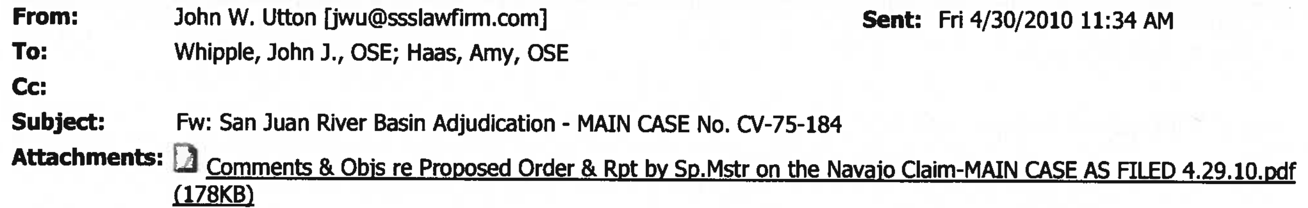
5J-17
Navajo Settlement

Attachments can contain viruses that may harm your computer. Attachments may not display correctly.

Whipple, John J., OSE



From: John W. Utton [jwu@ssslawfirm.com] **Sent:** Fri 4/30/2010 11:34 AM
To: Whipple, John J., OSE; Haas, Amy, OSE
Cc:
Subject: Fw: San Juan River Basin Adjudication - MAIN CASE No. CV-75-184
Attachments: Comments & Objs re Proposed Order & Rpt by Sp.Mstr on the Navajo Claim-MAIN CASE AS FILED 4.29.10.pdf (178KB)

----- Original Message -----
From: owner-wrattorney@11thjdc.com <owner-wrattorney@11thjdc.com>
To: wrattorney@11thjdc.com <wrattorney@11thjdc.com>; wrlaplata@11thjdc.com <wrlaplata@11thjdc.com>; Jolene McCaleb <jmccaleb@wtmlawfirm.com>; Liz Taylor <etaylor@taylormccaleb.com>; Richard Cole <rbc@keleher-law.com>
Cc: Victor Marshall <victor@vrmarshall.com>; Shirley Meridith <shirley@vrmarshall.com>; Sheri Heying <sheri@vrmarshall.com>
Sent: Thu Apr 29 15:50:19 2010
Subject: San Juan River Basin Adjudication - MAIN CASE No. CV-75-184

Dear Counsel:

Please find attached "Comments and Objections Concerning Proposed Order and Report by Special Master on the Navajo Claim, mailed to the Court for filing today.

Sincerely,
Sheri Cole Heying for
Victor R. Marshall, Esq.
Victor R. Marshall & Associates, P.C.
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400
victor@vrmarshall.com
sheri@vrmarshall.com

STATE OF NEW MEXICO
COUNTY OF SAN JUAN

STATE OF NEW MEXICO, ex rel.
THE STATE ENGINEER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, et al.,

Defendants,

vs.

THE JICARILLA APACHE TRIBE
AND THE NAVAJO NATION,

Defendant-Intervenors.

No. CV 75-184
Honorable James J. Wechsler
Presiding Judge

SAN JUAN RIVER BASIN
ADJUDICATION

SAN JUAN RIVER
GENERAL STREAM
LITIGATION

COMMENTS AND OBJECTIONS CONCERNING PROPOSED ORDER AND REPORT BY SPECIAL MASTER ON THE NAVAJO CLAIM

The San Juan Agricultural Water Users Association and Hammond Conservancy District (for ease of reference, "the Association") respectfully submit the following comments and objections regarding the proposed order and report submitted by the Special Master concerning the claim by the Navajo Nation ("the Navajo Claim").

At the outset, it must be reiterated once again that the Association does not represent any individual water owner in the San Juan Basin. Water owners have yet to be notified of this litigation and joined as parties. When they are joined, each water owner has the right to select his own counsel or to appear *pro se*. So at this point the Association has not been authorized to speak on behalf of any individual water owner. Thus far in this litigation, the role of the Association has been to point out the need to protect the rights of un-joined

parties until absent parties have been joined and given the opportunity to select their own counsel and the opportunity to speak for themselves, either through counsel or *pro se.*

In most respects, the report and proposed order by the Special Master are a significant step forward in this litigation. For the first time, after decades of aimless limbo, there may be a workable roadmap for this adjudication, along the lines proposed by the Special Master. With modifications, some of which are crucial, the overall plan by the Special Master can work. The Association submits these comments in an effort to make the process work, in a way that is fair to the parties who have not yet been heard.

The real problem is that the Navajo Nation and the State Engineer and the U.S. are not reconciled to the fact that they will have to litigate and prove the Navajo claim. The Special Master's report largely recognizes this fact, but the Settling Parties do not. The Settling Parties have taken the position that no litigation is required since they have somehow "settled" everything amongst themselves. The Special Master's report rejects that notion, so the Settling Parties give lip service to the idea of proving up their claim, but in reality everything they file is intended to evade litigation, or to make the litigation a rubberstamp.

The Settling Parties are desperate to have their self-serving "settlement" approved by this Court without a real adjudication, because they fear that judicial scrutiny will expose the legal and factual defects in their claim. The so-called "settlement" is an attempt to paper over the fatal defects, both legal and factual, in their position. The draft notice is also an attempt to paper over the reality that the settlement cannot be approved, because it is without legal and factual foundation. The Navajo Tribe keeps repeating that it is somehow

entitled to 606,660 acre-feet per year of diversion plus 325,670 acre-feet per year of consumptive use, plus other uses, but the Tribe is unable to explain the legal and factual bases to support its conclusion. The notice drafted by the Settling Parties presents the settlement as a *fait accompli*, and for that reason alone it is objectionable and unfair. If that notice is sent out with the Court's *imprimatur*, it means that the Court is taking sides on behalf of the Settling Parties, before the Court has even heard from other water users. The notice, which is drafted by the Tribe, is entirely one-sided. In every litigation, there are at least two sides, and the Court cannot identify the factual and legal issues in the case until it has heard from both sides. There are numerous reasons why the settlement cannot be approved, and many of them have not yet been mentioned in this litigation.

The Settling Parties are seeking a final court judgment which binds all the competing water users in the San Juan Basin. Therefore, the Settling Parties must join all of the water users against whom they are seeking a judgment. In order to do this, the Tribe must file a complaint setting forth its claim and explaining the factual and legal bases for the claim. The defendants are entitled to hire their own counsel or to appear *pro se*, and they are entitled to submit answers and counterclaims refuting or denying the Navajo Claim. This pleading process could occur in 2011 after all the parties are joined, but it is imperative that the Tribe present a complaint that explains why it has a right to all this water.

1. There is no deadline. The Tribe and the Settling Parties argue that the rights of existing water users must be short-circuited because the federal litigation establishes a deadline of December 31, 2013. This assertion is incorrect, as the Special Master established by questioning the Settling Parties at the hearing on November 17, 2009. *See*

Exhibit 2, attached to Suggestions, Comments . . . by SJAWU & Hammond (Jan. 4, 2010). The Settling Parties were forced to admit that the supposed deadline of December 31, 2013 can be extended by agreement of the parties, without authorization or legislation from Congress. In reality there is no deadline, because the parties can extend the dates for implementing all the conditions in the conditional settlement, including the adjudication date. (Of course, so can the Court.) Therefore, the procedural and substantive rights of other water users cannot be sacrificed to a deadline that does not exist.

2. There is no settlement. The Settling Parties claim that they have reached a settlement, but this is somewhat misleading. The parties have actually agreed to a "conditional settlement" which will ripen into a final settlement if, and only if, all of the conditions are met. Most of these conditions are unrealistic and unlikely to be met. For example, one condition is the construction of a pipeline to Gallup which is unlikely to ever be fully funded or constructed by the United States. Another condition is that there must be enough water in the Colorado River system to meet the Navajo Claim and other uses. *See* Motion for Limited Discovery Concerning 2007 BOR Hydrologic Determination, at 1-2 (filed Oct. 2, 2007) (quoting Navajo Indian Irrigation Project Act, Pub. L. No. 87-483, 76 Stat. 96, 100 (1962)). This condition cannot be met, because the best and most recent science establishes that (a) the Colorado River compacts grossly overestimated the amount of water actually available in the river system, and (b) the Colorado water supply will continue to shrink due to global warming and regional drought. In short, the "conditional settlement" is simply another pie-in-the-sky agreement where government agencies engage in make-believe about the amount of water that is available in the American West. This

pattern has been repeated over and over again for more than a century. For examples *see* Marc Reisner, *Cadillac Desert: The American West and Its Disappearing Water* (1986) and James Lawrence Powell, *Dead Pool: Lake Powell, Global Warming, and the Future of Water in the West* (2008). The Navajo settlement cannot be approved because it is based on water that does not exist.

The other problem is that the parties have entered into a "conditional settlement" using other people's water. The Navajo settlement cannot be approved because the Settling Parties have tried to settle their differences by using water to which they have no right. To use an analogy, the present situation is like Farmer Smith and Farmer Jones announcing that they have reached a "conditional settlement" of the water disputes between them. The conditions are: (a) Smith and Jones will split the water used by Farmer Roberts; and (b) the federal government will provide Smith and Jones with $2 million in federal improvements. In actuality, a "conditional settlement" like this is no settlement at all.

4. <u>Rules 1-071.1 through .5 must be read in conjunction with all of the other Rules of Civil Procedure</u>. This is both a legal and a practical necessity, because it is impossible to adjudicate a claim of this magnitude and complexity without following those rules. The Rules of Civil Procedure are efficient, well tested, and understood by all counsel. The Rules of Civil Procedure are neutral – they do not favor the plaintiff over the defendant.

If the Settling Parties manage to persuade the Court to dispense with the Rules of Civil Procedure, then the Court would need to write new rules of procedure so that all of the parties and their counsel will know them in advance. This is an impossible task, and if the Court goes down the road suggested by the Settling Parties, then the Court will be

perpetually writing and rewriting new rules. This is not an adjudication that lends itself to *ad lib*, *ad hoc*, on-the-fly rulemaking. Some degree of procedural informality might be appropriate in an expedited *inter se* on a small stream with a few dozen users, where there are no complex legal or factual questions. However, it is not appropriate or permissible when adjudicating the Navajo Claim to one-third of the stream water in the entire state. The Navajo Claim raises complex factual issues which are hotly disputed. It also raises novel questions of law under the state and federal constitutions, New Mexico's water statutes, the Colorado River compacts, state case law, and federal case law.

For example, the draft orders contemplate that the Tribe file a "statement of claim" and then defendants will file something after they are served. Then what? Without proper pleadings, neither the Special Master nor the Court nor the parties will be able to identify the factual and legal issues which are contested, and the issues that need discovery. Furthermore, unless the legal and factual issues are defined through the pleading process, it will be impossible for the parties to decide which issues might be settled, and which issues are impossible to settle.

In a civil case, it is the parties who define the legal and factual issues, via the pleading process. Defendants have equal rights as plaintiffs to raise the issues that the Court will have to adjudicate. Neither the Court nor the Settling Parties can define the issues in advance, because they cannot know what the issues will be, until they have heard from the defendants. It is understandable that the Tribe would like to set the procedures and the issues <u>before</u> the defendants have been heard from, because that will tilt the case towards the Tribe, but this is not permissible under the Rules of Civil Procedure (including the water

rules). Moreover it would violate judicial impartiality and neutrality for the Court to make up rules of procedure and decide what the issues are, before hearing from the thousands of water rights owners who are not in this litigation yet. The unjoined defendants have a right to be heard on the procedures in this case, as well as the substantive merits.

5. In all court documents, the term "Navajo settlement" should be replaced with "the Navajo claim." The use of the term "settlement" is misleading in several respects. First, the use of the term "settlement" begs the threshold question, which is whether the Settling Parties have the legal authority to enter into a settlement using this water. They do not. Second, this is not an actual settlement, but rather a "conditional settlement" which depends on conditions which have not been fulfilled. Third, as the Special Master has recognized, the Navajo settlement cannot settle the rights of persons who did not sign it. Fourth, the purported settlement is simply a claim by the Tribe to over 660,000 acre feet of water. It is the Tribe's burden to prove its claim, both legally and factually, just like any other plaintiff.

6. The draft documents misstate and prejudge the issues in favor of the Navajo claim. For example, the first question, legally speaking, is whether the Settling Parties have the legal authority to enter into the purported settlement. If any of the Settling Parties lack such authority, then the Court cannot approve the purported settlement, whether or not the purported settlement is fair.

7. The New Mexico Water Code requires a complete hydrographic survey of the San Juan River. NMSA 1978, §§ 72-4-13, -15, -16, -17. These statutory requirements date back to the original water code in 1907. This provision is and always has been mandatory.

For one thing, the provision is designed to protect small water users from having to bear the expense of hiring an engineer and surveyor to delineate water rights and land parcels to which the rights are attached. This hydrographic survey is the duty of the State Engineer. Indeed, it is the Engineer's first and foremost duty under the Water Code, because the adjudication and administration of water rights depends upon accurate, up-to-date, and impartial data on all water uses. Without them, relative priorities cannot be established; the amount of water cannot be quantified; and the land parcels cannot be identified.

The Navajo claim cannot be fully adjudicated in an expedited *inter se* without a new and complete hydrographic survey. For example, the proposed settlement gives a priority date of 1955 to much of the Navajo Claim. If the settlement were to be approved, then these water rights would have to be slotted into the San Juan priority scheme, behind the rights adjudicated by the Echo Ditch Decree and any other rights acquired prior to 1955. This is not some academic or theoretical exercise, because the Navajo "settlement" will result in frequent priority calls on the river. This means that the Court needs to ascertain and adjudicate which water rights are cut off, and which water rights take precedence over the Navajo Claim.

The Settling Parties are trying to avoid a full or partial hydrographic survey, in direct contradiction to the statute. Perhaps they fear that they cannot prove a past or future use for the huge quantity of water which they claim. Perhaps they want to squeeze non-Indian water users when the calls on the river begin. If the non-Indian users do not have their statutory protection – a complete and current hydrographic survey – then they can be

squeezed out by the cost of asserting their priority claims – a cost which the State Engineer is required to bear as part of the mandatory hydrographic survey.

Perhaps the OSE will assert that it does not have the money for a complete hydrographic survey. However that is not a legally valid excuse for violating the statute. Moreover, if the State Engineer hired more engineers and fewer lawyers, the State Engineer could complete the hydrographic survey.

Additionally, the Association is very concerned that the Settling Parties will not provide even a bona fide partial hydrographic survey of present and future uses.[1] The Association is very concerned that the Settling Parties will not comply with the Special Master's directives.

Furthermore, whatever is submitted by the Settling Parties is not impartial, and cannot constitute a hydrographic survey under the Water Code. In this litigation, the OSE has decided to be an advocate for the Navajo Tribe, an adversarial party, rather than a neutral and impartial public official. By supporting the Navajo claim, the OSE has abandoned any pretense that it can be considered impartial, independent, and objective. Therefore, any water data used in this litigation must be compiled by an independent expert, selected by the Court, not by the OSE or the Settling Parties.[2]

---

[1] Including practicably irrigable acreage (PIA).

[2] The experience thus far on the La Plata section demonstrates that the current OSE lacks neutrality and objectivity. The OSE is a party to the Echo Ditch Decree, and is bound by it. However the OSE has obtained "consent decrees" against hundreds of *pro se* litigants that cut back on the rights established by the Echo Ditch Decree, such as the right to spread water, Decree at 89, and the right to carriage water.

8. <u>The form of notice should not be decided now, because it will not be served until sometime in 2011</u>. Many of the current disputes come down to a very practical question: *What documents should be included in the mailing to all water rights claimants in 2011?* The Association respectfully submits that it is unnecessary and counterproductive to attempt to decide this question right now. This question should not be decided until the Settling Parties have filed their claim and the supporting hydrographic survey. This will not occur until the end of 2010, or later. *See* Special Master's order.

Once the Settling Parties have filed these documents, and the Special Master has reviewed them, the Special Master and the Court will be in a better position to assess what documents should be included in the envelope, and what they should say. The Association respectfully submits that the envelope should include a proper summons. The summons can be printed on two sides of one piece of paper, so the summons is just as cheap as any other notice. Most importantly, a summons is much more effective in notifying water rights holders that they are now defendants in a lawsuit. A summons commands the defendant to appear, and most laypersons have some inkling that a court summons cannot be ignored. A court "notice" is much more likely to be ignored.

Experience has shown that other forms of court approved notice are ineffective. This is demonstrated by the unfortunate experience in class action litigation, where court notices are ignored and thrown in the trash by the vast majority of recipients. This happens even when the recipients are promised something of value:

> Since individual class members are still required to opt-in, the 1966 Rule amendments postpone but do not eliminate notice and mass communication problems. The bulk of the class members are still likely to be uninformed and indifferent. The opt-in rates for some recent class action settlements are astonishingly low. In *Strong v. BellSouth Telecommunications, Inc.* [137 F.3d 844 (5th Cir. 1998)], for example, the settlement provided class members with the option of either continuing under a service plan or canceling and receiving a credit. Although the settlement purportedly provided $64 million in compensation, the credit requests submitted by class members amounted to less than $1.8 million. In *Buchet v. ITT Consumer Fin. Corp.* [858 F. Supp. 944 (D. Minn. 1994)], the proposed settlement would have provided class members with coupons worth up to $39 toward the purchase of property insurance or related products. The court refused to approve the settlement, citing actual redemption rates that ranged from 0.002% to 0.11% for similar coupons.

Thomas B. Leary, *"The FTC and Class Actions"* (Jun. 25, 2007), http://www.ftc.gov/speeches/leary/classactionsummit.shtm.

Therefore, a summons should be used rather than some other form of notice. The summons is the route set forth in the Rules of Civil Procedure, so it is the safest and most effective way of joining the defendants. Since the summons is as cheap as any other form of notice, it would be judicially imprudent not to include a summons. (Rather than engaging in the academic argument about whether some other form of notice meets constitutional minimum due process, the parties and the Court should concentrate on providing the notice that most effectively alerts *pro se* litigants that they are being sued and must respond. The arguments about minimum due process are irrelevant, because real courts provide full judicial due process, which goes far beyond the lowest due process that might scrape by under the Constitution.)

The Association also submits that the joinder package should include a complaint that complies with the Rules of Civil Procedure. A "statement of claim" is too amorphous, and it is likely to be confusing to the defendants. Moreover the statement of claim is one-sided and slanted in favor of the Navajo claim, but it would appear to have the approval of the Court.

Therefore, the order should be modified to require the Settling Parties draft their "statement of claim" in the form of a complaint that meets the requirements of Rule 1-008(A) and (E). Once the Special Master and the Court see the complaint, then they can decide whether it should be included in the mailing (the preferred course), or condensed or summarized for mailing.

In any event, the envelope to be mailed in 2011 needs to include very plain language designed to minimize confusion and the incidence of defaults. Such language is surprisingly difficult to draft, which is another reason for deferring a final decision on the contents of the mailing. It should include some plain and prominent language along the following lines: "YOU ARE NOW A DEFENDANT IN A LAWSUIT BY THE NAVAJO NATION THAT WILL AFFECT YOUR WATER RIGHTS. IF YOU WANT TO PROTECT YOUR WATER RIGHTS, YOU MUST RESPOND TO THIS SUMMONS."

9. <u>The 2011 mailing must be based on the most current and complete sources of data</u>. These sources include public records in San Juan County, OSE records, ditch records and the like. To move this case forward in 2011, it is imperative that the Settling Parties begin work now on assembling the mailing lists. Between now and the end of

the year, they should be required to report to the Special Master periodically on the lists that they are assembling.

10. <u>If a water rights owner is not served because of an error in notice by the Settling Parties, then that person must be allowed to participate later</u>. If a party is not properly joined due to a mistake or oversight in compiling the mailing lists, then that person must be allowed to participate if and when he learns about the lawsuit and seeks to be heard. It is always a plaintiff's duty to serve all defendants whose identity can be ascertained from the best available records. If a mistake has been made by the plaintiffs in this service list, then no further order of the Court should be required. Otherwise, the plaintiffs Settling Parties would have an incentive to use inferior data to increase the number of water owners who are defaulted.

11. <u>Discovery must include all issues that might be relevant to the validity of the Navajo "settlement</u>." The Special Master's report recognizes that discovery will be necessary to adjudicate the Navajo claim. However, the Settling Parties will vigorously resist real discovery, because it will expose the defects in the Navajo "settlement." For example, as the Special Master has correctly recognized, the Navajo settlement cannot be approved if it gives the Tribe more water than it would be entitled to as federal reserve rights. Discovery will show that the amounts in the settlement are grossly in excess of any entitlement that the Tribe would have to New Mexico water under federal reserve rights. There is no way that the Tribe could make beneficial use of 606,660 acre-feet per

year of diversion and 325,670 acre-feet per year of consumption within New Mexico, even if there were enough water in the river.[3]

12. The Association reiterates and incorporates the points which it has already made to the Special Master, and the Association also adopts the points raised by the Bloomfield Irrigation District.

CONCLUSION

Overall, the Special Master's report is a positive step forward. In broad terms, it provides a roadmap that will work, if the necessary modifications are made. The real problem is the Settling Parties want no litigation at all, or sham litigation where the procedures and the result are stacked in their favor, even before the defendants have been joined. The Special Master's report is a giant step in the right direction, but the non-Indian water rights holders in the San Juan have not yet been given a meaningful opportunity be heard. As the Special Master's report recognizes, the first and foremost task is to join the thousands of absent parties, so that they have the right to speak for themselves.

Most importantly, it must always be remembered that this Court is adjudicating constitutional rights, that is, the right to use water as set forth in Article XVI of the New Mexico Constitution. Those constitutional rights are entitled to full judicial due process in a court of law – a real adjudication with all the protections afforded by the judiciary. The constitutional rights of San Juan water owners cannot be sacrificed in the name of

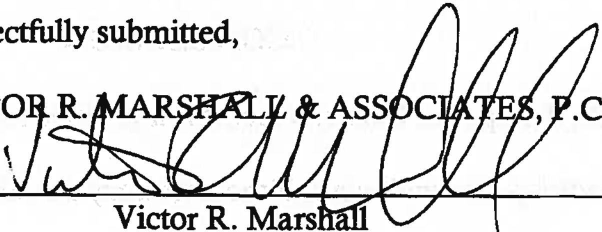
[3] The Navajo Nation is also making federal reserved rights claims in Arizona and in Utah, and the Navajo Nation is also claiming water from the Little Colorado River Basin in New Mexico, so the tribal claims are even more excessive than it first appears.

an "expedited *inter se*," or a "conditional settlement," or the nonexistent deadline. The Special Master's report seems to recognize this, but the Settling Parties do not.

After 35 years, the problem remains: the State Engineer and the Tribe and the U.S. are trying to prevent the absent parties from having the normal rights afforded to every litigant in a civil case.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.



By________________________________

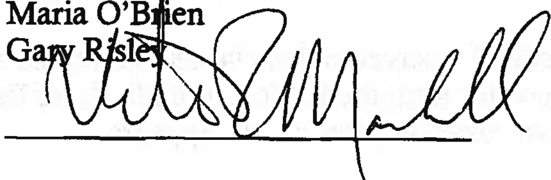
Victor R. Marshall
Attorneys for San Juan Agricultural
Water Users Association and
The Hammond Conservancy District
12509 Oakland NE
Albuquerque, New Mexico 87122
505-332-9400 / 505-332-3793 FAX

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by email to the attorneys electing email service at: wrattorney@11thjdc.com and to the La Plata parties electing email service at wrlaplata@11thjdc.com this 29th day of April, 2010.

I further certify that a true and correct copy of the foregoing has been served on the following attorneys by facsimile, by mail to Gary Horner, Dan Israel and William Johnson, and by email to Jolene McCaleb, Elizabeth Taylor, and Richard Cole on April 29, 2010.

Stanley Pollack and Bidtah Becker
Jay Burnham
John Draper and Jeffrey Wechsler
J.M. Durrett, Jr.
Robert Kidd and Michael Garcia
Tracy Hofmann, Arianne Singer and D.L. Sanders
Stephen Hughes, John Sullivan and Michael Thomas
Maria O'Brien
Gary Risley



____