

DISTRICT COURT
SAN JUAN COUNTY NM
FILED *C*

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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: It is an undisputed fact that NIIP is not PIA. The court should correct the factual record and its August 16 opinion accordingly.

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**MOTION FOR CORRECTION OF FACTUAL RECORD AND
AUGUST 16 OPINION CONCERNING NIIP**

The court has overlooked (or misapprehended) the factual record concerning NIIP. On pages 36 to 40 of its opinion, the court states that Mr. Rogers' testimony is not supported by facts in the record. The court's statement is incorrect. The court has overlooked all the other proof in the record which establishes without dispute that NIIP is not PIA.

When Jim Rogers testified that NIIP is not PIA, he was agreeing with the settling parties. On the record before the court, it is an undisputed fact that NIIP is not PIA.

In his affidavit, Jim Rogers testified that NIIP is not PIA, and no one, not one witness, has controverted him. His testimony simply corroborates all the other proof that can be found at various places in the record, including but not limited to the following:

A. The undisputed facts which were admitted by the NN, US, and OSE during summary judgment.

The following numbered facts were set forth in Motion for Partial Summary Judgment #4, filed April 15, 2013, in accordance with Rule 1-56. The NN, US, or OSE did not dispute any of these facts in their responses to Motion #4.

- #1. The land occupied by NIIP is not practicably irrigable acreage (PIA).
- #2. NIIP is not a beneficial (nonwasteful) use of water.
- #3. The lands occupied by NIIP are not suitable to sustained irrigation at reasonable cost.
- #6. Since its inception, the cost of building and operating NIIP-NAPI has substantially exceeded the revenue of NIIP-NAPI.
- #10. In 2011 Keller Bliesner and Associates compiled information on the completion of NIIP-NAPI. Based on that compilation and assuming a \$26 million per year funding level, completing construction will cost \$403 million, rehabilitation will cost \$125 million, addressing NIIP deficiencies will cost \$53 million, on-farm rehabilitation will cost \$14 million, and new on-farm development will cost \$61.7 million, for a total cost of \$656.7 million. Exhibit 2, Draft Water Resource Study (also Lionel Haskie Dep., Ex. 9).
- #11. None of the land occupied by NIIP-NAPI is within the boundaries of the 1868 Navajo Reservation.

B. No witness testified that NIIP is PIA.

No witness ever testified that NIIP is PIA, by affidavit or otherwise. No witness has opined that NIIP is PIA. Not John Whipple; not John Leeper; not Christopher Banet; not William Fogelman; not Gretchen Greene; not Travis Greenwalt; not Edward Lucero; not Aaron M. Beutler; not Eileen Camilli; not Clifford R. Landers; not Dean Anthony

Zimmerman; not Aaron S. Bliesner; not Lionel Haskie; and not any other witness. See affidavits filed by the US and NN April 15, 2013 as Attachments A through K; Whipple affidavits filed April 15 and May 24; Leeper affidavit filed April 15; Haskie deposition. The various reports filed by the US, NN, and OSE do not claim or testify or conclude or opine or allege that NIIP is PIA. The statement of claims filed by the US, NN, and OSE does not allege that NIIP is PIA.

C. John Leeper testified that NIIP will never be completed.

See Attachment A to Joint Memorandum of NN and US in Support of Settlement Motion, filed April 15, 2013, i.e. the affidavit of John Leeper, who states:

12. In addition, the Nation sought funding to complete the Navajo Indian Irrigation Project ("NIIP"), a large agricultural infrastructure development project with the potential to be a cornerstone of Navajo economic development and self-sufficiency. **Although authorized by Congress in 1962, NIIP remains substantially incomplete because insufficient appropriations have been provided to complete construction of the irrigation project. Today, of the 110,600 acres of land originally envisioned for the project, approximately 78,000 acres of irrigated acres have been prepared to which irrigation water is being applied, and, in 1996, the number of acres in irrigation was even less. This is hardly surprising, as Indian irrigation projects generally do not receive the same support as non-Indian projects. The contrast between NIIP and the San Juan-Chama Project provides a clear example. Eight years after the authorizing legislation was enacted into law only 17% of NIIP had been completed compared with 66% of the San Juan-Chama Project.**

24. Contemporaneously in 2004 and 2005, representatives of the Navajo Nation and the State were working with the staffs of Senators Domenici and Bingaman to ensure that the resulting settlement legislation would be politically viable when brought to Congress. **The initial draft settlement legislation included spending authorizations of \$ 1.1 billion, which included \$589.6 million for the NGWSP, an additional \$351 million for the completion of NIIP, and \$31.8 million to rehabilitate existing NIIP facilities. But in September of 2004, Senators**

Domenici and Bingaman met together with Navajo Nation President Shirley to advise him that they could not support a settlement conditioned on the completion of NIIP. The Senators were concerned that the Congressional Budget Office would "score" or attribute all future costs to complete NIIP against the cost of the settlement, which was already approaching one billion dollars without including the additional costs associated with NIIP.

25. The Navajo Nation had struggled to secure funds to complete NIIP ever since the project was authorized in 1962, and full funding for NIIP was a fundamental objective of the Navajo Nation when it entered into the water rights settlement negotiations. **Nevertheless, following the September 2004 meeting in Washington, the Navajo Nation conceded the removal of funding for NIIP from the draft settlement legislation.**

D. John Leeper testified that there are no future irrigation rights at NIIP based on PIA

In his affidavit filed April 15, 2013, John Leeper testified that "there are no rights to develop future irrigation [at NIIP] based on PIA." (Paragraph 59, at 23.)

E. The US, NN, and OSE do not contend that NIIP is PIA.

The US, NN, and OSE have never contended that NIIP is PIA. They conceded and admitted in open court that NIIP is not PIA. See Reply on Motion #4 filed May 24, 2013.

Mr. Stanley Pollock made the following admissions to the court during the hearing on April 30, 2013.

JUDGE WECHSLER: And I'd ask you to elaborate for the court, what is the Navajo Nation's position with respect to the matter of proving its water rights to NIIP?

MR. POLLACK: Your Honor, first of all, we don't think that it's the court's role here to determine what the water rights are for NIIP. We think what the court is charged with is approving an overall settlement, and getting into proof of each of the elements of the water rights that are proposed in the settlement is beyond what the court was instructed to do. Or at least the initial order by Judge Sanchez says that the purpose of the Navajo inter se is to determine whether or not to approve a

settlement that was ratified by Congress in 2009. It is not to go into the merits of the actual water rights that are identified in the settlement decree. We believe that's a slippery slope. **But with respect to the water rights for NIIP, no one here is arguing that the water rights for NIIP are based on practicably irrigable acreage. And we have been consistent on that from the beginning.** The court will recall that I did argue to the court when I asked for protective order to put a stop to all of this discovery about NIIP and PIA, that I argued that we were not basing the water rights for NIIP on PIA. **We were not basing it either in the settlement or in the United States statement of claim based on PIA, and that the water right for NIIP is a water right that has been established by Congress,** and that the court cannot, cannot abrogate a congressional authorization of water.

Therefore, before the defendants filed their summary judgment reply on May 24, the NN, US, and OSE had already admitted and not contested the fact that NIIP is not PIA. So the defendants did not resubmit all the evidence which they could have presented if the settling parties had contested that fact. [If the settling parties had claimed that NIIP is PIA, they would have been committing a massive Rule 11 violation.]

F. The Keller Bliesner report that it would cost \$656 million to complete and rehabilitate NIIP.

Exhibit 2 to the Motion for Partial Summary Judgment concerning NIIP, filed April 15, 2013, quoted above.

G. The deposition testimony of Lionel Haskie that the NIIP project does not generate enough money to maintain and repair itself.

Exhibit 9 to the Motion for Partial Summary Judgment concerning NIIP, filed April 15, 2013.

H. Jim Rogers' affidavits, which are based on personal observation and experience as an irrigator on the San Juan River.

The court's opinion overlooks all the other parts of the record which support Mr. Rogers' affidavits, like the exhibits he attached to his affidavit, and the statements by the settling parties themselves.

The exclusion of his testimony is plain legal error, because his testimony is based on his own personal observations and experience as an irrigator on the San Juan River and a neighbor to NIIP. Therefore it is admissible under Rules 11-701 and -702.

I. The financial reports which state that they do not include all the costs of NIIP.

The NAPI financial statements [NAPI-01 through NAPI-05] explicitly say that they do not include all of the costs for the NIIP project, such as the land, the canal system and roads, and the water. To quote one of the financial statements:

Land. The land occupied by present and anticipated of future farm operations of NAPI consists of certain portions of the present Navajo Nation reservation and other designated federal, state, and privately owned lands acquired by the Navajo Nation and placed in trust with the Federal Government. The title to such property remains with the Navajo Nation and, therefore, the cost or other value of the property is not reflected in the accompanying financial statements.

Primary Irrigation Facilities and Road. The primary irrigation canal system, roads, and related facilities were financed by the Federal Government and are maintained primarily by the Federal Government and others for the benefit of the Navajo Nation through NAPI. Ownership rights to these facilities and roads have not been transferred to NAPI and, therefore, the cost or other value of these assets has not been reflected in the accompanying financial statements.

* * *

Contributed Water and Related Cost. In the course of conducting farm operations, NAPI utilizes irrigation water provided by the Federal

Government, as discussed previously under primary irrigation facilities and roads. Neither the cost nor the contribution of the water is reflected in the accompanying financial statements.

Nonexchange Transactions. NAPI receives grants from certain Federal Government agencies, primarily the BIA and the Bureau of Reclamation, which meet the definition of nonexchange transactions under generally accepted accounting principles. Also, as an enterprise fund of the Navajo Nation, any capital contributions received from the Navajo Nation meet the definition of nonexchange transactions pursuant to generally accepted accounting principles.

Excerpts from NAPI-01, Financial Statements and Reports of Independent Auditor Moss, Adams, auditors note 2 (emphasis added).

Second Motion To Compel Discovery Concerning NIIP 4-5 (Sept. 26, 2012).

J. The Navajo Nation Answers to Interrogatories, which list and incorporate documents as part of their responses.

Subject to and without waiving its specific objections to this interrogatory, the Navajo Nation states that the answer to this interrogatory may be derived or ascertained from certain business records of NAPI that the Navajo Nation previously provided to the Marshall Parties in response to the *Joint Request for Documents and Designation of 30(B)(6) Witnesses Concerning the NIIP Project* (May 7, 2012). Rule 1-033(E), NMRA. See *Responses of the Navajo Nation to Joint Request Concerning the NIIP Project* (Aug. 17, 2012); *Notice of the Navajo Nation of Response to Non-Settling Parties' Requests for Discovery* (Aug. 17, 2012); *Amended Notice of the Navajo Nation of Response to Non-Settling Parties' Requests for Discovery* (Aug. 20, 2012); and *Certificate of Service for Navajo Nation's Supplemental Discovery Responses to Community Ditch Defendants' Discovery Requests Concerning the NIIP Project* (Nov. 27, 2012).

Responses and Objections of the Navajo Nation to the Marshall Parties' Additional Interrogatories on NIIP 3-4 (Jan. 7, 2013).

K. NAPI-01 through -05, produced August 17, 2012.

Wherefore, the Community Ditch Defendants move the court to correct the record and its August 16 opinion. It is undisputed that NIIP is not PIA.

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 September 5, 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: wrmavajointerse@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.