mexico as follows:

The state of Colorado agrees to deliver to the state of New Mexico from the San Juan river and its tributaries which rise in the state of Colorado a quantity of water which shall be sufficient, together with water originating in the San Juan basin in the state of New Mexico, to enable the state of New Mexico to make full use of the water apportioned to the state of New Mexico by Article III of this compact, subject, however, to the following:

(a) a first and prior right shall be recognized as to:

(1) all uses of water made in either state at the time of the signing of this compact; and

(2) all uses of water contemplated by projects authorized, at the time of the signing of this compact, under the laws of the United States of America whether or not such projects are eventually constructed by the United States of America or by some other entity;

(b) the state of Colorado assents to diversions and storage of water in the state of Colorado for use in the state of New Mexico, subject to compliance with Article IX of this compact;

(c) the uses of the waters of the San Juan river and any of its tributaries within either state which are dependent upon a common source of water and which are not covered by (a) hereof, shall in times of water shortages be reduced in such quantity that the resulting consumptive use in each state will bear the same proportionate relation to the consumptive use made in each state during times of average water supply as determined by the commission; provided, that any preferential uses of water to which Indians are entitled under Article XIX shall be excluded in determining the amount of curtailment to be made under this paragraph;

(d) the curtailment of water use by either state in order to make deliveries at Lee Ferry as required by Article IV of this compact shall be independent of any and all conditions imposed by this article and shall be made by each state, as and when required, without regard to any provision of this article;

(e) all consumptive use of the waters of the San Juan river and its tributaries shall be charged under the apportionment of Article III hereof to the state in which the use is made; provided that consumptive use incident to the diversion, impounding or conveyance of water in one state for use in the other shall be charged to the latter state.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

Victor R. Marshall
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Association; Hammond Conservancy District;
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CERTIFICATE OF SERVICE

I hereby certify that on this 19th 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: wrvnavajointerse@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.