No. 15-2047

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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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State of New Mexico *ex rel.* State Engineer,
*Plaintiff/Appellee*,

and

United States of America, Pueblo de Nambé, Pueblo de Pojoaque,
Pueblo de San Ildefonso, and Pueblo de Tesuque,
*Plaintiffs-Interveners/Appellees*,

v.

Elisa M. Trujillo,
*Defendant/Appellant*.

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On Appeal from the United States District Court for the District of New Mexico
(Johnson, J.) Case No. 66-cv-6639-WPJ-WPL

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# JOINT RESPONSE BRIEF OF APPELLEES PUEBLO DE NAMBÉ, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, AND PUEBLO DE TESUQUE

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**ORAL ARGUMENT NOT REQUESTED**

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## STATEMENT OF RELATED APPEALS

This Court has previously entered two opinions related to this appeal: *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976), and *State of New Mexico ex rel. Reynolds v. Gutierrez*, 440 Fed. App'x 633 (10th Cir. 2011) (unpublished).

For their Answer, Plaintiffs-Interveners-Appellees, Pueblo of Nambé, Pueblo of Pojoaque, Pueblo of San Ildefonso, and Pueblo of Tesuque (collectively, the "Pueblos") state as follows:

## STATEMENT OF JURISDICTION

The Court has jurisdiction over only one of the orders in this appeal: the district court's January 12, 2015 order to Defendant-Appellant Elisa M. Trujillo ("Trujillo"). *Order Adjudicating Post-1982 Domestic Well Water Rights* [docket no. 9989],[1] Aplt. App. 143 ("Trujillo Subfile Order" or "Subfile Order"). The Subfile Order states, "[t]here is no just reason to delay entry of this . . . Order as a final judgment . . . ." Aplt. App. 144. Under New Mexico law the Trujillo Subfile Order is a final, appealable order as between New Mexico and Trujillo. *See State ex rel. State Eng'r v. Parker Townsend Ranch Co.*, 887 P.2d 1247, 1249 (N.M. 1994).[2]

Trujillo's appeal also raises issues that are not specific to her Subfile Order, and thus are not final orders under *Parker Townsend*, and are not properly before

[1] References to district court documents are by document name, page cited, date entered, and district court docket number, along with reference to the appendix where they are reproduced. References to documents in the Appellant's Appendix are to "Aplt. App." and references to documents in New Mexico's Appendix are to "NM App." References to the Pueblos' Supplemental Appendix are to "Supp. App."

[2] *But see Order* at 4 (Mar. 2, 1994) [docket no.4299], Supp. App. 74; *infra* § I.A and n. 5.

the Court. 28 U.S.C. § 1292(a)(1) does not provide the Court with jurisdiction over Trujillo's appeal of an order denying a motion to quash an injunction, *Memorandum Opinion and Order* (Mar. 30, 2012) [docket no. 7579], Aplt. App. 239, because such order did not change any of Trujillo's legal rights. *See* Aplt. Br. 14. Trujillo challenges the district court's 1983 order that prohibited the New Mexico State Engineer ("State Engineer") from issuing permits under N.M. Stat. Ann. § 72-12-1 and limiting permits "to the use of water for household, drinking and sanitary purposes within a closed water system . . . ." *Order*, Jan. 13, 1983 [docket no. 641] ("Post-82 Well Order"), Aplt. App. 13-14. While Trujillo attempts to use her appeal of her Subfile Order to invoke a ruling from the Court on the Post-82 Well Order, her challenge is to the Court's quantification of her domestic well permit at 0.5 acre-feet per year ("AFY"), *not* to the Post-82 Well Order, and over which this Court has no jurisdiction.

With the exception of the Subfile Order, Trujillo's attempted appeal of all other orders of the district court is time-barred. Under Fed. R. App. P. 4(a)(1)(B), a notice of appeal must be filed with the district court within 60 days after entry of the order to be appealed where, as here, the United States is a party. Trujillo appeals a recommendation of the Special Master[3] that the district court grant New

[3] Orders of the Special Master may be objected to by filing objections with the district court, Fed. R. Civ. P. 53(f)(2), not by appeal to this Court. The Special

Mexico's motion for summary judgment, *Order Granting Motion for Summary Judgment Regarding the Claims of Elisa Trujillo under Subfile PM-43319* (Feb. 26, 2010) [docket no. 6917], Aplt. App. 42; the order denying objections to the Special Master's recommendations, *Memorandum Opinion and Order* (Sept. 20, 2012) [docket no. 7757], NM App. 93; *see* Aplt. App. 125 (order denying motion to reconsider entered April 17, 2013); and the order denying the motion to quash, entered March 30, 2012, Aplt. App. 239. Each of these orders was issued well prior to 60 days before the notice of appeal was filed on March 12, 2015, and thus the appeal as to those orders is not timely. The district court entered a subsequent order denying Trujillo's most recently filed motion to quash on May 29, 2015, *Memorandum Opinion and Order* (May 29, 2015) [docket no. 10204], Aplt. App. 147, *after* the notice of appeal was filed. That order is not subject to Fed. R. App. P. 4(a)(2)'s provision that the notice of appeal be treated as filed the date the order was entered, because the district court had not previously announced the order.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Court has jurisdiction over all the issues raised in this appeal.

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Master's recommendations were adopted by the district court and thus are binding on Trujillo.

2. Whether the Trujillo's Subfile Order should be affirmed because the district court correctly ruled Trujillo did not set forth evidence establishing beneficial use greater than 0.5 acre feet per year.

3. If Trujillo may collaterally attack non-final orders through her Subfile Order, whether the district court's order denying Trujillo's motion to quash the Post-82 Well Order should be affirmed.

## STATEMENT OF THE CASE

The appealed orders were entered in a general stream adjudication adjudicating the rights of all water users to the waters of the Nambé-Pojoaque-Tesuque River Basin ("Basin"), including groundwater users. *See* N.M. Stat. Ann. § 72-4-17. The United States, on its own behalf and on behalf of the Pueblos, intervened in the adjudication and was aligned as a plaintiff in the district court proceedings, and in 1974, the Pueblos moved to intervene and have independent legal representation. *See State of New Mexico v. Aamodt*, 537 F.2d 1102, 1105 (10th Cir. 1976) ("*Aamodt I*"). After determining that intervention by the Pueblos was warranted, the Court held that "the water rights of the Pueblos are not subject to the laws of New Mexico because the United States has never surrendered its jurisdiction and control." *Id.* at 1112.

Under New Mexico law, rights to use surface water and groundwater are governed by the principal of beneficial use. N.M. Const. Art. XVI, § 3

("Beneficial use shall be the basis, the measure and the limit of the right to the use of water."). In this adjudication, subfile orders are entered that declare "the amount, purpose, periods, place of use and specific tract of land to which it was appurtenant . . . ." *State ex rel. Reynolds v. Sharp*, 344 P.2d 943, 945 (N.M. 1959). Trujillo is incorrect in her assertion that "[g]roundwater rights run with the land," Aplt. Br. 10-11. Trujillo's Subfile Order is associated with her real property, but it is not appurtenant thereto. *See Walker v. United States*, 162 P.3d 882, 889 (N.M. 2007).

By at least 1982, many of the non-Pueblo domestic wells in the Basin had been adjudicated, except for the priority date. Aplt. App. 1. In 1982, the Pueblos and the United States filed a motion to require adjudication of all wells in the Basin that the New Mexico State Engineer permitted under N.M. Stat. Ann. § 72-12-1, and sought joinder of those permittees in the on-going adjudication. Aplt. App. 1. The Domestic Well Statute authorized the State Engineer to issue permits to allow for household use and "irrigation of not to exceed one acre of non-commercial trees, lawns or garden." After a hearing, the district court granted the United States' and Pueblos' motion, and, on January 13, 1983, entered the Post-82 Well Order, enjoining the State Engineer from issuing permits to appropriate "under-ground waters," except for permits "limited to the use of water for household, drinking and sanitary purpose within a closed water system that returns effluent

below the surface of the ground minimizing the consumptive use of water. All subject to further order of the Court." Aplt. App. 13-14.

In 1994, the district court entered two orders concerning domestic wells. In an order entered on March 2, 1994 ("March 1994 Order"), the district court directed the Special Master to proceed to quantify domestic rights, and to join claimants of post-1982 wells. *Order* at 4 (Mar. 2, 1994) [docket no.4299], Supp. App. 74. The order adopted the Special Master's recommendation that "[a]ll domestic . . . wells shall be quantified by historic beneficial use as required under N.M. Const. art. XVI, §3 and NMSA 1978, §72-12-2 (Repl. Pamp. 1985)." *Id.* at 2, Supp. App. 72. It provided that:

> Claimants of domestic . . . well rights are entitled to develop water rights to use an amount of water which does not exceed 3 acre-feet. The amount of water must be applied to beneficial use within a reasonable amount of time. The development of these rights must be pursued with due diligence. The Special Master shall afford non-Pueblo Defendants an opportunity to present evidence showing that they have complied with this rule.

*Id.* at 5-6, Supp. App. 75-76. The district court also determined that domestic rights claimants had the burden to show that "they will apply water, up to 3 acre-feet per year, to beneficial use within a reasonable period of time, provided that the reasonable period has not already expired . . . ." *Id.* at 2, Supp. App. 72. In entering the order, the district court determined that subfile orders are interlocutory in nature and subject to revision by the district court. *Id.* at 3-4, Supp. App. 73-74.

The district court entered another order on July 22, 1994 which amended domestic and livestock well subfile orders previously entered in the case to read "Amount of Water: not to exceed a diversion of 3 acre-feet per year from the well described above *or* the historic beneficial use, whichever is less." *Order* at 2 (July 22, 1994) [docket no. 4391], Supp. App. 79 (emphasis in original). With the assistance of United States Magistrate Judge Leslie Smith, the United States, New Mexico, the Pueblos, and some well users subject to the Post-82 Well Order presented to the district court a proposed settlement agreement regarding wells permitted after 1982. *Joint Motion Requesting Court to Approve Settlement Agreement Relating to Post-1982 Domestic Wells and to Appoint Watermaster* at 1 (May 27, 1999) [docket no. 5514], Supp. App. 80. The district court entered an order adopting the settlement agreement, known as the "Domestic Wells Agreement". *Order re Adopting Post-1982 Well Settlement Agreement* at 2 (Oct. 4, 1999) [docket no. 5549], Supp. App. 86. The Domestic Wells Agreement provided that:

> [t]he quantity of the water right that shall be adjudicated to each Settling Well Owner for domestic use from a Post-1982 Well shall be limited to seven tenths (0.7) of one acre foot per year times the number of households connected to such well, or the historic beneficial use of water from such well, whichever is less, without restriction as to indoor use or closed system use; provided, however, that in no event shall the total diversion from any such Post-1982 Well exceed three (3.0) acre feet of water per year.

*Id.* at 8, Supp. App. 94.

In 1985, Trujillo's predecessor in interest obtained a permit for a domestic well with conditions placed on the well by the State Engineer, some of which were in accordance with the Post-82 Well Order.[4] Aplt. Br. 5. Neither Trujillo nor her predecessor in interest sought to alter the domestic well permit to include outdoor uses through the provisions of the Domestic Wells Agreement. In any event, because Trujillo also has surface water rights for outdoor use from a ditch, the Acequia de los Ortizes, with a priority date of 1786, *see* Aplt. Br. at 10-11, there was no need to seek to use well water for outdoor watering purposes, and certainly Trujillo was not harmed by the well permit restriction against outdoor use because she has always had the ability to use water from the acequia for that purpose.

The district court entered an order to show cause why domestic well water rights should not be adjudicated pursuant to a proposed order quantifying the domestic well right to be 0.5 AFY. *Order to Show Cause* (Dec. 11, 2006) [docket no. 6194], Supp. App. 102. The Special Master established the process to join and adjudicate wells where permits were issued after the Post-82 Well Order. *Special Master's Order* (June 14, 2007) [docket no. 6239], Supp. App. 105.

The summary judgment order Trujillo purports to appeal was the Special Master's recommendation that summary judgment be granted on Trujillo's domestic well rights in proceedings pursuant to the Special Master's order. *Order*

[4] Trujillo's surface water rights for outdoor use from the Acequia de los Ortizes are not at issue in this appeal.

*Granting Motion for Summary Judgment Regarding the Claims of Elisa Trujillo Under Subfile PM-43319* (Feb. 26, 2010) [docket no. 6917], Aplt. App. 42. Trujillo had argued the Post-82 Well Order was ineffective as to her water rights, an argument the Special Master rejected. Aplt App. 48. The Special Master granted the State of New Mexico's motion for summary judgment that limited Trujillo's water right to 0.5 AFY "because Defendant Trujillo has failed to come forward with competent material facts quantifying her own permissible uses of water . . . ." Aplt. App. 52. The district court, in considering Trujillo's motion to reconsider the court's order overruling Trujillo's objections, agreed with this conclusion, ruling that "Trujillo has not shown that she has beneficially used more than 0.5 acre-feet of water per year indoors." *Memorandum Opinion and Order* (Apr. 17, 2013) [docket no. 7870], Aplt. App. 130. On January 12, 2015 the district court entered the Trujillo Subfile Order, quantifying the right to take up to 0.5 AFY of water from the well.

In 2012, the Pueblos, and the United States, the State of New Mexico, Santa Fe County, and the City of Santa Fe entered into a settlement agreement to finally adjudicate the Pueblos' water rights, which was approved by Congress in the Aamodt Litigation Settlement Act, Pub. L. No. 111-291, §§ 601-26, 124 Stat. 3064, 3134-56 (2010), requiring a final decree be entered by September 15, 2017. The district court entered an *Order to Show Cause and Notice of Proceeding to*

*Approve Settlement Agreement and Enter Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Tesuque, Pojoaque, Nambé, and San Ildefonso* (Dec. 6, 2013) [docket. no. 8035], Aplt. App. 231, and a *Case Management and Service Order* (Aug. 8, 2014) [docket no. 9506], Aplt. App. 174, both of which provided all parties to the adjudication the opportunity to accept the Settlement Agreement and become a party, or to file objections, which Trujillo, and many others, did. *See* Aplt. Br. 12. Those objections have been fully briefed by the parties and are pending before the district court, and neither the objections nor the Settlement Agreement are before this Court and the Court therefore lacks jurisdiction over any claims or issues Trujillo raises vis-à-vis the Settlement Agreement.

Trujillo has mounted numerous challenges to the Post-82 Well Order, challenges which are unrelated to her own Subfile Order, each of which has been rejected. Aplt. App. 130, 147, 239. Trujillo's most recent motion relied on 28 U.S.C. §§ 2283 and 2284. Aplt. App. 132. The district court ruled that Section 2283, which prohibits federal courts from issuing injunctions to stay proceedings in state courts, does not apply to an injunction issued against the New Mexico State Engineer. Aplt. App. 148. The district court ruled that Section 2284 is inapplicable because Trujillo cited no statute requiring a three-judge court to adjudicate water rights or to issue a preliminary injunction. Aplt. App. 148.

Finally, the district court rejected the argument that it did not have subject matter jurisdiction, citing prior orders reaching the same conclusion. Aplt. App. 148-49.

## SUMMARY OF THE ARGUMENT

The Court has jurisdiction over a single order being appealed, the Trujillo Subfile Order, and it should affirm that order because Trujillo has failed to demonstrate the district court erred in adjudicating the elements of the Subfile Order, in particular the limitation of beneficial use to 0.5 AFY where Trujillo did not demonstrate beneficial use in a greater amount. The Court does not have jurisdiction over the other orders being appealed because they are not final orders or because the appeal is untimely as to those orders. If the Court reaches those orders, however, such appeal should be denied because Trujillo's arguments are without merit.

## ARGUMENT

### I. The Court Only Has Jurisdiction Over the Appeal of the Trujillo Subfile Order, and that Order Should Be Affirmed.

Trujillo raises a number of issues in her appeal, and purports to appeal a number of the district court's orders, but the Court only has jurisdiction over her Subfile Order. As described below, the Court should affirm the Trujillo Subfile Order.

A. The Subfile Order is a Final Order.

The Subfile Order states, "[t]here is no just reason to delay entry of this . . . Order as a final judgment . . . ." Aplt. App. 144. The New Mexico Supreme Court has recognized that a subfile order is appealable "insofar as the subfile order adjudicates all water-rights issues between the state and the applicant . . . ." *Parker Townsend Ranch Co.*, 887 P.2d at 1249.[5] The rulings on issues between New Mexico and Trujillo—"amount, purpose, periods, place of use, and specific tract of land to which it was appurtenant"—may be considered a final order, despite the fact that the Subfile Order is subject to an *inter se* challenge by other parties to the final decree. *See State ex rel. Reynolds v. McLean*, 392 P.2d 12, 13 (N.M. 1964); Aplt. App. 145. Trujillo's appeal, however, improperly attempts to extend the Court's limited jurisdiction over the Trujillo Subfile Order to a wholesale review

[5] In the March 1994 Order, Judge Mechem ruled that subfile orders entered in a stream adjudication are not final orders and thus subject to revision by the district court prior to entry of a final decree. March 1994 Order at 3-4, Supp. App. 73-74. However, under state law a subfile order in a stream adjudication is a final order and it is that state law which should apply in the context of this stream adjudication. *See Parker Townsend Ranch Co.*, 887 P.2d at 1249 (a subfile order "satisfies the policies of certainty in dispute resolution, alienability of property, facilitation of meaningful appellate review, and achievement of judicial efficiency to hold that such subfile orders are final insofar as they resolve all claims for relief between the state and the applicant"). Here, the district court determined the Subfile Order should be immediately appealable, in accord with the New Mexico water law and law relating to general stream adjudications which applies in this case.

of the ongoing general stream adjudication and orders entered therein, and, in particular, the Settlement Agreement.

The Trujillo Subfile Order references the district court's denial of Trujillo's motion for summary judgment, which objected to the Post-82 Well Order. Aplt. App. 144. The district court's order denied Trujillo's challenge seeking a greater water right because Trujillo had not proved beneficial use of water in excess of 0.5 AFY—the adjudicated amount—and thus her challenge to the Post-82 Well Order was without merit. Aplt. App. 129-130. Here, if the Court decides to consider the appeal of the summary judgment order, such consideration must be limited to the specific findings set forth in the Trujillo Subfile Order. Any broader consideration of Trujillo's challenge would be outside the scope of the Court's jurisdiction.

B. Trujillo Fails to Demonstrate Error in the Subfile Order.

*1. Standard of Review.*

New Mexico courts will not reverse a subfile order when it is based upon substantial evidence, and this Court's review should be the same. *See Sharp*, 344 P.2d at 947. The burden is on the water user to demonstrate beneficial use. *See State ex rel. Reynolds v. Mears*, 525 P.2d 870, 872 (N.M. 1974). The district court granted summary judgment to the State Engineer on the quantity of Trujillo's water right, finding Trujillo did not establish a genuine issue of material fact as to the quantity of water used. *See Memorandum Opinion and Order* at 10 (Sept. 20,

2012) [docket no. 7757] NM App. 93, 102, (appeal of order is timely only as to its effect on Subfile Order). The Court's review of a grant of summary judgment is de novo, and the district court's order granting summary judgment should be affirmed where the non-moving party failed to "set forth specific facts showing that there is a genuine issue for trial." *Schneider v. City of Grand Junction Police Dep't*, 717 F.3d 760, 767 (10th Cir. 2013) (internal quotation marks and citations omitted).

*2. Trujillo fails to demonstrate an error in the quantity of water awarded in her Subfile Order.*

Trujillo objects to the quantity of water provided in her Subfile Order, and argues that the district court erred in limiting the quantity per the Post-82 Well Order. Aplt. Br. 27. The district court, however, did not err. Nothing in Trujillo's well permit constitutes proof of any beneficial use, let alone of 3.0 AFY, and, as the district court correctly ruled, "New Mexico law is clear that a water right is based on the amount of water beneficially used, not on the amount permitted." Aplt. App. 129 (internal quotation marks and citations omitted). Indeed,

> [a] water permit is an inchoate right, and is the necessary first step in obtaining a water right. It is the authority to pursue a water right—a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired.

*Hanson v. Turney*, 94 P.3d 1, 3 (N.M. Ct. App. 2004) (internal quotation marks and citations omitted). Since Trujillo failed to provide proof of her beneficial use

of her claimed 3.0 AFY, the district court accepted the State's proof that interior, household uses in the Basin do not exceed 0.5 AFY, and, as a result, the district court adjudicated Trujillo's well right at 0.5 AFY. Aplt. App. 143, 144.

*3. The Domestic Well Statute does not provide Trujillo with an entitlement to a greater amount of water than she can prove is beneficially used.*

Trujillo asserts, in connection with her argument that her due process rights were violated, that the New Mexico Domestic Well Statute, N.M. Stat. Ann. § 72-12-1.1 (2003), Aplt. Br. 28, and the State Engineer's regulation, N.M. Admin. Code Ann. § 19.27.5.9(D), Aplt. Br. 28-29, provide an entitlement to a certain amount of groundwater. Trujillo is incorrect on both counts.

In *Bounds v. State ex rel. D'Antonio*, 306 P.3d 457 (N.M. 2013), the New Mexico Supreme Court analyzed the distinction between the issuance of a domestic well permit—which the State Engineer must issue upon application—and administration of the water right under the permit. The Domestic Well Statute is consistent with New Mexico's prior appropriation system because a domestic well permit, like any other water right, "do[es] not create an absolute right to take water." *Id.* at 466. The State Engineer may condition the use of a water right based "on the *availability* of water to satisfy that right," and may impose limitations on the availability of water "for a number of reasons, including drought or the lack of priority due to unsatisfied demand of senior water rights." *Id.*

(emphasis in original). The New Mexico Supreme Court noted that domestic wells may also be limited by court order, municipal or county ordinances, or State Engineer regulations. *Id.* at 467 (citing N.M. Code Admin. § 19.27.5.13(B)(6)). "Therefore, not only are domestic well permits subject to curtailment by the State Engineer, they are explicitly subject to limitations by our courts and by local ordinance, should such a need arise after a proper evidentiary showing." *Id.* The Domestic Well Statute, therefore, does not create an entitlement to use of Basin water in the amount of 3.0 AFY. Aplt. Br. 28.

Nor does the cited provision of the State Engineer's regulation establish that Trujillo has a right to use 3.0 AFY. Section 19.27.5.9(D)(1) provides that, for a single household, "the amount and uses of water permitted are subject to such additional or more restrictive limitations imposed by a court," but where no such restrictive limitations exist,

> [t]he maximum permitted diversion of water . . . shall be 1.0 acre-foot per annum, except in hydrologic units where applicant can demonstrate to the satisfaction of the state engineer that the combined diversion from domestic wells will not impair existing water rights, then the maximum permitted diversion of water from a 72-12-1.1 domestic well permitted to serve one household shall be 3.0 acre-foot per annum.

N.M. Admin. Code Ann. § 19.27.5.9(D), Aplt. Br. 28-29.

Trujillo ignores the regulation language stating that limitations on use may be imposed by a court, and making the default amount of 1.0 AFY. Rather,

Trujillo focuses on the provision permitting use of 3.0 AFY where lack of impairment has been demonstrated to the State Engineer.[6] Aplt. Br. 29. As discussed above, however, the crucial issue is whether Trujillo set forth evidence demonstrating her beneficial use of greater than 0.5 AFY. In the absence of such evidence, an impairment analysis is irrelevant. Trujillo also appeals her Subfile Order on the grounds that the Post-1982 Well Order was unwarranted. App. Br. 16-17. In Trujillo's view, the permit issued by the New Mexico State Engineer in 1985 for Trujillo's well should not have memorialized the Court's preliminary injunction against outdoor uses of the well water, *id.* 21 (challenging the district court's jurisdiction to issue the preliminary injunction); *id.* 22 (asserting that Trujillo has been "deprived of her property right to use her domestic well to irrigate her trees and gardens"), and in any event, the permit identifies a maximum

[6] Trujillo represents that an affidavit of Francis West is "uncontroverted evidence" of lack of impairment. *Id.* The affidavit is irrelevant to this appeal. It was not presented to the district court in relation to the Trujillo Subfile Order, but was filed in support of Trujillo's and others' *Response to Motions in Support of Entry of a Partial Final Judgment and Decree* (Jan. 7, 2015) [docket. no 9973], Aplt. App. 186, 208. The Federal Rules of Appellate Procedure limit the record on appeal to materials filed with the district court at the time of the decisions under review. Fed. R. App. P. 10(a). In addition, the Francis West affidavit is incorrect, and contrary to prior rulings of the district court. Hydrology issues were thoroughly litigated before Special Master Harl Byrd in the early 1990s. *See Order Re Hydrology Matters* (July 17, 1991) [docket no. 3783], Supp. App. 1; *Order Re Hydrology Segment* (Aug. 19, 1991) [docket no. 3826], Supp. App. 4; *Order to Show Cause (*Aug. 6, 1992) [docket no. 4006], Supp. App. 10; *Special Master's Report to the Court Recommending Adoption of Findings of Fact Pertaining to Hydrology* (Apr. 6, 1993) [docket no. 4163], Supp. App. 69; *Order* (May 6, 1993) [docket no. 4178], Supp. App. 71.

of 3.0 AFY as the amount of water allowed to be extracted from the well, which permit right is a vested property right, and any reduction of that amount is, in Trujillo's view, an unconstitutional taking of her water right. *See id.* 5, 26-29.

*4. The Trujillo Subfile Order is not a taking.*

Trujillo appears to argue the Subfile Order adjudicating her water right amounts to a taking without just compensation. Aplt. Br. 15, 26-29. In New Mexico, a water right is a real property right. *Walker*, 162 P.3d at 893. But this right is a usufructuary right subject to state oversight and regulation by the state as a public resource. *See* N.M. Const. Art. XVI, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state."); N.M. Stat. Ann. § 72-2-1 (stating the State Engineer "has general supervision of the waters of the state"). Accordingly, the fact that a water right under New Mexico law is a limited kind of property right does not mean that a limit on the amount a well owner may use, whether by consensual settlement or by an administrative rebuttable presumption, somehow violates a property right, contrary to Trujillo's contentions. Indeed, the New Mexico Supreme Court's holding in *Bounds*, 306 P.3d at 466, forecloses such an argument. No New Mexico statute or regulation creates an "entitlement" to 3.0 AFY. Because permit holders have no entitlement to a specific quantity of water,

the Subfile Order (as well as the Settlement Agreement), by allowing a *presumption* of 0.5 AFY for a domestic well right subject to demonstrating a higher beneficial use, does not violate due process by depriving the objectors of a protected property interest. *See Bounds*, 306 P.3d at 469-70. There is no property interest in 3.0 AFY absent a demonstration of beneficial use of that amount.

The Court should affirm the Trujillo Subfile Order as Trujillo has failed to point to any evidence in the record demonstrating the district court erred in limiting Trujillo's use to 0.5 AFY.

## II. The Court Does Not Have Jurisdiction Over the Other Orders Being Appealed, But if Jurisdiction is Exercised, Each Order Should be Affirmed.

### A. The Court Does Not Have Jurisdiction Over the Post-82 Well Order, the Order Denying the Motion to Quash the Post-82 Well Order, or the Summary Judgment Orders.

The Court does not have jurisdiction over the other orders Trujillo purports to appeal because, with the exception of the Trujillo Subfile Order, even if the other orders being appealed were final orders, the appeals are made out of time. Fed. R. App. P. 4(a)(1)(B) provides that a notice of appeal must be filed with the district court within 60 days after entry of the order to be appealed where, as here, the United States is a party. "The filing of a timely notice of appeal is an absolute prerequisite to [the Court's] jurisdiction." *Parker v. Bd. of Pub. Utilities of Kansas City, Kan.*, 77 F.3d 1289, 1290 (10th Cir. 1996).

Trujillo appeals the Special Master's recommendation[7] to grant New Mexico's motion for summary judgment, entered on February 26, 2010, Aplt. App. 42, and an order denying objections to the Special Master's recommendations dated September 20, 2012. Aplt. App. 125 (order denying motion to reconsider, entered April 17, 2013); *see also* Aplt. Br. 14. Both of these orders were issued well prior to 60 days before the notice of appeal was filed on March 12, 2015, and those appeals are not timely. Trujillo's appeal of the *Memorandum Opinion and Order* (Mar. 30, 2012) [docket no. 7579], Aplt. App. 239, is also untimely, as it was entered by the district court on March 30, 2012. On May 29, 2015, the district court entered a subsequent order denying Trujillo's most recently filed motion to quash, *Memorandum Opinion and Order* (May 29, 2015) [docket no. 10204], Aplt. App. 147, *after* the notice of appeal was filed. That subsequent order is not subject to Fed. R. App. P. 4(a)(2)'s provision that the notice of appeal be treated as filed the date the order was entered, because the district court had not previously announced the order, which renders that appeal equally out of time.

The Court also does not have jurisdiction over the order on the motion to quash under 28 U.S.C. § 1291 because it is not a final order. The district court's order denying Trujillo's motion to quash the Post-1982 Well Order did not certify it as immediately appealable, Aplt. App. 149, even though that would have been an

[7] *See supra* n. 2.

option for Trujillo under 28 U.S.C. § 1292(b). *See United States v. Copar Pumice Co.*, 714 F.3d 1197, 1205 (10th Cir. 2013) ("[T]he party could ask the district court to certify an appeal under 28 U.S.C. § 1292(b)[.]"). The Court does not have jurisdiction under 28 U.S.C. § 1292(a)(1) over Trujillo's appeal of an order denying her motion to quash an injunction or for the alternative a three judge court, as Trujillo claims. Aplt. Br. 14. Section 1292(a)(1) does grant jurisdiction over appeals from an order "refusing to dissolve or modify injunctions . . . ," but the Court lacks jurisdiction to consider Trujillo's appeal of the district court's order denying her motion to quash. *See Copar Pumice Co.*, 714 F.3d at 1209-10. Trujillo has not shown, nor can she, that there is immediate, irreparable damage that will result from the denial of her motion to quash the Post-1982 Well Order—her permit has been in place subject to the restrictions since 1985—and Trujillo has shown nothing to demonstrate that there is a "danger of injustice" that outweighs the "inconvenience and cost of piecemeal review." *Id.* The Court has determined that where a district court order, such as the order denying Trujillo's motion to quash, clarifies or enforces the original preliminary injunction, specifically the Post-1982 Well order, the Court does not have appellate jurisdiction over that order:

> Unlike modification orders, [a]ppellate courts do not have jurisdiction to review a district court order that merely interprets or clarifies, without modifying, an existing injunction. Whether an order interprets or modifies an injunction is determined by its actual, practical effect.

> An order is a clarification if it does not change the parties' original legal relationship, but merely restates that relationship in new terms. A modification, by contrast, alters the legal relationship between the parties, or substantially changes the terms and force of the injunction. To change the legal relationship of the parties, the order must change the command of the earlier injunction, relax its prohibitions, or release any respondent from its grip.

*Hatten-Gonzales v. Hyde*, 579 F.3d 1159, 1170 (10th Cir. 2009) (internal quotation marks and citations omitted). Thus, even though the Post-1982 Well Order constitutes a preliminary injunction, *Memorandum Opinion and Order* at 4-5 (Apr. 17, 2013) [docket no. 7870], NM App. 131-32, the Court does not have jurisdiction under 28 U.S.C. § 1292(a) to consider an appeal of the district court's order denying Trujillo's motion to quash the Post-1982 Well Order because it did not modify the Post-1982 Well Order. *See Hatten-Gonzales*, 579 F.3d at 1170.

For these reasons, the Court should limit any ruling only to affirming the Trujillo Subfile Order and dismiss the appeal as to all other issues.

B. <u>If the Court Exercises Jurisdiction Over All Orders In this Appeal, it Should Reject Trujillo's Challenges as Meritless.</u>

*1. The McCarran Amendment is a procedural statute that has been followed by the district court.*

As discussed herein, the only district court order properly before the Court is the Trujillo Subfile Order, which is a final order as between the State and Trujillo. Trujillo, however, uses her appeal of her Subfile Order to challenge other aspects of the ongoing general stream adjudication which are entirely irrelevant to the

Subfile Order. The McCarran Amendment, 43 U.S.C. § 666, is a procedural and jurisdictional statute that waives the sovereign immunity of the United States for stream adjudications. The United States is not a party to the Subfile Order, and thus the McCarran Amendment is entirely irrelevant to this appeal

Trujillo, however, argues that the McCarran Amendment, requires Pueblo water rights to be defined under state law, and, therefore, Trujillo and the Pueblos are "similarly situated" vis-à-vis their water rights claims. Aplt. Br. 25-26. In addition to being irrelevant to this appeal, this argument is wrong. The Supreme Court has interpreted the McCarran Amendment to be a procedural requirement that the United States' water rights claims, including those on behalf of Indian tribes in its role as trustee for the tribes, may be made in state court where the state court proceeding exists and that proceeding is comprehensive. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570 (1983). But when adjudicating the rights of Indian tribes pursuant to McCarran Amendment jurisdiction, "[s]tate courts, as much as federal courts, have a solemn obligation to follow federal law." *Id.* at 571.

To the extent that Trujillo argues that her water right is protected by the Treaty of Guadalupe Hidalgo, 9 Stat. 222 (July 4, 1848), Aplt. Br. 11, she is wrong and her right is governed by New Mexico law. *See State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 60-61 (N.M. 2004). Contrary to Trujillo's assertions, Trujillo and the Pueblos are not similarly situated. Trujillo's water rights are

recognized, created under, and subject to the laws of the State of New Mexico pertaining to water rights, *see* Aplt. Br. 5, 15 (describing Trujillo's well permit as issued by the New Mexico State Engineer in 1985), but the Pueblos rights are not. As this Court recognized, "[t]he rights of the non-Indians are subject to the water laws of New Mexico. The water rights of the Pueblos are not subject to the laws of New Mexico because the United States has never surrendered jurisdiction and control." *Aamodt I*, 537 F.2d at 1112.

Here, where the Pueblos' rights have never been subject to state law, the McCarran Amendment merely gives federal consent to having those water rights adjudicated. Thus, the McCarran Amendment is of no effect here. Trujillo distorts the McCarran Amendment to argue that "each and every owner along a water course must be amenable to the laws of the State if there is to be a proper administration of the water." Aplt. Br. 25. Of course, that argument is wrong and the Court should reject it.

2. *The procedures employed by the district court comport with due process.*

In another argument irrelevant to her Subfile Order, Trujillo objects to an order entered on May 24, 2007, establishing procedures for approval of the Settlement Agreement, entry of a partial final decree, entry of an interim administrative order, and entry of a final decree. Aplt. Br. 29; *see also* Aplt. App. 18. But the Settlement Agreement and objections thereto are not before the Court,

and an order by the district court with respect to the Settlement Agreement has not been made. The Court should reject Trujillo's attempted appeal of the May 24, 2007 district court order.

*3. The District Court Correctly Denied the Motion to Quash the Post-82 Well Order.*

As she argued to the district court, Trujillo asserts that the Post-82 Well Order violates 28 U.S.C. § 2283 and 28 U.S.C. § 2284(b). Aplt. Br. 19-23. Section 2283, the Anti-Injunction Act, by its own terms, does not apply. "A court of the United States may not grant an injunction to stay proceedings *in a State court* except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (emphasis added). Yet Trujillo admits that the Post-82 Well Order applies to the New Mexico State Engineer, *not* to any proceeding in a State court. Aplt. Br. 19. Therefore, on its face the Anti-Injunction Act does not apply to the order affecting the State Engineer's ability to issue permits under the Domestic Well Statute. *See Armstrong v. Maple Leaf Apartments, Ltd*, 508 F.2d 518, 523 (10th Cir. 1974) (Anti-Injunction Act is inapplicable when a state body is performing an "administrative function"); *Copar Pumice Co. v. Morris*, No. CIV 07-0079 JB/ACT, 2009 WL 5201799, at *14 n.5 (D.N.M. Oct. 23, 2009) (unpublished), *aff'd*, 639 F.3d 1025 (10th Cir. 2011) ("Every . . . circuit that has addressed the

issue has held that the Anti–Injunction Act does not apply to state administrative proceedings.").

Trujillo describes Section 2283 as "the most current version of the holding in *Ex parte Young,* [209 U.S. 123 (1908)]" that a federal court cannot interfere in state court proceedings. Aplt. Br. 19. This is incorrect. *See Juidice v. Vail*, 430 U.S. 327, 335 n.11 (1977) (noting that *Ex parte Young* does not apply Section 2283 but rather is "an application of the reason underlying" the statute). Trujillo fails to explain how the district court here is interfering with proceedings pending in state court for the simple reason that there are no proceedings pending in state court.

Trujillo's argument that the district court erred in rejecting her argument for a three-judge court also must be rejected. Aplt. Br. 20, 22. 28 U.S.C. § 2284(a), on which Trujillo relies, provides, "[a] district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." Trujillo has not identified any statute that applies to the Post-82 Well Order and requires a three judge court. Further, Trujillo's reliance on *Schneider v. Rusk*, 372 U.S. 224, 224 (1963) (per curiam), for the proposition that substantial questions of constitutional law should be referred to a three-judge court, is likewise misplaced. Aplt. Br. 22. The federal statute on which *Schneider* turned, 28 U.S.C. § 2282 (which provided that an

interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress on grounds of unconstitutionality should not be granted unless the application therefor has been heard and determined by a three-judge district court), was repealed by Pub. L. 94-381, § 2, 90 Stat. 1119 (Aug. 12, 1976). *Schneider*, therefore, is inapplicable. Because no authority exists for Trujillo's proposition that the district court erred in refusing to refer to a three judge panel, the district court's order should be affirmed.

The district court, in its order issued after Trujillo filed her notice of appeal, correctly rejected Trujillo's arguments that the Post-1982 Well Order should be quashed. Aplt App. 147. The district court found Trujillo's arguments to be "completely without merit because neither of the statutes on which they rely are applicable to this case." Aplt. App. 148. Consistent with the discussion above, the district court ruled the Post-1982 Well Order "does not 'stay proceedings in a State court'" and "does not challenge the constitutionality of the apportionment of congressional districts of the apportionment of any statewide legislative body." Aplt. App. 148.

## CONCLUSION

For the reasons set forth herein, the Court should affirm the Trujillo Subfile Order and deny the remaining challenges in this appeal.

Respectfully submitted on this 31st day of August, 2015.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the foregoing brief is submitted in a proportionally spaced font and contains 7,014 words, as calculated by the word count function of Microsoft Word 2010, which was used to prepare this brief.

Pursuant to 10th Circuit Rule 25.5, all required privacy redactions have been made. All paper copies required to be submitted to this Court are exact copies of the version submitted electronically. This electronic submission was scanned for viruses using the most recent version of Sophos Endpoint Security and Control, and it is free of viruses.

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## CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015 I electronically filed the foregoing using the court's CM/ECF system which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.

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