STATE OF NEW MEXICO
SAN JUAN COUNTY
THE ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,	**CV-75-184**
Plaintiff,	**HON. JAMES J. WECHSLER**
	Presiding Judge
vs.	**SAN JUAN RIVER**
	GENERAL STREAM
THE UNITED STATES OF AMERICA, *et al.*,	**ADJUDICATION**
Defendants,	
	Claims of the Navajo Nation
THE JICARILLA APACHE TRIBE AND THE NAVAJO NATION,	**Case No. AB-07-1**
Defendant-Intervenors.	

NAME OF PARTY: State of New Mexico *ex rel.* State Engineer ("the State").

DESCRIPTIVE SUMMARY: The State's *Consolidated Response to Motions filed by Community Ditch Defendants, Gary L. Horner, Robert E. Oxford and Defendants B Square Ranch LLC et al on April 15, 2013*

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STATE'S CONSOLIDATED RESPONSE TO MOTIONS FILED BY COMMUNITY DITCH DEFENDANTS, GARY L. HORNER, ROBERT E. OXFORD AND DEFENDANTS B SQUARE RANCH, LLC ET AL ON APRIL 15, 2013

The State of New Mexico *ex rel.* State Engineer ("State") submits this consolidated response to the *Community Ditch Defendants' Motion and Memo for Partial Summary Judgment Concerning Applications for Permits From the State Engineer ("Community Ditch Defendants' Motion Concerning Permits")*; *Community Ditch Defendants' Motion For Partial Summary*

Judgment Concerning The Minimum Needs Of The Navajo Reservation In New Mexico; Motion For Partial Summary Judgment Concerning NIIP; Community Ditch Motion for Partial Summary Judgment Concerning Availability of Water and Impacts on Other Water Users; Conditional Motion to Dismiss for Lack of Jurisdiction and Failure to Join Indispensable Parties; Introduction to Community Ditch Motions for Partial Summary Judgment filed by Community Ditch Defendants; *Gary L. Horner's Motion for the Determination of the Applicable Standard for the Determination of Federal Reserved Water Rights* and *Brief in Support* filed November 8, 2012, *Gary L. Horner's Motion for a Determination That Federal Law, Permits, or Contracts Do Not Define the Extent of the Water Rights for the Navajo Nation* and *Brief in Support* ("*Horner Federal Law Brief*"); *Gary L. Horner's Motion for Summary Judgment: that is, the Settling Parties' Settlement Motion should be denied* and *Memorandum in Support* ("*Horner SJ Memorandum*") filed by Gary L. Horner; *Robert E. Oxford's Dispositive Motion for Summary Judgement* filed by Robert E. Oxford ("*Oxford Motion*"); and *Defendants B Square Ranch, LLC et al's Motion that Settling Party Navajo Nation Waived and Relinquished its Winter Rights when Navajo Indian Irrigation Project was Built* filed by Defendants B Square Ranch LLC et al (collectively, "*April 15 Motions*") filed on April 15, 2013 in this *inter se* proceeding.

Many of the *April 15 Motions* re-argue issues that have already been presented to and addressed by the Court. Further, many of the objections presented in the *April 15 Motions* are not to the Proposed Decrees, but to existing law and the limitations of the movants' own water rights, and they seek a remedy which this Court does not have the jurisdiction to provide in the adjudication of the Navajo Nation's claims. In responding to the arguments raised in the *April 15 Motions*, the State is not conceding that any of the issues are before the Court for review other

than for the Court to evaluate whether the State has met its burden. For the reasons below, the *April 15 Motions* should be denied.

I. The Scope of this Expedited *Inter Se* Proceeding is Limited to the Adjudication of the Navajo Nation's Water Rights by entry of the Proposed Decrees.

As the Court recently reiterated, this is an expedited *inter se* proceeding to resolve the water rights claims of the Navajo Nation within the San Juan River Basin adjudication pursuant to Rule 1-071.2 NMRA and the case management and procedural orders entered by the Court to guide the adjudication. *Order Striking Community Ditch Defendants' Answer and Counterclaim, pp. 2-3,* entered February 15, 2013. A water rights adjudication is a special proceeding to determine the elements of all water rights in a particular stream system. NMSA 1978, § 72-4-15 (1907); Rule 1-071.2(D), NMRA 2012. It has long been recognized that pursuant to the McCarran Amendment, 43 U.S.C. § 666, this Court has jurisdiction "to undertake general water rights adjudications of a river system or other source applicable to all federally reserved water rights, including those waters reserved for the use of Indian tribes," and that the United States is a defendant. *Jicarilla Apache Tribe v. United States,* 601 F.2d 1116, 1128 (10th Cir.), *cert. denied,* 444 U.S. 995, 100 S. Ct 530 (1979).

The only water right claims before the Court in this subproceeding are those of the Navajo Nation (*id,* p. 4), and the only issue currently before the Court is the "Severed Issue" of whether to adjudicate the Navajo Nation's water rights by entry of the Proposed Decrees. *See Order Striking Community Ditch Defendants' Answer and Counterclaim, p. 4,* August 19, 2010, *Order Establishing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Water Rights of the Navajo Nation.*

In its consideration of that issue, the Court has determined that in order to meet the legal standard that the Proposed Decrees are "fair, adequate, and reasonable, and consistent with the public interest and applicable law," the Settling Parties have the burden to demonstrate that provisions in the Settlement Agreement and the Proposed Decrees "will reduce or eliminate impacts on junior water rights." *Amended Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof*, entered April 12, 2012. However, requiring that the Settling Parties produce evidence regarding these provisions does not expand the scope of the Court's jurisdiction beyond that of determining the elements of the Navajo Nation's water rights. Many of these provisions involve issues and disputes that are outside the scope of this subproceeding or the Court's jurisdiction in this adjudication. They are only before the Court as evidence of a settlement protection that the Court is evaluating, not as part of the rights to be adjudicated.

What are before the Court for adjudication are the Proposed Decrees, not any permits or interstate compacts or the Reclamation Act or the United States Bureau of Reclamation ("BOR")'s storage rights or operation of Navajo Reservoir. These issues are outside the scope of this Court's jurisdiction and the scope of this subproceeding, which is to determine the elements of the Navajo Nation's water rights. It is only through the settlement of the Navajo Nation's claims that the State has the ability to address some of these concerns, and negotiate protections, through agreement, that are beyond the Court's jurisdiction to provide.

For instance, to address the desire for storage in Navajo Reservoir for those without a contract, the settlement provides some of the benefits of a storage contract, benefits that would not be possible without the settlement. The requirement that the Settling Parties produce evidence regarding these benefits, however, does not expand the scope of this subproceeding or

the Court's jurisdiction to include the validity of the storage permits, the requirements for repayment contracts, the State Engineer's administration of water rights or the BOR's management of a federal project. While the Settlement Agreement may include provisions regarding the administration and the exercise of the Navajo Nation's water rights, those are not part of the elements of the water right, but are protections that the State negotiated to protect junior water rights from the Navajo Nation's senior priority and quantity. The Court's review is limited to an evaluation of whether these provisions in the Settlement Agreement "will reduce or eliminate impacts on junior water rights" within the scope of this subproceeding, not to determine the validity of the BOR's permits or the State's compliance with interstate compacts.

Further, neither water supply nor impairment to junior users are before the Court in an adjudication. The purpose of a water rights adjudication is to recognize existing water rights in a stream system, not to grant new appropriations. Applications for new appropriations of water are exclusively through an administrative proceeding before the State Engineer. *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039 ¶ 20, 24, 289 P.3d 1232 (2012). Whether there is water available for appropriation is a threshold determination in the State Engineer's evaluation of a water rights application, but not in an adjudication. *Id.* at ¶ 25. The delegation of this determination to the State Engineer is within the purpose of the Legislature's grant of broad powers to the State Engineer "to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process". *Id.* at ¶ 24. While the determination of available water supply is necessary in determining whether to grant a new appropriation, it is not a necessary determination in the Court's adjudication of existing rights. The Court is not granting new appropriations of water, but recognizing water rights that already exist.

II. The Motions For Summary Judgment Fail To Make a Prima Facie Showing and Should Be Denied.

The Community Ditch Defendants, Gary L. Horner, B Square Ranch LLC et al and Robert E. Oxford claim they are entitled to summary judgment on a variety of matters (collectively, "*SJ Motions*"). In support of these claims, they allege that certain "facts" are undisputed. In reality, the *SJ Motions* consist of hearsay, opinions, misinterpretations of the law, and conjecture – not facts supporting summary judgment. The State does not argue against summary judgment on the basis that there are genuine issues for trial. Rather, the *SJ Motions* should be denied because they fail to make a prima facie showing of entitlement to summary judgment. By failing to come forward with competent, admissible evidence supporting their motions, movants have not met the requisite elements for summary judgment and they are not entitled to judgment as a matter of law.

Summary judgment can be granted only where the moving party is entitled to judgment as a matter of law, upon clear and undisputed facts. Rule 1-056(C) NMRA; *First Nat. Bank in Albuquerque v. Nor-Am Agr. Products, Inc.*, 88 N.M. 74, 80, 537 P.2d 682, 688 (1975), *cert. denied* 88 N.M. 29, 536 P.2d 1085. Those facts must "refer with particularity to those portions of the record upon which the moving party relies." Rule 1-056(D)(2) NMRA. The party moving for summary judgment must make a prima facie showing and come forward with evidence to establish the fact in question. *Rivera v. Brazos Lodge Corp.,* 111 N.M. 670, 672, 808 P.2d 955, 672 (1991). Hearsay that would not be admissible at trial is not sufficient evidence of fact and cannot be admitted as summary judgment evidence. *Steck v. Home Indemnity Co.*, 74 N.M. 419, 421, 394 P.2d 267 (1964); *Seal v. Carlsbad Independent School Dist.*, 116 N.M. 101, 105, 860 P.2d 743, 747 (1993). Arguments of counsel are not evidence upon which a trial court can rely

in a summary judgment proceeding. *V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 472, 853 P.2d 722, 723 (1993).

Here, the "facts" relied upon by movants are not only far from clear, in many cases, they are not even facts, but legal argument. Furthermore, movants fail to cite to the record as required by Rule 1-056, fail to establish any foundation or basis for these "facts", and rely on inadmissible hearsay. The *SJ Motions* should be denied.

III. The United States Department of Interior Has Complied with the Statutory Procedures Under State Law to Divert San Juan River Water for Federal Projects.

Community Ditch Defendants and Gary L. Horner make various arguments regarding the validity of State Engineer permits[1] issued to the United States Department of Interior. *See Community Ditch Defendants' Motion Concerning Permits* and *Horner Federal Law Brief.* Community Ditch Defendants request partial summary judgment that the United States "does not hold valid permits or permit applications for any of the water claimed in permit application numbers 2847, 2829, 2873, 2883, 2917, 3215, or application 2847, 2849, 2873, 2917 Combined". *Community Ditch Defendants' Motion Concerning Permits* at 2. Horner requests summary judgment that permits issued to federal agencies by the State Engineer do not define the extent of the water rights to which the Navajo Nation may be entitled. *Horner Federal Law Brief* at 4. While challenges to the validity of permits that were authorized decades ago is outside the scope of this *inter se* proceeding, the State will address these arguments to the extent the permits relate to the protections provided to junior water users under the terms of the Settlement Agreement and the Proposed Decrees.

[1] While the applications that were endorsed by the State Engineer pursuant to NMSA 1978, § 72-5-33 may not technically be "permits", we are referring to them as permits as a matter of convenience for the Court and parties.

The central premise of Community Ditch Defendants' and Horner's arguments is that the permits held by the United States Department of Interior are invalid because the United States did not comply with various provisions of the New Mexico statutes governing the issuance of permits to appropriate water, and therefore, the permits do not provide a legitimate basis for adjudication of the Navajo Nation's water rights under the settlement. The State disagrees that the permits are invalid and that the Navajo Nation is not entitled to receive water under the permits. For the reasons set forth below, the motions should be denied.

Community Ditch Defendants' and Horner's arguments are based upon the same fundamental misunderstanding of New Mexico law governing diversion of water for federal projects. For example, Community Ditch Defendants claim that OSE File Nos. 2847, 2829, 2873, 2883, 2917, 3215, and Application Nos. 2847, 2849, 2873, 2917 Combined are invalid because they were not published pursuant to 1978, § 72-5-4. *Community Ditch Defendants' Motion Concerning Permits* at 1. Community Ditch Defendants and Horner also allege that the permits are invalid because the United States did not comply with various other provisions of NMSA 1978, §§ 72-5-1 *et seq* governing the appropriation and use of surface water. *Community Ditch Defendants' Motion Concerning Permits* at 2; *Horner Federal Law Brief* at 67-114. These sections set forth the requirements for issuance of a permit for the beneficial use of water.

However, the sections cited by Community Ditch Defendants and Horner do not apply to permits issued to the United States for diversion of water for federal reclamation projects. These permits are authorized pursuant to NMSA 1978, § 72-5-33. Section 72-5-33 provides special conditions and requirements for reservation of water by the United States for federal reclamation projects. Section 72-5-33 provides that, upon notice by the United States that it intends to utilize water for a federal reclamation project, such water is withheld from appropriation by others for

three years. NMSA 1978, § 72-5-33(A). The United States must file plans for the proposed works within three years of the date of the notice. *Id.* If the United States fails to file such plans or if there is a determination that the reclamation project will not be constructed, the water is released and becomes public water subject to general appropriations. *Id.* Section 72-5-33 does not require the United States to comply with the statutory provisions regarding the issuance of permits cited by the Community Ditch Defendants and Horner.

Here, the United States Department of Interior provided notice of its intent to utilize water and filed plans for the proposed works in accordance with §72-5-33. Therefore, the United States has met all applicable statutory requirements to reserve water for federal reclamation projects and there is no merit to Community Ditch Defendants' and Horner's arguments.

Horner further argues that the permits do not provide a legitimate basis for the Navajo Nation's water rights or priority dates because the Navajo Nation has not perfected rights to water under the permits pursuant to state law. *See Horner Federal Law Brief* at 85-113. Horner asserts that the Navajo Nation has no right to water under the permits because it has not diverted such water or put it to beneficial use. *See, e.g., Horner Federal Law Brief* at 85. These arguments confuse the nature of the Navajo Nation's water rights and the role of the State Engineer permits under the Settlement Agreement. The Navajo Nation holds federal reserved water rights established pursuant to *Winters v. U.S.*, 207 U.S. 564 (1908). These rights are not dependent upon the state law doctrines of prior appropriation and beneficial use. Thus, it is immaterial whether the Navajo Nation has perfected water rights under state law. Moreover, the State Engineer permits, rather than being the basis for the Navajo Nation's water rights, simply provide a mechanism to supply water for their prior existing water rights without requiring new

diversions. Therefore, Horner's argument is based upon flawed interpretations of the law and his motion should be denied.

IV. The Settlement Agreement is in Accordance With the Law With Regards to OSE File No. 2883.

Robert E. Oxford requests summary judgment that the Settlement Agreement is contrary to law because it awards the Navajo Nation one-half of the available water under OSE File No. 2883. *See Oxford Motion* at 3. Oxford argues that the Settlement Agreement contravenes a decision issued by this Court in *San Juan Water Commission v. John R. D'Antonio, Jr., New Mexico State Engineer*, No. CV-2008-1699. That case involved an appeal from a decision of the State Engineer that there was no water available for appropriation under OSE File No. 2883. On August 16, 2011, the Court entered an order finding that water withheld under OSE File No. 2883 had been released by operation of law pursuant to NMSA 1978, § 72-5-33(A)(2) and ordering the State Engineer to publish the San Juan Water Commission's ("SJWC") application to appropriate surface water. On September 1, 2011 that decision was timely appealed by the State to the New Mexico Court of Appeals. Pursuant to NMSA 1978, § 72-7-3, decisions of the district court are stayed upon the timely filing of an appeal by the State Engineer:

> [A] decision of the district court shall be binding on the state engineer who shall thereafter act in accordance with such decision unless within sixty days after the entry of such decision or judgment of the district court, an appeal shall be taken from the decision of the said district court.

See also NMRA 1-062(E). In February 2013, the Court of Appeals entered an order staying the appeal for 12 months to allow the parties to engage in settlement discussions. On February 12, 2013, the State and the SJWC filed with this Court a notice of settlement. Because no reviewing court has ruled on the merits of this issue, there is no basis for Oxford's contentions and his motion should be denied.

V. Use of Stored Water Complies with State and Federal Law.

A cornerstone of the protections to junior users provided by the settlement is the Navajo Nation's agreement to take most of its water from storage. *See State of New Mexico's Memorandum in Support of Motion for Entry of Partial Final Decrees* (filed April 15, 2013) ("*State's Memorandum*") at 12-17. Instead of exercising a senior direct flow right, the Navajo Nation agrees to substitute water stored with a junior priority to supply the vast majority of its uses. The Navajo Nation gives up its right to assert a senior priority for the Navajo Indian Irrigation Project ("NIIP") and the Navajo-Gallup Water Supply Project ("NGWSP or Navajo-Gallup Project") unless supply from Navajo Reservoir is "irretrievably lost," as discussed in the *State's Memorandum* at 13-14. The settlement allows the State to take advantage of the existence of Navajo Reservoir to require that supply for most Navajo water uses come from storage and not senior direct flow. This means that in times of low flows, Navajo demands for NIIP and the Navajo-Gallup Project do not compete with direct flow diversions from the San Juan and Animas Rivers.

The *April 15 Motions* fail to recognize the essential benefit provided by storage. Instead, they attack the settlement's reliance on stored water, calling it illegal. Not satisfied with the settlement's direct flow protections, the movants take a further step and claim that they are entitled to storage water of their own, even in the absence of a storage contract, permit or other authorization. Gary L. Horner argues that federal law requires that state and local interests be provided with storage space in federal reservoirs. *See Horner Federal Law Brief* at 25-31.[2] Both Horner and Oxford further contend that the settlement illegally precludes direct flow diverters

[2] The *Horner Federal Law Brief* also devotes a number of pages to argument that the Navajo Settlement Contract is not a basis for decreeing water rights. *Id.* at 63-67. This misses the point. The Proposed Decrees do not seek to adjudicate water rights to the Navajo Nation based on federal storage contracts. As described above, the settlement provides that the Navajo Nation will subordinate most of its senior federal reserved water right in return for water impounded to storage under a junior priority.

from taking releases of stored water. *See Horner SJ Memorandum* at 169-186; *Oxford Motion* at 1-3. They claim that direct flow diverters should not be limited to the quantity of direct or natural flows entering (and bypassed by release from) Navajo Reservoir and they can augment their supply by taking water released from storage. These positions are contrary to long-settled water law of the West and the specific laws governing Navajo Reservoir.

Throughout the Western states construction of dams allowed flood flows to be captured and made available for use:

> Recognition of reservoir storage as one of the chief features of water utilization appears in the water rights jurisprudence throughout the West. Storage is a means of conserving water, by capturing it when plentiful and holding it back for future use....Thus, with use of upstream reservoirs, spring floodflows may not only be prevented from inundating downstream lands, but may be stored and made available for late-season use when unregulated flows are low. And they may even be carried over from so-called "wet" years to mitigate the deficiencies of "dry" seasons.

See Hutchins, Wells A., Harold H. Ellis and J. Peter DeBraal, *Water Rights Laws in the Nineteen Western States* (1971), Chapter 7, at 348-349. Impoundment of flood flows made a new supply available for additional uses.

In 1956, Congress authorized the construction of Navajo Dam and other projects in the Colorado River Basin "for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize...the apportionments made to and among them..., providing for the reclamation of arid and semiarid land, for the control of floods...." Pub. L. No. 84-485, 70 Stat. 105 (April 11, 1956) § 1 ("Colorado River Project Storage Act"). In 1962, Congress authorized construction of the Navajo Indian Irrigation Project and the San Juan-Chama Project and required that any water user seeking supply of stored water in Navajo Reservoir would have to obtain a contract from the Secretary of the Interior: "No person shall have or be entitled to have

the use for any purpose ... of water stored in Navajo Reservoir or of any other waters of the San Juan River and its tributaries originating above Navajo Reservoir to the use of which the United States is entitled under these projects except under contract satisfactory to the Secretary and conforming to the provisions of this Act." Pub. L. No. 87-483, 76 Stat. 96 (June 13, 1962) ("1962 Act") § 11(a). In anticipation of the water uses proposed by the Colorado River Project Storage Act and the 1962 Act, the State of New Mexico in 1955 reserved water from appropriation to be utilized by these projects under State Engineer File Nos. 2847 and 2849.

The movants complain that the settlement will deprive them of the use of water stored in Navajo Reservoir by requiring them to have a contract for such water. *Oxford Motion* at 2; *Horner SJ Memorandum* at 169-172. The 1962 Act, however, already requires a contract for the use of water stored at Navajo Reservoir. Neither the Settlement Act nor the Settlement Agreement imposes that as a new requirement. But the settlement does contain several provisions that provide storage benefits to direct flow diverters without a contract. First, as described on page 17 of the *State's Memorandum*, the Settlement Agreement gives a benefit to direct flow diverters by augmenting bypass of direct flow with releases of stored water up to a total of 225 cfs, under the conditions set forth in Paragraph 9.1. The Settlement Act, § 10701(a)(4), specifically authorizes the provisions of Paragraph 9.1, which otherwise would have been contrary to the 1962 Act's contract requirement. Second, the settlement creates a mechanism for parties without a contract to access water stored in Navajo Reservoir through the "top water bank" as authorized in the Settlement Act § 10401(b). *See United States and Navajo Nation's Memorandum in Support of Entry of Settlement Decrees* at 55-56. Third, as discussed on pages 16 and 17 of the *State's Memorandum,* one of the settlement's important protections for direct flow diverters is the "alternate water" provision, which requires the Hogback and Fruitland Projects to use available "alternate water" released from storage before making a priority call for

direct flow, under Paragraph 9.2 of the Settlement Agreement. This gives direct flow diverters a benefit from water stored in Navajo Reservoir even though they do not have a contract for stored water.[3]

Again, it is important to point out that the settlement, including the Proposed Decrees, is not the cause of movants' complaints about storage. Their objection is not to the settlement but to existing law, which is not the subject of this subproceeding. In particular, the settlement creates no new administrative regime or authority that differentiates between direct flow and released storage water in the river. Movants' arguments that they are entitled to "excess" stored water and any stored water released into the river are not objections to the determination of the Navajo Nation's water rights in the Proposed Decrees. They are objections to the administration of the San Juan River under long-standing Western and New Mexico law.

It is long-settled in the common law of the West and is codified in most Western state statutes that a water user may utilize a natural water course to deliver water for its own diversion and use downstream. Hutchins's seminal treatise on water law, *Water Rights Laws in the Nineteen Western States* (1971), sets forth the "well settled rule" of use of natural channels to convey water:

> A person who is making an appropriation of water from a natural source or stream, is not bound to carry it to the place of use through a ditch or artificial conduit, nor through a ditch or canal cut especially for that purpose. He may make use of any natural or artificial channel, or natural depression, which he may find available and convenient for that purpose, so long as other persons interested in such conduit do not object, and his appropriation so made will, so far as such means of conducting the water is concerned, be effected as if has carried it through a ditch or pipe-line for that purpose and no other.

Chapter 9 at 602 (quoting *Lower Tule River Ditch Co. v. Angola Water Co.*, 86 P. 1081 and citing, among other cases, *Hoffman v. Stone*, 7 Cal. 46, 49 (1857) ("It would be a harsh rule,

[3] Not surprisingly, the Navajo Nation would only agree to make these concessions if direct flow diversions do not exceed the available direct flow, consistent with the 1962 Act. *See* Settlement Agreement at para. 9.2.6

however, to require those engaged in these enterprises to construct an actual ditch along the whole route through which the waters were carried, and to refuse them the economy that nature occasionally afforded in the shape of a dry ravine, gulch, or cañon."). *See* P. M. Dwyer, *Right of appropriator of water to recapture water which has escaped or is otherwise no longer within his immediate possession*, 89 A.L.R. 210, at III(f)(1) (1934; cum. supp. 2012) ("Where water is intentionally emptied into a natural stream for the purpose of conducting it to another point, the stream being used simply as a conduit in lieu of an artificial canal or ditch, and there is no intent on the part of the one emptying the water into the stream to abandon such water, it is universally held that the water may be recaptured from the stream.") (emphasis added) (citing numerous cases, including *United States v. Haga, 276 F. 41* (D. Idaho 1921); *Hoffman v. Stone,* 7 Cal. 46 (1857); *Butte Canal & Ditch Co. v. Vaughn*, 11 Cal. 143 (1858); *Herriman Irrig. Co. v. Keel*, 69 Pac. 719 (Utah 1902)). "It is elementary that a stream may be used as a part of the ditch system and that the person adding the water has the right to redivert it from the stream at the place it is needed for use." Trelease, *Reclamation Water Rights,* 32 Rocky Mtn.L.Rev. 464, 471 (1960) (quoted in *Public Service Company of Colorado v. FERC*, 754 F.2d 1555, 1564) (10th Cir. 1985).

Part and parcel of this principle of black letter law is protection from claims of abandonment by others who may seek to appropriate the additional water. "The reservoir owner who uses a natural stream to deliver stored water therefore does not abandon or lose control over the stored water when he places it in the stream for delivery, rediversion and beneficial use downstream." *Public Service Company of Colorado v. FERC*, 754 F.2d at 1564-65 (*citing Sorenson v. Norell,* 135 P. 119, 120 (Colo.App. 1913); *Ft. Morgan Reservoir and Irrigation Co. v. McCune,* 206 P. 393, 395 (Colo 1922); *Herriman Irrigation Co. v. Keel,* 69 P. 719, 726 (Utah 1902)). *See* Hutchins Chapter 9 at 604 ("No abandonment. – In mingling one's waters with those

flowing in a stream for the purpose of diverting an equivalent quantity below, there is obviously no intention of abandoning the water").

Such augmentation of supply to the stream system does not entitle a direct flow diverter to more water than is otherwise available. In an early opinion, the California Supreme Court reasoned:

> It does not necessarily follow that the water introduced by the defendants became subject to the use of the plaintiffs, because its identity was lost by being mingled with the water naturally flowing in the creek. The rights of the parties, after such mingling, are not unlike the rights of the owners of goods of equal value after their mixture--both are entitled to take their given quantity.

Butte Canal & Ditch Co. v. Vaughn, 11 Cal. 143, 151 (1858). Thus, the court held:

> The first appropriator of the water of a stream passing through the public lands in this State, has the right to insist that the water shall be subject to his use and enjoyment to the extent of his original appropriation, and that its quality shall not be impaired so as to defeat the purpose of its appropriation. To this extent his rights go, and no further. In subordination to these rights, subsequent appropriators may make such use of the channel of the stream as they think proper, and they may mingle with its waters other waters, and divert an equal quantity, as often as they choose. Whilst resting in the perfect enjoyment of their original rights, the first appropriators have no cause of complaint.

Id. at 153-154 (emphasis added). The Colorado Supreme Court put it simply: "Where water is stored in a channel reservoir, a ditch headed in such reservoir has no right by virtue of direct use decree to deplete such storage, but may properly take water from the reservoir by virtue of such decree only in the amount of the current inflow from sources subject to such direct use decree to the ditch." *City and County of Denver v. Northern Colorado Water Conservancy District*, 130 Colo. 375, 276 P.2d 992 (1954). *See* Dwyer at III(f)(2) ("that water which one has saved, developed, or produced, which comes from an independent or extraneous source to the natural irrigation flow of the stream, and has been put into the river as a conduit by the producer or owner for the purpose of taking it out and using it lower down the stream for irrigation, belongs

to the one who put it into the stream as against all priorities; or, put in a way already expressed by this court, one who by his own efforts increases the natural flow of a stream, either by saving or developing water, is entitled to its benefit to the extent of the increase as against all consumers, regardless of priority") (*quoting* dissenting opinion in *Rio Grande Reservoir & Ditch Co. v. Wagon Wheel Gap Improv. Co.,* 191 P. 129 (Colo. 1920)).

New Mexico law is in accord. In 1911, the New Mexico Supreme Court recognized that water of a natural stream when impounded and reduced to possession by artificial means is personal property. *See Hagerman Irr. Co. v. McMurry*, 16 N.M. 172, 113 P. 823, 825 (1911). The state water code specifically exempts "waters for storage reservoirs" from operation of forfeiture. *See* NMSA 1978, § 72-5-28(A) (1907). In 1999, the State Legislature extended these concepts to water stored in underground reservoirs: "Water added to an aquifer or system of aquifers to be stored for subsequent diversion and application to beneficial use pursuant to project permit is not public water and is not subject to forfeiture pursuant to §72-5-28 or 72-12-8 NMSA 1978." *See* NMSA 1978, § 72-5A-8(A) (1999).

New Mexico law provides for release of stored water into a natural stream for delivery downstream to intended beneficiaries.

> Where the rights of others are not injured thereby, it shall be lawful for the owner of any reservoir, canal or other work, to deliver water into any ditch, stream or watercourse, to supply, appropriations therefrom and to take in exchange therefor, either above or below such point of delivery, a quantity of water equivalent to that so delivered, less a proper deduction for evaporation and seepage to be determined by the state engineer; provided, such owner shall, under the direction of the state engineer, construct and maintain suitable measuring devices at the points of delivery and diversion.

§ 72-5-26 (1907) NMSA 1978. *See Miller v. Hagerman Irr. Co.*, 20 N.M. 604, 151 P. 763 (1915) (application within Rio Hondo stream system). *See also* Hutchins Chapter 9 at 606-613

(discussion of exchange and substitution mechanisms set forth in various state statutes, including New Mexico's, to accommodate use of natural channels to convey water).

In 2003, the State Legislature directed the New Mexico State Engineer to adopt rules for priority administration to ensure that authority is exercised, among other things "so as to create no impairment of water rights, other than what is required to enforce priorities...." NMSA 1978, § 72–2–9.1 (2003). In response, the State Engineer promulgated regulations for administration of water rights, entitled Active Water Resource Management regulations (AWRM), 19.25.13.1–.50 NMAC (Dec. 30, 2004). *See Tri-State*, 2012-NMSC-039 (holding that the Legislature delegated lawful authority to the State Engineer to promulgate AWRM regulations). The AWRM regulations include specific provisions for separate administration of direct flows and released storage water, including the duty of state water masters to "administer direct flow water for delivery to in-priority administrable water rights, curtail diversions by out-of-priority administrable water rights, ensure the delivery of storage water to those having rights to its use, and protect storage water releases from diversion by those without rights to its use[.]" 19.25.13.17(H) NMAC.

The movants' arguments that the settlement eliminates direct flow diverters' right to take water released from storage are unfounded. Under already-existing law, their right is defined by the quantity of natural flow. The two New Mexico cases cited by the movants, *State ex rel. Reynolds v. Luna Irr. Co.*, 80 N.M. 515, 458 P.2d 590 (1969) and *City of Raton v. Vermejo Conservancy Dist.*, 101 N.M. 95, 678 P.2d 1170 (1984) do not support their position. In *Luna* the Court identified no legal basis for recognizing the status of water alleged to be impounded in Lake Luna in Arizona: "We do not concern ourselves with appellant's right to store waters in Arizona." 80 N.M. at 516, 458 P.2d at 591. Without any basis or mechanism to recognize and

administer water crossing the state line, the Court simply held that waters flowing into the state are public waters and are subject to adjudication. *Id. See* Hutchins Chapter 9 at n. 52, pp. 603-6-613 (noting the limited scope of the holding: "However, the court apparently did not conclude anything regarding the nature of the rights in such waters other than to merely refute Luna Irrigation Company's contention that, since such waters were its own private waters, it should be excluded from an action begun by the State Engineer to adjudicate water rights in the stream in New Mexico."). Similarly, the *Raton* case does not stand for the proposition that "excess" water in a reservoir must be released to downstream diverters upon demand, even though they have no interest in or entitlement to stored water. *Horner MSJ Memorandum* at 172 & 178-182; *Oxford Motion* at 3. That case simply holds that when the senior storage diverter reaches the maximum of its right, it must bypass any additional amounts flowing down the Chico Rico system when needed by the downstream junior.

Wherefore, the State requests the Court to deny the *April 15 Motions.*

Respectfully submitted, this 10th day of May 2013.

STATE OF NEW MEXICO

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CERTIFICATE OF SERVICE

I certify that on this 10th day of May 2013, at approximately 4:30 pm, an electronic copy of this *Consolidated Response to Motions filed by Community Ditch Defendants, Gary L. Horner, Robert E. Oxford and Defendants B Square Ranch LLC et al on April 15, 2013* was served by attaching an electronic copy to an email sent to: wrnavajointerse@nmcourts.gov.

/s/ Arianne Singer