DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 MAY 24 AM 8:01

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: The US, NN and OSE concede that NIIP is not PIA, and make no claim based on PIA. Because NIIP is not PIA, water for NIIP cannot be included in the Navajo water claim.

The US, NN and OSE claim that the 1962 NIIP Act establishes a water right for NIIP. They have failed to inform the court that section 13 of the 1962 Act expressly states that it does establish any water rights.

NUMBER OF PAGES: 7 + 3-page exhibit
DATE OF FILING: May 24, 2013

REPLY IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT # 4 – NIIP

SUMMARY:

A. The US, NN and OSE concede that NIIP is not PIA.

B. Because NIIP is not PIA, water for NIIP cannot be included in the Navajo water claim.

C. To compensate for this fatal defect in their case, the US, NN, and OSE attack the jurisdiction and authority of the court.

D. The US, NN and OSE have failed to tell this court that the 1962 NIIP act explicitly states that it does not create any water rights.

D✓

A. THE US, NN AND OSE CONCEDE THAT NIIP IS NOT PIA.

The settling parties have never contended that NIIP is practically irrigable acreage. They admit that NIIP is not PIA. See partial transcript of the hearing in this case on April 30, 2012, attached and incorporated as Exhibit 1.

> JUDGE WECHSLER: . . . . And I'd ask you to elaborate for the court, what is the Navajo Nation's position with respect to the matter of proving its water rights to NIIP?
>
> MR. POLLACK: Your Honor, first of all, we don't think that it's the court's role here to determine what the water rights are for NIIP. We think what the court is charged with is approving an overall settlement, and getting into proof of each of the elements of the water rights that are proposed in the settlement is beyond what the court was instructed to do. Or at least the initial order by Judge Sanchez says that the purpose of the Navajo inter se is to determine whether or not to approve a settlement that was ratified by Congress in 2009. It is not to go into the merits of the actual water rights that are identified in the settlement decree. We believe that's a slippery slope.
>
> **But with respect to the water rights for NIIP, no one here is arguing that the water rights for NIIP are based on practicably irrigable acreage. And we have been consistent on that from the beginning.** The court will recall that I did argue to the court when I asked for protective order to put a stop to all of this discovery about NIIP and PIA, that I argued that we were not basing the water rights for NIIP on PIA. **We were not basing it either in the settlement or in the United States statement of claim based on PIA, and that the water right for NIIP is a water right that has been established by Congress**, and that the court cannot, cannot abrogate a congressional authorization of water.

Exhibit 1 [emphasis added].

B. BECAUSE NIIP IS NOT PIA, WATER FOR NIIP CANNOT BE INCLUDED IN THE NAVAJO WATER CLAIM.

First, the United States Supreme Court has ruled that PIA is the only basis for quantifying and awarding federal reserved rights under *Winters*. *Arizona v. California*, 373

U.S. 546, 601 (1963) ("The only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.").[1]

Second, since the settling parties acknowledged that NIIP is not PIA, water for NIIP does not meet the PIA standards required by *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 205-10, 861 P.2d 235, 246-51 (Ct. App. 1993) (the *Mescalero* case).

Third, PIA is simply the broader principle of beneficial use, as applied to irrigation projects. Beneficial use is the cornerstone of state and federal water law in the arid western regions of the United States. All of the governing statutes and cases require appropriators of water to put the water to beneficial use and to avoid wasting water. Reclamation Act of 1902, 43 U.S.C. § 372.

> § 372. Water right as appurtenant to land and extent of right.
>
> The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

The beneficial use requirement is built into the Reclamation Act of 1902, the New Mexico Constitution of 1912 as approved by Congress, and every federal and state law since then, including the Colorado River Storage Act of 1956 and the NIIP Project Act of 1962. Federal and state agencies like the BOR and the OSE have no legal authority to authorize a

---

[1]The Arizona Supreme Court has opined that there may be other bases in *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 201 Ariz. 307, 35 P.3d 68, 76 (2001) ("*Gila River V*"). The opinions of the Arizona state courts are not binding on this court, whereas the opinions of the U.S. Supreme Court are. See *United States v. Washington*, 375 F. Supp. 2d 1050, 1063 (W.D. Wash. 2005), where the federal court rejected *Gila V* as "contrary to federal law."

nonbeneficial use, whether by permit or contract or otherwise. See *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1144 (10th Cir. 1981).

Fourth, nonbeneficial use never creates a water right, no matter how long it persists. NIIP has diverted water for decades, but a prolonged waste of water cannot create a water right. The failure of public officials to enforce the law cannot create a water right. *Erickson v. McLean*, 62 N.M. 264, 270-74, 308 P.2d 983, 987-89 (1957):

> [N]o matter how early a person's priority of appropriation may be, he is not entitled to receive more water than is necessary for his actual use. An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use, within the meaning of the Constitution. Article 16, §§ 1, 2 and 3, and § 75-11-2 of 1953 Compilation. Water, in this state, is too scarce, and consequently too precious, to admit waste.
>
> Water is too valuable to be wasted, either through an extravagant application for the purpose appropriated or by waste by misapplication which can be avoided by the exercise of a reasonable degree of care to prevent loss, or loss of a volume which is greatly disproportionate to that actually consumed.
>
> * * * *
>
> The State is vitally concerned in every appropriation. The need for water is imperative, and often the supply is insufficient. . . . [T]he the rule that no one has a right to use or divert water except for beneficial use is clearly indicated by the framers of our Constitution.
>
> * * * *
>
> The State of New Mexico functions through persons who are for the time being its officers. The failure of any of these persons to enforce any law may never estop the people to enforce that law either then or at any future time. It would be as logical to argue that the people may not proceed to convict a defendant of burglary because the sheriff perhaps saw him and

> failed to stop him or arrest him for another burglary committed the night before.
>
> The general rule is, that neglect or omission of public officers to do their duty cannot work an estoppel against the state . . . .

McLean is binding on this court.

In *Jicarilla Apache*, the Tenth Circuit quoted, adopted and followed the rules in *McLean*. It held that storage of San Juan-Chama water in Elephant Butte was not a beneficial use, even though the BOR and the City of Albuquerque had declared and agreed that it was a beneficial use. The court also held that a contract for water with the BOR does not create a beneficial use. *Jicarilla* is also binding on this court as regards federal law on water. *Jicarilla* holds that beneficial use is a non-waivable requirement of state and federal laws, including the Reclamation Act and N.M. Const. art. XVI, § 3. An official agreement or contract with the BOR cannot authorize a nonbeneficial use.

Therefore, because NIIP is not PIA,, the Navajo Nation does not have a right to water for NIIP. The Navajo Nation may have water rights for the Hogback and Fruitland projects, down in the valley. The amount of water and acreage for these projects is in dispute, so the exact amounts will have to be quantified in stage II.

C. TO COMPENSATE FOR THE FATAL DEFECT IN THEIR NIIP CLAIM, THE SETTLING PARTIES ATTACK THE JURISDICTION AND AUTHORITY OF THIS COURT.

See Mr. Pollack's statements at the April 30 hearing, quoted above.

See also Mr. Guarino's repeated statements that the court has no jurisdiction over any decision by the federal government regarding the San Juan River. According to Mr. Guarino, if the defendants don't like it, they can walk across the street [in Santa Fe] to

federal court. According to the US, NN and the OSE, this court is powerless to protect the other water users in the San Juan Basin, even the ones who have water rights that were adjudicated and decreed by the San Juan County District Court in the 1948 Echo Ditch Decree.

D. THE US, NN AND OSE HAVE FAILED TO TELL THIS COURT THAT THE 1962 NIIP ACT EXPLICITLY STATES THAT IT DOES NOT CREATE ANY WATER RIGHTS.

The 1962 Act authorizes the future appropriation of federal money to construct NIIP. It authorizes the possible future expenditure of money to move dirt, pour concrete and move forward on an irrigation project. It does not establish or grant a water right. The 1962 Act does not repeal the federal laws and cases that require beneficial use.

Section 13 explicitly disclaims any Congressional intention to create a water right:

> (c) No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by this Act, and Congress does not by its enactment, construe or interpret any provision of the Colorado River compact, the Upper Colorado River Basin compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, the Colorado River Storage Project Act, or the Mexican Water Treaty or subject the United States to, or approve or disapprove any interpretation of, said compacts, statutes, or treaty, anything in this Act to the contrary notwithstanding.

Pub. L. 87-483, 76 Stat. 96, § 13(c) (Jun. 13, 1962) (*codified as* 43 U.S.C. § 615uu(c)), available at http://digital.library.okstate.edu/kappler/Vol6/html_files/v6p0954.html, last accessed May 22, 2013.

Section 13(c) means two things. The 1962 NIIP Act does not create a water right for NIIP. The 1962 NIIP Act does not prejudice the water rights of the Community Ditch Defendants.

The US, NN and OSE have deliberately misrepresented the terms of the 1962 Act. They have deliberately and knowingly failed to inform the court about the explicit Congressional disclaimer in the 1962 Act. They have argued that the 1962 Act established water rights for NIIP, even though the 1962 Act says exactly the opposite. See Rule 1-011 and Rule 16-303(A)(2), "Candor toward the tribunal":

> A. **Duties**. A lawyer shall not knowingly:
>
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall
Victor R. Marshall
Attorneys for San Juan Agricultural Water Users Association; Hammond Conservancy District; Bloomfield Irrigation District; various ditches; and various members thereof.
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400 / 505-332-3793 FAX

CERTIFICATE OF SERVICE

I hereby certify that on May 24, 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.

This is a partial transcript of the San Juan Navajo Inter Se hearing on April 30, 2013.

MR. MARSHALL: Now, I don't know where we are on this, and this is another example, and maybe it will become clearer when they respond to our motion for partial summary judgment on NIIP. That they are saying quote "the Navajo Nation does not seek water rights for NIIP under a PIA theory." close quote. Some other theory.

Well, we're still entitled to discovery about PIA, whether it's their theory or not. The crucial thing is, Your Honor, we're entitled as defendants to pursue our theories of the case. Our factual theories – no, those facts aren't right, here's what the facts really are. And no, that legal theory is wrong.

And so throughout this, they with some success been able to say, oh well that's not our theory. So you can't ask about it.

No, we're asking about the counter theories to rebut their theories, and explain what the facts really are.

Now, we don't have answers, and I think, I don't know what the remedy is. By the way the Navajo Nation says you don't have jurisdiction or authority to award costs or anything like that. And the court has to address that jurisdiction argument, because they say that we can do whatever we want, and you don't have jurisdiction. You have jurisdiction to give us what we want, but that's it.

And we've heard that for 5 years, and that has got to stop. We're going to put on our theory of the case, which has a lot more merit than theirs. Now let me give you a good example . . . .

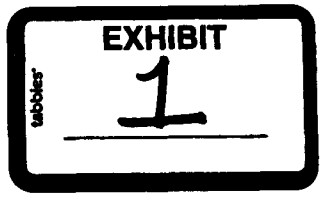
[Summary of omitted material: It would cost $656,700,000 to complete NIIP.]

That of course is germane to whether NIIP is a PIA. Whether irrigation at NIIP is economically feasible. And it is absolutely clear that it is not.

But they are trying to prevent us from demonstrating what their own documents show. And they're not entitled to do that. We have raised as a defense in our objections, that NIIP is not PIA. We've filed a motion because at this point, on this record, we are entitled to summary judgment in our favor that it's not PIA.

Now maybe and apparently they have some other theory, which they have yet to articulate with specificity, that somehow PIA doesn't matter.

But the crucial thing is, defendants are not second-class citizens. They are entitled to present their case, and on summary judgment they [the settling parties] have the burden of proving PIA for NIIP, or some other theory. And they have the burden of overcoming the defenses which we have raised. Check Wright and Miller. When you're a plaintiff, you not only have to prove your case, that there are no questions of fact, but you have to overcome all of



the defenses and objections raised by defendants. They can't do that.

But here again, we're in a situation where we have been stonewalled on a central issue. They say, we have our theory, and that's the only theory that anybody's entitled to discovery on. That's reversible error Your Honor, but it's happened over and over again.

Now, if they are sticking with what they say, that they are not seeking a water right under PIA, then maybe we can move on. But we need to wait and see where they are, because what I think's going to happen, they now realize that there's a huge hole in their case, and they're going to backtrack, after discovery is completed and after they stonewalled us.

So that's the situation. I think that the court should basically take a look at this once we have the summary judgment briefs in here, but they need to be held to their statement of claim, that they're not claiming that NIIP is PIA.

JUDGE WECHSLER: OK. Mr. Pollack . . . .

MR. POLLACK: [Summary of omitted material: We are not stonewalling. Multiple 30(B)(6) witnesses designated. Back and forth on depositions. Witnesses were made available to Mr. Marshall.]

MR. GUARINO: [Mr. Marshall choose not to depose the witnesses we made available.]

MR. MARSHALL: . . . . But let me come back to something: burden of proof. They have to prove that NIIP is PIA. They have the burden of proof, and they can't go forward unless they have responded to discovery, and they haven't. The record will show that.

And the other thing, we don't have the money to keep pursuing this. We've done it for more than a year, and we still never got a basic answer to these questions. So I'll file some more materials, and I'd ask the court to look very carefully at the excerpts we've already provided from Mr. Haskie's deposition, where he didn't bring any of the things that he was asked to bring.

JUDGE WECHSLER: I have looked at that, Mr. Marshall, I have looked at those. And I'll look at them again.

MR. MARSHALL: Okay.

Your Honor, if PIA is off the table, and they've taken it off the table, maybe we can move forward. We will be filing, you know, we're sticking with the court's timetable, because we've got enough to defeat this, right now. But the fact is, they have not provided that discovery on this crucial issue. At least under our theory.

JUDGE WECHSLER: Okay, Mr. Pollack, let me ask you . . . There's been, Mr. Marshall has addressed the theory question, and there was, and he has quoted. I saw your comment that you made at the deposition of Mr. Haskie. And I'd ask you to elaborate for the court,

what is the Navajo Nation's position with respect to the matter of proving its water rights to NIIP?

MR. POLLACK: Your Honor, first of all, we don't think that it's the court's role here to determine what the water rights are for NIIP. We think what the court is charged with is approving an overall settlement, and getting into proof of each of the elements of the water rights that are proposed in the settlement is beyond what the court was instructed to do. Or at least the initial order by Judge Sanchez says that the purpose of the Navajo inter se is to determine whether or not to approve a settlement that was ratified by Congress in 2009. It is not to go into the merits of the actual water rights that are identified in the settlement decree. We believe that's a slippery slope.

But with respect to the water rights for NIIP, no one here is arguing that the water rights for NIIP are based on practicably irrigable acreage. And we have been consistent on that from the beginning. The court will recall that I did argue to the court when I asked for protective order to put a stop to all of this discovery about NIIP and PIA, that I argued that we were not basing the water rights for NIIP on PIA. We were not basing it either in the settlement or in the United States statement of claim based on PIA, and that the water right for NIIP is a water right that has been established by Congress, and that the court cannot, cannot abrogate a congressional authorization of water. Congress said, the Navajo Nation will have the right to five hundred . . . a diversion of 508,000 acre-feet to irrigate 110,630 acres at NIIP. So with respect to the court's jurisdiction, all we're saying there, is that the court doesn't have the authority to change the act of Congress. And we have never said, contrary to Mr. Marshall's accusation, we have never said that the court has no jurisdiction over the Navajo Nation or the United States.