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 US and NN do not want the court to take judicial notice of common weights and measures of water because they want the court to know as little as possible about this case and the controlling law. The US and NN do not dispute the correctness of the water measures and conversion factors.

These weights and measures enable the court to understand why NIIP is not PIA. PIA is required by *Winters* and subsequent cases and all applicable statutes.

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COMMUNITY DITCH REPLY ON THEIR REQUEST FOR JUDICIAL NOTICE OF WEIGHTS AND MEASURES OF WATER

Since water is the subject of this inter se proceeding, the Community Ditch Defendant-counterclaimants have asked the court to take judicial notice of standard weights and measures which are used in dealing with water. In their response, filed June 25, 2013, the Navajo Nation and United States object to the court using, or even knowing about, the common units by which water is measured, such as an acre foot or a CFS or a miner's inch.

Apparently the NN and US want the court to sign the proposed decree in a state of complete ignorance, without knowing the quantities involved. The NN and US claim that

"the water units and measures . . . have no bearing on any matter before the Court." Response at 1. That assertion is hard to fathom.

It is not clear whether the State of New Mexico joins in the continued objections by the NN and US, since the revised table includes the gallon figure suggested by Mr. Utton.

By way of reply, the Community Ditch Defendants make the following points:

1. **The court can take judicial notice of weights and measures.** Rule 11-201, NMRA; *United States v. Perot*, 98 U.S. 428 (1878) (adopting value of Mexican vera and league in Texas land grant case); *Ulrich v. Pateros Water Ditch Co.*, 67 Wash. 328, 333-34, 121 P. 818, 820 (1912) (contract was not uncertain and could be specifically enforced with agreement about the definition of a miners' inch).

2. **The NN, US and OSE do not dispute the water measurements presented to the court.** In their response, the NN and US argue that water units of measurement are somehow irrelevant to a water rights case. However, they do not say that any of the units and conversion factors are wrong. Nor can they, since all of the units are quite common and standard. All of them are regularly used in judicial decisions about water.

The only quibble concerns the weight of water. As the conversion sheet shows, one cubic foot of water weighs approximately 63.2 pounds. The density of water varies slightly, depending on temperature, salinity, etc., but these variations are minor and not material for present purposes.

If the NN and US are objecting to the weight of water, are they asking the court to assume that water has no weight? (If water were weightless, then pigs could fly, since pigs are mostly water.)

3. The court needs these water units to understand *Winters* and the case before it.

A. Understanding *Winters*. In footnote 1 of their response, the NN and US argue that this court does not need to understand the water units used in *Winters v. United States*, 207 U.S. 564 (1908), *aff'g* 143 F. 740 (9th Cir. 1906). This is a rather bizarre argument, since the NN and US are basing their water claims on *Winters*.

In *Winters*, the Supreme Court affirmed an award of water rights to the Fort Belknap Indians based upon the amount of irrigable acreage. According to the recitation of facts by the Ninth Circuit,

> The Indian reservation comprises an area of about 1,400 square miles, embracing about 1,000,000 acres of land, the greater portion of which is grazing land, "well adapted to stock raising." Act June 10, 1896, c. 398, 29 Stat. 351. There are, however, some portions thereof that are suitable for agriculture, and of these portions "approximately about 30,000 acres are susceptible of irrigation with the waters of Milk river."

143 F. at 741. These 30,000 acres were susceptible to irrigation because they were located in the river valley adjacent to the river. In other words, these small portions of the reservation were practicably irrigable acreage, due to their location in the river bottom.

The Supreme Court affirmed the award of 5000 miner's inches to the tribe. In Montana, a miner's inch is equal to 1/40 cubic foot per second.

B. Understanding this case. In the present case, the NN and the US and OSE are demanding that the court award the Navajo Nation more than 646,640 acre-feet of diversion and 335,681 acre-feet of depletion. So it would be prudent and judicious for the court to know how much an acre foot is.

The settling parties think the court does not need to know about the quantities of water in their proposed decree. Throughout this litigation, the settling parties have asserted that the court should just rubber stamp their proposed decree without any scrutiny whatsoever. In essence, the NN and US and OSE want the court to sign a quiet title judgment to all this water without knowing what it is doing. *Nemo dat quod non habet*, a/k/a "The Brooklyn Bridge."

The special master and the court have rejected the notion that ignorance is the best policy, so the settling parties are working to make sure that the court knows as little as possible about the facts and the law that control this case. When the settling parties object to weights and measures of water, they are simply continuing their tactics of ignorance. They do not want this court to educate itself about the basic underlying facts in this case, because as the court does so, their case dissolves.

For example, one central question is whether there is enough flow in the San Juan River to accommodate the proposed decree and (a) the needs of other users (junior and senior), and (b) the Colorado River compacts, and (c) the US demands for endangered species. See Community Ditch Motion for Partial Summary Judgment Concerning Availability of Water and Impacts on Other Water Users (#3). In order to analyze this question, the court needs to be able to convert flow figures – CFS – into acre-feet. The chart of measures and conversions enables the court and the parties to do this. Using the chart, any rudimentary calculation shows that the natural flow of the San Juan River is not nearly enough to accommodate all these demands. To cover up this fact, the US and NN and OSE would like the court to be unable to convert CFS to acre-feet or vice versa. In their view,

this is an expedited inter se, so ignorance is bliss. Fortunately, judges do not subscribe to that doctrine.

4. The settling parties have conceded that NIIP is not PIA. The chart explains why. The US and NN and OSE have admitted the fact that NIIP is not practicably irrigated acreage (PIA). They have conceded that NIIP is not PIA in their statement of claims; in their briefs; in their objections to discovery; in their responses to Community Ditch Motion for Partial Summary Judgment re NIIP (#4); and in several of the hearings conducted by the court, including the telephonic hearing on April 30 and the summary judgment hearings in Aztec on June 11 and 12.

The chart of weights and measures of water explains why NIIP is not PIA. It is an indisputable physical fact that one cubic foot of water weighs more than 63 pounds. Therefore, it is also an indisputable physical fact that one acre foot of water weighs more than 2,700,000 pounds.

This indisputable physical fact – the crushing weight of water – explains why NIIP is not PIA. Even though water is a liquid, it is so heavy that it becomes economically infeasible to transport and pump water uphill for irrigation. This is why NIIP has been unable to repay its construction costs, or to cover its operational cost. This is why PIA acreage is limited to lands in the river valley which can be served by gravity.

Likewise, this is why, in *Winters*, only 30,000 acres out of 1,000,000 were practicably irrigable.

Respectfully submitted,

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By /s/ Victor R. Marshall

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 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: wrnavajointerse@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.