STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.*,	)	CV-96-888
OFFICE OF THE STATE ENGINEER,	)	Honorable James J. Wechsler
Plaintiff,	)	
	)	Lower Rio Grande Adjudication
	)	
vs.	)	Outlying Areas Section
	)	
ELEPHANT BUTTE IRRIGATION	)	Subfile No. LRO-28-008-9009
DISTRICT, *et al.*,	)	Case No. 307-OA-9703126
Defendants.	)	New Mexico Copper Corporation
	)	
	)	Subfile No. LRO-28-008-9010
Copper Flat Expedited *Inter Se*	)	Case No. 307-OA-9702236
	)	William J. Frost
	)	Case No. 307-OA-9702237
	)	Harris Gray

Charles P. Barrett, Stanley and Joyce Brodsky, John and Cindy Cornell, Jim Goton, Arlene Lynch, Agnes and John McGarvie, Melody K. Sears, Robert Shipley, Robin Tuttle, R. Wm. and Nolan Winkler, and the Hillsboro Mutual Domestic Water Consumers Association ["HMDWCA"] ("Hillsboro Claimants/Defendants" or "Hillsboro")

HILLSBORO's
ADDITIONAL CLOSING ARGUMENT, POST-TRIAL BRIEF, REQUESTED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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I. ADDITIONAL CLOSING ARGUMENTS.

Hillsboro Claimants/Defendants (hereinafter "Hillsboro") incorporate herein by reference its oral closing argument at trial and set forth as follows:

New Mexico's constitutional principle of beneficial use of water is grounded on millennial practice in Native American custom, centuries of Spanish civil law, decades of Mexican statutory law and United States Territorial law. Water rights are granted for use that is beneficial to the appropriator and, through that use, beneficial to the whole community. Thus, any claim to water rights is a claim to have benefited all. When NMCC and Mr. Frost and Mr. Gray claim 7,481 acre feet per year ("af/yr.") rights, combining NMCC's claim of 1,019 af/yr. and Mr. Gray's and Mr. Frost's claim of 6,462 af/yr., with a priority date of 1975, they claim to have continuously benefited the society for forty-one (41) years with that immense water use. Can this Court acknowledge society's enormous debt for what in actuality was less than four months of mining and milling which used little more that 800 af of water? Is the claim not a fabulous exaggeration?

NMCC and Mr. Frost and Mr. Gray rest their claim on the 1984 Declarations of Water Rights filed by Copper Flat Partnership ("CFP"). As with all New Mexico Declarations of Water Rights, these are sworn declarations, for which reason they are accepted as *prima facie* evidence of the matter as declared. However, the 1984 CFP Declarations *actually* declared a 1982 beneficial use of 278,385,500 gallons (854 af). [**NMCC Ex. 37 at pdf 3].** In the Declaration form, at item 5, instead of entering the *quantity* beneficially used as the form requires, the Declarant entered footnotes claiming

that all the wells together *if used maximally* would consume 6,462 af/yr. and directing the reader to an attached synopsis for the actual use.

This significant omission on the CFP Declarant's form appears to be no more than a clever ruse to avoid swearing falsely. It gives the impression of a large declared quantity, while burying the actual declaration of beneficial use in an attachment. Yet, that illusory quantity has become the amount of water rights claimed in this case, *as if* it had been sworn to. Thus, CFP's application to transfer the water rights claims 6,462 af/yr. as "consumptive use" water rights. [**NMCC Ex. 65 at item 4(b)]**.

Similarly, the Change of Ownership declaration from CFP to Mr. Gray in 1987 -- after the expiration of the four (4) year presumptive statutory period for a forfeiture of CFP's water rights -- specifies the ownership of 6,462 af/yr. "consumptive use" water rights. [**TRP Ex. 114 at item 2]**. But, in this sworn declaration, these 6,462 af/yr. rights are assigned to only ten (10) of the original nineteen (19) wells, seemingly stripping the other nine (9) mine-site wells of any water rights, since 6,462 af/yr. was the declared *would-have-been* "total" of all wells "together, in any proportion." [**NMCC Ex. 37 at 1].**

Indeed, the 1984 Declarations for those nine (9) mine-site wells seem to declare the capacities of these wells as part of the *would-have-been* "total" 6,462 af/yr. declared. [**NMCC Ex. 41-47 and 55 (LRG 4652 S-4 through S-10 and LRG 4654)]**. Yet, NMCC now adds 1,019 af/yr., from these nine (9) mine-site wells to that figure, thus counting those capacities twice and calling them "vested." Moreover, all of this gaming of the facts ignores the enormous amount of time that has now passed -- 1982 to the present -- without any of the water at issue being put to any beneficial use. That fact, along with those set

forth above and in the brief that follows, highlight the proverbial Elephant in the room: in truth, there are actually no water rights to adjudicate in this matter.

Can the prevarications, ploys, intentional and unintentional errors, and self-contradictory declarations all be taken at face value, as NMCC and Mr. Frost and Mr. Gray aver and would have this Court do in its determination of the actual amount of water (if any) put to beneficial use in this matter?

Hillsboro contends that once the smoke has dissipated and the distorting mirrors are removed, there are not now, nor have there been, any water rights to convey under any of the subfiles at issue. Hillsboro's following *Post-Trial Brief*, supported by its *Requested Findings of Fact and Conclusions of Law*, explicates this conclusion.

II. POST-TRIAL BRIEF

A. Table 1 - Historical Summary Of Key Actions In The Case[1]

1974-1980	Quintana Minerals explores and develops Copper Flat Mine on a lease from Inspiration.
1980	Copper Flat Partnership formed to mine Copper Flat.
1980-1982	Quintana Minerals sets up mining and milling facility for Copper Flat Partnership. Mine/mill put water to beneficial use for about 3 1/2 months in 1982. Beneficial use of water ends in June, 1982.
1982-1986	Copper Flat Partnership liquidates assets after unsuccessful attempts to sell the mining operation. Water used only as needed to shutdown site and conduct salvage of materials and equipment.
1985-1986	CFP intends to sell its water rights. CFP then intends to change purpose and place of use of the water rights to an area outside of Las Cruces.
1986-1987	Mining and water equipment removed for salvage. Site reclaimed to BLM requirements for final reclamation of abandoned mining sites. Mining leases returned to Inspiration.
1987	CFP sells water rights to Mr. Frost and Mr. Gray for $20,000.00. Mr. Frost and Mr. Gray put no water to beneficial use.
1988	Mr. Frost and Mr. Gray form a partnership with Gerald Lyda to use water for other than mining. Plan withdrawn in 1991. No beneficial use of water.
1991	Mr. Frost and Mr. Gray settle their dispute with Gold Express over ownership of the water rights. Gold Express obtains the undisputed right to use as much or as little of the water rights as it wants. No beneficial use of water.
1994	Alta Gold takes over the Gold Express agreement to pay Mr. Frost and Mr. Gray for possible use of water rights without their intervention -- *i.e.*, Alta Gold, standing in the proverbial shoes of Gold Express, may use as much or as little of the water as it wants. No beneficial use of water.
1999-2000	Alta Gold bankruptcy. Mr. Frost and Mr. Gray reacquire the water rights. After re-acquiring the water rights, they do nothing to put the water to beneficial use.
2001-2007	Lawsuit over quieting title to water rights. After winning the lawsuit, Frost and Gray do nothing to put the water to beneficial use.
2010	NMCC makes deal with Mr. Frost and Mr. Gray to obtain water rights, for mining and milling copper at the Copper Flat site.
1982-2016	**No evidence of beneficial use of the water rights claimed in this case.**

[1] For documentation, *see generally*, Requested Findings of Fact, *supra*, IV, at 15-23.

B. Legal Issues.

Based upon the facts set forth above, a single established fact characterizes all the water rights claimed by NMCC, Mr. Frost and Mr. Gray: the claimed rights have not been used (in the case of the vested rights) or developed (for the inchoate rights) for an exceedingly long time. Non-use and non-development of water rights violate a fundamental tenant of New Mexico and Western water law, that water under the law of prior appropriation is to be used maximally for the maximum public benefit. **N.M. Const. Art. XVI at §§ 2, 3.**

Compared to the four year term of nonuse under "common law" forfeiture and compared to the similarly derived statute which allows the initiation of forfeiture proceedings after a period of four years of nonuse, such long periods of nonuse and non-development are extraordinarily long and unreasonable and raise a presumption of abandonment that claimants had the burden of refuting – and this they did not and could not do at trial. See *State of New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irrigation Distric*t, Lower Rio Grande Adjudication, No. CV-96-888, Claimant SunnySide Properties, LLC, "Memorandum Order Adopting Special Master's Report" (July 25, 2014) ("*SunnySide*") at 3 (twenty-two year period of nonuse sufficient to raise the presumption of intent to abandon); see also *State of New Mexico v. Aragon*, No. 69-CV-07941, slip op. at 3 (D.N.M. February 9, 2004) (seventeen years of nonuse triggers presumption of intent to abandon) ("*Aragon*"); *United States v. Abousleman*, No. CIV-83-1041-SC at 12 (D.N.M. 1994) ("failure to use water for 16 years, without other evidence, may be sufficient to raise a rebuttable presumption of an intent to abandon a water right,

thus, shifting the burden to present sufficient evidence of excuse for nonuse to the water right claimant") ("*Abousleman"*).

Nonuse of claimed vested rights and non-development of the claimed inchoate rights have damaged the LRG Basin and will continue to damage the Basin as long as they are unused and undeveloped. This is due to the fact that in New Mexico, where prior appropriation and beneficial use are constitutional commands, holding open the vested or inchoate right to develop water for a substantial amount of time prevents potential appropriators who would put the water to a beneficial use from doing so. This means that both the would-be appropriator and the community are deprived of the fruits of the benefits of that use while the speculators holding onto the rights are, by sanctioned delay, rewarded for depriving others of the benefits of that use. N.M. Const. Art. XVI, §§ 2, 3; see also *Yeo v. Tweed*y, 1929-NMSC-033 at ¶ 20, 34 N.M. 611, 690 (New Mexico's water laws are intended to encourage use and discourage nonuse or waste).

All of NMCC's and Mr. Gray's and Mr. Frost's arguments and facts are constructions to excuse the extremely long term nonuse, yet, they do not disturb this single fact that underlies all the complexities and confusions of both fact and law that the various justifications create. While the application and legal significance of this single fact of nonuse vary across parts of this case, it is the underlying truth which no self-interested argumentation should be allowed to obscure.

From the single fact of excessive nonuse and non-development, two issues of law emerge as important to adjudicating the water rights in this case: (1) the operation of the law of forfeiture and/or abandonment in relation to vested water rights, and (2) the

operation of the relation back doctrine in water law.

Hillsboro contends that one of the decisions this Court must make is whether the State Engineer's failure to give notice of pending forfeiture allows nonuse to continue indefinitely past the common law forfeiture period of four years. The result of such inaction would be catastrophic for the water users of the Lower Rio Grande Basin – and, as precedent, similarly catastrophic for water users throughout the state.

Similarly, this Court must also decide whether common law abandonment may be invoked to prevent further nonuse and whether any circumstances and conditions exist in this case to warrant allowing remediation despite such an extremely lengthy period of nonuse.

Relative to the second issue, additionally, this Court must decide under what circumstances is an inchoate right relating back to the originating project permanently extinguished. This determination includes the proper standard of reasonable diligence required to maintain an inchoate right relating back to the originating project, and the length of time that must elapse before non-development of a water right through continuous effort becomes an unreasonable burden upon water users and potential water users in a Basin.

1. Beneficial use, nonuse, forfeiture and abandonment.

The issue of nonuse descends directly from the constitutional principle of beneficial use. **N.M Const., Art. XVI §§ 2, 3**. If beneficial use is the basis, measure (or quantification), and limit (or temporal duration) of water rights, then necessarily nonuse invalidates water rights. The state affects that invalidation by invoking statutory forfeiture,

NMSA 1978, Section 72-12-8. Common law provides another basis for invalidating unused water rights through abandonment. The two are distinguished only by the will (i.e., "intention") of the holder of unused water rights. In forfeiture the public takes back the rights against the will of the claimant. In abandonment, the claimant relinquishes possession of the right by action or inaction. *SunnySide, supra,* at 6-12. In New Mexico, the forfeiture statute excuses forfeiture when there are "circumstances beyond the control of the user" that have resulted in nonuse. *South Spring Co*., 1969 NMSC-023 at ¶ 17, 80 N.M. 144, 148. Nonuse, however, is competent evidence of intent to abandon. *Id*. at ¶ 19. "[A]fter a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for nonuse." *Id*. at ¶ 20; see generally, *SunnySide, supra* at 3.

Holding on to water rights with thirty four (34) years of nonuse of the vested rights claimed by NMCC, Mr. Frost and Mr. Gray, clearly violate the principle of beneficial use. This extensive period is far longer than the four year period allowed in both common law and statutory law for forfeiture. [**NMSA 1978, § 72-12-8]**. The statute requires that the State Engineer provide notice of intent to forfeit and a one year grace period to redeem the rights, triggering an additional year in which to do so. The extra year evinces the legislative concern that forfeiture not take place without notice and an opportunity to be heard. In this case, it is patent that the claimants have had notice and a trial on their rights in this instant proceeding and all the process that led up to the trial.

Mr. Frost and Mr. Gray, in effect, were on notice that their rights are being

challenged. Moreover, claimants knew that the loss of these rights was possible [**RFOF**[2] **19**]. The facts of nonuse were revealed at the start of this case. Claimants were given their day in court to respond with evidence that they had been using their water rights or had a legitimate right excusing thirty-four (34) years of nonuse.

Thus, this Court has the authority to declare a forfeiture of the claimed vested rights in this case. Moreover, the instant adjudication is a special statutory procedure to determine the validity and non-validity of claimed water rights in the Lower Rio Grande Basin. *See, generally,* **NMSA §§ 72-4-15, 17, 19**. On its face, these rules authorize the Court to validate or invalidate the claims before it.

In the event this Court is reticent to invoke forfeiture, a case can be made that abandonment through nonuse without excuse has invalidated the rights at issue. However, the intent to abandon beneficial use is also the intent to abandon the conditions on which that right is based, and, consequentially, the intent to abandon the right itself.

Demonstrating intent to permanently cease beneficial use of water also demonstrates intent to abandon vested water rights. That is because mere wish or intent to use the water is insufficient to defeat actual nonuse, as the legally accepted definition of appropriation requires actual beneficial use of the water. See, e.g., *Carangelo v. Albuquerque-Bernalillo County Water Util. Auth.*, 2014-NMCA-032 at ¶ 36, 320 P.3d 492 at 503-504 (water must be appropriated and applied to beneficial use in order to obtain a right to the water); *State ex rel. Martinez v. McDermett*, 1995-NMCA-060, ¶ 10, 120 N.M. 327 (there must be "actual use" of the water taken for "some purposes that is socially

[2] Requested Findings of Fact, subsection III *infra*.

accepted as beneficial"); see also *State ex re. Erickson v. McLean*, 12957-NMSC-012 at ¶ 28, 62 N.M. 264 (there is no "right to use or divert water except for beneficial use'); *Snow v. Abalos*, 1914-NMSC-022 at ¶ 12, 18 N.M. 681 ("application to a beneficial use … gives the continuing right to divert and utilize the water"). Furthermore, an excessively long and continuous failure to use water rights, or water, creates the presumption of intent to abandon. *State v. South Springs Co.*, 1969-NMSC-023, 80 N.M.144, 452 P.2d 478(1969); *see also SunnySide, Aragon, and Abousleman, supra*.

Such a presumption is strengthened by the failure to maintain the works necessary for using water, creating a *prima facie* case for abandonment. "[A]pplication of water to beneficial use is essential to a completed appropriation." *State ex rel. State Eng'r v. Crider*, 1967-NMSC-133 at ¶ 22, 78 N.M. 312 (citing *Pecos Valley Artesian Conservancy District v. Peters*, 1948-NMSC-022, 52 N.M. 148; *Carlsbad Irrigation District v. Cobble*, 42-NMSC-042, 46 N.M. 335. The right to appropriate for beneficial use must be continuously applied, and the right, "to the appropriation of water for future use is subject to the condition that the needed water be applied to beneficial use within a reasonable time. If not so applied such right may be lost." *Crider*, supra, at ¶ 30.

Since *South Spring*, the principle has been established in administrative codes: *See* **19.26.2.20.B NMAC** ("Nonuse for an unreasonable period of time establishes a presumption of abandonment and *prima facie* evidence of the intent to abandon the right"). Both conditions were true in the *South Springs* case where water was unused for 32 years, a bit shorter than in the instant case, and the works were not kept up, as in this case. Additionally, failure to apply to the State Engineer for permission to extend nonuse is

another sign of intent to abandon the right. *See* **NMSA 1978, § 72-12-8B** (requiring application to extend nonuse). The extremely lengthy period of nonuse in this case constitutes relinquishment of the claimed right—facially, a deliberate act of abandonment.

2. Relation back doctrine.

In its simplest formulation, the doctrine of relation back is the back-dating of a water right from the time of its beneficial use to the time of the origin of the development of water which led to that use. If the development has been sufficiently expeditious, duly diligent, more or less continuous, completed within a reasonable time, then a relation is established between the origin of the development and the resulting beneficial use, so that a back-dating of priority is allowable. These conditions derived both historically and logically from the need in arid climates for maximum and efficient use of water and from the competitive nature of the general law of prior appropriation. During large water projects where the time of development is long, equity and fairness require that other water users who establish rights during the period of development, the intervening rights, not be damaged by an unconditional application of relation back over a long time. Those intervening rights would have been based on beneficial use that was prior to the perfection of the large project's rights but lose that priority through unconditional relation back. Thus the full, conditioned relation back doctrine attempts to balance the rights of the large project as against the rights of other projects that are completed during the large project's extended period of development.

In the instant case, the project of water development was started in 1975, and after 41 years, it has not been completed, nor are there signs of it being completed. The number

of Lower Rio Grande Basin water users whose rights the relation back doctrine[3] intends to protect is very large and keeps getting larger.

We might conceive the relation back doctrine as a kind of conditional agreement between an appropriator and the public. In effect, when an appropriator signals an intention to use water by initiating a plan of development of water use, the public sets aside a priority as of the date of that commencement and an amount of water that is intended to be used in the projected plan. This reservation is not itself a water right, which in New Mexico can only be vested by actual beneficial use. It might be termed an "inchoate right," if it is understood that an inchoate right is not a right to use water but simply the initiation of a process towards acquiring a right. See *Christopher v. Owens*, 2016-NMCA-099 at ¶ 25, 385 P.3d 633 ("an inchoate right" is one "to pursue the development, establishment, and perfect of water right" but not to be confused with actually owning a water right). If the appropriator does not pursue the development with "reasonable diligence," that is, does not fulfill the conditions that protect other users, then the agreement is nullified. The public then withdraws that temporary reservation. The inchoate right is extinguished.

3. *Mendenhall* water rights.

NMCC and Mr. Frost and Mr. Gray claim 5,195 af/yr. of what they characterize as "*Mendenhall* Water Rights." [**State Ex. 32 pdf 4, 6**.] We understand this misleading term

[3] Hillsboro's understanding and application of the relation back doctrine is based upon Prof. G. Emlen Hall's "A History of the Development of the Doctrine of Relation in Western Water Law," **TRP Ex. 220, Hall Expert Legal Historian Report**. On the intent to protect the intervening rights, see *id.* at **3 (pdf 4), 11 (pdf 12)**.

to refer not to a kind of water rights, not to water rights *per se*, that is rights to use water, but development of water for beneficial use interrupted by the declaration of the Lower Rio Grande Basin in September, 1982. However, NMCC and Mr. Frost and Mr. Gray claim the right to develop based on the Court's judgment in *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, and its progeny. If anything at all, they are inchoate rights. If not extinguished, they are subject to the doctrine of relation back.

In the *Mendenhall* case, the Court invoked classic relation back doctrine to validate Mendenhall's water rights, concluding that the extension of the basin under Mendenhall's land during his development of a pre-basin project did not jeopardize the perfection of his inchoate rights through beneficial use, even though that use post-dated the establishment of basin. Since the Court in *Mendenhall* was asked to decide on the legality of beneficial use which had already occurred, the case seems inappropriate as precedent for the instant case, where beneficial use has not occurred.

It appears in this case that *Mendenhall* is serving as NMCC's, Mr. Frost's and Mr. Gray's counsel's ploy for vastly expanding the time of relation-back. The intention is clear: counsel for NMCC, Mr. Frost and Mr. Gray would like to have the entire duration of potential mineral exploitation of the site. This is because the Lower Rio Grande basin was extended in 1982 to include the land of Copper Flat Mine several months after the Copper Flat Partnership closed down operations without obtaining all possible mineral exploitation at the site.

However, the Court in *Mendenhall* was concerned that the declaration of a basin would not accidentally nullify an honest and diligent development of water, robbing the

appropriator of the just fruits of his investment. NMCC, Mr. Frost and Mr. Gray were in no way harmed by the declaration of basin, as the Copper Flat Partnership's decision to shut down operations was prior to the basin declaration -- and the Partnership had already developed the water needed to do what they did. Declaration of the expanded basin neither interfered with that development in any way, nor did it make it illegal.

NMCC's and Mr. Gray's and Mr. Frost's invocation of *Mendenhall*, however, gives an opportunity to clarify the nature of "reasonable diligence" in the relation back doctrine. In *Mendenhall,* time is the essence. The project was begun in April or May, 1949. Failing to find sufficient water, five months later an oral contract for well drilling was made and put into written form two months after that. Work started "as soon as possible" – but on February 6, 1950--the same day that the State Engineer declared the basin. *Id.* at ¶ 1. The new well was sufficient. Water was put to irrigation that very "crop year," meaning May or June, 1950--barely a year after the initiation of the project. The *Mendenhall* Court had these facts in mind when using "reasonable diligence" as a requirement for "relation back." Persistent, expeditious, reasonably continuous action was taken as "reasonable diligence."

The *Mendenhall* Court's conception of the amount of time relation there could be before water was put to beneficial use was "months" or even "years" -- but a four year span was recognized under certain circumstances § 75-11-31, N.M.S.A. 1953. *Id.* ¶¶ 18-19. The *Mendenhall* Court conceived of projects taking months or years, **not** years and decades. A four year relation was thought to be a typical benchmark for such situations.

When *Mendenhall* is invoked in the instant case, there is some disproportion between the "reasonableness" of the endeavor in *Mendenhall* where there was no period of

non-development and in the instant case where the "diligent" effort has been sparse and intermittent at best and the duration of the "effort" has lasted 40 times as long as in the *Mendenhall* case and ten (10) times as long as that Court was willing to consider as reasonable. These considerations will be rehearsed later when we examine in detail the facts of the extant case in terms of the conditions of time and diligence required by the relation back doctrine and show that the claimed inchoate rights are extinguished and therefore cannot be developed into vested water rights.

IV. REQUESTED FINDINGS OF FACT

Hillsboro incorporates herein by reference the requested findings of fact of Turner Ranch Properties ("TRP") and the State Engineer, to the extent they do not conflict with the below proposed findings, and respectfully requests this Court to make findings on those facts and the ones set forth as follows:

1. In Subfile 28-008-9009, NMCC claims vested water rights from nine (9) wells at the Copper Flat Mine site, LRG 4652 S-4 through S-10, S-17 and LRG 4654.[4]

2. In Subfile 28-008-9010, Mr. Frost and Mr. Gray claim water rights from wells at a well-field eight (8) miles from the Copper Flat Mine. The wells are four (4) production wells, LRG 4652, LRG 4652 S, LRG 4652 S2 and S3, which were used in 1982 for mining. There are also six (6) Monitoring Wells (MW) that were not used for mining and classified as supplemental wells which have no independent rights: LRG 4652 S-11 through S-16.[5]

[4] **State Ex. 1; State Ex. 12.**

[5] **State Ex. 1; State Ex. 11.**

3. Inspiration Development drilled wells at Copper Flat in 1971.[6]

4. In 1975, Quintana Mineral ("Quintana"), initiated a development of water for the purpose of operating an open-pit copper mine at Copper Flat, near Hillsboro.[7] The water was from the four production wells.

5. In 1980, Copper Flat Partnership (CFP) was created to bring together Quintana, the "deep" partners who formed the operational wing of the venture, and the funding wing: the Canadian Imperial Bank of Commerce ("CIBC").[8]

6. In March or April, 1982, CFP having completed mine construction, the mine began operations, and the mining use of water began March or April, 1982.[9] At that time, copper prices were low, and production would not have been profitable.[10]

7. Three and a half months later, at the end of June, mine operations ceased, and CFP shut the mine down, never to reopen.[11] Development of the water rights for mining permanently ended.

8. The Lower Rio Grande Basin was extended to include the area of the wells in September, 1982.[12]

9. Hydrological consultant John Shomaker advised CFP to apply to the Office

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[6] **NMCC Ex. 46, 47**.

[7] **NMCC Ex. 37, "Production Well Synopsis," pdf 2.**

[8] **NMCC Ex. 143, "Deed of Trust";6-29-16 Vol. 9 Tr. 101:6-129:24.**

[9] **3-15-16 Vol. 2 Tr. 131:5-8; 6-29-16 Vol. 9 Tr. 130:4-16.**

[10] **6-30-16 Vol. 10 Tr. 166:15-169:6.**

[11] ***Id.* 11-14.**

[12] **TRP 12, pdf 2.**

of the State Engineer for permission to extend its nonuse.[13]

10. In 1984, CFP filed Declarations of Water Rights with the State Engineer declaring having actually used 854 af of water in 1982.[14] A month after filing the Declarations, Quintana resigned as manager and operator of the mine and was not replaced.[15]

11. CFP intended to sell the water rights by 1985.[16] At the same time, CFP informed the Bureau of Land Management (BLM) that it had ceased mining.[17]

12. In 1986, CFP publically indicated its intent to stop using water according to the 1975 initiated water project by applying to the State Engineer to transfer its water rights away from Copper Flat Mine for the development of a suburb of Las Cruces.[18]

13. In 1986, CFP sold all its mining equipment and dismantled the mine, salvaging all water infrastructure that it owned.[19] No buildings, pumps, above ground pipes were left. The only underground piping not salvaged was on BLM land, and BLM would not permit salvaging of the pipes or high-tension wires.

14. Also in 1986, CFP agreed with BLM to a final (not temporary) reclamation

[13] **NMCC Ex. 38, pdf 9, last paragraph.**

[14] **NMCC Ex. 37.**

[15] **6-29-16 Vol 9 Tr. 158:3-12.**

[16] **6-29-16 Vol. 9 Tr. 163:15-167:9, 170:19-24; and 3-15-16 Vol. 2 Tr. 97:4-98:24.**

[17] **Hillsboro Ex. 13.**

[18] **NMCC Ex. 65 (TRP Ex. 83); 6-29-16 Vol. 9 Tr. 167:10-176:18.**

[19] **3-14-16 Vol. 1 Tr. 224:12-225:8; 3-15-16 Vol. 2 Tr. 8:6-14:2, 42:4-49:16; Hillsboro Ex. 16, 28, 29; 6-14-16 Vol. 6 Tr. 30:15-19.**

of the mine site, specifying an intent to abandon operations at Copper Flat.[20] CFP also communicated with State agencies stating its intent to cease permanently its operations.[21]

15. In 1987, CFP completed final reclamation upon abandonment of mining and permanently left the site.[22] In April, it sold its "water rights" to Mr. Frost and Mr. Gray for $20,000 without any access to the wells or the water.[23] Not having the instrumentality to use water, Mr. Frost and Mr. Gray have never put their "water rights" to use, that is, not in twenty-nine (29) years.[24]

16. There is no evidence that CFP applied to the State Engineer for an extension of nonuse.

17. There is no evidence that CFP filed a plan with State Engineer describing its 1975 water project.

18. Mr. Frost and Mr. Gray bought the rights as an investment.[25] They were not miners and had no interest in mining.[26]

19. Mr. Frost and Mr. Gray were knowledgeable about water rights.[27] They

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[20] **Hillsboro Ex. 20; 6-29-16 Vol. 9 Tr. 176:19-229:18.**

[21] **Hillsboro Exs. 17, 21, 23**.

[22] **Hillsboro Ex. 22.**

[23] **TRP Ex. 114, item 3**: "Copper Flat does not convey any interest in well bore, well casing, well equipment, or the wells themselves, the conveyance goes only to water rights." (Emphasis added.) **3-18-16 Vol. 5 Tr. 143:13-19.**

[24] Testified Mr. Gray. **3-18-16 Vol. 5 Tr. 138:19-22.**

[25] **3-18-16 Vol. 5 Tr. 142:21-23.**

[26] ***Id.*142:24-143:12.**

[27] For Mr. Frost: **3-15-16 Vol. 2 Tr. 99:6-17, 196:20-21, 238:12-21.** For Mr. Gray: **3-18-16 Vol. 5 Tr. 117:19-23.**

formed a business "to engage in the development and leasing of water rights."[28] In their water transactions they were represented by counsel.[29] They knew enough about their water rights to realize that the rights were subject to forfeiture and/or abandonment. Mr. Gray stated at trial: "I was worried that we were going to lose even our vested rights for nonuse."[30] It is probable that Mr. Frost and Mr. Gray had actual notice of this also by reading CFP's 1984 Declarations describing the water rights they had purchased, and, therefore, knew of Mr. Shomaker's advice to CFP to apply for an extension of nonuse from State Engineer included in the declarations. See **RFOF** 7 above. The presence of this information in the Declaration concerning the rights they purchased is certainly a basis to find constructive notice, as one is presumed to be aware of what he or she has purchased. Significantly, Mr. Frost and Mr. Gray failed to apply for such an extension.

20. In 1988, Mr. Frost and Mr. Gray applied to the State Engineer to transfer their rights' source, point of diversion, use, and location of use to create a recreational lake and to irrigate 3,311 acres.[31] Since only the vested rights of some 854 af/yr. was available for the transfer, the undeveloped rights being attached to a defunct project, there seems not enough water for the project, and this infeasibility was recognized in the 1989 agreement for the project.[32] Mr. Frost and Mr. Gray, thereby, acknowledged that the undeveloped

[28] **TRP Ex. 127, pdf 1.**

[29] **3-15-16 Vol. 2 Tr. 109:9-11; 3-18-16 Vol. 5 Tr. 120:21, 158:15-20, 164:21-22; 3-15-16 Vol 2 Tr. 198:23-25, 214:17-24.**

[30] **3-18-16 Vol. 5 Tr. 119:18-23.**

[31] **NMCC Ex. 78 (TRP Ex 118)**.

[32] **NMCC Ex. 82 (TRP Ex. 121);** *see also* **3-18-16 Vol. 5 Tr. 156:12-19 (**"It is possible that the New Mexico State Engineer will refuse to transfer all of the rights").

inchoate rights might not be transferable and may not even exist. The application was withdrawn in 1991.[33]

21. In 1991, Mr. Frost and Mr. Gray contracted to lease their rights to Gold Express for mining use at Copper Flat Mine,[34] but the "Letter of Agreement" did not require Gold Express to use any of the rights: "Gold Express Corporation shall be free in its own discretion to make use of so much of the Subject Water Rights as it may elect."[35] The contract was not a definite attempt to use water beneficially.

22. In 1994, by which time the water had not been put to beneficial use (or used at all) for twelve (12) years, Alta Gold took over the contract with Mr. Frost and Mr. Gray from Gold Express.[36] Alta Gold accepted the terms of the earlier "Letter of Agreement," and thus it was also free not to use the water.[37]

23. In 2001, Mr. Frost and Mr. Gray regained title to the water rights after Alta Gold's bankruptcy.[38] Neither Gold Express nor Alta Gold mined or constructed any water works.

24. Quiet title litigation with Hydro Resources over the water rights lasted from 2001 to 2007 and ended in favor of Mr. Frost and Mr. Gray.[39]

25. Four (4) years later, in 2010, Mr. Frost and Mr. Gray sold the rights to

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[33] **NMCC Ex. 88 (TRP Ex. 129).**

[34] **NMCC Ex. 87.** The "Letter of Agreement" as a lease, s*ee* **3-18-16 Vol. 5 Tr. 136:1-3.**

[35] **NMCC Ex. 87 at pdf 2, item 2; 3-18-16 Vol. 5 Tr. 134:19-136:3.**

[36] **NMCC Ex. 104.**

[37] **3-18-16 Vol. 5 Tr. 137:10-138:8.**

[38] **NMCC Ex. 113.**

[39] *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, 143 N.M. 142 and **NMCC Ex. 114.**

NMCC.[40] In that Option and Purchase Agreement NMCC offered to pay Mr. Frost and Mr. Gray $200,000 to amend the well declarations to increase the rights based on use to 1,900 af/yr.[41] Mr. Frost and Mr. Gray filed the Amended Declaration.[42] Therein, Mr. Frost swore that the amount of water rights was 6,462 af/yr. (item 4), that that amount of water was first put to beneficial use in 1981 (item 7), and that since 1981 that amount of water "has been used fully and continuously for all of the above described purpose" (item 7).[43] Appended to the Declaration is Exhibit "C" explaining that the new information increased the "amount of water actually put to beneficial use" in 1982 to 1,267 af/yr. To this figure are added the capacities of the unused Monitoring Wells, LRG 4652 S-11 through LRG 4652 S-16, originally declared in 1984 as supplemental wells without water rights. The "total amount of 'perfected' rights" claimed became 2,562 af/yr., well above the required 1,900 af/yr.[44]

26. Since the sale, another six (6) years have elapsed without NMCC putting the water to use. From 1982 to 2016, no open-pit mining has taken place at Copper Flat Mine. Vested rights initiated in 1975, if still valid, have not been exercised since June, 1982, a period of thirty-four (34) years. Inchoate rights initiated in 1975, if still valid, remain unappropriated and undeveloped for a period of over forty-one (41) years.

27. Wells at the mine-site in NMCC's subfile LRO-28-008-9009 have not been

[40] **NMCC Ex. 117.**
[41] ***Id.* at pdf 6; 3-18-16 Vol. 5 Tr. 186:1-8; 3-15-16 Vol. 2 Tr. 234:22-235:4.**
[42] **NMCC Ex. 118.**
[43] ***Id.* at pdf 3 and 4.**
[44] ***Id.* at pdf 10.**

used from thirty-two (32) to thirty-six (36) years.[45]

28. NMCC has not demonstrated a clear chain of title for the "rights" claimed at the mine-site in subfile LRO-28-008-9009.[46]

29. NMCC has not constructed any water works and plans to begin at the earliest at the end of 2019.[47]

30. If the past is prologue, it is likely NMCC will never mine Copper Flat.[48]

31. NMCC's and Mr. Frost's and Mr. Gray's claims directly threaten the rights of Four Hillsboro Claimants. The State Engineer assigned area of operation for the Hillsboro Mutual Domestic Water Consumers Association lies about 1½ miles from the Copper Flat Mine Pit lake, from which NMCC claims rights to 120 af/yr. **[6-14-16 6 Tr. 14:22-25]. I**n 1996, the Bureau of Land Management's *Copper Flat Project Environmental Impact Statement* projected permanent drawdowns in part of the Association's area of operation. *See* **[TRP Exh. 152, 4-13 (pdf 214)]** ("Warm Springs Canyon would experience a permanent drawdown of 10 feet in the water table"). Three other Hillsboro Claimants, James Goton, Agnes and John MacGarvie claim rights to wells located near the main Production Wells in the Palomas Basin. **[6-14-16 6 Tr. 22:14-23:19 and 24:5-22].** "Private wells in the Palomas Basin may experience a drawdown between 2 to 8 feet during groundwater withdrawal from the production well field." **[TRP Exh. 152, 4-10 (pdf 210)]**; *see also* **Hillboro Exh. 2** (Summary of Rights and Priorities of Hillsboro

[45] See Table 2, *supra* at 37, "Digest from Declarations of 1984 Showing Nonuse."
[46] See Table 3, *supra* at 40, "No Clear Title To Claimed Rights In LRO-28-008-9009."
[47] **3-15-16 Vol. 2 Tr. 87:10-12.**
[48] **6-30-16 Vol. 10 Tr. 184:3-5.**

Claimants/Defendants) and **[Hillsboro Exh. 3-12b]** (Rights and Priorities of Hillsboro Claimants/Defendants).

32. Hillsboro incorporates by reference the contents of Tables 1, *supra*, and Tables 2 and 3, *infra*, and requests that this Court utilize the facts set forth therein to make findings in this matter.

V. REQUESTED CONCLUSIONS OF LAW.

Hillsboro incorporates herein by reference the requested Conclusions of Law of TRP and the Office of the State Engineer, to the extent they do not conflict with the below requested conclusions of law, and, additionally, the conclusions of law set forth, *supra*, in under **II. B**. **Legal Issues**, and respectfully requests this Court to make conclusions of law as follows:

1. The cornerstone of the determination of a water right is whether the claimed right puts water to beneficial use. "Beneficial use shall be the basis, the measure and the limit of all right to the use of water." N.M. Const., Art. XVI, §2. See also *Hagerman Irrigation Co. v. McMurry*, 1911-NMSC-021 at ¶ 4, 16 N.M. 172, 180 (quoting WIEL ON WATER RIGHTS, §§ 26, 138, 168, and cases cited therein; also citing *Millheiser v. Long*, 1900-NMSC-012, 10 N.M. 99; *Wheeler v. North Irr. Co.*, 10 Colo. 582, 17 P. 487). The purpose of the application of these principles is conserve water in an arid climate by discouraging nonuse and waste and encouraging uses that are beneficial to the people of the state. See *Yeo v. Tweedy*, 1929-NMSC-033 at ¶ 20, 34 N.M. 611, 690 (New Mexico's water laws are intended to encourage use and discourage nonuse or waste)

2. Nonuse of claimed vested rights and non-development of the claimed

inchoate rights have damaged the Lower Rio Grande Basin ("LRG") and will continue to damage the Basin as long as they are unused and undeveloped. This is due to the fact that in New Mexico, where prior appropriation and beneficial use are constitutional commands, holding open the vested or inchoate right to develop water for a substantial amount of time prevents potential appropriators who would put the water to a beneficial use from doing so. This means that both the would-be appropriator and the community are deprived of the fruits of the benefits of that use while the speculators holding onto the rights are, by sanctioned delay, rewarded for depriving others of the benefits of that use. N.M. Const. Art. XVI, §§ 2, 3; *Yeo v. Tweed*y, *supra* at ¶ 20.

In this case, there is no dispute among the parties that the Quintana Mining Company, on behalf of the Copper Flat Partnership put water to beneficial use mining and milling copper for about three (3) months in 1982. **RFOF #7**. The dispute is over the amount of water put to beneficial use and whether any water right obtained through doing so actually still existed when the water rights were conveyed from the Copper Flat Partnership to Harris Gray in 1987.

3. Courts of New Mexico have long recognized that, in order to avoid the loss of a water right, an appropriator must make a good faith effort to apply the appropriated water as rapidly as circumstances allow and his or her means permit, and that will be considered a "reasonable time" for putting the water to beneficial use. See *Hagerman Irrigation Co. v. McMurry*, 1911-NMSC-021 at ¶ 1, 16 N.M. 172, 176 ("As long as the appropriator does not abandon, but continues in good faith, the application of the water to his land, as rapidly as his means and circumstances will permit, he will be held to be within

the limit of a reasonable time") (citations omitted).

The requirement for continual good faith application of water to beneficial use is sustained in the New Mexico statute on forfeiture, and even though the State Engineer has not given notice of pending forfeiture, Hillsboro contends that after four years of nonuse, that is, by June, 1986, the rights vested by beneficial use in 1982 were presumptively forfeited. The regulation of beneficial use has long recognized that rights are subject to regulation, adjudication and forfeiture for abandonment. See *State ex rel. Office of the State Eng'r v. Elephant Butte Irrigation Dist.*, 2012-NMSC-090 at ¶14, 287 P.3d 324, 328. the forfeiture statute excuses forfeiture when there are "circumstances beyond the control of the user" that have resulted in nonuse. *State ex rel. Reynolds v. South Spring Co*., 1969 NMSC-023 at ¶ 17, 80 N.M. 144, 148. Nonuse, however, is competent evidence of intent to abandon. *Id*. at ¶ 19 (citing *Utt v. Frey*, 106 Cal, 392, 39 P. 807 (1895); *Sieber v. Frink*, 7 Colo. 148, 2 P. 901 (1884)). Moreover, "[a]fter a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for nonuse." *Id*. at ¶ 20; see generally, *SunnySide, supra* at 3.

In this case one must look to the facts regarding the Claimants' actions in relation to its rights known to this Court through the trial process. The evidence showed that Mr. Frost and Mr. Gray did not and do not have the means to extract water from the subject locations of their purported rights: no wells, no pumps, no pipes, no technical expertise. In twenty-nine (29) years of owning these rights, Mr. Frost and Mr. Gray have done absolutely nothing to change that situation and have relied on others to take action. When a deal did not succeed in putting the water to beneficial use, they made another deal and

another -- yet, in all, never took the necessary steps to perfecting or maintaining the claimed water rights. The *South Springs* Court looked to Kinney's treatise for an explanation as to how rights would be lost:

> As to whether or not a water right, the water itself, the ditch, the canal, or other works have actually been abandoned or not depends upon the facts and circumstances surrounding each particular case, tending to prove the essential elements of an abandonment, namely, the intent and the acts of the party charged with abandoning such a right. . . . Abandonment is most usually provide by evidence of the failure of the party charged to use the right, or the water, or to keep the works necessary for the utilization of the water in repair; and if such nonusage or neglect is continued for an unreasonable period, it may fairly create the presumption of the intention to abandon[.]

2 KINNEY ON IRRIGATION AND WATER RIGHTS, 2d ed. 2012, § 1116 (1912), quoted in *State ex rel. Reynolds v. South Spring Co.*, 1969-NMSC-023 at ¶ 7, 80 N.M. 133. This echoes provisions in the state forfeiture statute at the time which allowed for a one year grace period after four years of nonuse to provide an opportunity to show circumstances beyond the owner's control as excusing the forfeiture. *Id.* at ¶ 3, quoting from § 75-5-26, N.M.S.A., 1953.

The South Spring Co. court went on to note that in that case the water rights had not been utilized for two years less than the rights at issue in this case, i.e. thirty-two (32) years. Kinney summarizes the differences between forfeiture and abandonment. Abandonment requires an intent that may be inferred from conduct. Forfeiture requires no intent. It is a statutory penalty for failure to act to consummate the water right within a specified time or, after consummation, failure to use within a specified time. Reviewing the evidence below, the Court upheld the forfeiture, finding, "In the case before us, if

appellants obtained appropriative rights to the use of the water in question, any such rights have now become lost by continuous nonuse for more than four years, as shown by the evidence, and such rights (if any) are forfeited." *Id.* at ¶ 11.

Given that this decision, though stated to be based upon forfeiture, is one in a case where the nonuse was eight (8) times that required by the statute, it is a "common law" forfeiture, rather than abandonment. In other words, though the pre-1965 forfeiture statute was quoted by the court, the forfeiture related to a substantial period of nonuse (although two years less than in the adjudication of rights in the instant case). The Court in South Spring noted the distinction that under a strict forfeiture statute, intention is required -- and, without stating so, the Court apparently took the substantial period of time (32 years) as manifestation of the intention to abandon, hence forfeit the rights at issue.

The four years of nonuse constituted a material violation of the requirement of good faith application of water. Had the State Engineer given forfeiture notice, CFP would not have been in a position to restore its right by beneficial use. The total dismemberment of the water works in 1986 and 1987 (**RFOF #13 and #14)** made remediation impossible. Thereafter, thirty-four (34) years of nonuse strengthen the presumption of forfeiture. **[RFOF #26].** The actions of salvaging all water using equipment ripened the presumption of forfeiture into a presumption of abandonment.

3. The Courts of New Mexico have defined "abandonment" of a water right as an intention that Courts will determine based upon the facts of the case. See WIEL ON WATER RIGHTS (2d ed.) at 351 ("Abandonment is a matter of intention and it is within the province of the court to determine whether abandonment has or has not taken place"), see

also *Keeney et al. v. Carillo et al*., 1883-NMSC-005, 2 N.M. 480. Even "a chain of title carrying a water right is not enough to rebut a presumption of intent to abandon. *Haystack Ranch, LLC v. Fazzio,* 997 P.2d 548 (Colo. 2000) (quoting *Knapp v. Colorado River Water Conservation Dist.,* 131 Colo. 42, 54, 279 P.2d 420, 426 (1955), "the fact that the [water] right appears to have been carried through a continuous chain of paper title" is insufficient to overcome a presumption of intent to abandon").

Hillsboro contends that when CFP salvaged the equipment at the site **[RFOF #13 and #14]** and also sold at salvage prices ("fire sale prices") those rights **[RFOF #15]** without access to the wells or water, it demonstrated an intent to abandon not just the mining project but the water project attached to them and the vested rights that were defined by that purpose, place and use. Hillsboro also contends that whatever water rights at the mine-site in Subfile LRO-28-008-9009 that might have been valid at the time of CFP's declarations have long been abandoned by nonuse of from thirty-two (32) to thirty-six (36) years. **[RFOF #27].**

4. New Mexico courts have recognized that when nonuse lasts an excessive time, the burden of proof shifts from the accuser to the nonuser. *State ex rel. Reynolds v. South Springs Co.,* 1969-NMSC-023, 80 N.M.144; *see also SunnySide, Aragon, and Abousleman, supra*. Such a presumption is strengthened by the failure to maintain the works necessary for using water, creating a *prima facie* case for abandonment.

In this case, the vested rights have not been exercised for thirty-four (34) years. **[RFOF #26].** Hillsboro contends that in this case, the nonuse has not only been excessively long but it has been egregious in that all the water works that were in place

were removed. NMCC needs to show why the rights in its subfile should be redeemed. Mr. Frost and Mr. Gray need to show why the rights in their subfile should be redeemed. Hillsboro contends they have provided evidence at trial to prove that their rights have not been extinguished by a substantial period of nonuse.

5. The relation back doctrine, which governs the treatment of inchoate rights, requires that the development of rights through an initiating project be pursued with reasonable diligence. *State ex rel. Reynolds v. South Springs Co.*, 1969-NMSC-023,¶¶ 9-13, 80 N.M. 144, 147 ("[T]he continuance of the title to a water right is based upon continuing beneficial use"). *Cartwright v. Pub. Serv. Co.*, 1958-NMSC-134, ¶¶ 153-156, 66 N.M. 64, 114 (Federici, J., dissent), (holding that "no water right becomes vested until it has been applied to beneficial use to the full extent of its right"), *overruled on other grounds by State ex rel. Martinez v. City of Las Vegas*, 2004 NMSC 9, ¶ 1, 135 N.M. 37; see also *Hydro Res. Corp. v. Gra*y, 2007 NMSC 61, ¶ 21, 143 N.M. 142, 173 P.3d 749 ("[g]round water, like surface water, must be appropriated and applied to beneficial use before a vested water right will result"); *Eldorado Utils., Inc. v. State ex rel. D'Antonio*, 2005-NMCA-041, 137 N.M. 268; *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, ¶¶ 9-14, 68 N.M. 467, 470 (water rights do not vest until the water is placed to beneficial use).

Significantly, the *Mendenhall* Court also held that "the rights of an appropriator of water do not become absolute until the appropriation is completed by the actual application of the water to the use designed." *Id*. (internal quotation marks and citation omitted)." Hillsboro contends that a sequence of actions by CFP between 1984 and 1987 caused the

inchoate rights that were potentially part of the 1975 water project to be extinguished. These were: (a), The mine operator and manager left and was not replaced **[RFOF #10]**; (b), CFP intended to sell the water rights **[RFOF #11]**; (c), CFP filed an application to use its water in a development outside Las Cruces **[RFOF #12]**; (d) CFP completely dismantled the mine and therefore ended the project which sustained the inchoate, undeveloped water rights **[RFOF #13]**; (e) CFP did a final and complete reclamation on BLM land occupied by the project **[RFOF #14]**; (f) CFP informed the public that it was abandoning the project which defined the inchoate rights **[RFOF #14]**, and (g) CFP sold the water rights to Mr. Gray without access to the water and wells. This assured that the mine could not operate without new rights (**RFOF #15).**

Any of these actions alone could have extinguished the inchoate rights. Together, they make it patent that by 1987 extinction was definitive and no inchoate rights were transferred or transferable to Mr. Gray.

6. New Mexico courts have decided that water rights are separate from land interests and are not appurtenant to land except for irrigation rights. See, on this transfer, *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶24; 143 N.M. 142; see also, *Walker v. United States,* 2007-NMSC-038, ¶¶21, 22, 142 N.M 45; *KRM v. Caviness*, 1996 NMCA-103, ¶¶ 6-10, 122 N.M. 389, overruled in limited part concerning statement on appurtenant land and water rights by *Walker v. United States*, 2007-NMSC-03, 142 N.M. 45

; *Christopher v. Owens*, 2016-NMCA-099 at ¶ 25, 385 P.3d 633.

Hillsboro contends that NMCC does not have a full chain of title to support ownership of the water rights at the mine-site. NMCC's title derives from Hydro

Resource's 1989 deed of water rights to COBB, but no evidence is in record that Hydro Resources received any water rights from its predecessor in interest, Inspiration Development. (**RFOF #28**).

7. This Court's Memorandum Order adopting the Special Master's Report in the *SunnySide Properties, LLC* water rights adjudication has much in common with the instant matter. See, generally, *State of New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irrigation Distric*t, Lower Rio Grande Adjudication, No. CV-96-888, Claimant SunnySide Properties, LLC, "Memorandum Order Adopting Special Master's Report" (July 25, 2014) ("*SunnySide*").

First, a substantial period of nonuse in *SunnySide* (22 years) and an even more substantial period of nonuse in this case (34 years). *Compare SunnySide, supra,* at 3 ("The Court agrees that this 22-year period of nonuse . . . is sufficient to raise the presumption of intent to abandon") with **[RFOF #15, #26, and #27]**.

Second, *SunnySide* claim that the presumption of abandonment after a substantial period of nonuse is counteracted by its efforts to lease the property to two different parties find a parallel in Mr. Frost and Mr. Gray attempting to lease to Gold Express and Alta Gold. *Compare SunnySide* at **[RFOF #21 and #22 and 3-15-16 Vol. 2 Tr. 113:2-117:2; 3-18-16 Vol. 5 Tr. 121:3-127:3]**.

Third, *SunnySide* making a contract "for borrow material and water" parallels the Mr. Frost and Mr. Gray contract with Gerald Lyda. *Compare Sunnyside* at 5, 6-11 and **[RFOF#20;3-15-16 Vol. 2 Tr 106:5-107:6, 209:20-212:16; 3-18-16 Vol. 5 Tr 147:8-150:8].**

However where the two cases diverge in a major way is when in *SunnySide* there actually was an attempt to repair water works and water to beneficial use--but those two instances, brief ones, within the 22 year period, were efforts taken by a third party who made his own application to the Office of the State Engineer for use of 5 acre feet of water for one year. *Id.* at 11. (Even if these efforts had been under a lease agreement, the lessor, whether SunnySide, Ltd in that case or Mr. Frost and Mr. Gray in this one, would have been continuously responsible for legally maintaining the water right. NMSA 1978 §72-6-3(B).

Astoundingly, in this case, Mr. Frost and Mr. Gray have not provided a shred of evidence they did any more than participate in a series of failed speculative ventures in relation to the water rights at issue. There is no evidence in the record that they ever took any steps to actually put water to beneficial use. There is no evidence that they ever obtained access to the capped wells at the mine site. There is no evidence that they took steps to have pumps placed in wells and plumbed and tested and used. There is, in fact, no evidence that they ever used any water for any reason, let alone putting it to a beneficial use of any kind.

Most significantly, Hillsboro contends, they never even took the steps that any reasonably prudent business person – certainly reasonably prudent water "brokers" or speculators would take – to properly – i.e., legally – maintain the water rights. According to their own accounts, they were not naïve. [**RFOF #19; 3-15-16 Vol. 2 Tr. 99:6-17, 196:20-21, 238:12-21, and 3-18-16 Vol. 5 Tr. 117:19-23].** They held themselves out as water rights brokers, forming their partnership for that purpose. [**TRP Ex. 127, pdf 1].**

Moreover, they had available to them in the State Engineer's files of the rights they purchased and claim to own, advice from an experienced hydrological engineering firm: John Shomaker and Associates. In the file, Mr. Shomaker warns CFP that it needs to take the legal steps to protect its rights. Mr. Frost and Mr. Gray had constructive knowledge of that warning, as it is presumed purchasers of water rights read the State Engineer's file describing those rights. [**RFOF #9; NMCC Ex. 38, pdf 9, last ¶].**

Finally, they also had the legal advice of lawyers from Mr. Woodbury from Silver City, and, ultimately, beginning with the *Hydro Resources* case and continuing through the instant adjudication, Charles DuMars and his firm, Law and Resource Planning Associates. [**RFOF #19; 3-15-16 Vol. 2 Tr. 109:9-11; 3-18-16 Vol. 5 Tr. 120:21, 158:15-20, 164:21-22; 3-15-16 Vol 2 Tr. 198:23-25, 214:17-24].** Yet, with all of their business acumen and high-powered engineering and legal advice, they never—in some 29 years—took the necessary measures with the State Engineer to assure preservation of their water rights.

The only excuse Mr. Frost and Mr. Gray presented to this Court was, essentially, the same one that CFP used: economic circumstances beyond their control. However, even with the best economic excuses, as this Court knows from its *SunnySide* decision, failed deals, unlike so-called "Acts of God" or *Force Majeure,* do not prevent a finding of abandonment of the water rights when there is a substantial period of nonuse. *Id.* at 10-11 (citing *CF & I Steel Corp v. Purgatoire River Water Conservancy Dist.*, 515 P.2d 456, 458 (Colo.1973) ("[I]t might be said that nearly every abandoned water right could have its nonuse justified by the economic that might prevail sometime in the future"); see also *Knapp v. Colorado River Water Conservation Dist.*, 279 P 2d 410, 427 (Colo. 1955)

("Speculation on the market, or sale expectancy, is wholly foreign to the principle of keeping life in a proprietary right and is no excuse for failure to perform that which the law requires"). (The factual and legal argument on the economic excuse concerning the price of copper, *infra* at **V. Argument,** subsection **C**, is incorporated herein by reference. The legal considerations discussed above in *SunnySide* and the cases cited therein apply to the claims discussed in subsection **C.)**

Tracking the Court's language in *SunnySide* and applying it to the matter at hand, we can say that recognizing and giving credence to Mr. Frost's and Mr. Gray's failed negotiations, deals, and attempts to contract and/or speculatively lease the water rights as an excuse for nonuse would frustrate the policy goal of maximizing beneficial use because Mr. Frost and Mr. Gray had, at all times, the opportunity to sell water at a more competitive price, or to use it for other commercial and industrial (or any other) purposes. *SunnySide*, *supra*, at 11. The facts of the matter here are as stark as they were in *SunnySide*: none of the deals, negotiations, contracts or leases resulted in "any beneficial use of the water from the subfile property." *Id.* at 12.

All of the excuses here, from CFP's through Mr. Frost's and Mr. Gray's are no more than "purely economic excuses to nonuse." *Id.* As this Court concluded in *SunnySide*, "the maintenance of groundwater wells is an essential component of ensuring beneficial use" yet, even with maintenance of water work -- something that ended completely by 1986 for CFP and Mr. Frost and Mr. Gray have never done since acquiring ownership in 1987 -- there must be a showing of putting water to beneficial use for the purpose intended, else the presumption of abandonment from 34 years of nonuse cannot be

rebutted. *Id.*

8. Hillsboro has standing to appear in this proceeding. This issue was litigated based upon the submittals of the parties and oral argument in December 2015. The Court denied the motion to bar Hillsboro and TRP for lack of standing and issued an Order to that effect, "Memorandum Order Denying Motion to Dismiss for Lack of Standing (January 15, 2016). Hillsboro incorporates by reference its pleadings on this matter and further sets forth that because of the facts above, *infra* at **[RFOF #31]**, Hillboro is a necessary party whose rights may be affected by the Court's adjudication of priority dates for the claims in this case. The New Mexico Supreme Court addressed the issue in *W.S. Ranch*, stating that, "It is a familiar and fundamental rule that a court can make no decree affecting the rights of a person over whom it has not obtained jurisdiction, or between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights." *State ex rel. Reynolds v. W.S. Ranch*, 1961-NMSC-061, 69 N.M. 169. Hillsboro is a necessary party to this matter and therefore it has standing to appear and participate in the adjudication.

9. The facts in Tables 1 through 3, being true and correct, demonstrate, as a matter of law, based upon the cases discussed herein, that there were no water rights to lawfully convey to Frost and Gray, that, in any event, such rights, inchoate or otherwise, would, after some thirty-four (34) years without being put to beneficial use, be extinguished by both forfeiture and abandonment, and that the rights claimed by NMCC in

this matter were similarly extinguished by that passage of time and NMCC, in any event does not have any proper title to these rights.

V. ARGUMENT.

A. The Rights Claimed In Subfile LRO-28-008-9010 Were Extinguished.

The subfile comprises four (4) production wells (LRG 4652, LRG 4652 S, LRG /4652 S-2, and LRG 4652 S-3) and six (6) monitoring wells that CFP never used (LRG 4652 S-11 through S-16). Mr. Frost and Mr. Gray claim 1,267 af/yr. vested rights from the production wells **[NMCC Ex. 118]** and 5,195 af/yr. inchoate rights, which are the rest of the *would-have-been* 6,462 af/yr. taken to have been originally declared in 1984.

The inchoate rights by being as yet unappropriated and undeveloped rights cannot be quantified by actual beneficial use, so the amount is meaningless. Further, Hillsboro contends that the inchoate rights expired with CFP's mining project in 1987. A new project to mine Copper Flat could not revive them, since another project is another project no matter how similar to the original. Similarity is not identity. If these potential rights did not extinguish with the initiating project, they still could not be transferred to Mr. Gray. See generally, *Hanson v. Turney*, 2004-NMCA-069 at ¶¶ 8-17; 136 N.M. 1 (inchoate rights to put water to beneficial use cannot be transferred; the right must first be put to beneficial use in a particular place and for a specific purpose, citing and quoting with approval *Green River Dev. Co. v. FMC Corp*., 660 P.2d 339, 348-51 (Wyo. 1983)). [49]

[49] NMCC says it follow the original water use plan by reusing foundations and footprints of machinery. Yet, the water use is markedly different. The throughput of ore (15,000 tons per day) is doubled. This doubles the rate of water needed. [**3-14-16 1 Tr. 42:19**]. NMCC's water project does not even approximate the original plan.

TABLE 2 -Digest From Declarations of 1984 Showing Non-Use Of Water

LRG 4652 S-4 (*Greer Windmill* or *Greer Well* or *GWQ-8*): 1980 to 2016: No evidence of use of this well for thirty-six (36) years.
LRG 4652 S-5 (also called *McCravey-Grayback Well*): 1983 to 2016: **No evidence of use for thirty-three (33) years**.
LRG 4652 S-6 (*McCravey-Dutch Gulch Well* or *GWQ2*): 1984 to 2016: **No evidence of well use for thirty-two (32) years.**
LRG 4652 S-7 (*Irwin Well South*): 1980 to 2016: N**o evidence of use for thirty-six (36) years**.
LRG 4652 S-8 (*Old Office Well* or *GWQ-7 North*).[50] 1982 to 2016: **No evidence of use for thirty-four (34) years.**
LRG 4652 S-9 (*South Inspiration Well* or *GWQ-9* or *IDW-1*). 1982 to 2016: **No evidence of use for thirty-four (34) years.**
LRG 4652 S-10 (North Inspiration Well, GWQ-1, IDW-2). 1982 to 2016: **No evidence of use for thirty-four (34) years.**
LRG 4652 S-17 (The *Open Pit*). No use shown of the Open Pit water. 1982: No evidence is presented in the Declaration (**NMCC Ex. 54**) of any use. Pit water was *intended* to be used for dust control, no unambiguous evidence at trial demonstrated that it was, in fact, used for that purpose--calculations show the claimed use is unlikely.[51] '82 to 2016: **No use for thirty-four (34) years.**
LRG 4654 (*Dolores* or *Delores Well*). In pertinent part, the 1984 declaration states: 1932: El Oro Company inserts casing in old mine shaft for to pump out water for mining purposes l932 to l934: Well used for mining purposes until El Oro shuts it. l934 to l981: Various small mining outfits pump intermittently 1981 to 2016: **No evidence of use for thirty-five (35) years.**

[50] Evidence was presented at trial that "Office Well" or LRG 4652 S-8 was reported to have a pump and plumbing in 2011. **6-28-16 Vol. 8 Tr. 80:10-85:15** and **TRP Ex. 192**. The equipment noted to be old; no information provided as to owner/appropriator, purpose of use, amount of water used, or when water used, and no showing of beneficial use. ***Id.* and NMCC Ex. 45 pdf 2.** Use between 1943 and 1980 is unsupported. ***Id.* at pdf 3-4**.

[51] **6-27-16 7 Tr. 190:11-191:13, 6-28-16 8 Tr. 104:14-105:21, and 6-28-16 8 Tr. 75:6-79:1.** NMCC's claim that CFP used 120 af for dust control during months in 1982 is absurd. The source of water is seepage. **TRP Ex. 114, pdf 4**, **last paragraph**. The alleged 120 af of seepage in four months makes a yearly flow of 360 af/yr. That is almost half the water used in production during those months. Why would CFP pump water eight (8) miles uphill when it had all this apparently undiscovered water at hand? As dust control, the water (at a 223 gallons/min flow) would have turned the mine into a swamp.

The quantity of the claimed vested rights is contested by the State Engineer in its Offer of Judgment. **[State Ex. 11].** Hillsboro favors the State's determination that in 1982, CFP used 861.84 af/yr. for the same reasons State gives. **[6-27-16 Vol. 7 Tr. 158:22-160:3].** But Hillsboro contends that the quantity is immaterial because the vested rights have been abrogated by forfeiture and/or abandonment, as stated above in **RCOL #1 - #4**.

Mr. Frost and Mr. Gray have only offered as excuses for non-abandonment supposed evidence of due diligence. We note that due diligence is applicable to the development of waters. Appropriators are constrained to work towards beneficial use with due diligence. However, once vested, water rights are held by continuous beneficial use. **[RCOL #2].** Mr. Frost and Mr. Gray have held these rights for twenty-nine (29) years without use and without the instrumentality of use. They have not shown diligence in setting up water works, hiring engineers, negotiating for actual use.

Besides speculating on water rights for twenty-nine years **[RFOF #18]**, they show only three instances of possible use: 1) The infeasible Lyda plan to create a recreational lake and irrigate over 3,311 acres [**RFOF #20**]; 2) The lease of the rights to Gold Express and Alta Gold **[RFOF #21 and #22];** 3) The sale of the rights to NMCC **[RFOF #25]**. These actions all ended in further nonuse. The first was deliberately halted, which like CFP's abandonment of Copper Flat Project, demonstrates an intention not to use water. Since water rights, unlike fee simple absolute property, are conditional on beneficial use, the intent not to use water is equivalent to the intent to abrogate the right, that is, to abandon the right.

The second plan supposedly demonstrating diligence in applying water was the two leases, but the statute on leasing water **[NMSA 1978 72-6-3(B)]** specifically states, in pertinent part: "[T]he lease shall not toll any forfeiture of water rights for nonuse, and the owner shall not, by reason of the lease, escape the forfeiture for nonuse prescribed by law." ***Id.*** Clearly the legislature did not intend leasing to be itself considered beneficial use. Further, as indicated above in **[RFOF #21 and #22]**, neither lease agreement required the use of water.

As for the sale of the rights to NMCC, we have no idea if it will result in beneficial use, NMCC having indicated that it might sell the mine. *See* footnote to **[RFOF #30].**

Hillsboro believes that Mr. Frost and Mr. Gray did not carry their burden of refuting and rebutting the presumptive abandonment of the alleged vested rights.

B. The Rights Claimed In Subfile LRO-28-008-9009 Were Extinguished And No Clear Title Exists To Whatever Rights There May Have Been.

1. Non-use of wells NMCC claims in subfile LRO-28-008-9009.

These wells have all been in a state of nonuse for between thirty-two (32) and thirty-six (36) years. Hillsboro contends these rights have all been abandoned and reverted to the public, as claimants did not adduce any evidence at trial to show that the water at issue in this file has, in fact, been put to beneficial use. Given the length of time of nonuse, the burden of providing evidence of beneficial use -- and, as will emerge later, title to the claimed water -- was on the claimants. This, NMCC failed to do.

2. No Clear Title For NMCC's Water Rights In Subfile LRO-28-008-9009

TABLE 3 – No Clear Title To Claimed Rights In Subfile LRO-28-008-9009

Pre-1965	All rights for mining statutorily forfeited for nonuse.
1965-1989	There is no evidence submitted in this case of the transfers of title from any of the various, alleged appropriators/owners of the claimed rights to Inspiration Development, the holder of title to the mining claims.
1989	In one day, Hydro Resources, through a series of special warranty deeds, transfers the patented and unpatented mining claims at Copper Flat *together with water rights "appurtenant to the Property"* first to COBB Resources then to Copper Flat Mining Company.[52]
1994	Copper Flat Mining Company transfers its mining claims and "appurtenant water rights" to Alta Gold.[53]
2001	Alta Gold transfers the water rights back to Hydro Resources.[54]
2010	Hydro Resources transfers the water rights to NMCC.[55]

Transfers of the water rights associated with all the wells at the mine-site, in the NMCC Subfile LRO-28-008-9009, began with Hydro Resources in 1989. However, Hydro Resources did not own the water rights it transferred. *See below*, "Table 3 - No Clear Title To Claimed Rights In Subfile LRO-28-008-9009." The quit claim deed transferring title to the mining claims at the mine-site from Inspiration Development to Hydro Resources did not transfer water rights, only the claims themselves. **[NMCC Ex. 84, pdf 5 and TRP Ex. 123, p. 1].** As no water rights are appurtenant to mining claims, Hydro Resources did not receive any of these water rights from Inspiration Development. *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶24 specifically on this transfer; 143 N.M. 142; *Walker v. United States,* 2007-NMSC-038, ¶¶21, 22, 142 N.M. 45; *KRM v.*

[52] **[NMCC Ex. 84, pdf 22 and 36].**

[53] **[6-28-16 8 Tr. 67:2-16].**

[54] **[*Id.* 67:17-23]**.

[55] **[*Id.* 67:24-68:8]**.

Caviness, 1996 NMCA-103, ¶¶ 6-10, 122 N.M. 389. Significantly, claimants produced no evidence at trial or in the stipulated exhibits that demonstrates any of the various historical appropriators of water from the mine-site wells ever transferred title to Inspiration.

Thus, NMCC has not even demonstrated ownership of the rights it claims to water in the mine-site wells that comprise Subfile LRO-28-008-9009. Without even considering the presumptively abandoned status of these wells due to nonuse (which is detailed above), the failure to demonstrate a clear chain of title makes it legally impossible for the Court to find that claimant NMCC acquired the water rights at issue in this subfile. On that basis, Hillsboro contends that this Court's consideration of *how much* water properly comprises this claim is an inappropriate academic exercise.

C. Falling Copper Prices Do Not Excuse Nonuse and Non-Development

NMCC and Mr. Gray and Mr. Frost excuse CFP's 1982-87 abandonment of Copper Flat Mine by citing falling copper prices, claiming that because prices were beyond its control the shutdown was unintentional. But the argument is faulty. The evidence of falling prices is ambiguous. **[3-15-16 Vol. 2 Tr. 21:9-24:10].** Other factors besides copper prices needed to be considered, such as the quality of ore, or other contractual arrangements such as interest rates. **[6-29-16 Vol. 9 Tr. 67:10-68:23].** Mr. Bailey, Quintana's mill manager, specifically cited high interest rates as a cause of closure. **[NMCC Ex. 118, Bailey Deposition at 22:17-25, pdf 18].** Evidence has also shown the possibility of other financial and personal liability reasons determining both the beginning and the ending of the operation. **[6-30-16 Vol. 10 Tr. 164:3-169:6].**

Fluctuating prices are a norm of mining business, so that a price drop is hardly a

force majeure. If mining could not respond to price drops, for example by increasing throughput, the whole industry would be dead. See **NMCC Ex. 32, pdf 8** for evidence that throughput was not increased in 1982 to compensate price drop.

Further, Hillsboro has earlier contended that merely economic reasons cannot legally excuse the nonuse of water.[56] **[RCOL #7].**

VI. CONCLUSION.

The Hillsboro Claimants come before the Court to demonstrate the concerns of small water users of the Basin. They do not "represent" in the legal sense of the term, but they represent in the *exempla* sense of the word which Hillsboro contends is the intent of the statutes governing basin adjudications. The Hillsboro group is a sampling of the water using public whose water and water rights are at issue in adjudicating the claims of NMCC and Mr. Frost and Mr. Gray. As individual users, their interests are narrowly defined by individual rights being threatened by NMCC's and Mr. Gray's and Mr. Frost's claims, [57] but, as a group exemplary of the larger group of water users and future water users, they represent for this Court the "public welfare" at issue in this adjudication. The benefit and health of the entire Lower Rio Grande Basin requires that the Court re-affirm the basic principle of beneficial use and declare that 34 years of nonuse is inordinately long and unreasonable amount of time to hold such an important right without putting it to

[56] [**TRP Ex. 220] *op. cit.*,** gives a history of the insufficiency of the lack of means excuse at **[p. 13, pdf p. 14 and p. 15, pdf 16]**. The older opinion was rolled into the State Engineer's administrative rules operative in the 1980s as **SE-66-1 Article 2-15**, now recompiled as **19.27.1.38 NMAC**: "Financial inability to proceed shall not be deemed sufficient reason for granting extensions of time [for nonuse]."

[57] *See generally*, **[RFOF # 31]** and the documents cited therein.

beneficial use.

On the basis of the foregoing facts and law, Hillsboro requests that this Court find that all of the water rights claims in this matter have been abandoned.

Respectfully submitted:

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CERTIFICATION OF SERVICE

I, Jonathan Block, hereby certify that on this 26th day of January, 2017, the foregoing Additional Closing Argument, Post-Trial Brief, Requested Findings of Fact and Conclusions of Law were served electronically on the parties to this proceeding listed below:

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STATE OF NEW MEXICO
COUNTY OF DOÑA ANA
THIRD JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel*.,	)	CV-96-888
OFFICE OF THE STATE ENGINEER,	)	Honorable James J. Wechsler
Plaintiff,	)	
	)	Lower Rio Grande Adjudication
	)	
vs.	)	Outlying Areas Section
	)	
ELEPHANT BUTTE IRRIGATION	)	Subfile No. LRO-28-008-9009
DISTRICT, *et al*.,	)	Case No. 307-OA-9703126
Defendants.	)	New Mexico Copper Corporation
	)	
	)	Subfile No. LRO-28-008-9010
Copper Flat Expedited *Inter Se*	)	Case No. 307-OA-9702236
	)	William J. Frost
	)	Case No. 307-OA-9702237
	)	Harris Gray

HILLSBORO's ERRATA TO ITS POST-TRIAL BRIEF

Hillsboro respectfully requests the Court and parties to make the following changes to their copies of the Hillsboro Post-trial Brief as indicated below:

Location	Correction
Page ii at line 3	"*Cartwright"* should read *"Cartwright v."*
Page 29 at line 3	Delete the word "not" between "have and "been"
Page 36 at fn. 49,	Insert "will" between "it" and "follow"
Page 40 at line 3	Following "See" replace "below" with "above"

Thank you for your cooperation in making these changes as requested.

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