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

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER, Plaintiffs, v. THE UNITED STATES OF AMERICA *et al.*, Defendants.	CASE NO. CV-75-184 HON. JAMES J. WECHSLER Presiding Judge SAN JUAN RIVER BASIN ADJUDICATION Claims of Navajo Nation Case No. AB-07-1

DESCRIPTIVE SUMMARY: Albuquerque Bernalillo County Water Utility Authority and City of Espanola's Response in Opposition to Community Ditch Defendants' Motion and Memo for Partial Summary Judgment Concerning Applications for Permits from the State Engineer and Gary Horner's Motion for Summary Judgment: That is, the "Settlement Motion of the United States, Navajo Nation and the State of New Mexico for Entry of Partial Final Decrees" Should be Denied and Memorandum in Support.

PARTIES: Albuquerque Bernalillo County Water Utility Authority and the City of Espanola

NUMBER OF PAGES: 8

DATE OF FILING: May 10, 2013

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY AND CITY OF ESPANOLA'S RESPONSE IN OPPOSITION TO COMMUNITY DITCH DEFENDANTS' MOTION AND MEMO FOR PARTIAL SUMMARY JUDGMENT AND GARY HORNER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT

INTRODUCTION

The Albuquerque Bernalillo County Water Utility Authority ("ABCWUA") and the City of Espanola ("City") respond in opposition to the Community Ditch Defendants' *Motion and*

JUDGE

Memo for Partial Summary Judgment Concerning Applications for Permits from the State Engineer ("CDD Motion") and Gary Horner's *Motion for Summary Judgment : That is the "Settlement Motion of the United States, Navajo Nation and the State of New Mexico for Entry of Partial Final Decrees" Should be Denied* and *Memorandum in Support* ("Horner Motion" and "Horner Memo") (hereinafter, when referred to together, the Community Ditch Defendants and Gary Horner will be referred to jointly as the "Movants" and their summary judgment motions will be referred to jointly as the "Motions"). The Movants challenge the validity of Permit No. 2847 which applies to imported San Juan-Chama water stored in Heron Reservoir. This is water owned by ABCWUA and the City which have a direct interest in the disposition of this motion.

On April 15, 2013, the Community Ditch Defendants filed a motion for partial summary judgment "that the applicants do not hold valid permits or permit applications for any of the water claimed in permit application nos. 2847, 2829, 2873, 2883, 2917, 3215, or application 2847, 2849, 2873, 2917 Combined." *See* CDD Motion at 2. The basis for the CDD Motion is that "[a] notice for each of these applications was never published as required by NMSA 1978, § 72-5-4." *Id.* at 1. Gary Horner makes similar claims that the "Notices of Intention with respect to file No.s 2847 . . . . were not submitted in accordance with State Law" and "[n]o permits were ever issued . . . . in accordance with New Mexico law." *See* Horner Memo at 19-20. Mr. Horner also restates these claims in other forms throughout his pleading but his conclusions are the same. *See* Horner Memo at 30, 31, 51, 57 and 58.

The Motions should be denied for two reasons. First, the Movants' "facts" are immaterial and accordingly summary judgment cannot be granted in their favor. Second, the storage right at issue was acquired pursuant to NMSA 1978, § 72-5-33 (1995) which creates a special proceeding for the United States separate and apart from an application proceeding.

Despite the Movants claims to the contrary, NMSA 1978, §§ 72-5-1, 3, 4, 5, 6, 7, and 21 are inapplicable and published notice and a permit are not required under Section 72-5-33.

BACKGROUND

The Colorado River Compact, 45 Stat. 1057, 1064 (1928), provides "for the equitable division and apportionment of the use of the waters of the Colorado River System . . . ." Article II of the Compact divides the Colorado River into two basins. The Upper Basin generally consists of Colorado, New Mexico, Utah, and Wyoming. The Lower Basin generally consists of Arizona, California, and Nevada. The separation of the Upper and Lower Basins is based upon a division of water on the mainstem at Lee Ferry, Arizona. The apportionment of Colorado River water in the Compact is set forth in Articles III and VIII which define the division of water and the geographical limitations on the use of the water. Article III apportions 7,500,000 acre-feet of water per year for the *exclusive beneficial consumptive use* of each of the two basins.

The waters of the Upper Basin states, including the waters of the San Juan River system, were apportioned among the Upper Basin states by the Upper Colorado River Basin Compact, 63 Stat. 31 (1949). In Article XIV of the Upper Colorado River Basin Compact, the State of Colorado assented to the delivery to the State of New Mexico from the San Juan River and its tributaries in Colorado, of a quantity of water which would be sufficient, together with water originating in the San Juan River basin in New Mexico, to enable New Mexico to make full consumptive use of the water allocated to it by the Compact. The United States was a participant and signatory to this Compact and its apportionment, and Congress consented to the Compact in the Act of April 6, 1949 (63 Stat. 31).

Art. XIV states:

> 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: [not applicable conditions].

On April 11, 1956, Congress passed the Colorado River Storage Project Act. P.L. 84-485, 43 U.S.C. 620, *et seq.* The Act authorized the Secretary of the Interior to construct the first three units of the Colorado River Storage Project "[i]n order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, [and] making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact . . . ." 43 U.S.C. 620. Congress also directed the Secretary of the Interior to give priority to the completion of the planning reports of certain additional participating projects, including the San Juan-Chama Project. Congress mandated that the storage for the project be limited "to a single offstream dam and reservoir" and that it "be operated at all times by the Bureau of Reclamation . . . in strict compliance with the Rio Grande Compact as administered by the Rio Grande Compact Commission." *Id.*

On June 17, 1955, the New Mexico State Engineer, on behalf of the Bureau of Reclamation filed Notice of its Intention to Appropriate waters of the San Juan River. On March 6, 1958, the United States filed its Application for Permit to Appropriate the Public Surface Waters of the State of New Mexico, No. 2847, 2849, 2873, 2917 Comb.

The ABCWUA and the City have permanent contracts to the water that is stored under Permit No. 2847.

ARGUMENT

POINT I

SUMMARY JUDGMENT FOR THE MOVANTS IS NOT PROPER

Under Rule 1-056 (D), NMRA, ABCWUA and the City contend that fact nos. 1-5 identified by the Community Ditch Defendants and fact nos. 108, 109, 110, 111, 114, 154, 239, 266, 267, and 268 by Gary Horner, with respect to Permit No. 2847, are immaterial. The Movants' "facts" are immaterial because published notice of the United States' intent to utilize unappropriated water is not required and the United States filed plans for its project to utilize such water within three (3) years in accordance with Section 72-5-33. Accordingly, summary judgment cannot be entered. Summary judgment is only "appropriate where there are no genuine issues of *material* fact and the movant is entitled to judgment as a matter of law" and "[a]ll reasonable inferences are construed in favor of the non-moving party." *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶16, 141 N.M. 21, 150 P.3d 971 (emphasis added). New Mexico law requires that the alleged undisputed facts be material to obtain summary judgment. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶11, 148 N.M. 713, 242 P.3d 280. In order to determine which facts are material, the court must "look to the substantive law governing the dispute." *See Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, ¶17, 139 N.M. 750, 137 P.3d 1204.

The Movants' Motions for Summary Judgment do not contain a single fact upon which summary judgment can be granted. First, the Community Ditch Defendants cite to a series of inapplicable statutes, NMSA 1978, §§ 72-5-1, 3, 4, 5, 6, 7, 21, and 31, as the basis for their Motion for Summary Judgment. As further set forth below, the United States' Permit No. 2847 is governed solely by Section 72-5-33, *i.e.*, the "substantive law" governing this issue. *See* 2006-NMCA-077, ¶17. Second, Mr. Horner's claims that the "Notices of Intention with respect to File

No.s 2847 (San Juan-Chama Project)" were not submitted in accordance with New Mexico law "because the Notices of Intention were submitted by the State Engineer himself" and that "[n]o permits were ever issued" for said Notice are not only immaterial but incorrect. *See* Horner Memo at ¶108. Section 72-5-33 requires that United States notify the State Engineer of its intent to "utilize certain specified waters" and that the United States file plans "for the proposed works" for such specified waters within three years of the United States notice to the State Engineer. Such notice by the United States was made by the filing of June 17, 1955, and the required plans "for the proposed works" were filed by the United States with the State Engineer on March 6, 1958. The facts raised by the Movants are not only immaterial but unsupported by Section 72-5-33, the "substantive law" governing this issue, and cannot be the basis for summary judgment.

POINT II

PUBLISHED NOTICE IS NOT REQUIRED BY NMSA 1978, § 72-5-33

Section 72-5-33 applies to the reservation of surface water for a federal project under state law. That statute requires that the United States "notify the state engineer that the United States intends to utilize certain specified waters, the waters so described and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice shall not be subject to a further appropriation under the laws of the state for a period of three years from the date of the notice, within which time the proper officers of the United States shall file plans for the proposed works in the office of the state engineer for his information . . . ." *Ibid.*

Section 72-5-33 is significant in that it requires the United States to "notify" the State Engineer "that the United States intends to utilize certain specified waters, the waters so described and unappropriated, and not covered by applications or affidavits duly filed or permits. . . ." This section of law is unique in that it grants deference to the United States to withdraw

certain waters from appropriation by others during a three-year period of time in which the United States is preparing plans and specifications for filing with the State Engineer. The central limitation is that it applies only to waters that are "unappropriated" at the time that the Notice is filed. This is because waters that are appropriated, and being perfected by application to beneficial use by others, are not available for appropriation by the United States.

On March 6, 1958, the Regional Director of the Department of the Interior filed plans with the New Mexico State Engineer as required by Section 72-5-33 [1]. In the attachment entitled "Explanatory Statement," it is stated:

> This application is made to secure *a direct diversion and storage right* for the San Juan-Chama Project, a right to divert, store and release water in the proposed Navajo Reservoir unit, for use of Navajo Indian Irrigation Project, and San Juan-Chama Project, (by exchange), and for miscellaneous purposes, including the generation of power, all as a part of and as contemplated by the Colorado River Storage Project, authorized by Congress April 11, 1956 (70 Stat. 105). (Emphasis added).

See State Engineer File No. 2847, 2849, 2873, 2917 Comb.

The United States, by the terms of the document, sought a right to divert, store, and release the San Juan-Chama water. This process constitutes an exception to the statutory provisions for noticing a new appropriation of water as contained in Section 72-5-4 and permitting under Section 72-5-3. Accordingly, the "facts" cited by the Movants in their respective motions are not material. Neither published notice nor a permit are required. The filing of the Notice itself constitutes notice to other appropriators and the filing of the plans for the proposed works satisfies Section 72-5-33 in its entirety.

[1] In 1958, this statute was codified as NMSA 1953, § 75-5-33 (1907).

CONCLUSION

For the foregoing reasons the Motions should be denied.

Respectfully submitted,

STEIN & BROCKMANN, P.A.

By: _____

Jay F. Stein
Seth R. Fullerton
P.O. Box 2067
Santa Fe, NM 87504-2067
505-983-3880

Attorneys for Albuquerque Bernalillo County Water Utility Authority and the City of Espanola

CERTIFICATE OF SERVICE

I certify that on this 10th day of May, 2013, at approximately 3:00 p.m., an electronic copy of the Albuquerque Bernalillo County Water Utility Authority and City of Espanola's Response in Opposition to Community Ditch Defendants' Motion and Memo for Partial Summary Judgment and Gary Horner's Motion for Summary Judgment and Memorandum in Support was served by attaching an electronic copy to an email sent to: wrnavajointerse@nmcourts.gov. In addition, an electronic copy of this document was sent by e-mail to the list of parties identified in the Court's order of November 16, 2012.

Seth R. Fullerton, Esq.