



by Tri-State (“Conditional Disclaimer”). The United States, State Engineer and Navajo Nation do not object to Tri-State’s Conditional Disclaimer of Interest and Motion to Dismiss. The Zuni Tribe, however, objects. Tri-State’s understanding of Zuni’s objection to Tri-State’s Conditional Disclaimer is that Zuni does not want separate forms of disclaimers filed by various parties and that the form of Disclaimer of Interest (“Form Disclaimer”) filed by the United States on August 1, 2003 (a copy of which is attached hereto as Exhibit A) is sufficient to protect Tri-State. To the contrary, the Form Disclaimer is not sufficient to protect Tri-State as shown below.

**I. Tri-State’s Conditional Disclaimer Is Necessary to Protect It Against the Overly Broad and Ambiguous Form Disclaimer Language.**

First, a disclaimant utilizing the Form Disclaimer in catch-all language “disclaims any and all interest in the use of surface or ground waters of the Zuni River Basin.” Next, the disclaimant has the choice of checking two boxes, possibly to explain its catch-all disclaimer, although the purpose of the two boxes is not clearly defined. The first box provides that the disclaimant “does not use or presently claim a right to the use of surface or groundwater...within the Zuni River Basin....” The second box states the disclaimant “does not hold fee title to land” within the same Basin.

Tri-State’s Conditional Disclaimer, on the other hand, clearly and unequivocally links the same catch-all language that it “disclaims any and all interest in the use of the surface and groundwater within the Zuni River Basin...” to its explanation that its disclaimer is “because it does not use or presently claim a right to the use of surface or groundwater within the geographic boundaries of the Zuni River Basin....” There is no guesswork on the basis for its disclaimer.

Secondly, the Form Disclaimer ends by modifying its catch-all disclaimer with savings or non-prejudice language (“Non-Prejudice language”). This Form Disclaimer Non-Prejudice language protects the disclaimant only on petitions to or permits granted by the State Engineer

following the date of disclaimer. It leaves at least one gaping hole from protection against the disclaimer—the right of a disclaimant to purchase post-disclaimer existing water rights with a priority date prior to the disclaimer, to use the existing water rights at their existing place and purpose of use and point of diversion and a clear statement that a petition to change their use post-disclaimer does not convert their pre-disclaimer priority date to the date of a permit changing use and issued post-disclaimer. The Form Disclaimer Non-Prejudice language also is ambiguous. It simply does not protect Tri-State, as more particularly shown below.

On the other hand, Tri-State's Conditional Disclaimer contains Non-Prejudice language that protects it against ambiguity of the Form Disclaimer and its limitations, as detailed below.

As noted, the Form Disclaimer is not sufficient to protect Tri-State's possible post-disclaimer purchase and use of existing water rights against the overly sweeping and arguably ambiguous Form Disclaimer. Stated another way, the Form Disclaimer does not include language protecting against the catch-all disclaimer for Tri-State's possible purchase and use of existing water rights following the date of the Form Disclaimer. The Form Disclaimer's Non-Prejudice language only protects against the catch-all disclaimer for petitions to and permits from the State Engineer. However, use of existing water rights purchased post-disclaimer would not require a petition to or permit from the State Engineer by Tri-State if it chooses to use them at their existing point of diversion and for their existing place and purpose of use.

First, therefore, because the Form Disclaimer's Non-Prejudice language omits protection for a new owner's right to purchase and use existing water rights with a priority earlier than the date of the disclaimer, the Form Disclaimer arguably precludes purchase and use of pre-disclaimer existing water rights. Secondly, and most noticeably, the last sentence of the Form Disclaimer Non-Prejudice language overarches and injects ambiguity by the phrase "the priority

date of a water right permit...cannot be earlier than the date of this disclaimer.” This phrase confuses two priority dates.

In particular, the Form Disclaimer Non-Prejudice language states:

*It is understood that this disclaimer does not prejudice the right of the undersigned and/or his/her successor(s)-in-interest from petitioning in the future the State Engineer for a permit to put surface and/or groundwater in the Zuni River Basin to beneficial use nor does this disclaimer preclude the State Engineer from granting the undersigned and/or his/her successor(s)-in-interest a right to beneficially use the surface and/or groundwater in the Zuni River Basin. It is further understood that the priority date of a water right permit granted under the laws of the State of New Mexico can not be earlier than the date of this disclaimer.*

The phrase in the last sentence can be read to confuse an earlier priority date of existing water rights *prior* to the disclaimer but purchased *after* the disclaimer as contrasted to the date of a future permit (changing the use of these existing water rights) issued *after* the date of the disclaimer. These dates would be completely different dates - one prior to and the other following the disclaimer-- and they cannot be merged. Existing water rights prior to the disclaimer either have a priority date of their first use for declared rights or of the permit date for permitted rights. *See*, NMSA 1978, § § 72-1-2, 72-1-3 and 72-1-4 (surface water rights declarations); 72-5-1, 72-5-3 and 72-5-6, together with 72-1-2 (surface water rights permits); 72-12-4 and 72-12-5 (groundwater rights declarations); 72-12-3 (groundwater rights permits). This priority date will be adjudicated in this adjudication. This pre-disclaimer priority date cannot be convoluted with the date of a permit issued by the State Engineer post-disclaimer sought by a purchaser’s petition (also post-disclaimer) to change the use of these existing water rights. *See*, NMSA 1978, § § 72-5-22, 72-5-23 and 72-5-24 (changes of use for surface water rights); 72-12-7 (changes of use for groundwater rights). These existing water rights ordinarily do not

lose their existing priority date simply because the State Engineer later issues a permit to change their use.

However, the last sentence of the Form Disclaimer Non-Prejudice language would arguably result, through ambiguity, in loss of the pre-disclaimer priority date. In sum, this last sentence would impermissibly convert the pre-disclaimer priority date of existing water rights to the post-disclaimer date of a permit to change their use. A purchaser should not risk the loss of an early priority on water rights purchased after the date of its disclaimer because of ambiguity in the Form Disclaimer Non-Prejudice language.

Tri-State's Conditional Disclaimer language, on the other hand, does not leave to chance and spells out that it is not prejudiced on future purchases of existing water rights with a priority earlier than the date of its Conditional Disclaimer or on future petitions for a new appropriation. The Conditional Disclaimer specifically enunciates that Tri-State's disclaimer does not prejudice the right of Tri-State:

1. to acquire hereafter existing surface and groundwater rights;
2. to petition the State Engineer for a change in place and/or purpose of use and/or point(s) of diversion of such rights;
3. to petition the State Engineer in the future for a permit for a new appropriation of water to beneficially use surface and/or groundwater; or
4. to petition the State Engineer with similar petitions;
5. nor does it preclude the State Engineer from granting such petitions.

Tri-State's Conditional Disclaimer also expressly enunciates that the priority date "of any water right permit for a new appropriation of water" cannot be earlier than the date of the Conditional Disclaimer. This enunciation will not overarch, so as to impermissibly preclude

with overly broad or ambiguous language the post-disclaimer purchase of and use of other existing water rights (with a pre-disclaimer priority). Any State Engineer permit to change the use or point of diversion of existing water rights purchased post-disclaimer and thereafter petitioned for change of use would, by its date alone, follow the date of the Conditional Disclaimer. But, unlike the last sentence of the Form Disclaimer, the Conditional Disclaimer does not confuse the pre-disclaimer priority date of existing water rights purchased post-disclaimer with the date of a post-disclaimer permit granting change of use or point of diversion.

**II. Tri-State's Conditional Disclaimer Is Necessary to Assure That An Order of Dismissal Is Entered Upon the Effectiveness of Tri-State's Disclaimer.**

Unlike the Form Disclaimer, Tri-State's Conditional Disclaimer conditions the disclaimer upon entry of an order of dismissal in the form attached as Exhibit A ("Order") to the Conditional Disclaimer. The Order's language repeats the Non-Prejudice language in the Conditional Disclaimer. Disclaiming water rights should be followed by an immediate dismissal from this adjudication. Conditioning the disclaimer upon entry of the Order dismissing Tri-State assures immediate dismissal upon effectiveness of the Conditional Disclaimer.

Otherwise, a hiatus will almost certainly occur between filing the Form Dismissal and an order dismissing the disclaimant. Although the Court's Order of July 15, 2002 provided that "[o]nce such parties have identified themselves by filing a disclaimer, the United States shall take necessary steps to effect dismissal, if appropriate," nonetheless, a substantial delay may occur. Tri-State's Conditional Disclaimer underscores the importance of avoiding delay. Upon the effective date of its Conditional Disclaimer, Tri-State should be absolved from any obligation to follow the proceedings, comply with orders or respond to pleadings because the Court has entered its Order dismissing it.

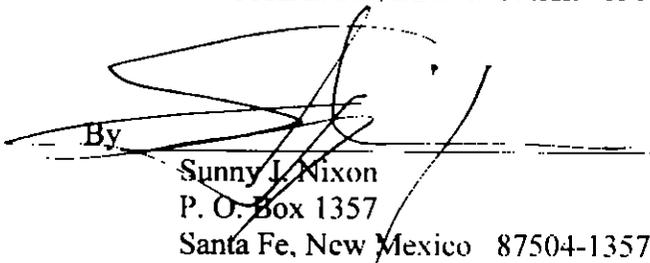
### **Conclusion**

For the foregoing reasons, Tri-State moves the Court for entry of its Order granting Tri-State's Conditional Disclaimer of Interest and Motion to Dismiss and dismissing Tri-State from this action.

Respectfully submitted,

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