

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 MAY 10 PM 3:24

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA et al.,

Defendants.

D-1116-CV-75-184

Honorable James J. Wechsler
Presiding Judge

San Juan River Adjudication

Cause No. AB-07-1

Claims of the Navajo Nation

DESCRIPTIVE SUMMARY: Defendants B Square Ranch, LLC et al.'s Consolidated Response to Settling Parties' Memorandums in Support of Settlement Motion

NAME OF PARTY: Defendants B Square Ranch, LLC et al.

NUMBER OF PAGES: 12 (Response) plus 3 (Exhibit)

DATE OF FILING: May 10, 2013 by electronic service and May 10, 2013 with Court Clerk.

DEFENDANTS B SQUARE RANCH, LLC ET AL.'s
CONSOLIDATED RESPONSE TO MEMORANDUM OF
THE NAVAJO NATION AND THE UNITED STATES IN SUPPORT
OF THE SETTLEMENT MOTION AND TO STATE OF NEW
MEXICO'S MEMORANDUM IN SUPPORT OF SETTLEMENT
MOTION FOR ENTRY OF PARTIAL DECREES

Pursuant to the Third Amended Order Granting Motions to Extend Deadlines and Setting Schedule Governing Discovery and Remaining Proceedings filed March 15, 2013 ("Third Amended Order"), the Navajo Nation and the United States filed a Memorandum in Support of the Settlement Motion and the State of New Mexico filed a separate Memorandum in Support of Settlement Motion for Entry of Partial Decrees

JUDGE

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(collectively "Settling Parties' Memorandums") in the above-styled action on April 15, 2013.

Defendants B Square Ranch, LLC et al. are hereby filing a Consolidated Response to Settling Parties' Memorandums in Support of Settlement Motion instead of separate responses to the Settling Parties' Memorandums.

Relinquishment and Waiver of Winters Rights by Navajo Nation

Defendants B Square Ranch, LLC et al. filed a Motion on April 15, 2013 in the above-styled action providing evidence that Settling Party Navajo Nation relinquished and waived its rights under Henry Winters et al. vs. United States, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908). when the Navajo Indian Irrigation Project ("NIIP") was approved.

The Settling Parties' Memorandums show the Settling Parties negotiated and approved the Settlement Agreement on the basis and assumption that the Navajo Nation retained and currently is entitled to water rights under Winters.

The following statements by Settling Party New Mexico in its Memorandum are the only reference in the Settling Parties' Memorandums concerning the waiver and relinquishment of the Navajo Nation's water rights under Winters:

"Some have argued that by enactment of 1962 legislation authorizing the NIIP, the Navajo Nation waived some or all of its *Winters* claims. However, the Navajo Nation did not sign any prior settlement agreement waiving claims and the Act itself does not recite any waiver."

Page 31, Settling Party New Mexico's Memorandum

Defendants B Square Ranch, LLC et al.'s Motion that was filed on April 15, 2013 provided evidence and statements or representations by the Navajo Nation, through its

authorized representatives, wherein the Navajo Nation expressly relinquished and waived its water rights under Winters in exchange for NIIP to be constructed.

Assuming, but not admitting, that: (i) the Navajo Nation's waiver and relinquishment of its Winters rights are limited to only NIIP and not applicable to any other water rights of the Navajo Nation, and (ii) Tables 3 and 4 of the Comparison of Diversions and Depletions by Type (AFY) on Pages 40 and 41 of Settling Party New Mexico's Memorandum are accurate, then Tables 3 and 4 should be changed for depletions and diversions associated with NIIP as follows:

Table 3. Comparison off Diversions by Type (AFY)

	US Claims	NRCE Report	Current Right	Proposed Decree
NIIP	379,874	371,717	0	353,000
Total Diversions	937,608	772,142	189,154	480,729

Table 4. Comparison off Depletions by Type (AFY)

	US Claims	NRCE Report	Current Right	Proposed Decree
NIIP	283,781	269,937	0	270,000
Total Depletions	595,257	534,859	58,575	334,542

In the Settling Parties' Memorandums, the Navajo Nation claims it has a contract to take water from storage at the Navajo Reservoir for NIIP, and then the Navajo Nation appears to argue that this contract allows it to assert ownership or is entitled to an adjudication of water rights associated with NIIP.

The above revised Tables 3 and 4 show that the "Proposed Decree" approving the Settlement Agreement will allow the Navajo Nation to receive total diversions of 480,729 AFY and total depletions of 334,542 AFY. By inserting the above described assumptions in Tables 3 and 4, the Navajo Nation only has "Current Rights" to total diversions of 189,584 AFY and total depletions of 58,575 AFY.

Thus, the approval of the Settlement Agreement will award substantial **more** (not less) water rights than what the Navajo Nation could secure at a trial.

The Settlement Agreement is not consistent with applicable law. The Settling Parties have relied upon Winters in an attempt to vest ownership and an adjudication of water rights in the Navajo Nation. However, due to the voluntary and knowing waiver and relinquishment by the Navajo Nation of its Winters rights, the Settlement Agreement is contrary to applicable law.

Defendants B Square Ranch, LLC et al. agree with the Settling Parties Navajo Nation and the United States that (i) Courts have long employed the fair, adequate and reasonable standard in the review and approval of voluntary, negotiated agreements compromising claims in litigation, and (ii) Courts have applied different factors in construing the fairness, adequacy and reasonableness of a settlement to fit the circumstances of the case. Pages 3 and 4 of Settling Parties Navajo Nation's and United States' Memorandum.

The proposed Settlement Agreement is not fair and reasonable because it does not recognize the fact that the Navajo Nation waived and relinquished its Winters rights in the early 1960's. Instead, the Settling Parties are now attempting to secure an adjudication that recognizes the ownership of water rights to which the Navajo Nation is

not entitled due to its knowing and voluntarily relinquishment and waiver of its Winters rights.

The proposed Settlement Agreement is also not consistent with public policy. It is the public policy of New Mexico to recognize and enforce fair and reasonable settlement agreements. This policy is violated when executive departments of the State of New Mexico, the Navajo Nation and the United States negotiate and approve a Settlement Agreement (i) that awards more water rights to the Navajo Nation than it is entitled to and which it could secure at trial, and then (ii) request the judiciary to approve an unfair and unreasonable Settlement Agreement.

The inconsistency of the Settlement Agreement with public policy is further evidenced by the failure of the Settling Parties while negotiating and approving the Settlement Agreement:

- to conduct a significant review of the negotiations, legislative history, documents, agreements and laws for the Upper Colorado River Project and the Navajo Indian Irrigation Project.

- to take into consideration the Navajo Nation's previous voluntarily and knowing waiver and relinquishment of the Navajo Nation's reserved water rights under Winters in exchange for the Navajo Indian Irrigation Project.

- to conduct an adequate due diligence in reviewing the status and history of the water rights of the Navajo Nation.

Denial of Due Process

Reference is made to the following statements made in Settling Parties Navajo Nation's and United States' Memorandum in support of the Settlement Agreement:

- “Objectors to the Settlement Motion have offered no expert evidence to refute the DCMI claims.”

Page 36, Settling Parties Navajo Nation's and United States' Memorandum

-“Objectors to the Settlement Motion have offered no expert evidence to refute the U. S. claims for heavy industrial uses.”

Page 38, Settling Parties Navajo Nation’s and United States’ Memorandum

-“Objectors to the Settlement Motion have offered no expert evidence to refute the U. S. claims for livestock uses.”

Page 39, Settling Parties Navajo Nation’s and United States’ Memorandum

-“Objectors to the Settlement Motion have offered no expert evidence to refute the U. S. claims for past, present and future uses.”

Page 44, Settling Parties Navajo Nation’s and United States’ Memorandum

-“Objectors to the Settlement Motion have offered no expert evidence to refute the U. S. claims for past and existing Navajo impoundments.”

Page 44, Settling Parties Navajo Nation’s and United States’ Memorandum

-“Despite the relatively low burden placed on the Objectors to rebut the evidence of the Settling Parties, the Objectors have not produced a single expert on any issue before the Court, and have only deposed one Rule 1-030 (B)(6) witness identified by the Navajo Nation concerning the operations of the Navajo Agricultural Products Industries at NIIP”.

Page 70, Settling Parties Navajo Nation’s and United States’ Memorandum

Defendants B Square Ranch, LLC et al. incorporate and adopt by reference the following statements and arguments in motions for extension of time previously filed in the above-styled action by several Non-Settling Parties:

- A. Cities of Aztec and Bloomfield on September 13, 2012
- B. San Juan Water Commission filed September 14, 2012
- C. La Plata Acequia Association et al. on September 21, 2012
- D. Robert Oxford on September 24, 2012
- E. Defendants B Square Ranch, LLC et al. on March 5, 2013
- F. Defendants B Square Ranch, LLC et al. on April 11, 2013

As previously stated in the above-described motions for extension of time as well as other pleadings and documents filed by the Non-Settling Parties in the above-styled action, Defendants B Square Ranch, LLC et al. and the other Non-Settling Parties have not be able to adequately respond to the discovery requests by the Settling Parties, to

identify witnesses and exhibits, and to comply with the scheduling orders issued by the Court.

Defendants B Square Ranch et al. and the Non-Settling Parties also have not had sufficient time to review the documents originally, subsequently and currently being produced by the Settling Parties. Further, Defendants B Square Ranch et al. and the remaining Non-Settling Parties have not been able to complete sufficient discovery to adequately prepare and file dispositive motions and to prepare for an evidentiary hearing in the above-styled action.

The normal course for a law suit is to have the parties file dispositive motions after discovery is completed. The Court has been notified several times by several Non-Settling Parties that discovery is not complete, but the Court continues to establish discovery deadlines that cannot be met. No matter how many times the Court establishes a shorter discovery deadline than requested by Defendants B Square Ranch, LLC et al. and other Non-Settling Parties, the fact remains that the Non-Settling Parties have not completed discovery in the above-styled action and they are being prejudiced and being unfairly treated.

The scheduling orders entered in the above-styled action have **denied and are currently denying fundamental due process** to Defendants B Square Ranch et al. and the remaining Non-Settling Parties to: (i) fully protect their rights and interests in the above-styled action; (ii) comply with the orders of the Court; (iii) examine the discovery that has been provided by Settling Parties; (iv) request additional discovery from the Settling Parties, sometimes through motions to compel; (v) adequately object, respond or answer the discovery requests of the Settling Parties; (vi) fully develop objections or

responses to the proposed Settlement Agreement; (vii) make a knowledgeable and informed decision whether to approve or oppose the proposed Settlement Agreement; (viii) take over, schedule and attempt to complete the work that was being performed by the Non-Settling Parties who then entered into settlement agreements in the above-styled action; (ix) conduct depositions of Settling Parties' witnesses; (x) review the voluminous documents previously produced by the Settling Parties; (xi) overcome the obstacles stated by other Non-Settling Parties in reviewing the documents produced by Settling Parties; (xii) satisfy onerous, unnecessary and unreasonable requirements and procedures to review and copy voluminous documents at repositories established by Settling Parties in several locations; (xiii) prepare dispositive motions within a reasonable time after discovery is completed; and (iv) prepare responses to the Settling Parties dispositive motions, including the pending Settling Parties' Memorandums.

As previously stated several times to the Court, Defendants B Square Ranch, LLC et al. need additional time to: (i) complete discovery, (ii) prepare and file their dispositive motions after discovery is completed and after the Settling Parties have filed their dispositive motions, and (iii) prepare and file responses to the Settling Parties' dispositive motions, including the pending Settling Parties' Memorandums.

Further, Rule 1-056 (F) NMRA 2013 states as follows:

"F. When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his position, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Attached hereto as Exhibit "A" and incorporated herein by reference is the Affidavit of Tommy Bolack stating that Defendants B Square Ranch, LLC et al. need to perform the following to be able to proceed in the above-styled action:

- A. Examine the discovery that has been provided by Settling Parties;
- B. Request additional discovery from the Settling Parties;
- C. Adequately object, respond or answer the discovery requests of the Settling Parties;
- D. Fully develop objections or responses to the proposed Settlement Agreement;
- E. Make a knowledgeable and informed decision whether to approve or oppose the proposed Settlement Agreement;
- F. Take over, schedule and attempt to complete the work that was being performed by the Non-Settling Parties who entered into settlement agreements in the above-styled action;
- G. Conduct depositions of Settling Parties' witnesses;
- H. Review the voluminous documents previously produced by the Settling Parties;
- I. Overcome the obstacles stated by other Non-Settling Parties in reviewing the documents produced by Settling Parties;
- J. Satisfy onerous, unnecessary and unreasonable requirements and procedures to review and copy voluminous documents at repositories established by Settling Parties in several locations;
- K. Prepare dispositive motions within a reasonable time after discovery is completed; and
- L. Prepare responses to the Settling Parties dispositive motions, including the pending Settling Parties' Memorandums.

Failure of Settling Parties to Comply with
Rule 1-056 NMRA 2013, "Summary Judgment"

At the present time the following deadlines are in effect concerning the above-styled action:

March 31, 2013	Close of discovery
April 15, 2013	Settling Parties' memorandum in support of Settlement Agreement
April 15, 2013	Non-Settling Parties' dispositive motions
May 10, 2013	Responses to dispositive motions
May 24, 2013	Replies to responses to dispositive motions
June 11 and 12, 2013	Hearing on dispositive motions
Week of July 8, 2013	Decision on need for evidentiary hearing

Pursuant to the Third Amended Order Granting Motions to Extend Deadlines and Setting Schedule Governing Discovery and Remaining Proceedings filed March 15, 2013 ("Third Amended Order") and Rule 1-056 NMRA 2013, "Summary Judgment", a procedure has been established wherein the Court can determine whether a genuine claim for relief exists for the Settlement Agreement and whether there is a genuine issue of fact warranting the submission of this action to the Court for an evidentiary hearing.

The Settling Parties' Memorandums filed in the above-styled action on April 15, 2013 do not comply with Rule 1-056 NMRA 2013.

Rule 1-056 NMRA 2013 states in relevant part as follows:

"A. For claimant. A party seeking to recover upon a claim ... or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." ...

"C. Grounds for motion. The judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. ..."

"D. Time; procedure.

..."(2) The moving party shall submit to the court a written memorandum containing a short, concise statement of the reason in support of the motion with a list of authorities relied upon." ...

"The memorandum in support of the motion shall set out a concise statement of all of the material facts as to which the moving party contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which the moving party relies." ...

"E. Form of affidavits; further testimony; defense required. Supporting ... 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 to the matters stated therein. ..."

The Settling Parties' Memorandums do not comply with Rule 1-056 as follows:

-The Settling Parties' Memorandums do not contain a short and concise statement of the reasons in support of the Settlement Motion. The Memorandum of Settling Parties Navajo Nation and United States (without affidavits and exhibits) contains 76 pages. The Memorandum of Settling Party State of New Mexico (without affidavits and exhibits) contains 85 pages.

-The Settling Parties' Memorandums do not contain a concise statement of all material facts as to which the Settling Parties contend no genuine issue exists.

-The Settling Parties' Memorandums do not number the material facts that Settling Parties contend that no genuine issue exists.

-The Settling Parties' Memorandums do not contain numbered material facts that refer with particularity to those portions of the record to which the Settling Parties rely.

-The supporting affidavits to Settling Parties' Memorandums were not made on the personal knowledge of the affiants, these affidavits did not set forth such facts as would be admissible in evidence; and the affidavits do not show affirmatively that the affiant is competent to testify to the matters stated in his/her affidavit.

In particular, numerous statements in the supporting affidavits, and particularly the affidavits of John J. Whipple and John W. Leeper, were not based on **personal knowledge** of the affiants, but were in the narrative or contained historical information.

Further, numerous statements in the supporting affidavits, and particularly the affidavits of John J. Whipple and John W. Leeper, did not state facts which would be admissible in evidence based on the testimony of these affiants. Sustainable objections

that would exclude these statements can be made on the basis of conclusions of law by the affiants, relevancy, hearsay or lack of foundation.

Finally, all of the supporting affidavits that accompanied the Settling Parties' Memorandums were signed by the affiants in the time period from April 10, 2013 through April 15, 2013 except for the affidavit of Clifford R. Landers that was signed on March 19, 2013. See Attachments A through K filed with Settling Parties Navajo Nation's and United States' Memorandum and the Affidavit of John J. Whipple filed with Settling Party New Mexico Memorandum.

Discovery in the above-styled action closed on March 31, 2013. The affidavits submitted by the Settling Parties that were dated after March 31, 2013 should not be considered by the Court and should be stricken from the record.

WHEREFORE, Defendants B Square Ranch, LLC et al. pray for the entry of an appropriate order denying the Settlement Motion of Settling Parties Navajo Nation, United States of America and State of New Mexico in the above-styled action, and for such other relief as the Court deems proper.

TULLY LAW FIRM, P.A.



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STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT

STATE OF NEW MEXICO ex rel.
STATE ENGINEER,

D-1116-CV-75-184

Plaintiff,

Honorable James J. Wechsler
San Juan River Adjudication

v.

THE UNITED STATES OF AMERICA et al.,

Claims of Navajo Nation
Case No. AB-07-01

Defendants.

AFFIDAVIT OF TOMMY BOLACK

STATE OF NEW MEXICO)
) ss.
COUNTY OF SAN JUAN)

TOMMY BOLACK, upon being duly sworn under oath, deposes and states as follows:

1. I am a resident of San Juan County, New Mexico and have been a resident of such County for over 60 years.

2. The following described entities or companies are Defendants in the above-styled action:

B Square Ranch, LLC, a New Mexico limited liability company
Bolack Minerals Company a.k.a. Bolack Minerals Company Limited
Partnership, a New Mexico limited partnership
Estate of Tom Bolack a.k.a. Thomas Felix Bolack, Deceased, a probate
proceeding initiated in the District Court of San Juan County, New Mexico
Bolack Museum Foundation, a New Mexico non-profit corporation
Tommy Bolack Revocable Trust, a New Mexico trust

EXHIBIT "A" to
Defendants B Square Ranch, LLC et al.'s
Consolidated Response to Settling Parties'
Memorandums in Support of Settlement Motion

3. I am the following described officer or representative of the Defendants listed in Paragraph 2 above:

Member of B Square Ranch, LLC
General Partner of Bolack Minerals Company
a.k.a. Bolack Minerals Company Limited Partnership
Co-Personal Representative of the Estate of Tom Bolack
a.k.a. Thomas Felix Bolack, Deceased
President of Bolack Museum Foundation
Trustee of the Tommy Bolack Revocable Trust

4. I have read the following described motions for extension of time that were previously filed in the above-styled action:

- A. Cities of Aztec and Bloomfield on September 13, 2012
- B. San Juan Water Commission filed September 14, 2012
- C. La Plata Acequia Association et al. on September 21, 2012
- D. Robert Oxford on September 24, 2012
- E. Defendants B Square Ranch, LLC et al. on March 5, 2013
- F. Defendants B Square Ranch, LLC et al. on April 11, 2013

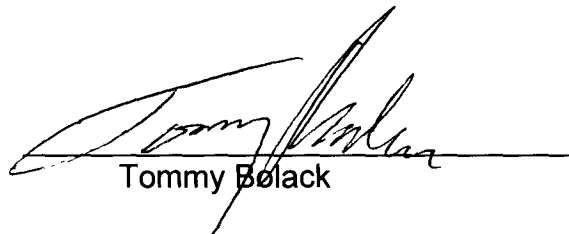
5. I have read Defendants B Square Ranch, LLC et. al's Consolidated Response to Settling Parties' Memorandums in Support of Settlement Motion to which this Affidavit is attached as Exhibit "A".

6. I have been informed and I am aware of the current proceedings in the above-styled action.

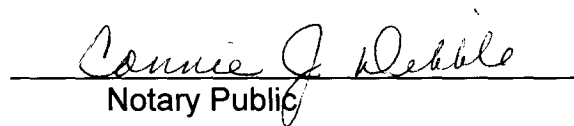
7. Based on my personal information and knowledge, the Defendants listed in Paragraph 2 above are currently unable to: (i) fully protect their rights and interests in the above-styled action; (ii) comply with the orders of the Court; (iii) examine the discovery that has been provided by Settling Parties; (iv) request additional discovery from the Settling Parties; (v) adequately object, respond or answer the discovery requests of the Settling Parties; (vi) fully develop objections or responses to the proposed Settlement Agreement; (vii) make a knowledgeable and informed decision whether to approve or oppose the proposed Settlement Agreement; (viii) take over, schedule and attempt to complete the work that was being performed by the Non-Settling Parties who have entered into settlement agreements in the above-styled action; (ix) conduct depositions of Settling Parties' witnesses; (x) review the voluminous documents previously produced by the Settling Parties; (xi) overcome the obstacles stated by other Non-Settling Parties in reviewing the documents produced by Settling Parties; (xii) satisfy the requirements and procedures to review and copy voluminous documents at repositories established by Settling Parties in several locations; (xiii) prepare dispositive motions within a reasonable time after discovery is completed; and (iv) prepare responses to the Settling Parties dispositive motions, including the pending Settling Parties' Memorandums.

8. Based on my personal information and knowledge, the Defendants listed in Paragraph 2 above currently need additional time to: (i) complete discovery, (ii) prepare and file their dispositive motions after discovery is completed and after the Settling Parties have filed their dispositive motions, and (iii) prepare and file responses to the Settling Parties' dispositive motions, including the pending Settling Parties' Memorandums.

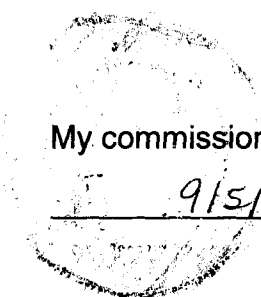
DATED: May 10, 2013.


Tommy Bolack

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me on May 10, 2013 by Tommy Bolack.


Notary Public

My commission expires:


9/5/15