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: On their face, the purported dispositive motions filed by the US, NN, and OSE do not meet the requirements of Rule 56 or the Rules of Evidence, so they should be summarily denied. The defendants dispute the major facts and points of law claimed by the other side. The US, NN, and OSE have the burden to overcome every one of the defenses raised by the Community Ditches.
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COMMUNITY DITCH RESPONSE TO PURPORTED DISPOSITIVE MOTIONS FILED BY THE NAVAJO NATION, THE UNITED STATES, AND THE OFFICE OF THE STATE ENGINEER

On April 15, 2013, the US, NN, and OSE filed motions which purport to be dispositive motions which entitle them summarily to judgment. These purported dispositive motions must be summarily denied because they are defective on their face. They are defective procedurally, factually, and legally. They do not begin to meet the requirements for dispositive motions under the Rules of Civil Procedure (Rule 1-056) and the Rules of Evidence. These nonconforming motions are not cognizable under the rules, so the Court and the defendants should not waste time and effort on them.

The April 15th motions are just a rehash of the motions to approve settlement which the US, NN, and OSC filed earlier in this case. These rehashed motions do not begin to meet the requirements for summary judgment motions under Rule 1-056, and the applicable Rules of Evidence, and the governing law.

1. **The settling parties simply ignore all of the factual and legal defenses raised by the Community Ditch Defendants, even though the settling parties have the burden to overcome every one of those defenses.** Under the Rules of Civil Procedure and this court's orders on the burden of proof and persuasion, the settling parties have two tasks. First, they must demonstrate that there is no disputed issue of fact or law regarding all of the claims which they are making. Second, they must also demonstrate that there is no disputed issue of fact or law concerning all of the defenses raised by the Community Ditch Defendants in their objections. The settling parties fail in the first task, and they have not even attempted the second task. They simply ignore the objections filed by the Community Ditch Defendants, as if they did not exist. Since the settling parties have not even tried to negate those defenses, their motions must be summarily denied.

A party moving for summary judgment must demonstrate that no genuine issue of material fact exists as to affirmative defenses stated in the opposing party's pleadings. *Fidelity National Bank v. Tommy L. Goff, Inc.*, 92 N.M. 106, 108-09, 583 P.2d 470, 472-73 (1978).

> A claimant is entitled to summary judgment only when no genuine issue of material fact exists, the papers on the motion demonstrate the right to relief, and every one of the defenses asserted legally are insufficient. Since a single valid defense may defeat recovery, however, claimant's motion for summary judgment should be denied when any defense presents significant fact issues that should be tried.

10B Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 2734, at 256 (1998).

2. There are disputes about all of the major facts alleged by the settling parties. All of the major issues of fact in this case are disputed, such as beneficial use and PIA; the availability of enough water in the Colorado River system to accommodate the Navajo settlement within New Mexico's share; the stream flow predictions made by Whipple and others in 2007, which are contradicted by the government's own later study in December 2012; good faith negotiations; the amount of acreage actually irrigated by the Navajo projects; the amount of water used; the size of the Navajo population; the projected future needs of the population on the reservation; the availability of other water sources within the Navajo reservation, which make it unnecessary to take water from the San Juan River; the likelihood that NIIP will never be completed; the likelihood that the Navajo Gallup pipeline will never be completed.

For example, the settling parties allege but cannot prove that there is enough water available to New Mexico to accommodate the Navajo settlement. The settling parties' conclusion is disputed by the affidavits of Jim Rogers (and others), and by the government's own study released in December 2012.

For more details on the factual disputes, see the documents which are filed simultaneously and incorporated herewith: Affidavit of Jim Rogers (May 10, 2013) and Addition Exhibits Filed by Community Ditch Defendants (May 10, 2013).

The Community Ditch Defendants also submit and incorporate the exhibits which they have previously filed in support of their motions in support of partial summary judgment.

3. The motions do not include a numbered list of the facts which the settling parties claim to be undisputed, as required by Rule 1-56(D)(2). This is required by Rule 1-056: "The facts shall be numbered and shall refer with particularity to those portions of the record upon which the moving party relies."

4. The motions are not supported by evidence which is admissible under the Rules of Evidence. In their motions, the settling parties simply recycle the mass of material which they assembled and manufactured for this case. Almost all of this pile of stuff is inadmissible. The pile of unverfied stuff amounts to millions of pages, but the height of the pile does not make it admissible. Rule 1-056 explicitly says that summary judgment motions must be supported by information which is admissible under the Rules of Evidence. Rule 1-056(E):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated therein.

Almost all of the material submitted by the settling parties is inadmissible under one or more Rules of Evidence.

A. The reports and surveys by the settling parties are hearsay under Rule 11-801(C). Hearsay means "a statement that (1) the declarant does not make while testifying at the current trial or hearing, and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."

B. A party to litigation cannot overcome the hearsay objection by self quotation. The settling parties submit a bunch of "reports" which they prepared especially for this litigation. And then they quote themselves in their affidavits and pleadings. Or they

incorporate their own reports and statements by reference. But the "reports" are still out-of-court statements which are not admissible under the hearsay rules. A party cannot make an out-of-court statement admissible by writing it down and then quoting it in an affidavit.

C. **Under Rule 11-801(D)(2), the Community Ditch Defendants and other defendants may use the settling parties own statements against them, but the settling parties cannot use their own statements as evidence.** Under Rule 11-801(D)(2), a party can use "an opposing party's statement" against the opposing party. So the Community Ditch Defendants can offer statements made by the settling parties against them, and those statements are admissible against them. One example is the December 2012 BOR Study. The 2012 study disproves Mr. Whipple's made-to-order conclusions in 2007.

Conversely, the US and the NN and the OSE can use statements made by the Community Ditch Defendants against them. But the US and NN and OSE cannot use their own statements to bootstrap their case.

D. **The US and NN and OSE prepared all their materials as part of this litigation, so those materials are not admissible as ordinary business records.**

E. **The settling parties' witnesses are not competent to testify about many of the topics included in their affidavits.** There are several rules of evidence which exclude most of the information and affidavits filed by the settling parties. Lack of personal knowledge under Rule 11-602; opinion testimony by lay witnesses; testimony by unqualified "experts" under Rule 11-702; failure to disclose the bases of opinion testimony under Rules 11-702 and 11-705; inadequate authentication or identification under Rule 11-901.

5. The settling parties "evidence" does not meet *Daubert* standards. The New Mexico Supreme Court, in *State v. Anderson*, ruled that "In short, 'under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" 118 N.M. 284, 291, 881 P.2d 29, 36 (1994) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)). *Daubert's* reliability standard is met "[w]here the science underlying an expert's testimony may properly be taken for granted because the reliability of the science in question has long been accepted." *State v. Fuentes*, 2010-NMCA-027, ¶ 28, 147 N.M. 761, 228 P.3d 1181. The 2007 hydrologic determination does not meet *Daubert's* reliability standards because the reliability of the "science" was not widely accepted for a long period. And the 2007 exercise was not scientific at all, because the people who prepared the determination knew that they needed to reach the conclusion that there was enough water for the Navajo agreement. The data and methods in the 2007 report are refuted by the more reliable work which the BOR released in December 2012.

6. The credibility of the settling parties' witnesses is disputed. John Leeper, John Whipple and the other witnesses were hired and employed to reach preordained conclusions, not scientific conclusions. They were paid to inflate the water claims of the Navajo Nation, and to find paper water regardless of the scientific evidence. When there are genuine issues as to the credibility or competence of the witness, his affidavit cannot be accepted as true, because it is not subject to cross examination.

> It should be remembered that affidavits are ex parte documents. The affiants are not subject to cross-examination and their demeanor cannot be evaluated. Consequently, affidavits offered on a summary-judgment motion are likely to be scrutinized carefully by the court to evaluate their probative

> value and to determine whether they meet the standards prescribed in Rule 56(e) as to form and content.

10A Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane. *Federal Practice and Procedure*, § 2722, at 379 (1998).

> Another important principle remains to be considered regarding the use of affidavits. Since the function of the judge when resolving a summary-judgment motion is to determine if a genuine factual dispute exists, affidavits may not be employed to resolve disputed factual issues. They may be used only determine whether any issues actually are in dispute.

10B Charles Alan Wright *et al. supra* § 2738, at 371.

7. **The settling parties' motions are defective as a matter of law, because they contradict federal and state statutes and controlling case law.** These points of law are discussed in Community Ditch Defendants' objections filed October 19, 2012. These are incorporated by reference as part of this response. As explained in the objections and the briefs, the proposed settlement is contrary to the following laws and cases, among others:

N.M. Const. art. XVI, §§ 1, 2, & 3, approved and ratified by Congress.
Enabling Act, 36 Stat. 557.
Resolution of Admission, 37 Stat. 39
Proclamation Admitting New Mexico as a State, 37 Stat. 1723.
McCarran Amendment, 43 U.S.C. § 666.
Colorado River Compact, Articles III(f) & (g), IV(b), VI, VII, and VIII.
Upper Colorado River Basin Compact, Articles III(b)(2), VII, XV(a), XVI, and XIX(a).
NMSA 1978, §§ 72-4-13, -15, & -17.
NMSA 1978, §§ 72-5-1, -2, -3, -4, -5, -6, -7, -21, & -31.
NMSA 1978, § 72-8-4 & -5.
NMSA 1978, § 72-14-3.1.
NMSA 1978, § 72-5-17.
Reclamation Act of 1902, 32 Stat. 388, 390 (Jun. 17, 1902).
Colorado River Storage Project Act, 70 Stat. 105 (Apr. 11, 1956).
Navajo Indian Irrigation Project Act, 76 Stat. 96 (Jun. 13, 1962).
Winters v. United States, 207 U.S. 564 (1908).
United States v. New Mexico, 438 U.S. 696 (1978).

Arizona v. California,373 U.S. 546 (1963).
United States v. District Court for Eagle County, 401 U.S. 520 (1971).
California v. United States, 438 U.S. 645 (1978).
Mimbres Valley Irrigation Co. v. Salopek, 90 N.M. 410, 564 P.2d 615 (1977).
Cappaert v. United States, 426 U.S. 128, 139, 141 (1976).
New Mexico ex rel. Martinez v. City of Law Vegas, 135 N.M. 375, 89 P.3d 47 (2004).
State ex rel. Clark v. Johnson, 120 N.M. 562, 904 P.2d 11 (1995).
State ex rel. Reynolds v. Sharp, 66 N.M. 192, 196, 344 P.2d 943, 945 (1959).
State ex rel. Reynolds v. Luna Irrigation Co., 80 N.M. 515, 458 P.2d 590 (1969).
State ex rel. Martinez v. Lewis, 116 N.M. 194, 861 P.2d. 235 (Ct. App. 1993).
Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

8. **The settling parties' summary judgment motions must be denied, because the Community Ditch Defendants are entitled to partial summary judgment on certain key issues.** *See* the motions for partial summary judgment filed by the community ditch defendants, April 15, 2013, with supporting exhibits. These filings are incorporated by reference as an integral part of this response.

9. **The settling parties acknowledge that the proposed Navajo settlement is defective.** The settling parties were well aware of the problems with the "settlement" they are asking the court to approve. After the draft settlement was released to the public, an internal federal memo stated:

> At the present time very few people if any, including the federal team believe that the NN San Juan water settlement will be approved in its present form, if at all.

Additional Exhibits, Exhibit 4.

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 May 10, 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: wrnavajointerse@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.