

STATE OF NEW MEXICO
COUNTY OF SAN JUAN
ELEVENTH JUDICIAL DISTRICT COURT

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

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MUR

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: Overview of summary judgment motions. Partial summary judgment must be entered that the United States does not hold valid permits from the state engineer for files numbered 2847, 2829, 2873, 2883, 2917, 3215 or 2847, 2849, 2873, 2917 Combined. The US, NN and OSE admit that no such permits exist.

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REPLY ON PARTIAL SUMMARY JUDGMENT MOTION NO. 1 – PERMITS

I. Overview of Partial Summary Judgment Motion Nos. 1 Through 4.

The Community Ditch Defendants have filed four motions for partial summary judgment, targeted at a few specific issues which are amenable to summary judgment. These narrow motions do not dispose of this proceeding, not by any means, but they do clear out some of the false issues so that the court and the parties can concentrate on the real issues that are factually disputed. That is the purpose of Rule 1-056 NMRA – to eliminate the clutter so that the court can concentrate on the key issues. In this case there are two main questions. First, what is the source, the legal basis if any, of the water rights claimed

by the Navajo Nation? Second, what is the amount of the water rights in New Mexico that belong to the Navajo Nation?

On the first question, the US, NN and OSE have contended that Navajo water rights were based on the series of permits issued by the state engineer. As it now turns out, there are no such permits. Discovery has shown, and the settling parties have conceded, that no such permits exist, because the permit applications were never published. Motion for Partial Summary Judgment No. 1 – permits.

The US, NN and OSE have also contended that Congress created water rights for NIIP when it passed the 1962 act authorizing the expenditure of federal funds to construct the NIIP project. The US, NN and OSE have failed to disclose to this court that in section 13 of the 1962 NIIP Act, Congress expressly stated that the statute does not establish any water rights. See Motion for Partial Summary Judgment No. 4 – NIIP.

On all four motions for partial summary judgment, the US, NN and OSE have failed to respond as required by Rule 1-056. For their response, the settling parties have only filed more briefs with more argument by counsel setting forth their version of the facts. This does not meet the requirements of Rule 1-056(D)(2):

A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the moving party's fact that is disputed. All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted.

When a party moves for summary judgment under Rule 1-056, the opposing party cannot rest on the allegations contained in his complaint or upon mere arguments or assertions. *Oswald v. Christie*, 95 N.M. 251, 253, 620 P.2d 1276, 1278 (1980).

II. Reply on Partial Summary Judgment Motion No. 1.

The Community Ditch Defendants have moved for a partial summary judgment on a narrow issue: the settling parties do not have permits for the water rights they are claiming, because the permit applications were never published.

In their responses to the summary judgment motion, the United States, Navajo Nation, and OSE admit this fact, just as they did earlier in their response to request for admission. State's Consolidated Response at 7 n.1 (May 10, 2013) ("While the applications that were endorsed by the State Engineer pursuant to NMSA 1978, § 72-5-33 may not technically be "permits", we are referring to them as permits as a matter of convenience for the Court and parties."); US Response to Motions Seeking To Invalidate at 2 n.1 (May 10, 2013) (will keep calling them permits).

So the US (on behalf of NN) and the OSE have reduced themselves to semantic falsehood: "There are no permits, but we will call them permits anyway." The settling parties have cited no legal authority that no permit equals a permit.

As a fallback argument, the US, NN and the OSE now claim that the United States and the Navajo Nation are completely exempt from New Mexico's water application and permitting laws. It is exceedingly strange to hear the state engineer argue that he has no role in reviewing and approving federal water projects in this state.

The settling parties mischaracterize two sections of the water code. They mischaracterize NMSA 1978, § 72-5-33 by claiming that this section is the only section of

the water code that applies to federal projects. According to their misreading of the statute, the United States only needs to file plans for projects, and at that point all of the water for the project is permanently reserved for the United States, without review by the OSE, publication, notice to the public, opportunity to challenge the application, or any judicial process whatsoever. Their reading of the statute creates a denial of due process and a taking of property without due process and just compensation.

Section 72-5-33 is not the only section of the water code that applies to federal projects. The other provisions of the water code on applications and permits also apply to the United States, and must be read *in pari materia* with this particular section, which sets out special but not exclusive requirements for federal projects.

The US, NN and the OSE then mischaracterize NMSA 1978, § 72-9-4. First, that section only applies to the changes made by the 1941 statute, not the entire water code. Second, the settling parties interpretation contradicts *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981), which holds that the United States must apply for a permit from the state engineer for a federal project. *Id.* at 1144. Third, when the state engineer assigned his water applications to the federal government, the state conditioned the assignment on the filing of applications by the United States. The United States accepted that condition and filed applications. But the applications were never published. Fourth, the United States is a builder of waterworks, and the conveyor of water, not the owner of water. Any owner of water is subject to the provisions of the New Mexico water code. Otherwise the water code is meaningless.

Wherefore, the motion for partial summary judgment is well taken and must be granted, based on the undisputed fact that the applications were never published. Therefore, at the present time, the United States does not hold valid permits from the state engineer for files numbered 2847, 2829, 2873, 2883, 2917, 3215 or 2847, 2849, 2873, 2917 Combined. No such permits exist.

Respectfully submitted,

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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: wrvajointerse@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.