

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 MAY 10 PM 12:54

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.

D-1116-CV-75-184

HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

Claims of the Navajo Nation
Case No. AB-07-1

NAME OF PARTY: The Navajo Nation and the United States.

DESCRIPTIVE SUMMARY: The Navajo Nation and United States respond to the *Conditional Motion to Dismiss for Lack of Jurisdiction and Failure to Join Indispensable Parties*, filed April 15, 2013, by the Community Ditch Objectors.

NUMBER OF PAGES: 7, including certificate of service.

DATE OF FILING: May 10, 2013.

**RESPONSE OF THE NAVAJO NATION AND UNITED STATES IN OPPOSITION TO
COMMUNITY DITCH OBJECTORS' CONDITIONAL MOTION TO DISMISS**

INTRODUCTION

The Navajo Nation and the United States have both filed answers in the stream system adjudication of the San Juan River Basin and are parties before this Court.¹ The *Conditional Motion to Dismiss for Lack of Jurisdiction and Failure to Join Indispensable Parties* ("Motion to

¹ See *Answer of the United States* (filed July 7, 1975) (asserting defenses on behalf of the United States alone); *Supplemental Answer of the United States* (filed Jan. 8, 1976) (asserting defenses on behalf of the Navajo Nation and other Indian tribes); and Navajo Nation's *Answer of Intervening Defendant* (filed June 22, 1977).

Dismiss”) is merely a procedural vehicle the Community Ditch Objectors² utilize to pursue a sweeping ruling that this Court’s jurisdictional authority in this proceeding knows no bounds. Motion to Dismiss at 3 (“the court must rule on whether it has plenary jurisdiction”). If the Court cannot exercise “plenary jurisdiction,” the argument goes, then the Court has no jurisdiction at all and must dismiss this proceeding. *Id.* Applicable law plainly defines the contours of the Court’s jurisdiction. The Motion to Dismiss cites no authority and finds no support in the law.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO DECIDE THE SETTLEMENT MOTION AND NEITHER THE NAVAJO NATION NOR UNITED STATES HAS ARGUED OTHERWISE

The United States Supreme Court has determined that in the McCarran Amendment, 43 U.S.C. § 666, Congress waived the sovereign immunity of the United States, as trustee of Indian water rights, in a state court “adjudication of rights to the use of water of a river system or other source.” *United States v. Dist. Ct. for Eagle County*, 401 U.S. 520, 523 (1971) (quoting 43 U.S.C. § 666(a)). Further, the Supreme Court has determined that “although the McCarran Amendment did not waive the sovereign immunity of Indians as *parties* to state comprehensive water adjudications, it did ... waive sovereign immunity with regard to the Indian *rights* at issue in those proceedings.” *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 567 n.17 (1983). The United States appears in this expedited *inter se* subproceeding (“subproceeding”) only for the limited purposes authorized in the McCarran Amendment—to adjudicate the water rights of the Navajo Nation. While the sovereign immunity of the Navajo Nation was not waived by the

² The Community Ditch Objectors have filed notices of intent to participate in this proceeding and objections as provided in the orders governing this proceeding. They are not “defendants” or “counterclaimants” and their answer and counterclaim were stricken by the Court. *Order Striking Community Ditch Defendants’ Answer and Counterclaim* (filed Feb. 15, 2013).

McCarran Amendment, the Nation's appearance before this Court constitutes a similarly limited, consensual waiver of sovereign immunity, again for the sole purpose of adjudicating the Nation's water rights.

This subproceeding "is a proceeding in which a water rights claim is resolved in a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978 both as between the plaintiff and the defendant and as among the defendant and other water rights claimants." Rule 1-071.2(B)(1) NMRA. The plaintiff is the State of New Mexico acting through the State Engineer and the defendants are the Navajo Nation and the United States. The Community Ditch Objectors are among the "other water rights claimants" who have voluntarily chosen to participate in this proceeding. Therefore, all necessary parties are before the Court.

The Navajo Nation, United States, and State of New Mexico have moved the Court to enter the Proposed Decrees contemplated by the Settlement Agreement and that is the sole basis for this Court's exercise of jurisdiction in this subproceeding. *See Order of Reference to Special Master of Joint Motion Concerning Procedures for Approval of Navajo Decree* (filed Oct. 7, 2009) at 1. Should the Settlement Motion be denied, the Navajo Nation and the United States will vigorously assert in this adjudication the Nation's senior water rights to a significant quantity of water from the San Juan River. Contrary to the assertions of the Motion to Dismiss, no grounds exist on which the Navajo Nation and the United States would argue that the "court lacked jurisdiction to enter an adverse judgment." Motion to Dismiss at 2.

II. THIS COURT CANNOT EXERCISE UNLIMITED, PLENARY JURISDICTION OVER THE NAVAJO NATION AND THE UNITED STATES

To the extent that the Motion to Dismiss seeks a ruling that the Court, in this subproceeding, possesses "plenary continuing jurisdiction over the United States and the Navajo Nation in all matters relating to the San Juan River basin," *id.*, the Motion to Dismiss cites no

authority for this extraordinary proposition, nor are the United States or Navajo Nation aware of any. Even giving the Community Ditch Objectors the benefit of a generous reading of their Motion to Dismiss, they are entitled to no relief.

The Motion to Dismiss first appears to assert that this Court, as part of this subproceeding, has jurisdiction over the Federal government's operation of Navajo Dam. Motion to Dismiss at 3. As an initial matter, it is important to recall that "the Government's consent to be sued must be strictly construed in favor of the sovereign." *United States v. Nordic Village*, 503 U.S. 30, 33 (1992). With this principle in mind, nothing in the McCarran Amendment can be construed to waive the sovereign immunity of the United States for challenges to reclamation project operations. *Dugan v. Rank*, 372 U.S. 609, 618 (1963) (McCarran Amendment not applicable to a suit seeking to prevent the United States from storing and diverting water at a reclamation project); *see also United States v. Testan*, 424 U.S. 392, 399 (1976) ("the terms of the [United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit") (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). In other words, this Court's exercise of jurisdiction over the United States in this subproceeding is necessarily limited by the McCarran Amendment, which waives the sovereign immunity of the United States only for the purpose of quantifying the United States' water rights.

The Motion next appears to assert that this Court's limited exercise of jurisdiction in this subproceeding extends to review of the United States' efforts to comply with its obligations under other federal laws, such as the Endangered Species Act. Motion to Dismiss at 3. Again, the McCarran Amendment simply does not waive the United States' sovereign immunity for such purposes. *See Nordic Village*, 503 U.S. at 33. Assuming the existence of a proper waiver

of sovereign immunity, the federal courts would provide the proper forum to address such concerns.

In *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000), *cert. denied* 531 U.S. 812, the Ninth Circuit Court of Appeals considered a challenge by reclamation project irrigators to decisions of the United States concerning the operations of the Link River Dam in Oregon. Holding that the irrigators were not third party beneficiaries of the dam operations contract and thus entitled to no relief, the court concluded that the United States, as the owner of the dam, was responsible (1) for “taking control of the Dam, when necessary to meet the requirements of the ESA, requirements that override the rights of the Irrigators”; and (2) “to divert the water and resources needed to fulfill the Tribes’ rights, rights that take precedence over any alleged rights of the Irrigators.” 204 F.3d at 1213-14. The Circuit Court expressly acknowledged the difference between the case before it, where jurisdiction was premised on federal law “questions involving the Bureau’s operation and management of the Project,” and a case not before it, but rather pending in Oregon state court, involving “a comprehensive water rights adjudication contemplated by the McCarran Amendment.” *Id.* at 1214 n.3. That distinction holds true here as well. The McCarran Amendment did not waive the sovereign immunity of the United States to litigate any federal question ostensibly related to the use of water in the San Juan River Basin and this subproceeding is not the proper forum in which to raise issues concerning the operations of Navajo Reservoir.

CONCLUSION

This Court has jurisdiction over the subject matter of this expedited *inter se* subproceeding specifically concerning the quantification of the Navajo Nation’s water rights and entry of the Proposed Decrees pursuant to the Settlement Agreement. The Navajo Nation and

the United States are subject to the jurisdiction of this Court. The Motion to Dismiss, and all relief requested therein, should be denied.

Respectfully submitted this 10th day of May, 2013.

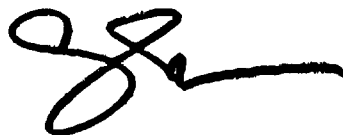
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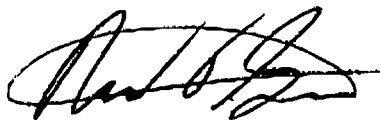
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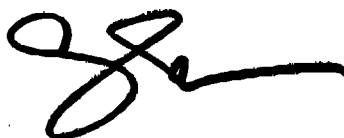


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CERTIFICATE OF SERVICE

I certify that on this 10th day of May, 2013, an electronic version of the *Response of the Navajo Nation and United States in Opposition to Community Ditch Objectors' Conditional Motion to Dismiss* was served by electronic mail to: wrrnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the list of parties identified on the *Notice of Amended Service List* (filed Feb. 25, 2013).



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