

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

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 JUN -5 PM 11:01

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: Notarized and verified affidavit of Jim Rogers. This affidavit was originally filed without notarization on May 10, 2013 in opposition to the purported dispositive motions filed by US, NN, and OSE, and also in support of the Community Ditch motions for partial summary judgment.

NUMBER OF PAGES: 2 +10 page attachment

DATE OF MAILING: June 4, 2013

**VERIFICATION OF AFFIDAVIT OF JIM ROGERS FILED MAY 10, 2013
CONCERNING CROSS-MOTIONS FOR SUMMARY JUDGMENT**

The Community Ditch Defendants file herewith a verified and notarized copy of the affidavit of Jim Rogers which was originally filed on or about May 10, 2013.

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.
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CERTIFICATE OF SERVICE

I hereby certify that on June 4, 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.

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Honorable James J. Wechsler

Presiding Judge

DESCRIPTIVE SUMMARY: Affidavit filed by Community Ditch Defendants as part of their response to purported dispositive motions filed by US, NN, and OSE on April 15, 2013. This affidavit is also filed in support of the Community Ditch motions for partial summary judgment.

NUMBER OF PAGES: 10

DATE OF FILING: May 10, 2013

AFFIDAVIT OF JIM ROGERS

STATE OF NEW MEXICO)
) ss
COUNTY OF SAN JUAN)

I, Jim Rogers, being duly sworn, allege and state:

1. My name is Jim Rogers. I live in Waterflow, New Mexico near the Navajo Indian Irrigation Project. I am a farmer and a rancher. I have lived and farmed in this valley for more than 40 years, and my family for 70 years before that. My property gets water from the Jewett Valley Water Users Association, which is the last community ditch before the Hogback. I have been the chairman of that Association and overseen the operation and delivery of water from it since 1996. Because I oversee the delivery of water, I

observe the water flows in the San Juan River almost daily. I or someone else checks the water levels in our ditch at several points along the ditch at least four times a day.

2. This ditch was constructed by the farmers in this valley well before 1900. Many of the current ditch members are direct descendants of those that actually moved the dirt. My wife's great grandfather and his sons essentially finished the last third of the Jewett Valley ditch by themselves. All of these original ditch builders and water users sacrificed a great deal. And the ditch continues to be operated by these farmers and they volunteer their time and efforts. About 10% of our ditch members are Navajo. The members maintain, rehabilitate and police its use and operation, so the importance of the ditch and the water it provides cannot be over-emphasized.

3. When word started to leak out about a possible Navajo Nation settlement, all San Juan River agricultural water users felt threatened and worried. The proposed settlement would adversely affect all of the ditches up and down the San Juan River and the Animas River. On behalf of our community ditch association representing ditches on the upper and lower Animas River and the upper and lower San Juan River, I dispute the statements made by John Whipple about the supposed negotiations. His statements are wrong and misleading. The community ditches were not involved in the negotiations. In fact, our repeated attempts and motions for discovery were either refused or ignored. Our involvement didn't start until the proposed settlement was released. And Mr. Whipple's Affidavit does not accurately describe what happened. When we tried to make suggestions, or voiced our concerns about any particular issue, we quickly observed that the settling parties were just going through the motions. The whole thing was a sham. They had no intention of negotiating major issues with us, because they had already reached their deal

among themselves without us. The US and NN and OSE told us that we would have input in court after the settlement was filed. But after they filed the settlement, they fought hard to keep us from being heard in court.

4. John D'Antonio of the OSE and Esteban Lopez of the ISC and their lawyers repeatedly told the public and the legislature that the proposed settlement was a good deal for New Mexico because it prohibited the Navajo Nation from exporting their water from New Mexico. The settling parties repeatedly said this during the public information sessions ordered by the court. In these sessions, the settling parties were allowed to present their spin on the proposed agreement but the opponents were limited by the court monitor to brief questions or statements. These sessions were set up to promote the government position without giving us equal time, or any real opportunity to present our position. There was no way to get the US, NN, and OSE to actually answer the questions we asked.

5. The OSE and the ISC have finally admitted that the proposed agreement does not prevent the Navajo Nation from exporting the water if they are awarded it. They deliberately deceived the legislature and the public and us on this key issue for years, in order to get the agreement signed.

6. When we first saw the proposed settlement, one major question was: Is there enough water to cover all this and maintain our water rights as well? We hired Tom Turney, the former state engineer to give us an opinion. His opinion to us was, no, there isn't enough. Many of the settling parties' statements seem to try to leave the impression that Mr. Turney supported it. That was not the impression Mr. Turney left with us; he seemed to have strong, negative concerns.

7. Anyone who lives and depends on river flow during the irrigation season can see that, except in high water years (very rare of late), there is not enough river flow in the San Juan basin to accommodate the proposed settlement. When I saw the descriptions and predictions in the December 2012 BOR study, and the previous concoction or manufacture of water from decreased evaporation from Lake Powell calculated by Mr. Whipple, I was absolutely convinced that Mr. Turney was right. Mr. Whipple's calculations were just paper water, not objective or scientific, and made to reach a predetermined conclusion that there was enough water in the Colorado River system to accommodate the proposed settlement. Why didn't our State Engineer try to obtain a truly objective, independent assessment? Isn't that part of his job?

8. The water availability estimates and calculations by Mr. Whipple and Mr. Leeper in their affidavits are paper water calculations. They are computer modeled. They are simulations, not the real thing. They do not correspond to the real amount of water in the river. Their estimates and calculations overstate the amount of water available in the Colorado River basin, and the amount of water available to New Mexico as its share of the Colorado basin water supply.

9. When the proposed agreement was signed in 2005, a knowledgeable observer pointed out that there was not enough water to accommodate the agreement, and predicted that the governments would manipulate their calculations to arrive at a predetermined result.

Recently the State of New Mexico and the Navajo Nation reached a settlement of the Navajo water claims in New Mexico. . . . However, New Mexico has a problem, it has already allocated its full share of the water available under the 1988 hydrologic determination to other uses. Therefore, to

comply with the proposed Navajo settlement, New Mexico needs the Secretary to redo the hydrologic determination and, magically, find more water in the Upper Basin.

Eric Kuhn, Memorandum to Board of Directors, Colorado River Water Conservation, at 2 (Apr. 6, 2006). Mr. Whipple and the BOR manipulated the paper water figures in at least 2 ways. First, the BOR and Whipple assumed that there will be less evaporation from the major upper basin reservoirs (Lake Powell, Flaming Gorge, and Navajo) because of lower water levels. Lower water levels in the reservoirs does mean less evaporation, but their calculations ignore the cause of these lower water levels: decreasing water supply. Under Mr. Whipple's "less is more" theory, if the water levels in the main reservoirs went to zero, then there would be more water available to New Mexico! Second, the calculations also rely on paper water from the downsizing of the Animas-La Plata project. This has been the subject of litigation between the San Juan Water Commission in front of Judge Rozier Sanchez. The Whipple/Leeper calculations do not take into account the best and most recent scientific evidence, such as the December 2012 water supply and demand study by the Department of the Interior and the BOR. The 2012 BOR study is more realistic than the figures that were manufactured for the 2007 hydrologic determination. *See Additional Exhibits Filed by Community Ditch Defendants, Exhibits 2 and 3.*

10. There are shortages for this year due to the prolonged drought, low snowpack, and extremely dry soil conditions. The Colorado Basin River Flow Center (CBRFC) is a government agency that is part of the National Weather Service of the National Oceanic and Atmospheric Administration. (NOAA). CBRFC provides detailed water supply figures for the San Juan Basin and the whole Colorado River Basin. Go to www.cbrfc.noaa.gov

and click on "WATER SUPPLY". The latest CBRFC figures are that river flow at Farmington will be 39% of normal for the April July runoff in 2013.

11. When there are real shortages, the supposed release of 225 cfs under section 9.1 does very little. Mr. Whipple and Mr. Leeper point to section 9.1 of the proposed agreement, but that section does very little when there are real shortages. It only applies when "total storage" in Navajo Reservoir exceeds 1,000,000 acre-feet. So the 225 cfs will not be available this year, 2013, or in most of the shortage years in future. Section 9.1 does not impair the ability of the Secretary to deliver water to all Navajo reservoir water supply contractors, like NIIP and Hogback and Fruitland, or to supply whatever water he deems necessary for endangered species. So 9.1 is essentially meaningless. Additionally, 225 cfs (measured at Archuleta just below Navajo dam) is not nearly enough flow to meet irrigation needs during the peak irrigation season, plus all the other needs.

12. Another major concern about the proposed settlement had to do with process – how would the adjudication or court approval of the proposed Navajo Nation settlement mesh or conflict with the adjudication of everyone else's water rights? Many of us had lived through the adjudication of the Jicarilla settlement, which was universally viewed as a disaster – rushed, biased, unfair, undemocratic, and without much due process for plain folks. We felt compelled to try to make a difference in this one.

13. We know that the Navajo Nation has water rights, but why are these governments, particularly the State of New Mexico, trying so unabashedly to disenfranchise the water rights of some citizens in favor of other citizens. Our water rights were not "awarded," they were proven and based on prior application and beneficial use, and based on law at considerable expense and sacrifice.

14. The proposed alternate water supply of 12,000 acre-feet provides very little real benefits to non-Indian users. In their affidavits Mr. Whipple and Mr. Leeper claim that the alternate water supply provisions in section 9.2 provide very substantial benefits to non-Indian users. They are wrong. The benefits of the proposed alternate water supply are mostly nonexistent. One, the alternate water supply is cut off in times of shortage, when it is needed most. See section 9.3. There is no alternate water supply when Navajo Reservoir has less than 1 million acre feet in storage on May 1. As of May 1, 2013, the BOR reported Navajo Reservoir storage at 938,928 af. So there will be no alternate water supply for 2013. Two, the alternate water supply provides water for the Navajo projects at Hogback and Fruitland, not to non-Navajo users. Three, the alternate water supply is charged against NIIP, not Hogback and Fruitland, so it does not diminish the demands that these 2 lower ditches can make. Four, 12,000 acre-feet is a very small amount. During the peak irrigation months, this amount would be used up in just a few days.

15. John Whipple has contradicted himself. In explaining the original draft, he represented that there would be a call on the river on average once every twenty years. After the 12,000 acre foot provision was added, Whipple said there would still be a call once every twenty years with the 12,000 foot provision, and without it there would be a call once every two years.

16. The settlement does not provide any reliable measurements of actual depletions by NIIP. The proposed agreement does not put any practical enforceable limits on the NIIP depletions, because there is no accurate way to measure the depletions and return flows on the surface, or whether there are any return flows underground. *See* Additional Exhibits Filed by Community Ditch Defendants, Exhibit 1.

17. The alleged "top water bank" does not exist. The proposed agreement authorizes the Secretary of the Interior to approve a top water bank in Navajo Reservoir, but it does not require the Secretary to do this. A water bank is a good idea, because our ditches and other users need water storage very badly. The proposed agreement does not give us storage. If the court approves the agreement in its present form, the federal government will ignore us, just like they did when they built Navajo Dam. Local ditches were told they would get storage, but it didn't happen.

18. Leeper's paragraph 44 is wrong. There is no historical basis for the Navajo Nation to claim 100,659 acre-feet for industrial uses.

19. Leeper paragraphs 53 through 59 on NIIP are incorrect. There is no PIA study showing that NIIP is PIA. My 40 years of experience have already shown that it is not practicable to irrigate NIIP. See my affidavit filed April 15, 2013, which is incorporated as part of this response.

20. Leeper paragraphs 60 through 66 are incorrect. The Navajo Nation is not entitled to an 1868 priority date for NIIP because most of NIIP is outside of the 1868 reservation boundaries.

21. In paragraph 74 Mr. Leeper says that some unidentified federal experts identified approximately 50,000 acres of additional feasible irrigable acreage beyond NIIP and Hogback and Fruitland. Based on my knowledge of the San Juan River Basin in New Mexico, no such acreage exists. What does Mr. Leeper mean by "feasibly irrigable acreage"? Is that different than "practicably irrigable acreage" ?

22. In paragraphs 76 to 79, Mr. Leeper describes protections for the San Juan - Chama Project for up to 135,000 acre-feet of depletions every year. As Mr. Leeper states,

the San Juan - Chama Project has a priority date of 1955, at best. So these "protections" for San Juan - Chama would be at the expense of the community ditches and other local users in San Juan County who hold earlier priority water rights that were adjudicated under the 1948 Echo Ditch Decree.

23. We object, under Rule 1-056(F) to the affidavits filed by the US and NN on April 15, 2013, Attachments A through K, affidavits of Leeper, Banet, Fogleman, Greene, Greenwalt, Lucero, Beutler, Camilli, Landers, Zimmerman, and Bliesner. They filed these affidavits after the discovery cut-off so we would have no opportunity to refute them. The same goes for the Whipple affidavit filed by the OSE.

24. Gretchen Greene's population estimates are wildly inflated. She did not use the actual 2010 U.S. Census numbers for the Navajo reservation in New Mexico. The census data shows that the Navajo population on the reservation is falling, not growing. I know this is true from my own personal observations.

25. The Jewett Valley ditch ends just above the Hogback project. From the corner of my property I can see the Hogback intake a few hundred yards away. Because of my location close to the Hogback and Fruitland projects, I have been in a position to observe the irrigation there as it relates to the proposed settlement as well. Over the years these projects have had tough irrigation issues. Early on there was no real infrastructure built, they needed pumps to lift the water, and when those failed, there was no maintenance, so the farmers couldn't depend on the water supply. Consequently, their crops died and individual farming failed. Certainly they have never irrigated all the acreage claimed by the settling parties. In the last year or so, there has been a flurry of activity with large increases in the amount of infrastructure started for new ditches and new individual setups. It is as


though the Navajo Nation and the US are trying to, after the fact, make their acreage and water claims true. The increased amounts of water provided in the settlement for the Hogback and Fruitland can never be put to beneficial use at those projects. Since they are at the end of the river system, someone else further upstream loses the possibility of putting the water to beneficial use. It makes one wonder what is really going to happen to this water.

FURTHER AFFIANT SAYETH NOT.



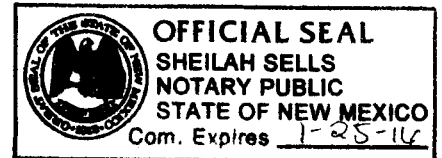
JIM ROGERS

SUBSCRIBED AND SWORN TO before me by Jim Rogers on May 30, 2013.



Notary Public

My commission expires January 25, 2014.



CERTIFICATE OF SERVICE

I hereby certify that on May 10, 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: wnavajointerse@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.