

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

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED

MCK

2013 MAY 24 AM 8:01

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: In Stage I of this bifurcated proceeding, the defendants are entitled to summary judgment that the proposed settlement awards amounts of water that exceed the minimum needs of the Navajo tribal members on the Reservation in New Mexico. So the settlement violates *U.S. v. New Mexico, Cappaert, and Arizona v. California*.

Stage I summary judgment will not prejudice the NN, because Stage II will award the actual amount that it is entitled to.

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**REPLY ON PARTIAL SUMMARY JUDGMENT MOTION NO. 2 –  
MINIMUM NEEDS**

At the request of the US, NN and OSE, the court has bifurcated this proceeding into two stages or phases. In Stage I, the only question is whether the court should approve the proposed settlement and decree *in toto*, without any changes or modifications. The settling parties have imposed the condition that there be no changes, because the settling parties present this as a package deal, with no changes by the court or by any of the defendants who are affected by the deal. BHP agrees that there can be no change.

On top of the no changes rule, the court has promulgated rigorous legal standards for approval of the settlement. These legal standards correctly set forth some of the legal and

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factual requirements which the settling parties must meet. With no changes allowed, and with the legal standards in place, in Stage I the court must reject the proposed settlement package if there is any single legal or factual defect in the package. In the hundreds of pages in the proposed settlement and decree, there are dozens of legal and factual defects. The Community Ditch motions for partial summary judgment focus on just a few of them.

Then comes Stage II, where the actual water rights of the Navajo Nation in New Mexico are proved and quantified. This is a much more difficult task than Stage I, and it requires more precision and more evidence than Stage I. In Stage I the settlement package must be rejected if it is inconsistent with any provision of state or federal law. It must be rejected if the settling parties fail to prove that the Navajo Nation is entitled to more than the amounts of water in the settlement. The settlement must be rejected if the amounts of water exceed the minimum needs of the Navajo reservation in New Mexico.

Partial Summary Judgment Motion No. 2 must be granted because there is no material dispute that the water amounts in the proposed settlement are far in excess of the minimum needs of the Navajo reservation in New Mexico. How far in excess makes no difference in Stage I. The exact amount of the excess is not material to the yes or no decision before the court in stage I, because the quantification of Navajo water rights has been separated and reserved for Stage II

In short, there is no need for a trial in 2013 to answer the Stage I question. In response to Partial Summary Judgment Motion No. 2, the settling parties have admitted all of the numbered facts. They have admitted that there are fewer than 42,127 Navajos living on the reservation in New Mexico. See Undisputed Fact No. 1 and the census data incorporated as Exhibit 1 to the Motion. They have also admitted that the population of the

Navajo Nation in New Mexico is shrinking, rather than growing. See Undisputed Fact No. 3 and Affidavit of Jim Rogers ¶ 24 (May 10, 2013). In their responses, the settling parties do not submit affidavits or other admissible evidence to controvert these facts.

So the question under *Winters* and the federal reserved water cases is: What is the minimum amount of water needed for approximately 42,000 Navajos to live within the reservation in New Mexico? In Stage I, it is not necessary to calculate this number exactly. That is the task for Stage II. In Stage I, the only question is: Do 42,000 inhabitants need a minimum of 646,640 acre-feet of diversion and 335,681 acre-feet of depletion in order to live on the Reservation? Of course not. They need much less water than that. How much less is irrelevant in Stage I. The exact amount of their minimum needs will be ascertained in Stage II.

Therefore, the proposed settlement must be rejected because it exceeds the minimum needs standard set by *United States v. New Mexico*, 438 U.S. 696, 700-01 (1978); *Cappaert v. United States*, 426 U.S. 128, 141 (1908); and *Arizona v. California*, 373 U.S. 546, 600-01 (1963). The defendants are entitled to a Stage I partial summary judgment on this issue. The actual minimum needs will be litigated, approved, quantified, and adjudicated in Stage II.

Granting summary judgment on the Stage I question does not prejudice the NN, because in Stage II it will receive the actual amount it is entitled to.

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: [wrvajointerse@nmcourts.gov](mailto: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.