

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED

2013 APR 15 AM 11:47

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 for Partial Summary Judgment #2. The proposed decree cannot be approved because it provides far more water than is necessary to meet the minimum needs of Navajos living on the reservation in New Mexico. The proposed decree violates *U.S. v. New Mexico*, *Arizona v. California*, and *Cappaert*.  
  
NUMBER OF PAGES: 4 +2 page exhibit  
  
DATE OF FILING: April 15, 2013

**COMMUNITY DITCH DEFENDANTS' MOTION  
FOR PARTIAL SUMMARY JUDGMENT CONCERNING THE MINIMUM NEEDS  
OF THE NAVAJO RESERVATION IN NEW MEXICO**

Pursuant to Rule 1-056(D), the Community Ditch Defendants move the court for a partial summary judgment that the proposed settlement and court decree would provide amounts of water significantly in excess of the minimum needs of Navajo tribal members living on the reservation in New Mexico.

**POINT I: There Is No Genuine Dispute That the Amounts of Water in the Proposed Settlement and Decree Are Considerably in Excess of the Minimum Amounts Needed by Navajo Tribal Members Living on the Reservation in New Mexico.**

There is no genuine issue as to the following material facts:

D-

1. According to the 2010 census, the total number of Native Americans living on the Navajo reservation in New Mexico is 42,127. Exhibit 1, attached.

2. The total number of Navajo tribal members living on the Navajo reservation in New Mexico is less than 42,127 by some unknown amount, because that figure includes Native Americans who are not members of the Navajo tribe.

3. The Navajo tribal population living on the Navajo reservation is shrinking rather than growing.

4. The proposed settlement and judgment would award the United States and the Navajo Nation 646,640 acre-feet of annual diversion rights and 335,681 acre-feet of annual depletion rights.

5. These amounts are significantly in excess of the minimum amount necessary to make a homeland for Navajo tribal members on the Navajo reservation in New Mexico. 646,640 acre-feet diversion would be an average of 15.35 acre-feet per person per year for the 42,127 Native Americans living on the reservation. 335,681 acre-feet depletion would mean an average per person consumption of 7.97 acre-feet per year by every Native American on the reservation in New Mexico.

6. That is considerably more than the minimum amount of water needed for a Navajo or a non-Navajo person to live in New Mexico.

7. Navajos and non-Navajos can attain a reasonable standard of living in New Mexico without needing to divert 15.35 acre-feet or consume 7.97 acre-feet of water per person.

8. According to the 2010 census, there are 2,059,179 persons living in New Mexico.

9. If each of the residents of New Mexico needed to consume an average of 7.97 acre-feet per year to live in New Mexico, then New Mexico would need water resources capable of supplying 16,411,000 acre-feet for consumption each year.

9. New Mexico does not have water resources that can supply 16,000,000 acre-feet of consumption per year.

10. Navajos do not need 7.97 acre-feet of consumption per person to live on the Reservation in New Mexico, just as other residents of New Mexico do not need 7.97 acre-feet of water per person to live in New Mexico.

**POINT II: The Proposed Settlement and Decree Do Not Comply with the Law Set Forth in *United States v. New Mexico*, *Cappaert*, and *Arizona v. California*.**

As a matter of law, the Community Ditch Defendants are entitled to a partial summary judgment that the proposed settlement and decree are not in accordance with applicable law, because they would award amounts of water which are more than the amounts allowed by law. The law is clearly summarized in *United States v. New Mexico*, 438 U.S. 696 (1978):

While many of the contours of what has come to be called the "implied-reservation-of-water doctrine" remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water necessary to fulfill the purpose of the reservation, no more." *Cappaert v. United States*, 426 U.S. 128, 141, 96 S. Ct. 2062, 2071 (1908). See *Arizona v. California*, 373 U.S. 546, 600-01, 83 S. Ct. 1468, 1497-98 (1963); *United States v. District Court for Eagle County*, 401 U.S. 520, 523, 91 S. Ct. 998, 1001 (1971). Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.

This careful examination is required both because the reservation is implied, rather than expressed, and because of the history of congressional intent in the field of federal-state jurisdiction with respect to allocation of water. Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. *See California v. United States*, 438 U.S. 645, 653-70, 678-79, 98 S. Ct. 2985, 2990-98, 3002-03 (1978). Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator.

438 U.S. at 700-01.

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 15th day of April, 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: [wrvajointerse@nmcourts.gov](mailto:wrvajointerse@nmcourts.gov) and to the filing list referred to in the Notice of Amended Service List filed February 25, 2013.

/s/ Victor R. Marshall

Victor R. Marshall, Esq.



GCT-PL2

Population and Housing Occupancy Status: 2010 - State -- American Indian Area/Alaska Native Area/Hawaiian Home Land

2010 Census Redistricting Data (Public Law 94-171) Summary File

NOTE: For information on confidentiality protection, nonsampling error, and definitions, see <http://www.census.gov/prod/cen2010/pl94-171.pdf>

NOTE: Change to the California, Connecticut, Mississippi, New Hampshire, Virginia, and Washington P. L. 94-171 Summary Files as delivered.

Geography: New Mexico

Geographic area	Total population	Housing units		
		Total	Occupied	Vacant
AMERICAN INDIAN RESERVATION AND OFF-RESERVATION TRUST LAND -- FEDERAL All areas				
Acoma Pueblo and Off-Reservation Trust Land, NM	3,011	1,167	803	364
Acoma Pueblo	3,005	1,162	800	362
Acoma Off-Reservation Trust Land	6	5	3	2
Cochiti Pueblo de, NM	1,727	741	647	94
Cochiti Pueblo de	1,727	741	647	94
Isleta Pueblo, NM	3,400	1,374	1,248	126
Isleta Pueblo	3,400	1,374	1,248	126
Jemez Pueblo, NM	1,815	522	474	48
Jemez Pueblo	1,815	522	474	48
Jicarilla Apache Nation Reservation and Off-Reservation Trust Land, NM	3,254	1,175	1,028	147
Jicarilla Apache Nation Reservation	3,250	1,171	1,026	145
Jicarilla Apache Nation Off-Reservation Trust Land	4	4	2	2
Laguna Pueblo and Off-Reservation Trust Land, NM	4,043	1,368	1,187	181
Laguna Pueblo	4,043	1,367	1,187	180
Laguna Off-Reservation Trust Land	0	1	0	1
Mescalero Reservation, NM	3,613	1,112	1,019	93
Mescalero Reservation	3,613	1,112	1,019	93
Nambe Pueblo and Off-Reservation Trust Land, NM	1,611	730	673	57
Nambe Pueblo	1,611	730	673	57
Nambe Off-Reservation Trust Land	0	0	0	0
Navajo Nation Reservation and Off-Reservation Trust Land, AZ--NM--UT (part)	65,764	23,554	19,034	4,520
Navajo Nation Reservation	42,127	15,037	12,260	2,777
Navajo Nation Off-Reservation Trust Land	23,637	8,517	6,774	1,743
Ohkay Owingeh, NM	6,309	2,599	2,265	334
Ohkay Owingeh	6,309	2,599	2,265	334
Picuris Pueblo, NM	1,886	975	783	192
Picuris Pueblo	1,886	975	783	192
Pojoaque Pueblo of and Off-Reservation Trust Land, NM	3,316	1,546	1,422	124
Pojoaque Pueblo of	3,283	1,535	1,411	124
Pojoaque Off-Reservation Trust Land	33	11	11	0
Sandia Pueblo, NM	4,965	1,827	1,679	148
Sandia Pueblo	4,965	1,827	1,679	148
San Felipe Pueblo, NM	3,563	833	766	67
San Felipe Pueblo	3,563	833	766	67



Geographic area	Total population	Housing units		
		Total	Occupied	Vacant
San Ildefonso Pueblo and Off-Reservation Trust Land, NM	1,752	741	664	77
San Ildefonso Pueblo	1,752	741	664	77
San Ildefonso Off-Reservation Trust Land	0	0	0	0
Santa Ana Pueblo, NM	621	261	167	94
Santa Ana Pueblo	621	261	167	94
Santa Clara Pueblo, NM	11,021	4,906	4,409	497
Santa Clara Pueblo	11,021	4,906	4,409	497
Santo Domingo Pueblo, NM	3,255	666	620	46
Santo Domingo Pueblo	3,255	666	620	46
Taos Pueblo and Off-Reservation Trust Land, NM	4,384	2,513	1,977	536
Taos Pueblo	4,329	2,484	1,959	525
Taos Off-Reservation Trust Land	55	29	18	11
Tesuque Pueblo and Off-Reservation Trust Land, NM	841	344	311	33
Tesuque Pueblo	841	344	311	33
Tesuque Off-Reservation Trust Land	0	0	0	0
Ute Mountain Reservation and Off-Reservation Trust Land, CO--NM--UT (part)	0	0	0	0
Ute Mountain Reservation	0	0	0	0
Zia Pueblo and Off-Reservation Trust Land, NM	737	201	182	19
Zia Pueblo	737	201	182	19
Zia Off-Reservation Trust Land	0	0	0	0
Zuni Reservation and Off-Reservation Trust Land, NM--AZ (part)	7,891	2,189	1,972	217
Zuni Reservation	7,891	2,183	1,972	211
Zuni Off-Reservation Trust Land	0	6	0	6
San Felipe Pueblo/Santa Ana Pueblo joint-use area, NM	0	0	0	0
San Felipe Pueblo/Santa Ana Pueblo joint-use area	0	0	0	0
San Felipe Pueblo/Santo Domingo Pueblo joint-use area, NM	0	0	0	0
San Felipe Pueblo/Santo Domingo Pueblo joint-use area	0	0	0	0

Source: U.S. Census Bureau, 2010 Census.

2010 Census Redistricting Data (Public Law 94-171) Summary File, Tables P1 and H1