ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff
vs.
UNITED STATES OF AMERICA, et al.,
Defendants

THE JICARILLA APACHE TRIBE and the NAVAJO NATION

Defendant-Interveners

No. CV 75-184
HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER GENERAL STREAM ADJUDICATION

Claims of the Navajo Nation
Case No.: AB-07-1

1. Name of party: Robert E. Oxford, Pro-Se Objector

2. Descriptive Summary: Robert E. Oxford's reply to the Navajo Nation, USA and State of New Mexico's response to my summary judgment motions filed April 15, 2013.

3. Number of pages of present document: 4

4.Date of Filing: May 24, 2013

REPLY OF ROBERT E. OXFORD'S TO THE RESPONSE BY THE SETTLING PARTIES TO MY SUMMARY JUDGEMENT MOTION MOTIONS TO DENY THE SETTLEMENT AGREEMENT AND ASSOCIATED PROPOSED DECREES OF THE NAVAJO NATION WATER RIGHTS

1. The Navajo Nation /USA argue that the McCarran Amendment is not the governing document to determine the water rights of the Navajo Nation, and the U.S. as trustee of Indian water rights. It is interesting to note the State of New Mexico's response on page 3, argues just the opposite, that this court has jurisdiction over the proposed settlement agreement and proposed decree of the water rights proposed in this Inter Se proceeding. Of course this court has jurisdiction and will either approve or deny the proposed "settlement'.

2. The Navajo Nation /USA argue that "it is equally well settled that the parameters of Indian reserved rights must be determined pursuant to Federal Law," "Federal Law controls Federal water rights." The State of New Mexico, in its response filed May 10, 2013, on page 4 confirms that this State District Court will determine these water rights, and the administration thereof. I agree this court will determine whether this Settlement Agreement is fair, adequate, and reasonable, and consistent with the public interest and applicable law. The State argues the Settlement Agreement is "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 kind of double speak is this argument? Clearly the Settlement Agreement is not fair and reasonable to other non-Indian water users as it preports to give the Navajo Nation water administered in a manner not consistent

with established water court cases (Luna Irrigation and City of Raton cited in my Summary Judgment motion). The proposed decrees cite historical water use on the Hogback-Cudei Indian Ditch not supported by the States own expert witness in his disposition, (see my Summary Judgment motion filed April 15, 2013). By authorizing approximately 5000 more acres of irrigated land, with an increase of 1 CFS per 40 acres or a 125 CFS increase in demand of direct flow 1868 priority water on the San Juan River will assure non-Indian junior water right users to be curtailed of use to satisfy this uncalled for increase in demand.

The Settling parties argue the Settlement Agreement includes 12,000 acre-feet of water released from Navajo Reservoir storage will offset this condition and it might have helped were it not for the provision that it is not available in any water year there is not 1,000,000 a-f of stored water by May 1st in Navajo Reservoir. This provision will not reduce the harm therefore the Navajo Settlement in not fair and reasonable and it should be summary denied.

The Navajo Nation /USA argue that each item in the settlement agreement need not be fair and reasonable but the amounts, as a whole, only need be. This type of argument cannot stand because that's like saying one element offsets another. No one can judge, including this court, whether one part of the settlement is so egregious, that another part is equally offsetting that as a whole it is fair and reasonable.

The Feds argument on page 9 that State Water Law does not apply but Federal Law and acts of Congress supersede all else is pure disingenuous. I defer to Mr. Horner's arguments on this issue and incorporate his filings as if they were my own.

In the States argument on page 4 of their response to my summary judgment motions they argue the administration of the water in Navajo Reservoir, and released into the San Juan River, are "outside the scope of this court's jurisdiction and the scope of this sub proceeding."

The State has made these issues germane to this Navajo Inter Se proceeding by trying to argue the reservoir water and the releases are governed by existing federal acts authorizing their construction. As to storage in Navajo Reservoir this is subject to State Water Law Statute 72-5-17. The State argues federal law governs and anyone must have a federal contract for water from this reservoir. State law governs that <u>any</u> reservoir owner must provide storage space, if space permits. This would be for a storage space contract for your water right, not for excess water stored in Navajo Reservoir.

The state admits on page five of their response that the Settlement Agreement may? (does) include provisions regarding the administration and the exercise of the Navajo Nation's water rights, but argue this is protection (?) for non-Indian junior water rights. The State makes a tortured argument on page five that the water rights in this proceeding are not appropriations of water, but recognizing water rights that already exist. This is the most ridiculous theory I have ever hear of in my 25 years of water right experience. There are <u>no existing</u> water rights held by the Navajo Nation/USA at this juncture in this proceeding. To assert this in the State's response at the bottom of page five shows a lack of respect to the court that this proceeding and court are <u>relevant</u>.

The State argues on page seven of their response the File No's. 2847, 2849, 2873, 2883, 2917, and 3215 are not germane to these proceedings, but yet these documents represent how these waters, of the San Juan Basin, were set aside in the 50's and 60's so that other appropriators could not keep appropriating more water in the basin than would be available when these projects were complete. These file numbers were never developed into actual appropriations and water rights as footnote (1) of the State's response says at the bottom of page seven. The State argues these file numbers are outside the scope of this Inter Se proceeding but yet they represent the water that only exists to satisfy the Navajo Water Right Settlement. The State cannot have it both ways in their arguments about this settlement proceeding. Mr. Horner and Mr. Marshall's arguments that these are not valid water right appropriation permits is correct.

While it may be true that the Winters Doctrine Federal Reserve Water Rights are not subject to state law doctrines the Navajo Nation did relinquish its Winters Rights when accepting the NIIP and its water. I support Mr. Tully's Summary Judgment argument and motion that this is supported by undisputed facts that his summary judgment motion describes and submits.

On page ten of the State's response to my Summary Judgment Motion that the Settlement Agreement is not applicable to existing law they argue because this court case (San Juan Water Commission v. John D' Antonio Jr., New Mexico State Engineer, No. CV-2008-1699) has been appealed and stayed until February 2014 my motion has no basis until the reviewing court has ruled on the merits. This in fact is not true, this case is binding on both parties and the State, who negotiated and gave away half of this water in the Settlement Agreement. Applicable law exists with the judgment rendered by Judge Sanchez August 16, 2011. This decision contravenes the Settlement Agreement section 8.1.1 on page 13, whereby the Settlement Agreement awards 50% of the leftover water in File 2883 to the Navajo Nation/Federal Government. The court case agrees with the San Juan Water Commissions Argument they <u>alone</u> are entitled to proceed with their application with the State Engineer to appropriate <u>all</u> of the leftover water and the State Engineer is ordered to publish said application and proceed to act on it. This issue clearly establishes that the Settlement Agreement is not according to applicable law and this is an undisputed fact and the court should deny the Settlement Agreement summarily.

The State's response on pages 11-19 purports that the Settlement Agreement quotes existing water law regarding storage and water releases from Navajo Reservoir. They argue their assertions "complies with State and Federal Law." The State would have you believe the Settlement Agreement is supported by long-settled water law of the west. They then go on to argue all kinds of federal law and other states water law that supports their contention. Nowhere do they, in12 pages of argument, address the Luna Irrigation Supreme Court Case or the City of Raton court case except on the last page 19 of their response. The State admits that Luna could not claim a private right to waters released from storage into a public waterway, such as the San Juan River, and it must be considered public water by the State Engineer. The City of Raton case ratifies State Water Law 72-5-1, which defines a water right as that amount of water used annually.

As in the City of Raton case a reservoir held stored water in excess of the amount of water that the water right owner could not put to beneficial use for the remainder of his <u>annual</u> amount. The court held that the excess water stored must be released to downstream diverters (users) that are out of priority because of low flows in the river. This concept that reservoirs do not hold any carry over rights from one water year (January 1 – December 31st) to the next is basic water law. State water law protects the monopolization of water from others who have a beneficial use simply because you have built a reservoir to capture floodwaters for future years. If there is water in a reservoir left over to the next year it can be utilized for next year's use but only that amount that can be beneficially used in the following year. A water right carries no ownership in the water itself.

<u>In conclusion:</u> The State of New Mexico has entered into a settlement agreement associated with the proposed Water Right Decrees and this "Agreement" is the document that in this proceeding that is portrayed by the State as addressing the concerns of the non-Indian junior water right users and protecting their concerns. This could not be more deceiving to the average non-Indian water user. The proposed decrees documents the use and future use, of waters on the Navajo Nation Reservation, as it is defined now, but not in 1868. Are Federal Reserved Winters Doctrine Rights applicable to lands assigned after 1868? The State surrendered it to the Navajo Nation this concession and tries to argue that because the Navajo's will divert a lot of this water from storage with a 1955 priority. The harm is these rights are not subject to forfeiture and abandonment as all junior non-Indian water rights are. This water could remain unused but not available for use, to the San Juan Basin or anyone. The price to use these waters may be too costly. This defeats State Water Law and our constitution that water, everyone's need for or existence, has now

been monopolized by the Navajo/Nation and USA when no other entity can do this. The State, in its zeal to reach an argument, has exceeded the "minimal need" argument in other Federal Reserve water right adjudications. This is not fair and reasonable, as the court has decided one of the criteria must be, to be approved by this court. The "minimal need" standard has been exceeded, in especially as to an 1868 priority right for all of NIIP.

This constitutes my reply to the settling parties' response to my summary judgment motions and I request the court grant summary judgment against the Navajo Settlement primarily because it is not consistent with applicable law, but also it is not fair and reasonable to non-Indian users.

Respectfully, submitted by:

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May 24, 2013
Date

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I HEREBY CERTIFY – In accordance with the ORDER MANDATING ALTERNATIVE METHOD FOR SERVICE OF ORDERS, MOTIONS, NOTICES AND OTHER COURT PAPERS, entered in the present matter on September 28, 2011 by the Honorable James Wechsler, Presiding Judge – that a true copy of the foregoing was served on the parties and Claimants in the present matter, by attaching a copy of said document to an email sent to the following email list server(s) maintained by the Court this 24th day May 2013.

wrnavajointerse@nmcourts.gov.

ROBERT E. OXFORD