

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

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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 Community Ditch Defendants will amend their "Answer, Objections and Counterclaim" to include additional issues that have developed since their objections were filed in the fall of 2012. These issues include: Section 8 of the 1902 Reclamation Act; Section 13(c) of the 1962 NIIP Act; NIIP is not PLA; the proposed settlement is a compact which requires enactment of a state statute.

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NOTICE THAT COMMUNITY DITCH DEFENDANTS WILL AMEND THEIR "ANSWER, OBJECTIONS, AND COUNTERCLAIM"

The Community Ditch Defendant-counterclaimants give notice that they will amend their "Answer, Objections, and Counterclaim" which was filed on October 19, 2012. The court has allowed this pleading to set forth the objections of the Community Ditch Defendants, but not as an answer or counterclaim.

This pleading needs to be amended to set forth new points of law and fact which have been uncovered since the original objections were filed; to add subsequent events; and to conform with the legal and factual arguments which the parties have made, including but

not limited to the points raised by the court and the parties at the hearings on June 11 and 12, 2013.

Inter alia, the new material in the Community Ditch objections will include, without limitation, the following:

- a. The Navajo Nation and the United States and the OSE have conceded that NIIP is not practicably irrigable acreage (PIA).
- b. Section 8 of the 1902 Reclamation Act provides that "beneficial use shall be the basis, the measure and the limit of the right to use water." Section 8 of the Reclamation Act is incorporated into the 1956 Colorado River Storage Project Act and the 1962 NIIP Act. Section 8 was also carried verbatim into the New Mexico 1907 Water Code and 1911-12 New Mexico Constitution.
- c. There are no OSE permits for any of the water claimed by the Navajo Nation.
- d. By authorizing construction of NIIP, Congress did not create, grant, or recognize any water rights for the Navajo Nation. Section 13(c) of the 1962 NIIP Act states that "No right or claim of right to the use of the waters of the Colorado River system shall be aided or prejudiced by this Act" Pub. L. No. 87-483, 76 Stat. 96, 101 (Jun. 13, 1962).
- e. The proposed settlement would be a compact between the Navajo Nation, the United States, and the State of New Mexico. Such a compact requires enactment of a statute by the Legislature, like NMSA 1978, § 72-15-5 [1922 Colorado River Compact]; § 72-15-26 [1948 Upper Colorado River Basin Compact], and § 11-13-1 [Indian Gaming Compact]. The proposed "settlement" is an attempt to sidestep *State ex rel. Clark v. Johnson*, 120 N.M. 562, 904 P.2d 11 (1995).

f. The US, NN, and OSE assert that, even if the Navajo Nation has no federal reserved water rights, it can obtain water for NIIP and other uses through its storage contracts with the BOR. Their argument, if accepted, would obliterate the concept of federal reserved rights under *Winters*, and the doctrines of beneficial use and prior appropriation, and all state water laws.

g. NMSA 1978, § 72-5-17 requires the BOR to act as a public trustee to allow storage by third parties in Navajo Reservoir. Navajo Reservoir has several hundred thousand acre-feet of unused storage capacity which must be made available to the community ditches and others.

h. The US, NN, and OSE contend that the San Juan River can be operated like a private pipeline, contrary to *State ex rel. Reynolds v. Luna Irrigation Co.*, 80 N.M. 515, 458 P.2d 590 (1969), and the public waters doctrine in Article XVI, Section 2 of the New Mexico Constitution.

i. On December 12, 2012, the Department of the Interior and BOR released their "Colorado River Basin Water Supply and Demand Study." This latest study shows that the 2007 hydrologic determination is incorrect.

j. The December 2012 BOR study and the June 2013 data from the Colorado Basin River Forecast Center demonstrate that there is not enough water to accommodate the Navajo water claims along with all the other claims on the San Juan River within New Mexico's share of the Colorado River system.

k. The US, NN, and OSE violate the McCarran Amendment by repudiating the court's jurisdiction and authority to hear challenges to actions by the US and the NN. This

repudiation of the court's jurisdiction is sufficient reason, by itself, to reject the proposed settlement and decree.

l. The proposed settlement would eliminate the federal buyback of 11,000 acre-feet to partially offset the Jicarilla Settlement. This prejudices the community ditches and other users. And it is a switch from the Jicarilla Settlement that was presented to Judge Frost.

m. Section 17 D of the proposed decree unconstitutionally infringes the jurisdiction and fact-finding authority of the judiciary; and the rights of non-signing parties to due process with independent fact-finding by real judges; and the constitutional right of *de novo* fact-finding guaranteed by Article XVI, Section 5, enacted in 1997. It also violates the federal and state constitutions because it is an attempt to partially subjugate non-Navajo citizens to the sovereignty of the Navajo Nation.

n. The proposed settlement violates the legal rule, *nemo dat quod non habet*, literally meaning "no one gives what he doesn't have."

o. The Navajo-Gallup pipeline is illusory.

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 20, 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: wrvavajointerse@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.