

2015 FEB -9 PM 4: 51

STATE OF NEW MEXICO  
ELEVENTH JUDICIAL DISTRICT  
COUNTY OF SAN JUAN

No. CV-75-184

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

Hon. James J. Wechsler  
Presiding Judge

Plaintiff,

SAN JUAN RIVER STREAM  
SYSTEM ADJUDICATION

vs.

La Plata River Section

THE UNITED STATES OF AMERICA, et al.

Thelma Faye Nickles  
Lloyd L. Nickles

Defendants,

Court Case No. AF-01-210

vs.

Subfile No. SJLP-005-0031

THE JICARILLA APACHE TRIBE and the  
NAVAJO NATION,

Defendants-Interveners

**STATE OF NEW MEXICO'S PROPOSED FINDINGS OF FACT  
AND CONCLUSIONS OF LAW**

Plaintiff, State of New Mexico, *ex rel.* State Engineer ("State") hereby files its *Proposed Findings of Fact and Conclusions of Law* regarding the claims of Thelma Faye Nickles and Lloyd L. Nickles (Defendants) as they relate to subfile SJLP-005-0031.

**PROCEDURAL HISTORY**

On October 27, 2014, the State filed its *Motion for Summary Judgment and Memorandum in Support Thereof*. On November 13, 2014, the Defendants filed their *Response to State of New Mexico ex rel. State Engineer's Motion for Summary Judgment*. The State filed its *Reply to Nickles' Response to Motion for Summary Judgment* on December 1, 2014.

On December 16, 2014, presiding Judge James J. Wechsler issued his *Order Denying the State of New Mexico's Motion for Summary Judgment*, ordering that:

1. The Decree recognized that the irrigated acreage in the Decree Ownership Forms may not reflect the full irrigated acreage due to seasonal and yearly fluctuations in irrigation, and therefore the State's motion for summary judgment is DENIED regarding the amount of irrigated acreage that existed at the time of the Echo Ditch Decree.

2. The sole issue to be determined at the trial scheduled for January 8, 2015, is whether Claimants or their predecessors established a water right on more than 96.1 acres of Claimants' property prior to the 1948 Decree; and

3. Water rights not established as part of the Decree, including the right to irrigate certain acreage, require a permit from the Office of the State Engineer.

*Id.* at pg. 6-7.

On January 8, 2015 a hearing for Court Case No. AF-01-210 was held in the Eleventh Judicial District Court in Aztec, New Mexico, the Honorable James J. Wechsler presiding.

#### **GENERAL FINDINGS OF FACT**

##### **Beneficial use in excess of 96.1 acres prior to the 1948 Echo Ditch Decree:**

**Finding of Fact 1.** Apart from hearsay, the only documentary evidence of an alleged water right provided by the Defendants is a Statement and Claim of Water Right dated June 8, 1905 (1905 Claim) (Defendants' Exhibit L).

**Finding of Fact 2.** The 1905 Claim states,

"[O]n or about the 1st of July, 1904, the said J. W. Glaister begun preliminary work on this ditch clearing brush for the survey, surveyed August 1st, 1904, and actual construction begun December the 4th, 1904. The purpose and object of said ditch is to convey the surface and underground waters of said arroya [sic] on to the [subject lands]."

**Finding of Fact 3.** The specific infrastructure proposed by the 1905 Claim was described as follows: "The improvements consist of a dam, to reservoir waters flowing through said arroya [sic], a headgate by which to divert the water into the ditch aforesaid . . . ."

**Finding of Fact 4.** Although the 1905 Claim speaks of the construction of works and the intent to divert water, the Claim, in and of itself, provides no evidence that water was ever actually put to beneficial use.

**Finding of Fact 5.** No records or evidence were introduced that prove the plan described in the 1905 Claim was ever effectuated.

**Finding of Fact 6.** Although, Defendants' witness Don Nickles testified that his grandfather diverted water from McDermott Arroyo, this testimony was based on hearsay about events that occurred before he was born. Transcript, Don Nickles, 10:05.

**Finding of Fact 7.** Although, Defendants' witness Don Nickles testified that his grandfather diverted water from McDermott Arroyo, he did not offer any evidence of the existence of the works described in the 1905 Claim. Transcript, Don Nickles, 9:52.

**Finding of Fact 8.** Defendant Thelma Nickles testified that her grandfather diverted water from McDermott Arroyo. Transcript, Thelma Nickles, 10:29. This testimony was based on hearsay about events that occurred before she was born.

**Finding of Fact 9.** Defendant Thelma Nickles testified that she was told that her grandfather diverted water from McDermott Arroyo, however, she did not offer any evidence of the existence of the works described in the 1905 Claim. Transcript, Thelma Nickles, 10:31.

**Finding of Fact 10.** Defendant Thelma Nickles testified that she used to skate on the seeping water in McDermott Arroyo in wintertime. Transcript, Thelma Nickles, 10:33. This fact is not evidence that the dam, ditches, and works described in the 1905 Claim were ever built, nor is it evidence that any water from McDermott Arroyo was put to beneficial use.

**Finding of Fact 11.** The State's Exhibit 3, which is a Soil and Conservation aerial image from 1935 of the subject property, shows no evidence in 1935 of cultivation, ditches, or ponds related to the 1905 Claim. Transcript, Aguirre, 3:28.

**Finding of Fact 12.** There is no evidence in 1935 of a pond, a dam, ditches, seepage in the arroyo, or cultivation on the sloping land between the irrigated land and the arroyo. Transcript, Aguirre, 3:28.

**Finding of Fact 13.** The 1938 Hydrographic Survey Maps upon which the EDD is based were made using technology called plane table alidade surveying that required the surveyors to actually walk the land and physically measure every feature that was being mapped. Transcript, Aguirre, 4:18.

**Finding of Fact 14.** The surveyors who created the 1938 Hydrographic Survey Maps upon which the EDD is based were directed to capture all irrigated acreage in the San Juan Basin. Transcript, Aguirre, 4:22.

**Finding of Fact 15.** If there was a functioning infrastructure of a dam and ditches as described in the 1905 Claim, those surveyors conducting the 1938 Hydrographic Survey would have included it in the Report and the Hydrographic Survey Maps. Transcript, Aguirre, 4:22.

**Finding of Fact 16.** The 160 acres of alleged irrigation derived from the infrastructure described in the 1905 Claim were not mapped by the 1938 Hydrographic Survey conducted by the New Mexico State Engineer. Transcript, Aguirre, 4:22, 4:36.

**Finding of Fact 17.** The 1938 Hydrographic Survey Maps, upon which the EDD is based, show no evidence of the existence of the infrastructure or diversion from the 1905 Claim. Transcript, Aguirre, 3:28.

**Finding of Fact 18.** The 1938 Hydrographic Survey Maps upon which the EDD is based show no evidence of construction or beneficial use related to the 1905 Claim. Transcript, Aguirre, 3:28.

**Finding of Fact 19.** No evidence was introduced from 1905 that would establish the actual existence of the dam in the arroyo that was supposed to be the point of diversion for the 1905 Claim. Transcript, Oxford, 1:23

**Finding of Fact 20.** No evidence was introduced that would prove the actual existence of the dam in the arroyo that was supposed to be the point of diversion for the 1905 Claim between 1905 and 1948. Transcript, Oxford, 1:24.

**Finding of Fact 21.** No evidence was introduced that would prove that any of the proposals described in the 1905 Claim were actually realized.

**Finding of Fact 22.** No evidence was introduced that would establish that any amount of water from any source related to the 1905 Claim had ever been put to actual beneficial use on any lands. Transcript, Oxford, 1:30.

**Finding of Fact 23.** The 160 acres allegedly irrigated from the infrastructure described in the 1905 Claim were not identified as irrigated in *Jackson Canal and Reservoir Co. v. McDermott Irrigating Ditch Co.* (San Juan County Court, Cause 268, Nov. 26, 1910) (Cause 268).

**Finding of Fact 24.** The 160 acres allegedly irrigated from from the infrastructure described in the 1905 Claim were not measured in the Ditch Records that constitute Volume II of the EDD.

**Finding of Fact 25.** The 160 acres allegedly irrigated from the infrastructure described in the 1905 Claim were not described in the Ownership Forms in which the Court's final determination was recorded in the EDD.

**Finding of Fact 26.** None of the Defendants' witnesses could testify whether the 160 acres allegedly irrigated from the infrastructure described in the 1905 Claim were mentioned in the transcripts of the hearings held by the EDD Court. Transcript, Oxford, 1:33 to 1:35.

**Finding of Fact 27.** No evidence was presented that, at any time between 1905 and 1948, any flood in McDermott Arroyo washed out the infrastructure related to the 1905 Claim. Transcript, Don Nickles, 9:40; Thelma Nickles, 10:41; Enenbach, 2:38; Aguirre, 4:39.

**Finding of Fact 28.** But for hearsay testimony, no evidence was introduced, that between 1905 and 1948, water from the works described in the 1905 Claim was ever put to actual beneficial use.

**Finding of Fact 29.** No evidence was presented that there was ever beneficial use of water on the lands at issue in this case in excess of 96.1 acres prior to the 1948 final order in *Echo Ditch Company v. McDermott Ditch Company*, at 103 & 108 (NM 1st Dist. Ct., San Juan County, No. 01690, April 8, 1948) (Echo Ditch Decree, "EDD").

**The Echo Ditch Decree adjudicated a maximum of 96.1 acres to the Defendants**

**Finding of Fact 30.** Page 103 of the EDD (Defendant's Exhibit D) is an Ownership Form that shows the Court adjudicated 92.1 total acres as being irrigated from the Left Hand Ditch; with 85.0 of those total acres belonging to the Ralph Nickles property, and 7.1 of those acres belonging to the Fred and Florence Cummings property. Taken together with the Fred Cummings 4.0 acres entry Ownership Form on page 118 of the EDD, the EDD Court identified 96.1 acres irrigated for the property that now makes up the Defendants' property.

**Finding of Fact 31.** The Defendants submitted their Exhibit H, which is a version of the Ditch Record for the Left Hand Ditch from the 1938 Hydrographic Survey. This Ditch Record identifies 85.0 acres of irrigated land for the Ralph Nickles (Nickols) property, and 7.1 acres of irrigated land for the Fred and Florence Cummings property, for a total of 92.1 acres irrigated. However, Defendants' Exhibit H includes handwritten emendations that move "Not Irrigated" acreage to the "Irrigated" column.

**Finding of Fact 32.** Robert Oxford testified that the Office of the State Engineer in Santa Fe possesses a set of Ditch Records that does not include the handwritten changes like those found in Defendants' Exhibit H, and he does not know who made the marks on the Aztec District Office Ditch Records. Transcript, Oxford, 11:53.

**Finding of Fact 33.** Bill Enenbach testified that he has seen four or five different versions of the Ditch Records with different notations, and he assumes the source of the annotations was the Judge's Referee. However, he testified he has not seen written documentation to substantiate this. Transcript, Enenbach, 2:41.

**Finding of Fact 34.** It is unknown who made the handwritten emendations to Defendants' Exhibit H.

**Finding of Fact 35.** State's Exhibits 1 and 2 are copies of the Ditch Records that were copied from the Court's record. They include no handwritten emendations. These exhibits identify 56.2 acres of irrigated land for the Ralph Nickles property, and 4.9 acres of irrigated land for the Fred Cummings property, for a total of 61.1 acres. This 61.1 total acres irrigated matches the acreage in the 1938 Hydrographic Survey Maps 72 and 73 (State's Exhibits 6 and 7).

**Finding of Fact 36.** The 1938 Hydrographic Survey found a total of 61.1 total acres of irrigation on the Defendants' lands.

**Finding of Fact 37.** Even though the 1938 Hydrographic Survey found a total of 61.1 acres of irrigation on the Defendants' lands, the EDD adjudicated a maximum total of 96.1 acres of irrigation, as reflected in the Ownership Forms on pages 103 and 118 of the EDD.

**Collateral Estoppel:**

**Finding of Fact 38.** The EDD was entered by District Judge David W. Carmody on April 8, 1948, in the First Judicial District Court, San Juan County, New Mexico.

**Finding of Fact 39.** The rights determined by Cause No. 01690 are, as stated on page 44 of that cause of action:

**Rights Determined:**

That it is the intent and purpose of this Decree, and it shall be so construed, to fix and determine, not only the water rights of the Plaintiffs as against the water rights of each and every Defendant herein, but to also fix and determine the water rights of each and every Defendant herein as against the water rights of said Plaintiffs and of each, every, and all other defendants inter se.

**Finding of Fact 40.** The Defendants' water rights were necessarily determined by the Court in Cause No. 01690.

**Finding of Fact 41.** The immediate issue before the Court in the current adjudication is identical to the issue litigated in the EDD: how the water rights claimed by the Defendants should be adjudicated.

**Finding of Fact 42.** The lands that are the subject of the present subfile adjudication are coincident to and substantively identical to the lands to which water rights were adjudicated by the EDD.

**Finding of Fact 43.** All the water rights that might be related to those lands that are the subject of the current adjudication were surveyed by the 1938 Hydrographic Survey and considered by the EDD court.

**Finding of Fact 44.** Defendants Thelma and Lloyd Nickles' predecessors in interest in the Echo Ditch litigation were Ralph Nickles (aka Ralph Nickols), Fred and Florence Cummings, and Fred Cummings. See EDD at 103, 118, Ownership Forms; EDD Vol. II, Ditch Records, 402, 420; EDD Vol. III, 1938 Hydrographic Survey, maps 72, 73.

**Finding of Fact 45.** The Defendants' predecessors in interest had a full and fair opportunity to litigate the nature of their water rights in the EDD litigation.

**Finding of Fact 46.** The plaintiffs and defendants in the EDD were given proper notice of the proceedings, see EDD at 2-3, and were provided an opportunity to appear as witnesses on the record before the court to confirm or dispute any determination made by the 1938 Hydrographic Survey.

**Page 89 of the EDD**

**Finding of Fact 47.** The La Plata River is a stream of uncertain and varying seasonal flow, from year to year. EDD at 89.

**Finding of Fact 48.** In seasons when there is an abundant stream flow from the La Plata River, a much larger acreage of land is irrigated than in other seasons when the flow of the River is smaller. EDD at 89.

**Finding of Fact 49.** The Master Sheets and Ownership Forms included in the EDD for the La Plata River do reflect and show the actual irrigated lands at the time the State Engineer's hydrographic survey was made. EDD at 89.

**Finding of Fact 50.** It was intended that the provisions of the EDD should not be construed to limit the water rights and the use of water of the respective land owners to the specific lands shown in Volume II, which contained the Ditch Records, and Volume III, which contained the Hydrographic Survey Maps, of the State Engineer's Report. EDD at 89.

**Finding of Fact 51.** Rather than being limited by the acreages described in Volume II and Volume III of the EDD, the water of the respective land owners shall be applied and used for the irrigation of any or all of the irrigable land shown on the Ownership Forms relating to the La Plata River Ditches. EDD at 89.

**Finding of Fact 52.** The EDD Court retained jurisdiction of the adjudication for a period of two years from the date of entry of the EDD Judgment, for purposes that included correcting errors, bringing in new parties whose water rights should have been, but through inadvertent

omission, were not adjudicated in the EDD, and adjudicating the water rights any such new parties, provided that no change or modification would be made except after notice had been given to all parties who may be adversely affected thereby. EDD at 85.

**Finding of Fact 53.** The Defendants predecessors in interest had two years after the EDD was entered in which to notify the Court of any water right not adjudicated by the EDD including the 1905 Claim. EDD at 85.

**Finding of Fact 54.** The EDD addresses two previous adjudications concerning the La Plata: *La Plata Indian Ditch Co. v. Hillside Irrigating Ditch Co.* (San Juan County Court, Cause 197, April 22, 1901), and *Jackson Canal and Reservoir Co. v. McDermott Irrigating Ditch Co.* (San Juan County Court, Cause 268, Nov. 26, 1910). EDD at 45.

**Finding of Fact 55.** The Court held that the EDD will supplement the 1901 and 1910 causes by describing the specific lands to which the waters were appurtenant and that the descriptions of those rights would be set out in the Ownership Forms. EDD at 45.

**Finding of Fact 56.** The Echo Ditch Court held that one of the purposes of the EDD was to designate and describe in the Ownership Forms the lands to which the water rights have been determined to be appurtenant. EDD at 45.

**Finding of Fact 57.** The EDD sets forth its findings in a Master Sheet of approximately 287 pages entitled "Adjudicated Rights of Individual Canals, Ditches, Carriers, and Reservoirs, and Land Owners Using Waters Thereunder or Therefrom in Cause No. 01690, District Court, San Juan County, New Mexico" (Master Sheet). EDD at 85.

**Finding of Fact 58.** Within the Master Sheet, the individual water rights are grouped by ditch.

**Finding of Fact 59.** Within each Ditch grouping in the Master Sheet, all of the individual water rights owned by each claimant on each ditch are described in the Ownership Forms. EDD at 85.

**Finding of Fact 60.** Each Ownership Form describes the name of the ditch under which the water was appropriated and is used, the name of the river or stream (source) from which the water is diverted; the name of the land owner, the description of the land owned by him or her, the amount of water included in each water right, the page number in Volume II and the sheet number in Volume III of the State Engineer's Report filed herein, and other pertinent data relating to each water right. EDD at 85.

**Laches**

**Finding of Fact 61.** The Defendants' predecessors in interest filed the 1905 Claim.

**Finding of Fact 62.** The final decree in the EDD adjudication was filed in 1948.

**Finding of Fact 63.** The EDD Court retained jurisdiction for an additional two years, until 1950, for purposes that included correcting errors, bringing in new parties whose water rights should have been, but through inadvertent omission, were not adjudicated in the EDD, and adjudicating the water rights any such new parties. EDD at 85.

**Finding of Fact 64.** The Defendants knew of their 1905 Claim forty-three years before the EDD was entered.

**Finding of Fact 65.** The Defendants knew of their 1905 Claim forty-five years before the end of the two-year period in which the EDD Court retained jurisdiction. EDD at 85.

**Finding of Fact 66.** The Defendants waited at least sixty-four years with no explanation (from 1950 to 2014) before asserting their 1905 Claim.

**CONCLUSIONS OF LAW**

**Burden of Proof:**

**Conclusion of Law 1.** "The burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right." *Order Granting Motion for Summary Judgment Regarding the Claims of Elisa Trujillo Under Subfile*

*PM-43319 [Doc. No. 6824], State of New Mexico v. Aamodt*, No. Civ. 66-06639 (USDC-DNM) February 26, 2010 at page 6 (citing *Pecos Valley Artesian Conservancy Dist. v. Peters*, 54 N.M. 148, 152-153, 193 P.2d 418, 422-423 (1948)). This decision in *Aamodt* was recently cited by the Court in the *Zuni* adjudication, which similarly held, "It is too soon to say whether the burden assignment might shift at different stages of these proceedings. In general, however, the Court sees no reason to depart from the holding in *Aamodt* that the water rights user bears the burden of proof in water rights adjudications." *U.S. v. A&R Productions et al.*, 01 cv 00072 (USDC-DNM) August 28, 2014 *Order* at page 4 (Doc. No. 2985).

**The Defendants Have Failed to Prove the Existence of Beneficial Use Prior to 1948:**

**Conclusion of Law 2.** "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." (N.M. Const. art. XVI, § 3).

**Conclusion of Law 3.** The Defendants have failed to provide evidence of any beneficial use of water prior to 1948 that exceeds the 96.1 acres adjudicated by the EDD.

**Conclusion of Law 4.** A water right is determined, not by the priority of the diversion, but rather by the priority of application to beneficial use. *Millheiser v. Long*, 1900-NMSC-012, ¶ 3, 61 P. 111, 113.

**Conclusion of Law 5.** The mere creation of works does not establish a water right.

*Millheiser v. Long*, 1900-NMSC-012, ¶ 3, 61 P. 111, 113.

**Conclusion of Law 6.** Based on the evidence presented at trial, the Defendants' claim to a pre-1948 water right that exceeds the 96.1 acres adjudicated by the EDD cannot be recognized by this Court, and should be denied.

**Conclusion of Law 7.** Defendants Thelma and Lloyd Nickles failed to prove any use of water that would qualify as beneficial use in excess of the 96.1 acres prior to the 1948 EDD.

**The Echo Ditch Decree is a Final Determination of the Defendants' Water Rights:**

**Conclusion of Law 8.** Any evidence of an unknown and unspecified water right beyond the 96.1 acres adjudicated by the EDD is not cognizable by the Court. EDD at p. 5.

**Conclusion of Law 9.** The EDD is unequivocally final as to the water rights of the Defendants. EDD at p. 5.

**Conclusion of Law 10.** The Ownership Forms control the final determination of every water right in the EDD. EDD at 45.

**Conclusion of Law 11.** Page 89 of the EDD can only be interpreted as affirming the finality of the EDD and the finality of the determinations set forth in the Ownership Forms.

**Conclusion of Law 12.** Concluding that page 89 of the EDD does not affirm the finality of the EDD and the finality of the determinations set forth in the Ownership Forms risks overruling the EDD and undermining its finality as a judgment and decree. EDD at p. 5.

**Conclusion of Law 13.** The amount of acreage identified in the Ownership Forms is the maximum, not the minimum, amount of the lands adjudicated with appurtenant water rights in the EDD. EDD at pp. 5, 85, 89.

**Conclusion of Law 14.** The only way the Defendants can legally irrigate any acreage beyond the amounts specified in the Ownership Forms is by obtaining a permit from the OSE. NMSA 1978, § 72-12-3 (2001).

**Page 89 of the EDD:**

**Conclusion of Law 15.** The evidence presented by Defendants failed to establish any beneficial use of water under the Defendants' 1905 claim, and yet, conversely, the evidence illustrates that the EDD was intended to be a final order settling all parties' existing claims to waters of the La Plata.

**Conclusion of Law 16.** The EDD with its two-year grace period during which the court retained jurisdiction to correct factual errors, does not, on page 89 or anywhere else, allow water users to claim additional irrigation sixty-five years after the two-year decree correction period.

**Conclusion of Law 17.** Even assuming that the language on page 89, recognizing that the amount of water available for irrigation varied, allowed the irrigation of additional lands, any such allowance by the court was not open-ended; it gave the parties an additional two years to correct the EDD.

**Conclusion of Law 18.** Page 89 of the EDD states that the La Plata River is a stream of "uncertain and varying seasonal flow" and that the water is used on varying tracts each year depending on the flow. It further instructs that "such use of water shall be applied and used for the irrigation of any or all of the irrigable land shown on the respective Ownership Forms . . . ." The page 89 language, when compared to the Ownership Forms, Ditch Records, and Hydrographic Survey maps, makes sense only if the 96.1 acres as stated in the Ownership Forms is used as the maximum amount of acres adjudicated.

**Conclusion of Law 19.** The Ownership Forms of the EDD set forth the complete adjudicated water rights of every water right owner in the La Plata Stream System.

**Conclusion of Law 20.** The Ownership Forms of the EDD describe the maximum amount of acreage upon which each individual water right owner in the La Plata Stream System may put water to beneficial use.

**Conclusion of Law 21.** The EDD is the basis for all the water right determinations in the San Juan River Stream System adjudication. *See Order on Motions Concerning the Issue of Res Judicata and Collateral Estoppel and Related Matters* (Feb. 2, 2004), ¶¶ 3-6, at 1-2 (2004 Order).

**Conclusion of Law 22.** The EDD is a final judgment and decree and should not be undermined.

**Conclusion of Law 23.** The EDD is binding on those who were parties to the Echo Ditch litigation. 2004 Order.

**Conclusion of Law 24.** The EDD is binding on the successors in interest of those who were parties to the Echo Ditch litigation. EDD at 2-3.

**Collateral Estoppel:**

**Conclusion of Law 25.** Collateral estoppel prevents the relitigation of "ultimate facts or issues actually and necessarily decided in a prior suit." *Adams v. United Steelworkers*, 1982-NMSC-014, ¶ 16, 640 P.2d 475, 479.

**Conclusion of Law 26.** Before collateral estoppel is applied to preclude litigation of an issue, the moving party must demonstrate: (1) The party to be estopped must be a party to the prior proceeding, or a successor in interest to the party to the prior proceeding; (2) The cause of action in the case presently before the court must be different from the cause of action in the prior adjudication; (3) The issue that would be precluded must have been actually litigated in the prior adjudication; (4) The issue that would be precluded must have been necessarily determined in the prior adjudication; and (5) The party against whom estoppel is asserted must have had a full and fair opportunity to litigate the issue in the prior adjudication. *Shovelin v. Cent. New Mexico Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 10, 850 P.2d 996, 1000 (citations omitted).

**Conclusion of Law 27.** The predecessors in interest to the Defendants in the current cause of action were parties to the litigation that resulted in their water rights being adjudicated in the 1948 EDD. See EDD at 103, 118, Ownership Forms; EDD Vol. II, Ditch Records, 402, 420; EDD Vol. III, 1938 Hydrographic Survey, maps 72, 73.

**Conclusion of Law 28.** The EDD is a separate cause of action from the current case which is a subfile in the San Juan River Stream System adjudication. The EDD was litigated in the First Judicial District Court as Cause No. 01690, and the plaintiffs were a number of ditches including the Echo Ditch Company. The San Juan River Stream System adjudication is before the Eleventh Judicial District Court as Cause No. CV-75-184, and the plaintiff is the State.

**Conclusion of Law 29.** The issue currently before this Court – how the water rights claimed by the Defendants should be adjudicated – is identical to the issue litigated in the EDD.

**Conclusion of Law 30.** When an issue is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined, the issue is actually litigated. Restatement (Second) of Judgments § 27 comment (d) (1982).

**Conclusion of Law 31.** The Defendants' predecessors in interest had a full and fair opportunity to litigate the nature of their water rights in the EDD litigation. EDD Record of Hearings Before Referee Vol. II, at 21-22.

**Conclusion of Law 32.** The water rights of the Defendants' predecessors in interest were actually litigated before the EDD Court. EDD Record of Hearings Before Referee Vol. II, at 21-22.

**Conclusion of Law 33.** Regarding the water rights at issue in this case, the Defendants had their day in court. EDD Record of Hearings Before Referee Vol. II, at 21-22.

**Conclusion of Law 34.** For collateral estoppel purposes, issues necessarily determined are those which, in the previous case were essential to a decision therein and upon the determination of which the prior judgment was rendered. *McCarthy v. Kay*, 1947-NMSC-076, ¶ 10, 189 P.2d 450, 451.

**Conclusion of Law 35.** The EDD was intended to be a final determination of water rights in the San Juan River Basin. EDD at p. 5.

**Conclusion of Law 36.** All the water rights that might be related to the lands at issue in this case were surveyed by the 1938 Hydrographic Survey and considered by the EDD court.

Transcript, Aguirre, 4:15 to 4:24.

**Conclusion of Law 37.** The very purpose of the EDD litigation was to determine with finality the elements of the water rights of the Defendants and all other similarly situated claimants in the San Juan River stream system. EDD at p. 5.

**Conclusion of Law 38.** The elements of the Defendants' water rights were necessarily determined by the EDD. EDD at p. 5.

**Conclusion of Law 39.** The issue currently before this Court – how the water rights claimed by the Defendants should be adjudicated – was necessarily determined by the EDD Court, as evidenced by the Decree itself.

**Conclusion of Law 40.** The Defendants are barred, under the doctrine of collateral estoppel, from relitigating the adjudication of their water rights that were determined with finality by the EDD. *Shovelin v. Cent. New Mexico Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 10; 850 P.2d 996, 1000.

**Laches:**

**Conclusion of Law 41.** The court could never have intended that parties could come in over sixty years later to challenge the finality of the EDD. This is especially true in this case, in which the Defendants knew of their 1905 Claim forty-five years before the EDD was entered, and yet slept on their supposed rights to the detriment of not only the Plaintiff, but all parties to the EDD.

**Conclusion of Law 42.** Even assuming that the language on page 89 of the EDD would allow Defendants to assert the irrigation of additional lands, any such allowance by the court was not

open-ended: it gave the parties only an additional two years in which to correct the EDD. EDD at 85.

**Conclusion of Law 43.** The equitable doctrine of laches is applicable to the circumstances raised by the instant case.

**Conclusion of Law 44.** "Laches will lie when, in addition to other factors, there has been an unexplainable delay of such duration in asserting a claim as to render enforcement of such claim inequitable." *Skaggs v. Conoco, Inc.*, 1998-NMCA-061, ¶ 14, 125 N.M. 97, 957 P.2d 526.

**Conclusion of Law 45.** The elements of the doctrine of laches are: (1) Conduct on the part of another which forms the basis for the litigation in question; (2) Delay in the assertion of the complaining party's rights; (3) Lack of knowledge or notice on the part of the defendant that the complaining party would assert such rights; and (4) Injury or prejudice to the defendant in the event relief is accorded to the complaining party or the suit is not barred. *Skaggs v. Conoco, Inc.*, 1998-NMCA-061, ¶ 14, 125 N.M. 97, 957 P.2d 526; *Garcia v. Garcia*, 1991-NMSC-023, ¶ 31, 111 N.M. 581, 808 P.2d 31.

**Conclusion of Law 46.** In this adjudication, the State brought suit to determine water rights claims in the San Juan River Basin. Defendants have brought an additional claim at this late date against which the State is now in the position of defending.

**Conclusion of Law 47.** The Defendants are barred by the laches from raising a new water right claim so many years after the EDD was entered.

**Conclusion of Law 48.** The EDD is binding on Defendants.

**Conclusion of Law 49.** Overruling the EDD and allowing a hearing to consider evidence that could and should have been presented during the Echo Ditch litigation undermines the finality of the EDD. EDD at 85.

**Conclusion of Law 50.** Overruling the EDD and allowing a hearing to consider evidence that could and should have been presented during the Echo Ditch litigation could lead to protracted and costly litigation that will consume the limited resources of the Court, the State, and water rights owners.

**Conclusion of Law 51.** Revisiting a valid order of the Court subverts the compelling interests in finality in the case at issue. *In re Water Rights of Elk Dance Colorado, LLC*, 139 P.3d 660, 671 (Colo. 2006); *Rizzuto v. Davidson Ladders, Inc.*, 280 Conn. 225, 263, 905 A.2d 1165, 1189.

**Conclusion of Law 52.** A major purpose of a final water right decree is to provide assurance to the various water rights owners of the amount of water they are entitled to receive. *In re Water Rights of Elk Dance Colorado, LLC*, 139 P.3d 660, 671 (Colo. 2006).

**Violations of Due Process:**

**Conclusion of Law 53.** Permitting the Defendants to claim a water right in excess of the amount adjudicated by the EDD places the Defendants in a different and advantageous position from other similarly situated claimants in the La Plata section of the San Juan River Stream System adjudication. *State ex rel. Reynolds v. Allman*, 1967-NMSC-078, 427 P.2d 886.

**Conclusion of Law 54.** Due process requires all who may be bound or affected by a decree are entitled to notice and hearing, so that they may have their day in court. *Allman*, 1967-NMSC-078, ¶ 9, 427 P.2d at 888.

**Conclusion of Law 55.** Permitting the Defendants an opportunity to reopen the EDD and undermine is finality, could lead to reopening all the subfile orders entered in the La Plata section to allow all other claimants to have their expanded rights adjudicated. *State ex rel. Reynolds v. Allman*, 1967-NMSC-078, 427 P.2d 886.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 9<sup>th</sup> day of February, 2015, I caused a

true and correct copy of the foregoing to be mailed by first class mail, postage prepaid to:

F. Chester Miller, III, Esq.  
Attorney for Thelma Faye and Lloyd L. Nickles  
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