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 continue to reject the court's authority over the San Juan River. They assert that the court lacks jurisdiction to protect the rights of other river users, or to scrutinize the federal government's actions on the river.

The settling parties repudiation of the court's authority is sufficient reason to reject the proposed settlement. Their rejection makes the settlement unenforceable.

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REPLY ON CONDITIONAL MOTION TO DISMISS, OR IN THE ALTERNATIVE TO REJECT THE SETTLEMENT BECAUSE THE US, NN and OSE DO NOT RECOGNIZE THE COURT'S AUTHORITY

I. THE US, NN AND OSE CONTINUE TO REJECT THE COURT'S AUTHORITY.

In their responses to the conditional motion to dismiss, the United States and the Navajo Nation and the state engineer make it quite clear that they reject the court's authority and/or jurisdiction. According to them, the only permissible role for the court is to rubberstamp the proposed deal. The court has no authority to scrutinize the fairness or legality or factual basis for the proposed settlement. And once the court affixes its

rubberstamp to the agreement, the court has no further authority or jurisdiction. For example:

Response of the Navajo Nation and United States in Opposition at 9 (May 10, 2013):

> The Objectors' motions attempt to delve into the attributes of the water rights recognized in the Proposed Decrees and thus go beyond the limited inquiry of this expedited *inter se* subproceeding. The motions can and should be denied on this basis alone.

State's Consolidated Response to Motions at 4, 5 (May 10, 2013):

> What are before the Court for adjudication are the Proposed Decrees, not any permits or interstate compacts or the Reclamation Act or the United States Bureau of Reclamation ("BOR")'s storage rights or operation of Navajo Reservoir. These issues are outside the scope of this Court's jurisdiction and the scope of this subproceeding, which is to determine the elements of the Navajo Nation's water rights. It is only through the settlement of the Navajo Nation's claims that the State has the ability to address some of these concerns, and negotiate protections, through agreement, that are beyond the Court's jurisdiction to provide.
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> * * * *
>
> Further, neither water supply nor impairment to junior users are before the Court in an adjudication.

Partial Hearing Transcript (Apr. 30, 2013):

> 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.

[Emphases added.]

II. THE SETTLING PARTIES MISCITE THE NINTH CIRCUIT DECISION IN THE KLAMATH RIVER LITIGATION.

In their Response in Opposition to Conditional Motion To Dismiss, the NN and the US cite the court to the Ninth Circuit's decision in *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206 (9th Cir. 2000). They claim that this decision puts federal actions concerning a river beyond the court's authority. That decision is wrong; and the settling parties have failed to inform the court that it has been effectively overruled by later cases. See the Federal Circuit's decision in *Klamath Irr. Dist. v. United States*, 635 F.3d 505, 507, 519-20 (Fed. Cir. 2011), which explains the subsequent litigation:

> Plaintiffs–Appellants ("plaintiffs") are fourteen water, drainage, and irrigation districts and thirteen agricultural landowners in Oregon and California. Plaintiffs appeal the final judgment of the United States Court of Federal Claims that, based on two separate summary judgment decisions, dismissed their Fifth Amendment takings claims, their claims under the Klamath River Basin Compact, Pub.L. No. 85–222, 71 Stat. 497 (1957) (the "Klamath Basin Compact" or the "Compact"), and their breach of contract claims. *See Klamath Irrigation Dist. v. United States,* 67 Fed. Cl. 504 (2005) ("*Takings Decision*"); *Klamath Irrigation Dist. v. United States,* 75 Fed. Cl. 677 (2007) ("*Contract Decision*").
>
> On July 16, 2008, we certified three questions relating to the takings and Compact claims to the Oregon Supreme Court. *See Klamath Irrigation Dist. v. United States,* 532 F.3d 1376 (Fed. Cir.2008) ("*Certification Order*"). The certification was pursuant to a procedure whereby unsettled questions of state law may be certified to the Oregon Supreme Court. See Or. Rev. Stat. §§ 28.200–28.255 (2010). Pending action by the Oregon court, we

withheld decision on all of plaintiffs' claims. The Oregon Supreme Court accepted the case for certification, *Klamath Irrigation Dist. v. United States*, 345 Or. 638, 202 P.3d 159 (2009), and on March 11, 2010, the court rendered its decision, answering our certified questions. *See Klamath Irrigation Dist. v. United States,* 348 Or. 15, 227 P.3d 1145 (Or. 2010) (en banc) ("Certification Decision").

* * * *

In sum, we remand plaintiffs' takings and Compact claims for (1) determination, based on the *Certification Decision*, on a case-by-case basis, of any outstanding property interest questions; and (2) determination on the merits, on a case-by-case basis, of all surviving takings and Compact claims. On remand, the Court of Federal Claims should proceed as follows: First, it should determine, for purposes of plaintiffs' takings and Compact claims, whether plaintiffs have asserted cognizable property interests. In making that determination, the court should direct its attention to the third part of the three-part test set forth by the Oregon Supreme Court in response to our certified question 2. That is because it is not disputed that, in this case, the first two parts of the three-part test have been met. Specifically, the parties do not dispute that plaintiffs have put Klamath Project water to beneficial use and that the United States acquired the pertinent water rights for plaintiffs' use and benefit. As far as the third part of the three-part test is concerned, the court should address whether contractual agreements between plaintiffs and the government have clarified, redefined, or altered the foregoing beneficial relationship so as to deprive plaintiffs of cognizable property interests for purposes of their takings and Compact claims. In that regard, as seen, plaintiffs assert that there are no such contracts. On remand, the Court of Federal Claims should give the government the opportunity to demonstrate how plaintiffs' beneficial/equitable rights to the use of Klamath Project water have been clarified, redefined, or altered. In that context, it will be the government's burden to demonstrate with specificity how the beneficial/equitable rights of one or more plaintiffs have been clarified, redefined, or altered. After the government has come forward with its showing, plaintiffs will have the opportunity to respond. To the extent the Court of Federal Claims determines that one or more plaintiffs have asserted cognizable property interests, it then should determine whether, as far as the takings and Compact claims are concerned, those

interests were taken or impaired. That determination will turn on existing takings law.

III. THE STATE ENGINEER AND US AND NN ALL REJECT *LUNA IRRIGATION.*

The US and NN repudiate *State ex rel. Reynolds v. Luna Irrigation Dist.*, 80 N.M. 515, 458 P.2d 590 (1969). Joint Memorandum of the Navajo Nation and United States in Support of the Settlement Motions at 52 n.45.

Even worse, the OSE also rejects *Luna Irrigation*. State's Consolidated Response to Motions at 18-19. And thus NMSA 1978, § 72-1-1. And Article XVI, section 2 of the New Mexico Constitution.

The State's brief, at 14-17, cites a variety of cases from other states, as if those cases could overrule the New Mexico Supreme Court's decision in *Luna Irrigation*. The other states follow different rules, as they are entitled to do, but New Mexico has adopted a different rule in *Luna Irrigation*. This court and all the parties are required to obey *Luna Irrigation* unless and until they manage to get the Supreme Court to overturn it.

The OSE, NN and US seem determined to overturn the fundamental principles of water law found in *Luna Irrigation* and § 72-1-1 and Article XVI, § 2 of the New Mexico Constitution. For instance, the state engineer, at 14, cites a treatise to contend that rivers are to be treated like private pipelines. The state engineer's position is squarely contrary to *Luna Irrigation*, which holds that all water in a public watercourse is public water, even if the water has been stored in an upstream reservoir.

So, how do the state engineer and the NN and the US manage to transform a public river with public water into a private pipeline for private water?

Their joint position is a deliberate calculated repudiation of the Supreme Court's decision in *Luna Irrigation*. It is also a calculated effort to overturn § 72-1-1:

> All natural waters flowing in streams and watercourses, whether such be perennial or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use. A watercourse is hereby defined to be any river, creek, arroyo, canyon, draw or wash, or any other channel having definite banks and bed with visible evidence of the occasional flow of water.

The OSE and US and Navajo Nation are also disobeying the water law provisions of the New Mexico Constitution which were approved by Congress:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

N.M. Const. art. XVI, § 2.

Under New Mexico's Constitution, storage rights are not water rights, and storage rights do not create water rights. The right to take water from the river is determined by prior appropriation rights, not storage rights.

IV. WHAT IS THE PROPER REMEDY?

In a normal case, it would be an appropriate remedy to dismiss this inter se proceeding for lack of jurisdiction over the subject matter and indispensable parties. However that would play into the hands of the US, NN and OSE, who wish to eliminate the court's jurisdiction entirely. To them, judicial oversight is an intolerable nuisance. This is in part because the court is obligated to enforce the laws on prior appropriation and beneficial use. The settling parties don't believe in those rules.

So the better remedy is to refuse to approve the settlement in its present form, citing as one of several grounds that the settling parties do not recognize the court's continuing authority. The settling parties have no intention of recognizing the court's authority over their decisions. Once they get the court's rubber stamp, they will ignore the court and do what they want to the community defendants and all the other users of the San Juan River. The court has no further authority over their actions. They keep telling the court this, along with some doubletalk, just to be polite.

Therefore, to protect the court's own authority, to carry out the McCarran Amendment, and most of all to protect the other users of the San Juan River, both senior and junior, the court must disapprove the settlement in its present form, instruct all parties to work on an agreement that preserves the court's authority, and move on to Stage II – the quantification of the water rights of the Navajo Nation.

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 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.