

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT COURT

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 APR 15 AM 11:48

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: Conditional motion to dismiss this case for lack of subject matter and personal jurisdiction, based upon the repeated assertions by the settling parties that this court lacks jurisdiction. If so, then this case is an exercise in futility and a waste of time and resources.

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**CONDITIONAL MOTION TO DISMISS FOR LACK OF JURISDICTION
AND FAILURE TO JOIN INDISPENSABLE PARTIES**

Pursuant to Rules 1-012(B)(1); 1-012(B)(3); and 1-019(B), the Community Ditch Defendant-counterclaimants conditionally move the court to dismiss this case based upon the repeated assertions by the settling parties (including the state engineer) that this court lacks jurisdiction over the United States and the Navajo Nation, and also lacks subject matter jurisdiction over the actions of the United States and the Navajo Nation which affect the water in the San Juan basin, the subject matter of this adjudication.

The assertions that this court lacks subject matter jurisdiction or personal jurisdiction over the United States or the Navajo Nation or the state engineer are completely incorrect.

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However the settling parties persist in making those assertions, and the court has not addressed them. For example, Mr. Guarino for the United States recently stated to the court that if the community ditches had any problems with the actions of the United States in affecting the San Juan River, "they can walk across the street to the federal courthouse." Likewise, Mr. Stanley Pollack has repeatedly asserted that this court has no jurisdiction to determine the water rights for NIIP-NAPI. It appears that the state engineer agrees that this court lacks personal and subject matter jurisdiction, because the state engineer has allowed the United States and the Navajo Nation to make these assertions on behalf of all the settling parties without objection, by the state engineer.

These repeated assertions are completely contrary to the McCarran Amendment; *United States v. District Court in and for the County of Eagle*, 401 U.S. 520 (1971); and *United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002). This court does have plenary continuing jurisdiction over the United States and the Navajo Nation in all matters relating to the San Juan River basin. The three settling parties are trying to establish a one-way street: if the court approves the settlement in toto without change, then the settling parties will claim that the court had jurisdiction, but if the court declines to approve the settlement and determines that the Navajo Nation has fewer water rights than claimed, then the settling parties will claim after the fact that the court lacked jurisdiction to enter an adverse judgment. This makes this litigation a lose-lose proposition for the Community Ditch Defendants and all other parties. If the court enters the requested judgment, then the defendants lose. If the court agrees with defendants, then the settling parties will claim that the court lacks jurisdiction.

Moreover, the United States asserts that the court has no jurisdiction over the operation of Navajo Dam. And the United States claims that this court has no jurisdiction to scrutinize the amount of water the United States demands for endangered species to be delivered to Bluff, Utah. The United States is demanding at least 700,000 acre-feet per year for fish, with the right to claim even bigger amounts without limitation, in its sole judgment and discretion.

If the court lacks jurisdiction over the parties or the subject matter, then this case must be dismissed under Rule 1-019(B) for failure to join indispensable parties – the United States and the Navajo Nation. If the United States and the Navajo Nation have not been effectively joined in this case and the court's orders are not binding on them, then this proceeding is an exercise of no consequence.

Therefore, the court must rule on whether it has plenary jurisdiction, or whether it lacks such jurisdiction over the parties and the subject matter of this lawsuit. If the court believes that it lacks jurisdiction over any of the parties or any aspect of the subject matter of this case, then the court must dismiss this case. First, lack of personal or subject matter jurisdiction is a fatal flaw. Second, if the court lacks jurisdiction, then this proceeding is a colossal waste of time and scarce judicial resources. And the resources of all the parties.

One purpose of this motion is to require each of the settling parties to state and brief their respective positions on the court's jurisdiction. In particular, the state engineer should be required to state his position as to the court's jurisdiction and his own jurisdiction. The state engineer is in the process of abdicating his responsibilities to the United States of America. The next purpose of this motion is to create a clear record so that the settling parties cannot engage in double talk years from now. Another purpose is to have a clear

record for appellate review. And another purpose is to have the court rule that it has jurisdiction, since its jurisdiction has been challenged. The issue of jurisdiction should be certified for interlocutory review while this case proceeds.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

Victor R. Marshall
Attorneys for San Juan Agricultural Water Users
Association; Hammond Conservancy District;
Bloomfield Irrigation District; various ditches; and
various members thereof.
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400 / 505-332-3793 FAX

CERTIFICATE OF SERVICE

I hereby certify that on April 15, 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 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.