

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED

2013 JUN 14 PM 1 19

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:** Filing of charts, bench memo, and outlines used by Community Ditch Defendants at the Hearings on June 11 & 12, 2013.

**NUMBER OF PAGES:** 2 +6 pages of attachments

**DATE OF FILING:** June 14, 2013

**NOTICE OF FILING OF CHARTS, BENCH MEMO, AND OUTLINES**

The Community Ditch Defendants hereby file the attached charts, bench memo, and outlines used in the Hearings of June 11 & 12, 2013 in this case.

- a. Chart 1, two basic rules of western water law: prior appropriation and beneficial use.
- b. Chart 2, three claimed bases for NIIP water rights, negated: *Winters*, OSE permits, and 1962 NIIP Act.
- c. Chart 3, NEMO DAT QUOD NON HABET/Brooklyn Bridge.
- d. Bench memo on good faith (prong 1).
- e. Outline of authorities on beneficial use cited and/or quoted to the court.

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f. Outline of authorities on prior appropriation cited and/or quoted to the court.

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 June 14, 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](mailto: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.

PRIOR  
APPROPRIATION

BENEFICIAL  
USE  
(nonwasteful)

1902 Reclamation Act

1907 NM Water Code

1911-1912 NM Constitution

1922 Colorado Compact

1948 Upper [Colorado] Compact

1956 CRSP [Colo. River Storage Project]

1962 NIIP Act

\* 1963 AZ v. CAL - PIA

\* 1981 Jicarilla

\* 1993 MESCALERO - PIA

[ \* - binding authority ]

Community Ditch Chart 1 at Hearings on June 11 &12, 2013; Navajo Inter Se, AB-07-1

~~WINTERS - PIA~~

~~OSE PERMITS~~

~~1962 NHIP ACT 76 STAT 96 [P.L. 87-483]~~

Community Ditch Chart 2 at Hearings on June 11 &12, 2013; Navajo Inter Se, AB-07-1

NEMO DAT  
QUOD NON HABET

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BROOKLYN BRIDGE

Community Ditch Chart 3 at Hearings on June 11 &12, 2013; Navajo Inter Se, AB-07-1

**NAVAJO INTER SE, AB-07-1**  
**Hearings, June 11 -12, 2013**  
**BENCH MEMO ON GOOD FAITH**

1. Good faith is a question of fact. *Jaynes v. Strong-Thorne Mortuary, Inc.*, 1998-NMSC-004, ¶ 13, 124 N.M. 613, 954 P.2d 45; *Citizens Bank of Clovis v. Runyan*, 109 N.M. 672, 789 P.2d 620 (1990); *GMAC v. Anaya*, 103 N.M. 72, 76, 703 P.2d 169, 173 (1985).

2. In this case good faith is a disputed question of fact. The settling parties assert that they negotiated in good faith with water users on the San Juan. This assertion is disputed by the Community Ditch Defendants and others. See Affidavit of Jim Rogers ¶ 3 and ¶ 4 (May 10, 2013).

3. In their affidavits, the NN, US and OSE admit that they negotiated the draft settlement agreement without any participation by the Community Ditches. The settling parties first agreed among themselves on the major terms of the agreement without including the Community Ditches in the negotiations. Whiple affidavit ¶43; Leeper affid ¶22. After that, the changes to the agreement were largely cosmetic. The US, NN, and OSE refused to make any changes to the essential terms of the agreement.

4. Therefore, good faith is a question of fact which is genuinely disputed by the parties, so it cannot be decided on summary judgment motions.

5. The court's orders placed the burden on the settling parties to prove all the elements of their water claim, including that the proposed settlement was the product of good faith arms length negotiations. Since this element of plaintiff's claims is factually disputed, the settling parties are not entitled to summary judgment approving the settlement.

## BENEFICIAL USE

- 1902 Reclamation Act, 32 Stat. 388, § 8: “[T]he right of 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.”
- 1907 N.M. Water Code § 72-1-2: “Beneficial use shall be the basis, the measure and the limit of the use of water . . . .”
- 1908 *Winters* refers to beneficial use of water.
- 1912 N.M. Const. art. XVI, § 3: “Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”
- 1912 Colorado River Compact.
- 1948 Upper Basin Compact.
- 1956 Colorado River Storage Project Act is an implementation of the 1902 Reclamation Act.
- 1962 NIIP Act is also an implementation of the 1902 Reclamation Act.
- 1963 *Arizona v. California*, 373 U.S. 546, 557 n.23: “‘Beneficial consumptive use’ means consumptive use measured by diversions less return flows, for beneficial (nonwasteful) use.”; *id.* at 601: “We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage.”
- 1981 *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir.).
- 1993 *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235 (Ct. App.) (*Mescalero*).

Community Ditch Outline of Authorities used at Hearings on June 11 & 12, 2013  
Navajo Inter Se, AB-07-1

## PRIOR APPROPRIATION

- 1907 NM Water Code, now § 72-1-2: "Priority in time shall give the better right."
- 1908 *Winters*.
- 1910 Federal Enabling Act for NM. 36 Stat. 557, § 4: Congress will review and approve or reject NM's draft constitution, "and the said separate provisions thereof."
- 1911 NM Constitution, Art XVI, § 2: "Priority of appropriation shall give the better right."
- 1911 Federal Act Admitting NM and approving its constitution. 37 Stat. 39.  
Federal McCarran Amendment. 43 U.S.C. § 666 – federal deference to state water laws.
- 1978 *United States v. New Mexico*, 438 U.S. 696, 702: "... there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator."

Community Ditch Outline of Authorities used at Hearings on June 11 & 12, 2013  
Navajo Inter Se, AB-07-1