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

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,	**D-1116-CV-75-184**
	HON. JAMES J. WECHSLER
Plaintiff,	**Presiding Judge**
vs.	**SAN JUAN RIVER GENERAL STREAM ADJUDICATION**
THE UNITED STATES OF AMERICA, *et al.*,	
Defendants.	**Claims of the Navajo Nation**
	Case No. AB-07-1

NAME OF PARTY: The United States of America and the Navajo Nation.

DESCRIPTIVE SUMMARY: Response in Opposition to the Motions of the Community Ditch Objectors and Robert E. Oxford seeking corrections of the Court's August 16 Order.

NUMBER OF PAGES: 9.

DATE OF FILING: September 20, 2013.

RESPONSE OF THE NAVAJO NATION AND UNITED STATES IN OPPOSITION TO THE MOTIONS OF COMMUNITY DITCH OBJECTORS AND ROBERT E. OXFORD SEEKING "CORRECTION" OF THE ORDER GRANTING THE SETTLEMENT MOTION

INTRODUCTION

In four motions filed pursuant to this Court's *Order Granting Community Ditch Defendants' Motion Regarding Time to File Motions to Address the Order Granting the Settlement Motion* (filed Aug. 28, 2013) ("August 28, 2013 Order"), the Community Ditch Objectors and Robert E. Oxford argue that the Court either has overlooked or misapprehended certain facts of record in this case that should compel a reconsideration of the *Order Granting the Settlement Motion for Entry of Partial Final Decrees Describing the Water Rights of the*

D✓

Navajo Nation (filed Aug. 16, 2013) ("Order Granting the Settlement Motion").[1] As described in greater detail below, neither the Community Ditch Objectors nor Mr. Oxford has articulated a single reason that should compel this Court to reconsider any portion of the Order Granting the Settlement Motion. This Court should deny Objectors' Motions without a hearing and enter the Proposed Decrees.[2]

ARGUMENT

Objectors' Motions cite no legal authority for the relief sought. Although characterized as a request to correct the record, Objectors' Motions plainly seek reconsideration of the Order Granting the Settlement Motion. The Rules of Civil Procedure do not recognize post-judgment motions for reconsideration. *Albuquerque Redi-Mix, Inc. v. Scottsdale Ins. Co.*, 2007-NMSC-051, ¶¶ 8-10, 142 N.M. 527, 168 P.3d 99. Such motions will be treated either as motions to alter or amend the judgment under Rule 1-059(E) or motions for relief from judgment under Rule 1-060(B), depending on when they are filed. *Id.* at ¶ 8 (following *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173 (5th Cir. 1990)). Our courts have extended this same

[1] The four motions that are the subject of this Response consist of Community Ditch Objectors' *Motion for Correction of Factual Record and August 16 Opinion Concerning Navajo Population* ("Population Motion"); Community Ditch Objectors' *Motion for Correction of Factual Record and August 16 Opinion Concerning NIIP* ("NIIP Motion"); Community Ditch Objectors' *Motion for Correction of Factual Record and August 16 Opinion Concerning Expert Reports* ("Expert Reports Motion"); and *Motion by Robert E. Oxford for Corrections Concerning Hogback and Fruitland* ("Hogback and Fruitland Motion") (all filed Sept. 5, 2013) (collectively referred to as "Objectors' Motions").

[2] The Court may summarily dispose of the Objectors' Motions by entering the Proposed Decrees, which would have the effect of denying the requested relief. *See Stinson v. Berry*, 1997-NMCA-076, ¶ 8, 123 N.M. 482, 943 P.2d 129 (stating that "[w]here there has been no formal expression concerning a motion, a ruling can be implied by entry of final judgment or by entry of an order inconsistent with the granting of the relief sought"); *see also O'Brien & Associates, Inc. v. Carl Kelley Const., Ltd. Co.*, No. 30,875, 2011 WL 5040896 (N.M. Ct. App. Sept. 16, 2011) (entry of final judgment after filing of motion for reconsideration "necessarily denied" motion) (non-precedential).

treatment to motions for reconsideration filed, as in this case, after the Court indicated its intent to enter a final judgment but before having done so. *See, e.g., Matter of Estate of Keeney*, 1995-NMCA-102, 121 N.M. 58, 59, 908 P.2d 751, 752 (motion for reconsideration filed ten days after Court indicated it would grant summary judgment and eleven days before actual entry treated as Rule 1-059(E) motion).

The New Mexico statutes provide an alternative mechanism for challenging a final judgment in NMSA 1978, § 39-1-1. That section provides that a trial court retains jurisdiction over its orders for thirty days to enable the court to pass upon and dispose of any motions directed against the judgment that may have been filed within such period. Again, our courts appear to have extended the application of the statutory review process to decisions that portend final judgment. *Estate of Keeney*, 121 N.M. at 59, 908 P.2d at 752.

None of the Objectors' Motions were filed within ten days of the Order Granting the Settlement Motion.[3] Accordingly, they must be considered motions for relief from judgment under Rule 1-060(B) or motions for reconsideration under § 39-1-1. Reflecting on the fact that the general rules regarding Rule 1-060(B) actions are reasonably well settled in New Mexico, our Supreme Court summarized those rules as follows:

> Judgments of a district court are presumptively correct. It is horn-book law that a final judgment should not be lightly disturbed. To allow a party to correct alleged errors of law at any time by means of Rule 60 would significantly weaken the policy of finality embodied in the rules. Rule 60, however, was created to provide a

[3] Although the Court, on the motion of the Community Ditch Objectors, provided a timeframe in which to file the Objectors' Motions, the August 28, 2013 Order cannot be construed to extend the 10-day period for filing a Rule 1-059(E) motion to alter or amend the judgment. *See* Rule 1-006(B)(2) NMRA. The ten day time limitation fixed by Rule 1-059(E) "is one of the few limitary periods which the court has no power to enlarge." *Dozier v. Dozier*, 1994-NMCA-080, 118 N.M. 69, 71, 878 P.2d 1018, 1020 (quoting *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147, 154 (1st Cir. 1980)), *overruled in part on other grounds by Martinez v. Friede*, 2004-NMSC-006, 135 N.M. 171, 178, 86 P.3d 596, 603.

> simplified method for correcting errors in final judgments. The rule provides a reservoir of equitable power to do justice, but it is not to be used as a substitute for appeal. Where the rule is properly invoked, it should be liberally construed for the purpose of doing substantial justice.

Phelps Dodge Corporation v. Guerra, 1978-NMSC-053, 92 N.M. 47, 50, 582 P.2d 819, 822 (citations omitted). Rule 1-060(B)(1) encompasses judicial errors of law. *Deerman v. Board of County Com'rs*, 1993-NMCA-123, 116 N.M. 501, 505, 864 P.2d 317, 321. Grounds for relief under Rule 1-060(B)(6), permitted "for any other reason justifying relief from the operation of the judgment," must be extraordinary or exceptional. *Id.*

Regardless of whether Objectors' Motions are construed as motions for relief from judgment under Rule 1-060(B) or motions for reconsideration under § 39-1-1, this Court has "broad discretion" in ruling upon Objectors' Motions. *See Sun Country Sav. Bank of New Mexico, F.S.B. v.* McDowell, 1989-NMSC-043, 108 N.M. 528, 532, 775 P.2d 730, 734 (a trial court "has discretion to determine whether a judgment should be set aside under Rule 1-060(B)"); *Chapel v. Nevitt*, 2009-NMCA-017, ¶ 20 145 N.M. 674, 203 P.3d 889 (citing *Laffoon v. Galles Motor Co.*, 1969-NMCA-006, 80 N.M. 1, 3-4, 450 P.2d 439, 441-42, for the proposition that the "discretion vested in the trial courts in the exercise of control over their judgments" pursuant to Section 39-1-1 "is extremely broad"). Recognizing the extent of the Court's discretion, Objectors are required to demonstrate adequate grounds for the relief they seek. "The action of a court must always be supported by a good reason." *Laffoon*, 80 N.M. at 3, 450 P.2d at 441. Motions for relief pursuant to Rule 1-060(B) "should contain allegations which if true would invalidate the judgment or destroy its effect as to the matters under complaint." *Guerra*, 92 N.M. at 50, 582 P.2d at 822.

The Community Ditch Objectors and Mr. Oxford allege that the Order Granting the Settlement Motion is in error because it misconstrues certain key facts. However, neither the Community Ditch Objectors nor Mr. Oxford offers any specific basis of support for their assertions. On the contrary, the material in the record before the Court on which the Community Ditch Objectors and Mr. Oxford rely in support of Objectors' Motions actually confirms the soundness of the Order Granting the Settlement Motion. Objectors fail to demonstrate legal error or any other grounds justifying the relief they seek.

A. Motion for Correction of Record and August 16 Opinion Concerning Expert Reports

In their Expert Reports Motion, the Community Ditch Objectors challenge the Court's analysis of the Settling Parties' *prima facie* showing on the third element of the legal standard applicable to the *Settlement Motion of the United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees* (filed Jan. 3, 2011) ("Settlement Motion") by broadly attacking the numerous expert reports relied upon by the United States and Navajo Nation to support *The United States' Hydrographic Survey of Navajo Lands in the San Juan River Basin* (filed Jan. 3, 2011) and *The United States' Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation* (filed Jan. 3, 2011). See Order Granting the Settlement Motion at 28-34. The essence of this Motion is a sweeping challenge to the fundamental evidence produced in support of the Settlement Motion on the grounds that the various experts "relied on work done by others, without checking on the accuracy and reliability of the data on which they based their reports." Expert Reports Motion at 1. The Community Ditch Objectors offer not a scintilla of evidence to support their remarkable, and specious, claim that the Settling Parties' experts failed to confirm the validity of the data and information upon which they relied in their reports. *Id.* at 2. Indeed, as the Community Ditch Objectors

acknowledge, each expert executed an affidavit "attesting to the truth and accuracy of his or her work." *Id.* at 1. What the Community Ditch Objectors fail to add, however, is that each expert certified in his or her affidavit that he or she reviewed the contents of the material upon which he or she relied and that the information contained therein is true and accurate to the best of his or her knowledge. *See, e.g.*, Affidavit of Aaron M. Beutler (Attachment G to *Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion*) at 6, ¶¶ 10-11. In short, the Expert Reports Motion is unavailing on its face.

B. Motion for Correction of Factual Record and August 16 Opinion Concerning Navajo Population

The Population Motion merely reasserts the arguments previously advanced by the Community Ditch Objectors in their *Motion for Partial Summary Judgment Concerning the Minimum Needs of the Navajo Reservation in New Mexico* (filed Apr. 15, 2013) at 1-3 and in Exhibit 1 attached thereto. Because motions for reconsideration, whether brought pursuant to Rule 1-060(B) or otherwise, "are inappropriate vehicles to reargue an issue previously addressed by the court," *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000), the Court should summarily deny the Population Motion on this basis alone. *See Deaton v. Gutierrez*, 2004-NMCA-043, ¶ 10, 135 N.M. 423, 89 P.3d 672 (trial court properly denied defendants' motion to reconsider grant of summary judgment where motion was merely a restatement of arguments defendants already had advanced against granting summary judgment).

C. Motion for Correction of Factual Record and August 16 Opinion Concerning NIIP

The Community Ditch Objectors filed their NIIP Motion to assert again the arguments advanced in their *Motion for Partial Summary Judgment Concerning NIIP* (filed Apr. 15, 2013). Like the Population Motion, the NIIP Motion too should be summarily denied for the reasons stated in Section B above.

D. Motion by Robert E. Oxford for Corrections Concerning Hogback and Fruitland

In the Hogback and Fruitland Motion, Mr. Oxford argues that the Court "has gotten the historic diversion numbers wrong" for the two irrigation projects. Hogback and Fruitland Motion at 1. Mr. Oxford asserts that the historic maximum diversion rates of 524 to 1,209 cubic feet per second ("cfs") are "wildly inflated" and that the Court's reliance on these figures is misplaced. Thus, Mr. Oxford's argument goes, the limited combined flow rate of 321 cfs for the two projects agreed to by the Settling Parties cannot be justified. *Id.* at 3. *See* Order Granting the Settlement Motion at 21. The claimed basis for the error is that the Court "misread the Whipple and Leeper affidavits," which, according to Mr. Oxford, state that the historic maximum diversion rates of 524 to 1,209 cfs constitute "total diversion rates including NIIP, not just Hogback and Fruitland." Hogback and Fruitland Motion at 3.

The relevant portions of the Affidavit of John W. Leeper, Ph.D, P.E. (Attachment A to *Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion*) ("Leeper Affidavit") and the Affidavit of John J. Whipple (attached to *State of New Mexico's Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees*) ("Whipple Affidavit") simply do not support Mr. Oxford's claim of error. In Paragraph 71 of the Leeper Affidavit, which the Court cites in support of its conclusion that the limited combined flow rate of 321 cfs for the two irrigation projects constitutes a mitigating provision of the Settlement Agreement and Proposed Decrees, Dr. Leeper made unambiguously clear that the Navajo Nation, in the absence of the Settlement, could pursue and secure for the Hogback and Fruitland Irrigation Projects a reserved water right with a senior priority significantly larger than 321 cfs. *See* Leeper Affidavit at ¶¶ 70-71. Paragraphs 31-34 of the Whipple Affidavit, also cited by the Court in support of its conclusion regarding the 321 cfs flow rate limitation, do not

specifically identify the historic maximum diversion rates, but acknowledge the Navajo Nation's right to "irrigation depletions on the Hogback and Fruitland projects relative to historic uses or to amounts previously assumed in State planning studies." Whipple Affidavit at ¶ 31.

In sum, Mr. Oxford's claimed error is illusory and his motion must fail.[4]

CONCLUSION

The Community Ditch Objectors and Mr. Oxford have failed to demonstrate that the Order Granting the Settlement Motion "is clearly contrary to the logical conclusions demanded by the facts and circumstances of the case." *Sims v. Sims*, 1996-NMSC-078, ¶ 65, 122 N.M. 618, 930 P.2d 153. Accordingly, for the reasons set forth above, the Navajo Nation and United States ask the Court to deny each of the Objectors' Motions in their entirety without a hearing and enter the Proposed Decrees.

[4] Mr. Oxford submitted the Affidavit of Robert E. Oxford ("Oxford Affidavit") in support of the Hogback and Fruitland Motion. In its numbered paragraphs, the Oxford Affidavit simply tracks the argument outlined in the Motion. The Navajo Nation and United States hereby request that the Court strike the Oxford Affidavit as untimely. Like the argument it is intended to support, the Oxford Affidavit contains no information that was not available to Mr. Oxford prior to April 15, 2013, the deadline in this subproceeding for filing dispositive motions. It is enough for Respondents here to request that the Court disregard the Oxford Affidavit without the necessity of filing a separate motion to strike. *See Deaton*, 2004-NMCA-043, ¶ 11. For the same reason, the Navajo Nation and United States oppose Mr. Oxford's request for a site visit to the Hogback and Fruitland projects, and ask the Court to deny that request.

Respectfully submitted this 20th day of September, 2013.

UNITED STATES OF AMERICA

Andrew J. "Guss" Guarino
U.S. Department of Justice
Environment & Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
(303) 844-1343

Attorney for the United States of America

NAVAJO NATION

Stanley M. Pollack
M. Kathryn Hoover
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Navajo Nation (AZ) 86515
(928) 871-7510

Samuel D. Gollis
Samuel D. Gollis, Attorney at Law, P.C.
901 Rio Grande Boulevard, Suite F-144
Albuquerque, New Mexico 87104
(505) 883-4696

Attorneys for the Navajo Nation

CERTIFICATE OF SERVICE

I certify that on this 20th day of September, 2013, an electronic version of *Response of the Navajo Nation and United States in Opposition to Motions of Community Ditch Objectors and Robert E. Oxford Seeking "Correction" of the Order Granting the Settlement Motion* was served by electronic mail to: wrnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the list of parties identified on the *Notice of Amended Service List* (filed Feb. 25, 2013).

Samuel D. Gollis