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

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,	**D-1116-CV-75-184**
	HON. JAMES J. WECHSLER
Plaintiff,	**Presiding Judge**
vs.	**SAN JUAN RIVER GENERAL STREAM**
THE UNITED STATES OF AMERICA, *et al.*,	**ADJUDICATION**
Defendants.	**Claims of the Navajo Nation**
	Case No. AB-07-1

NAME OF PARTY: The United States of America and the Navajo Nation.

DESCRIPTIVE SUMMARY: Response to Community Ditch Objectors request to take judicial notice of water units of measure.

NUMBER OF PAGES: 8, including certificate of service.

DATE OF FILING: June 25, 2013.

RESPONSE OF THE UNITED STATES AND NAVAJO NATION TO REQUEST FOR JUDICIAL NOTICE OF WEIGHTS AND MEASURES OF WATER

On June 14, 2013 the Community Ditch Objectors filed their *Request for Judicial Notice of Weights and Measures of Water* ("Request for Judicial Notice"). The Community Ditch Objectors baldly assert that "[t]he court and the parties need these measures and conversion factors for this case." Request for Judicial Notice at 1. In fact, the water units and measures that are the subject of the Community Ditch Objectors' Request have no bearing on any matter before the Court. Further, the Request for Judicial Notice fails to meet the minimal, evidentiary requirements of Rule 11-201, NMRE, on which the Request is premised.

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I. Water units and measures have no bearing on any element of the analysis to determine whether the Proposed Decrees are fair, adequate and reasonable.

As the Court and the Settling Parties have now emphasized on numerous occasions, the only question before the Court is whether to enter the Proposed Decrees. The Court has established four elements of proof it will consider to determine whether the Proposed Decrees are fair, adequate and reasonable, and consistent with public policy and applicable law. *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof* (filed Apr. 19, 2012).

The water units and measures that are the subject of the Request for Judicial Notice are not relevant to this proceeding or to any of the elements that the Court will review in making its decision. In their Request, the Community Ditch Objectors aver that "the court and the parties also need these conversion factors in order to calculate water supplies and shortages in the San Juan River basin." Request for Judicial Notice at 2.[1] The Settling Parties have established that these issues are not before the Court. *State's Consolidated Response to Motions filed by Community Ditch Defendants, Gary L. Horner, Robert E. Oxford and Defendants B Square Ranch LLC etc. on April 15, 2013* (filed May 10, 2013) at 5 ("[N]either water supply nor impairment to junior users are before the Court in an adjudication."); *Brief in Opposition to Section-Wide Issue Subproceedings Proposed by Gary Horner and Bloomfield Irrigation Company* (filed Apr. 30, 2007) at 3-4 ("The immediate purpose of an adjudication is *not* to determine

[1] The additional justification for the Request cited by the Community Ditch Objectors – the need to convert units of measurement discussed in the *Winters v. United States*, 207 U.S. 564 (1908) – has no relevance to this proceeding, and is not necessary to parse that decision of the Supreme Court. Request for Judicial Notice at 1. Indeed, none of the five reported decisions in New Mexico that address the holding of *Winters*, including *State ex rel. Martinez v. Lewis*, 116 N.M. 194 (Ct. App. 1993) and *State of N.M. ex rel. v. Commissioner of Public Land*, 2009-NMCA-004, found it necessary to discuss the units of measurement used in Montana for the *Winters* case.

the amount of water currently available, but to judicially determine and quantify all existing valid rights to divert and use water from the system.")[2] In previous statements to the Court, the Community Ditch Objectors have contended that judicial notice of various units and measures of water are necessary to establish that the Navajo Indian Irrigation Project ("NIIP") does not meet the "practicably irrigable acreage" ("PIA") standard established in *Arizona v. California*, 373 U.S. 546 (1963) and applied in *State ex rel. Martinez v. Lewis*, 116 N.M. 194 (Ct. App. 1993). It appears that the Community Ditch Objectors are arguing that Indian reserved water rights cannot be recognized for NIIP through settlement if the Navajo Nation and the United States do not first establish that NIIP meets the PIA standard – a proposition that the Navajo Nation and the United States have demonstrated is without merit. *Response of the Navajo Nation and United States in Opposition to Summary Judgment Motions of Objectors* (filed May 10, 2013) at 17 ("Questions concerning the appropriate method for quantifying the water rights of the Navajo Nation, or establishing the priority of those rights, are matters for litigation and are not before the Court."); *Motion for Protective Order and Response of the Navajo Nation to Motion to Compel Concerning NIIP* (filed Oct. 16, 2012) at 5 ("As a matter of federal law, the water rights for NIIP have been determined, and a PIA analysis is inapposite.")

Counsel for the Community Ditch Objectors previously represented to the Court that these units of measurement were relevant because Mr. Rogers, in his affidavit attached to the

[2] Previously, Bloomfield Irrigation District and Gary L. Horner proposed that the Court '[n]eeded to determine water supply available within the La Plata stream system as part of the La Plata Subsection proceedings." *Bloomfield Irrigation District's and Gary L Horner's Motion for Consideration of Proposed Section-Wide Issues regarding the La Plata River Section* (filed Mar. 15, 2007) at 5. Ultimately, the Court subsequently rejected the proposal. *Order Approving Proposed Section-Wide Subproceeding #1, Denying Gary Horner and Bloomfield Irrigation District's Proposed Section-Wide Issues, and Requesting Additional Briefing on Notice* (Jul. 10, 2007) at 2 ("THE COURT further denies the nine issues proposed for Section-Wide Subproceedings by Gary Homer and the Bloomfield Irrigation District.")

Motion for Partial Summary Judgment Concerning NIIP (filed Apr. 15, 2013) ("NIIP Motion"),[3] argued that NIIP was not practicably irrigable, *inter alia*, because of the cost to lift water attributable to the heavy weight of water. In actuality, Mr. Rogers made no reference to the weight of water, although he did he opine, without foundation, that '[t]he lands occupied by NIIP are not suitable for sustained irrigation at reasonable cost." *Id.* at Exhibit 1 (Affidavit of Jim Rogers) at ¶ 5. The Navajo Nation and the United States have repeatedly explained that the claim for water rights associated with NIIP that would be asserted in litigation would not be based upon a PIA analysis. Indeed, even the Community Ditch Objectors themselves acknowledge the point. *See e.g. id.* at 2 ¶ 5 ("The United States, the Navajo Nation and the State are not making a PIA claim for NIIP or NAPI."). Nevertheless, the Community Ditch Objectors persist in claiming that the "Navajo Nation and the United States and the OSE have conceded that NIIP is not practicably irrigable acreage (PIA)." *Notice that Community Ditch Defendants will Amend their "Answer, Objections, and Counterclaim"* (filed Jun. 20, 2013) at 2. The position of the Navajo Nation and the United States is simply that the PIA standard is not appropriate to quantify the water rights for an existing,[4] authorized irrigation project.

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[3] The affidavit was not verified until May 30, 2013. *See Verification of Affidavit of Jim Rogers filed April 15, 2013* (filed Jun. 4, 2013).

[4] PIA was the standard adopted by the Wyoming Supreme Court in *Big Horn* for the quantification of the "reserved water right for lands on the reservation *not yet developed* for irrigation." *In re the General Adjudication of All Rights to Use Water in the Big Horn River System,* 753 P.2d 76 (Wyo.1988), *cert. denied sub nom. Shoshone Tribe v. Wyoming,* 492 U.S. 926, *cert. granted in part sub nom. Wyoming v. United States,* 488 U.S. 1040, *and aff'd without opinion by equally divided Court sub nom. Wyoming v. United States,* (1989) ("*Big Horn I*") (emphasis added). The *Big Horn I* approach to PIA was adopted by the New Mexico Court of Appeals. *State ex rel. Office of State Engineer v. Lewis,* 116 N.M. 194, 206, 861 P.2d 235, 247 (1993) ("The definition of PIA used in this case is the same as that used in the *Big Horn I* case.")

The Navajo Nation and United States have demonstrated that the weights and measures of water proposed to be recognized by the Court and the affidavit of Jim Rogers are simply irrelevant to these proceedings. The Request for Judicial Notice should be summarily denied.

II. The Community Ditch Objectors have failed to meet the minimum requirements of Rule 11-201.

The Request for Judicial Notice by the Community Ditch Objectors is substantively identical to their previous, untimely discovery request (*see Request for Admission and Stipulation About Water Units of Measure* (filed Feb. 11, 2013) and related to their previous, unfounded motion to compel (*see Motion to Compel Plaintiffs to Respond to Request for Admission Concerning Water Units* (filed Apr. 1, 2013)). Now, the Community Ditches adopt a new strategy in reliance on Rule 11-201, NMRE, to justify their request. Yet examination of the rule reveals that it provides no support for their Request.

As an initial matter, the Request for Judicial Notice is premature. The Court has just recently received extensive briefing and argument on the parties' dispositive motions. The Settling Parties have met their legal and factual burden to establish that entry of the Proposed Decrees is fair, adequate and reasonable, and consistent with public policy and applicable law. An evidentiary hearing on any element of the legal standard for the approval of the Proposed Decrees is unnecessary. Further, at this stage of the proceedings, the Court has not identified a single issue of material fact that remains in dispute or that requires resolution by an evidentiary hearing. Therefore, no justification exists for the Court to take judicial notice of any fact, let alone a page of alleged facts purporting to determine the appropriate units and measures for water with no reference to any source or authority.

In New Mexico, the requirements for judicial notice of adjudicative facts have been specified in the New Mexico Rules of Evidence. Rule 11-201, NMRE, provides in relevant part:

> **B. Kinds of Facts That May Be Judicially Noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it
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> (1) is generally known within the court's territorial jurisdiction,
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> (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, or
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> (3) notice is provided for by statute.
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> **C. Taking Notice.** The court
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> (1) may take judicial notice on its own, or
>
> (2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(emphasis added). Further, the matter of which a court will take judicial notice must be a subject of common and general knowledge. *Rozelle v. Barnard*, 72 N.M. 182 (1963) (citing *Waters-Pierce Oil Company v. Deselms*, 212 U.S. 159 (1909)). The matter subject to judicial notice must be known, well established, and authoritatively settled and any uncertainty of the matter or fact in question will operate to preclude judicial notice thereof. *Id.*

The Community Ditch Objectors' Request for Judicial Notice raises only questions and offers no basis for certainty on which the parties or the Court might rely. The Community Ditch Objectors have supplied no information, let alone the "necessary information," to lay the foundation for the factual propositions they seek to establish. Specifically, the Community Ditch Objectors point to no source or authority in support of their Request, and the United States and the Navajo Nation, like the Court, are simply left to guess where this material comes from.

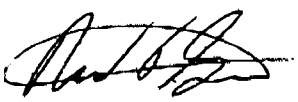
As described above, the information that is the subject of the Community Ditch Objectors' Request is wholly irrelevant to the Court's resolution of the question before the Court. The Community Ditch Objectors have made no effort to meet the minimum requirements of the rules they rely on, and the Court should reject the Request for Judicial Notice.

III. Conclusion

For the reasons set forth above, the Court should deny the Request for Judicial Notice. In the event the Court determines in the future that measures of water and conversion factors are necessary to decide an issue of disputed material fact and are therefore relevant to these proceedings, it would be appropriate for the Community Ditch Objectors to renew their request that the Court to take judicial notice of their "water units of measure".

Respectfully submitted this 25th day of June, 2013.

UNITED STATES OF AMERICA



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CERTIFICATE OF SERVICE

I certify that on this 25th day of June, 2013, an electronic version of *Response of the United States and Navajo Nation to Request for Judicial Notice of Weights and Measures of Water* was served by electronic mail to: wrnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the list of parties identified on the *Notice of Amended Service List* (filed Feb. 25, 2013).

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