

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 APR 16 PM 2:36

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

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

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants,

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

Defendant-Intervenors.

D-1116-CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

AB-07-1
Claims of the Navajo Nation

NAME OF PARTY: The United States of America

DESCRIPTIVE SUMMARY: United States' response to Community Ditch Defendants motion to reconsider order concerning evaporation from reservoirs throughout the Colorado River basin.

NUMBER OF PAGES: 7

DATE OF FILING: April 16, 2013

**UNITED STATES' RESPONSE TO THE COMMUNITY DITCH MOTION FOR
RECONSIDERATION ABOUT EVAPORATION FROM COLORADO RIVER
RESERVOIRS**

The United States responds in opposition to the Community Ditch Defendants' *Motion for Reconsideration about Evaporation from Colorado River Reservoirs* (April 1, 2013) ("Motion to Reconsider"). For the reasons stated below, the Court should deny the Community Ditch Defendants' Motion and, because the Court has twice previously addressed the matters that Community Ditch Defendants again raise in their motion, the Court should deny the motion without additional oral argument by the parties.¹

¹ To the extent that the Motion to Reconsider is directed to the Navajo Nation and the State of New Mexico, the

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I. INTRODUCTION

The following events are relevant to the Motion to Reconsider.

On February 15, 2013, the Community Ditch Defendants submitted its *Joint Discovery About Evaporative and Other Losses* to the Settling Parties. These written discovery requests expansively sought information concerning evaporative and seepage losses from every water storage reservoir throughout the entire Colorado River basin.

On February 19, 2013, and after being informed by the Settling Parties that the discovery request was untimely and that the sought information was irrelevant, the Community Ditch Defendants filed a motion to compel arguing that such information was discoverable "because the laws governing the San Juan River provide for the allocation of evaporative and other losses." *Motion to Compel Responses to Discovery about Evaporative and Other Losses* at 2 (Motion to Compel).

Immediately after the Motion to Compel was filed and before the Settling Parties had an opportunity to respond in writing, the Court, *sua sponte*, informed the parties that it would convene a hearing on the matters raised by the Community Ditch Defendants. On February 21, 2013, the Court held a hearing and heard oral argument on the matters raised.

On February 25, 2013, the Court issued its *Order Granting in Part Motion to Compel* (February 25th Order). The Court ruled, first, that the Community Ditch Defendants' February 15th discovery requests were untimely and, second, that the Court had previously (July 9, 2012) determined that for discovery purposes matters outside the San Juan River Basin of New Mexico were overly broad and irrelevant. February 25th Order at 1 and 2. Nonetheless, and consistent with the Court's previous rulings, the Court determined that seepage and evaporation from the

Navajo Nation and the State of New Mexico join with the United States in this response.

Navajo Reservoir alone “may” be relevant to the Court’s previously articulated legal standard. *Id.* In accord with the February 25th Order, the Settling Parties provided the Community Ditch Defendants information concerning seepage and evaporation losses from the Navajo Reservoir by March 2, 2013.

On March 1, 2013, the United States responded to the February 15th discovery requests as directed by the Court responding to the written discovery and providing the Community Ditch Defendants with documentary information regarding evaporative and seepage losses from the Navajo Reservoir. Likewise, the Navajo Nation and the State of New Mexico responded to the discovery request on March 4th with the information in their respective possession.

On March 1, 2013, the discovery period for all parties associated with this proceeding and specified by the Court ended. *Second Amended Order Setting Schedule Governing Discovery on the Non-Settling Parties and Remaining Proceedings* (March 15, 2013).

On March 8, 2013, the Court issued a limited extension of discovery to March 31, 2013. This limited extension of discovery was granted to permit non-settling parties the ability to depose specific Settling Party personnel who had been identified by ConocoPhillips and the San Juan Water Commission for deposition and to permit non-settling parties to continue to examine documents of the three regional document repositories maintained by the United States. *See Third Amended Order Granting Motions to Extend Deadlines in Part and Setting Schedule Governing Discovery and Remaining Proceedings* (March 15, 2013).

II. ARGUMENT

The Community Ditch Defendants offer no basis for its Motion to Reconsider and it should be denied.

The Community Ditch Defendants argue that the Court's February 25th Order should be reconsidered because "[t]he court's ruling was based on statements by counsel for the [Settling Parties] that evaporation from these reservoirs was irrelevant because it does not affect the water supply from the San Juan River in New Mexico." Motion to Reconsider at 1. The argument centers on the premise that the Settling Parties have at some unstated time in the past made misrepresentations to the Court and that the Court has relied on such misrepresentations. *See id.* at 2. ("The representations made by counsel for the settling parties were wrong."). The Community Ditch Defendants' assertions and arguments are without merit.

As an initial matter, the Community Ditch Defendants identify no instance when any Settling Party made the attributed statement quoted above and no Settling Party has made such a statement. Instead, it has been the Settling Parties' straightforward, consistent position that "water supply" has little or no relevance to the evaluation of the Settlement Motion. But regardless of what might have been said previously at anytime by the Settling Parties, the February 25th Order specifically describes the grounds for the Court's decision; contrary to the Community Ditch Defendants representations, these grounds do not include representations of the Settling Parties. Specifically, the Court recognized: 1) that the Community Ditch Defendant's discovery request was untimely; and 2) that, consistent with its July 9, 2013 Order, matters outside the San Juan Basin of New Mexico were not relevant to these proceedings. February 25th Order at 1 and 2.

Attached to the Motion to Reconsider are pages from a publically available 2012 Bureau of Reclamation report (*Upper Colorado River Basin Consumptive Uses and Losses Report 2006-2010 – provisional*), and from the Settlement Agreement (reflecting paragraphs 9.3.1 through 9.3.4). This information appears to be attached to simply argue again that evaporation from

reservoirs in other states is somehow relevant to these proceedings. These documents show no relevance and certainly do not constitute "new" information that justifies the Court's reconsideration of its February 25th Order.

Ultimately, the Community Ditch Defendants' argument concerning evaporation losses simply falls under its own weight as it did previously. On the one hand, under the Settlement Agreement, the Settling Parties agree that the Navajo Nation's ability to use water stored in the Navajo Reservoir is limited by New Mexico's interstate compacts (*i.e.*, the Colorado River Compact) including evaporation losses, whatever they might be. See Settlement Agreement at ¶ 9.3. On the other hand, were Navajo Nation water rights to be resolved through litigation and not settlement, evaporation from reservoirs would have no bearing whatsoever, as quantification of a federally reserved water right does not turn on reservoir evaporation.²

Just as it was on February 25th, under no circumstances is the evaporative loss information sought relevant to any component of the legal standard articulated by the Court to evaluate the Settlement Agreement. Therefore, in the end the additional information that the Community Ditch Defendants included in its Motion to Reconsider does nothing to make information concerning evaporative losses in reservoirs any more relevant than before. Except associated with the Navajo Reservoir as previously identified by the Court, such information remains unquestionably irrelevant to these proceedings.

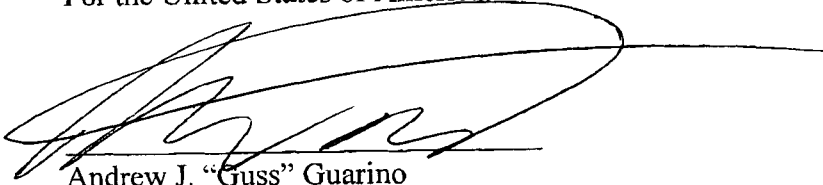
III. CONCLUSION

For the reasons outlined above, this Court should deny the Motion to Reconsider.

Respectfully submitted this 16th day of April 2013.

² In fact, evaporation losses from reservoirs outside the San Juan River Basin of New Mexico play absolutely no role in the quantification of any New Mexico water right within the basin, whether that right is based on federal or state law.

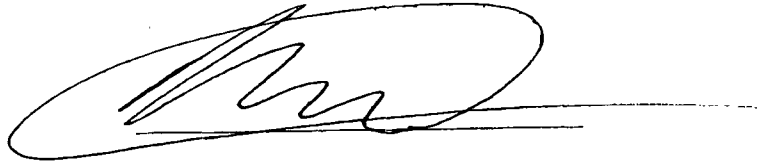
For the United States of America:



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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of April 2013, an electronic version of this **JOINT RESPONSE TO THE COMMUNITY DITCH MOTION FOR RECONSIDERATION ABOUT EVAPORATION FROM COLORADO RIVER RESERVOIRS** was served by attaching an electronic copy to an email sent to the following address: wnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov. In addition, an electronic copy of this document was sent by e-mail to the list of persons identified on the *Notice of Amended Service List* (filed Feb. 25, 2013).

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end, positioned above a horizontal line.