

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 OSE has conceded the motion. The NN and US have effectively conceded the motion, because they do not dispute that the 2010 census shows that the Navajo population on the Reservation is shrinking, contrary to the affidavit that Gretchen Greene filed in April 2013.

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**REPLY ON MOTION FOR CORRECTION  
CONCERNING NAVAJO POPULATION**

On August 28, 2013, the court entered an order giving all parties until September 5, 2013, to file motions concerning the court's August 16 opinion. On September 5 the Community Ditch Defendant-Counterclaimants filed a "Motion for Correction of Factual Record and August 16 Opinion Concerning Navajo Population." The State of New Mexico filed no response to the motion concerning Navajo population, thereby conceding the motion. See Point 1 below.

On September 20, the US and NN filed a combined response to all the motions for correction. The US and NN contended that the Navajo population motion was untimely,

*Dr*

even though it was filed within the time set by the court. The US and NN make the utterly invalid argument that the motion is untimely under the rules relating to post judgment motions, but no final judgment has been entered. See Point 2 below.

The US and NN did not respond to the underlying merits of the motion for correction concerning Navajo population. For example, they never mention Gretchen Greene's affidavit on Navajo population. The US and NN did not dispute that Gretchen Greene submitted an incorrect affidavit on April 15, 2013, by excluding the latest census data that shows that the Navajo population on the reservation is shrinking, not growing.

Since the US and NN did not contest the underlying merits of the motion concerning Navajo population, the motion must be granted. See Point 3 below.

**Point I. The State Has Conceded the Motion.**

The State of New Mexico/OSE filed no response to the motion for correction concerning Navajo population. The State of New Mexico did not join in the population response filed by the US and NN. Therefore the State has conceded the motion. Rule 1-007.1(D).

(The state did file a response concerning their expert witness John Whipple, but that response does not relate to the Navajo population.)

**Point II. The motion for correction was timely under the court's August 28 order and the Rules of Civil Procedure.**

The US and NN make the bizarre argument that the motion for correction concerning Navajo population was untimely. This argument flies in the face of the court's August 28 order and several Rules of Civil Procedure.

As the US and NN know very well, the court has not yet entered a final judgment in this case. Therefore the time limits for post judgment motions under Rules 1-059 and 1-060 do not apply at all. Nor does NMSA 1978, § 39-1-1, which also relates to final judgments. Rule 1-054(A) defines a judgment as a decree or order "from which an appeal lies." At present, there is no judgment, and the time for appeal and post-judgment motions has not started.

Rule 1-054(B)(1) also provides that court decisions are "subject to revision at any time before the entry of judgment adjudicating all the claims." See, e.g., *Albuquerque Commons Partnership v. City of Albuquerque*, 2003-NMCA-022, ¶ 11, 133 N.M. 226, 62 P.3d 317. The motion for correction asks the court to revise the record and its August 16 ruling. That ruling overlooks the evidence in the record from the 2010 census about the Navajo population.

**Point III. The US and NN did not dispute the underlying merits of the motion concerning Navajo population.**

In response to the Navajo population motion, the US and NN only raised spurious procedural arguments, to the effect that the motion was untimely. They filed no response on the merits of the motion itself. They never even mention Gretchen Greene's affidavit, or the evidence in the record which shows that the Navajo population is shrinking rather than growing. They did not dispute that the record shows the following points:

1. **The most recent census data from the US and the NN shows that the overall American Indian population on the Navajo Reservation is declining.** According to the actual census counts in 2000 and 2010, the American Indian population on the Navajo Reservation declined from 175,232 in 2000 to 169,321 in 2010 . . . .
2. **In her April 2013 affidavit about Navajo population, Gretchen Greene did not use the 2010 census data at all.** Her projections

used the 2000 census as the baseline for projecting future population in the year 2110, more than a century. Gretchen Greene excluded all 2010 census data from her affidavit, which was executed under oath on April 11, 2013 and filed on April 15, 2013.

3. **Gretchen Greene did not explain why she excluded the 2010 census data from her affidavit and projections on the Navajo population. The 2010 census data was available well before she filed her affidavit.**

Therefore the US and NN have effectively conceded the motion on its merits, and the motion should be granted. The August 16 opinion overlooks the 2010 census data in the record which shows that the Navajo reservation population is declining, not growing. Exhibits POP-1, POP-3, and POP-4.

Respectfully submitted,

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By /s/ Victor R. Marshall

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#### CERTIFICATE OF SERVICE

I hereby certify that on October 1, 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: [wrrnavajointerse@nmcourts.gov](mailto:wrrnavajointerse@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.