

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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

Plaintiff-Appellee,

v.

Ct. App. No. 33535

See also

Nos. 33437, 33439, 33534

San Juan County

D-1116-CV-1975-00184, AB-07-1

THE UNITED STATES OF AMERICA,

Defendant-Appellee,

v.

SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION;
HAMMOND CONSERVANCY DISTRICT; BLOOMFIELD
IRRIGATION DISTRICT; VARIOUS DITCHES AND VARIOUS
MEMBERS THEREOF,

Defendant-Appellants,

v.

NAVAJO NATION,

Defendant-Intervenor-Appellee.

**ACEQUIAS' REPLY TO CITY OF GALLUP
[Corrected Version]**

Victor R. Marshall, Esq.
Victor R. Marshall & Associates, P.C.
12509 Oakland NE
Albuquerque, NM 87122
(505)332-9400 victor@vrmarshall.com
Attorney for Defendant-Appellants San Juan
Acequias and Members Thereof

Oral Argument Requested

TABLE OF CONTENTS

Reply to Summary of Facts..... 1

Reply to Gallup Point I..... 2

Reply to Gallup Point II. 3

Reply to Gallup Point III. 5

CONSOLIDATED CONCLUSION AND REQUEST FOR RELIEF

Appellants request this court to reverse and vacate the judgment below;
to refer the Richardson-Navajo agreement to the New Mexico Legislature
for possible enactment, rejection, or modification; to rule on all the questions
posed by this appeal; to remand for further proceedings, including a trial
to quantify water rights for the Fruitland-Cambridge and
Hogback-Cudei projects, within the limits of PIA and beneficial use;
and to award costs on appeal. 7

TABLE OF AUTHORITIES

New Mexico Cases:

<i>State ex rel. Clark v. Johnson</i> , 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.....	2
--	---

New Mexico Statutes:

NMSA 1978, § 72-1-11 .	2
NMSA 1978, § 72-15-5 (Colorado River Compact).	1
NMSA 1978, § 72-15-26 (Upper Basin Compact).	1

Other Authorities:

Michael J. Cohen, “Municipal Deliveries of Colorado River Basin Water,” June 2011, available at www.pacinst.org/reports/ co_river_municipal_deliveries/	7
<i>Congressional Record</i> , 134 (Oct. 3, 1988); 27879, 30999 (Oct. 14, 1988).	5
<i>Congressional Record</i> , 19664-65 (Jul. 29, 1996).	5
Jedediah Rogers, <i>Animas La Plata Project</i> , Bureau of Reclamation (2009).	5

In reply to the answer brief filed by the City of Gallup, the San Juan acequias and community ditches would make the following points.

Reply to Summary of Facts.

In its summary of facts, the City of Gallup makes the following statement:

Under the Upper Colorado River Basin Compact, New Mexico received 11.25% of the upper basin allocation, i.e. initially some 840,000 afy [acre-feet per year]. That amount has since been significantly reduced because of diminished streamflow.

The acequias agree with this statement. New Mexico's 11.25% allocation originally amounted to approximately 840,000 acre-feet per year, more or less, depending on fluctuations in the flow of the Colorado River from year to year.

The acequias also agree that the amount of water available from the natural flow of the Colorado has been drastically reduced by global warming. See BIC Points 34, 35, 36, 37, 38, 39,

Since New Mexico's allocation under the compacts is now substantially lower than 840,000 acre-feet, as Gallup states, then the Richardson-Navajo agreement would award virtually all of New Mexico's compact water to the Navajo Nation. In other words almost all of New Mexico's allocation under the compacts would be transferred in perpetuity to the Navajo Tribe. This would be a change in the Colorado compact statutes, § 72-15-5 and § 72-15-26.

Therefore it requires legislative enactment under *State ex rel. Clark v. Johnson*, 1995-NMSC-048, 120 N.M. 562, 904 P.2d 11.

Reply to Gallup Point I.

Gallup argues that New Mexico's allocation of water under the Colorado compacts is not restricted to use within the basin of the San Juan River. This is true, but Gallup misunderstands the point which the acequias made in their Brief in Chief.

The acequias concur with Gallup that New Mexico's allocation of Colorado River water can be utilized outside of the hydrologic basin of the San Juan River. In fact, about 100,000 acre-feet per year is transported through the San Juan Chama Project to supply cities and towns along the Rio Grande River, like Albuquerque and Santa Fe. See BIC Point 39. If the Richardson-Navajo agreement ever takes effect, it will almost eliminate the water supply from the San Juan to the Rio Grande, because the San Juan Chama Project has a very low priority date – 1955 at best.

The acequias' Brief in Chief makes a different point, which the City seems to have misapprehended. The acequias point out that the 2005 legislation, § 72-1-11(C)(1) requires the Navajo Nation to settle all of its water rights claims, including its claims in the Little Colorado Basin where Gallup is

located, and in the Rio Grande Basin. BIC Point 8. Gallup does not contest this point, and Gallup should be very concerned that the OSE, Navajo Tribe, and U.S. did not comply with the statute. These unsettled Navajo claims pose a major threat to Gallup's existing water supply. This illustrates why the 2005 legislature required that any Indian water settlement must settle of all the tribe's water claims.

Reply to Gallup Point II.

Gallup contends that the settlement and accompanying federal legislation impose a legal requirement on the United States to build and complete the Gallup pipeline. Unfortunately, this is not the case. The City of Gallup has been misled on this point, just as the lower court was.

If one spends hours in carefully reading the settlement, the decree, and the federal legislation, one will discover that they do not impose a legally enforceable obligation on the United States to fund and build a pipeline to Gallup. The legislation authorizes the possible future construction of a pipeline to Gallup, but congressional authorization is not a guarantee that the project will be built. Furthermore, an authorization is not an appropriation, so the money may never materialize.

Maybe the Gallup pipeline will be built, and maybe it won't. One defect in the agreement is Gallup and the State of New Mexico will have no legal recourse if the project ends up unfinished. On the other hand, the Navajo Nation would get to keep all the water even if the pipeline is not built. That is why the Gallup pipeline is illusory: it is not legally guaranteed.

An unfinished project? This has been the sad history of the other Indian water projects in New Mexico, like the Navajo Indian Irrigation Project (NIIP) and the Animas-La Plata project. Congress originally planned these projects on a grandiose scale, but never completed them. NIIP was originally planned and engineered with the capacity to serve 110,630 irrigated acres. However, Congress has refused to complete the project. The Animas La Plata project was designed to include two reservoirs, seven pumping plants, a 24.3 mile dry-side canal, and 198 miles of lateral canals. This giant project has been cancelled. The small part that was completed consists of a pumping station near Durango that pumps water uphill to a lake (named after a politician), where the water sits and evaporates. The water in the lake has not been used for irrigation, because it is too expensive. Congressman George called Animas La Plata “ is a water project that is ill-concieved, overdesigned, wasteful of

energy, and environmentally destructive.” *Congressional Record*, 134 (Oct. 3, 1988); 27879, 30999 (Oct. 14, 1988).

These projects are dinosaurs. In Congress they have been called “Jurassic Pork.” *Congressional Record*, 19664-65 (Jul. 29, 1996); Jedediah Rogers, *Animas La Plata Project*, Bureau of Reclamation (2009). These big projects are unfeasible. They damage the environment, squander huge amounts of taxpayer money, and waste precious water from the Colorado River. Pork barrel water projects like this are opposed by both environmentalists and fiscal conservatives, so they are becoming extinct.

Reply to Gallup Point III.

The United States and Navajo Nation did submit population projections which were falsified by the deliberate omission of the 2010 census data. These figures – from the Census Bureau, an agency of the US government – that the reservation population shrank between 2000 and 2010. Dr. Greene must have known about them, because she is a demographer by trade, and the Census Bureau released those figures in March 2011. Yet in 2013, more than 2 years later she submitted an affidavit with population projections that excluded the most recent data. Her projections were scientifically invalid and not admissible under *Daubert*.

The City of Gallup does point to some information which might be useful at trial in quantifying the future water needs for the Navajo Nation in New Mexico. Gallup estimates that an average person needs 160 gallons per capita per day. This figure might be high, as compared with 127 gallons per day per person in Albuquerque, according to the latest figures from the Albuquerque Bernalillo County Water Utility Authority.

<http://www.abcwua.org/education/pdfs/WaterUseGraph.pdf>.

However, if one accepts Gallup's figure of 160 gallons per person per day for purposes of estimation, this is equivalent 0.18 acre-feet per year per person, See the water conversion table at RP 16085-89. This means that the approximately 40,000 Navajos living on the reservation in New Mexico need a water supply of 7,200 acre-feet per year to meet their needs. That is a lot less than the 635,000 acre-feet which the lower court awarded, without a trial.

635,000 acre-feet is far in excess of the minimum needs of the 40,000 Navajos living on the reservation, now or in the future. 635,000 acre-feet is more than 6 times the amount of water diverted by the Albuquerque metropolitan area. In 2008, Albuquerque drew 98,225 acre feet of water (mostly from wells) to serve a population of 538,586 people. The Richardson-Navajo deal would give the Navajo Nation twice as much water as the City of

Phoenix. Phoenix receives 305,577 acre-feet to serve an estimated population of 1,566,190 people. Michael J. Cohen, “Municipal Deliveries of Colorado River Basin Water,” June 2011, available at www.pacinst.org/reports/co_river_municipal_deliveries/; [RP 17848-49; RP 12207-08].

CONSOLIDATED CONCLUSION AND REQUEST FOR RELIEF

Appellants request this court to reverse and vacate the judgment below; to refer the Richardson-Navajo agreement to the New Mexico Legislature for possible enactment, rejection, or modification; to rule on all the questions posed by this appeal; to remand for further proceedings, including a trial to quantify water rights for the Fruitland-Cambridge and Hogback-Cudei projects, within the limits of PIA and beneficial use; and to award costs on appeal.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

Victor R. Marshall
Attorneys for the San Juan Acequias
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400
victor@vrmarshall.com

CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2016, a true and correct copy of the foregoing was served on counsel for the *amici*, appellees, and the appellants by email.

/s/ Victor R. Marshall

Victor R. Marshall, Esq.