DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2010 APR 30 PM 4 36

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

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

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants,

THE JICARILLA APACHE TRIBE AND THE NAVAJO NATION,

Defendant-Intervenors.

CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

Before Special Master
Stephen E. Snyder

Claims of the Navajo Nation
Case No. AB-007-01

SETTLING PARTIES' OBJECTIONS TO THE SPECIAL MASTER'S REPORT CONCERNING JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION

The State of New Mexico, the Navajo Nation, and the United States ("Settling Parties") submit these objections to the Special Master's Report Concerning Joint Motion for Order Governing Initial Procedures for Entry of Partial Final Judgment and Decree of the Water Rights of the Navajo Nation ("Report"), filed April 15, 2010.

As a general matter, the Settling Parties agree with the contents of the Report and specifically with the provisions of the Proposed Order attached to the Report as Exhibit A. The Settling Parties appreciate the work of the Special Master to hold hearings and to receive comments from the parties in order to develop a comprehensive and thoughtful process for entry of final decrees recognizing the water rights of the Navajo Nation. The Settling Parties respectfully submit the following objections regarding four issues raised by the Report that the Settling Parties believe require further discussion.

1. **Portions of the Report do not correctly describe the adjudication process in New Mexico.**

The Settling Parties agree with the Special Master's ultimate conclusion, under Section II.A of his Analysis, that joinder of all water rights claimants is not required prior to commencing an expedited *inter se* proceeding. However, the Settling Parties must respectfully disagree with portions of the Report's description and characterization of the adjudication process, which are not necessary to reach this conclusion.

While the Report correctly observes that the adjudication process may take decades to complete, this is not caused by the "inordinate amount of time required to identify all claimants in a stream system by means of a hydrographic survey." Report, p. 8. A hydrographic survey, by itself, typically takes only a fraction of the time required to adjudicate the water rights identified in the survey. Nor does the process of joinder, alone, contribute significantly to the length of adjudications. It is rather the process of obtaining individual subfile orders on each water right with the water right owners that requires substantial amounts of time and prolongs the progress of adjudication. Water right owners may be difficult to serve, defendants' objections almost always require that individualized field checks be performed, and the process of resolving any disputes or misconceptions necessitates individualized attention, all of which take time and depend on the cooperation of the defendants and factors outside the State's control.

The Settling Parties also disagree with the statement, in the same paragraph of the Report, that "bifurcating" the adjudication of a water right into two proceedings is a "problem" that "undermines judicial efficiency by creating the possibility that the court might have to resolve the same dispute twice." This conclusion is speculative. The Report points to no adjudication in New Mexico where this "problem" of judicial inefficiency has in fact occurred, and the State is not aware of any such instance. In fact, it is this specific two-step process of first adjudicating

individual subfiles, on a section-by-section basis, followed by a "further hearing to determine the relative rights of the parties, one toward another," that the New Mexico Supreme Court approved as "a reasonable and practical way to accomplish the desired purposes" in *State ex rel. Reynolds v. Sharp*, 66 N.M. 192,196-7, 344 P.2d 943, 947-8 (1959). Therefore, the Settling Parties request that the Court disregard the paragraph containing these views of the adjudication process expressed in the Report.

The Settling Parties must also object to the view asserted by the Report at page 9 that "the court is unable in a subfile proceeding to definitively resolve issues critical to the effective management of New Mexico's water resources." The statutory purpose of an adjudication is to determine all rights to the use of water in a stream system, not to manage the State's water resources. *See* NMSA 1978, Sections 72-4-15 through 19 (1907). In contrast, the management of the State's water resources is specifically under the purview of the State Engineer, who has "general supervision of waters of the state and of the measurement, appropriation, distribution thereof." NMSA 1978, Section 72-2-1 (1907). This broad authority has recently been affirmed by the New Mexico Supreme Court in *Lion's Gate Water v. John D'Antonio*, 2009-NMSC- 057, ¶24. Further, in *State of New Mexico ex rel. Martinez v. Parker Townsend Ranch*, 118 N.M. 780, 781-2, 887 P.2d 1247, 1248-9 (1994) the New Mexico Supreme Court affirmed *Sharp*'s holding that a subfile order is a final order, binding on the parties to the order, for the matters covered within it. "Subfile orders are a declaration of water rights upon which persons rely in the use and transfer of such rights for decades before a final resolution of the universal questions at issue *inter se*." *Id.* at 782. Therefore, an *inter se* proceeding is not necessary in order to definitively resolve issues raised in a subfile proceeding, for the purposes of the State Engineer's administration of the State's water resources.

Further, the Settling Parties strongly object to the characterization that "an expedited *inter se* is nothing more than the consolidation of a subfile proceeding and an *inter se* proceeding into a single proceeding." Report at p. 9. As the Settling Parties have discussed extensively in previous comments, there are at least two different types of expedited *inter se* proceedings under New Mexico water law and practice. *See* Settling Parties' Suggestions on the Special Master's Draft Report and Proposed Order Concerning Joint Motion filed March 5, 2010, pp. 4-6; Settling Parties' Suggestions Concerning Special Master's Proposed Order Mandating the Commencement of an Expedited *Inter Se* Proceeding for the Resolution of All Water Rights Claims of the Navajo Nation filed December 14, 2009, pp. 4-5. In addition to the type of expedited *inter se* proceeding described in the Report, this Court has used a second type of expedited *inter se* in its approval of the Jicarilla Apache settlement. In this second type of *inter se*, the subfile and *inter se* proceedings are not consolidated into a single proceeding. Instead, as in the Jicarilla *inter se*, the subfile issues have already been resolved between the State and the subfile claimant, and rather than waiting for *inter se* to occur in the regular course of the case, the court approves expediting the second step. This is the situation with the Navajo settlement. The subfile issues have been resolved by settlement between and among the Settling Parties and they are asking the Court to commence the second step, the *inter se* phase, now instead of waiting until the end of the case.

The distinction outlined above is very important. In the first type of proceeding, the claims are subject to full-scale litigation by all parties; the State, the subfile defendant and all other participants are entitled to the full range of discovery, motions practice and evidentiary trial on the merits. In the second type of proceeding, both the subfile defendant and the State are bound by the terms and conditions imposed by the subfile phase. Having completed the subfile

phase, a subfile defendant is not required to file a complaint commencing the *inter se* phase. Instead, *inter se* begins by giving all other potential claimants the opportunity to object to the terms and conditions established in the initial phase. If for example a subfile dispute is resolved by settlement, the settling subfile defendant is not then subjected to unlimited litigation by all parties.

2. **Portions of the Report do not correctly characterize the Settling Parties' activities between 1997 and 2009.**

The Report at pages 16 and 17 broadly describes the development of the settlement agreement and the intent of the Settling Parties. As an initial matter, a description of the intent of the Settling Parties is unnecessary to the Report. Further, the Report contains some descriptions that are not based on any representations of the Settling Parties or otherwise described in the record. As a result, the Settling Parties request that the unnecessary descriptions in the Report be disregarded.[1]

It is important for the Court to understand that for more than a decade, the Navajo Nation and the State of New Mexico have worked to secure a settlement between them. The settlement between the Navajo Nation and the State was achieved on April 19, 2005. To be sure, the United States must ultimately be a party to the settlement agreement; however, the United States was not a party to the 2005 agreement. Further, the United States' role in the negotiations was necessarily limited by the fact that Congress had not authorized the United States to resolve the Navajo Nations' water rights in the San Juan River Basin. After April 19, 2005, the Navajo Nation and the State actively worked with Congress to secure the Settlement Act. In the

[1] Specifically, beginning on the bottom page 16 with "According to the Settling Parties, …" and through page 17 to the sentence ending with " ….request that the August 20, 2004 order be vacated.", the Settling Parties request that the text of the Special Master's report be disregarded. In addition, beginning on the bottom of page 18 with the sentence, "The State and the Navajo Nation …" and through page 19 to the sentence ending with "… Appendix 2 Rights was delayed."

meantime, given the high uncertainty associated with the passage of federal legislation, the United States, as trustee for the Navajo Nation, had no choice but to continue to participate in the Navajo San Juan Basin Adjudication as though no settlement had been signed by the Navajo Nation and the State. Ultimately the Settlement Act was signed into law on March 30, 2009, and the United States was authorized to resolve the water rights of the Navajo Nation.

Specifically, the Report at page 17 states "The Settling Parties now represent ... that a hydrographic survey of the Appendix 2 Rights cannot be completed by the October 1, 2010 deadline ...." The Settling Parties have never made the representation that a hydrographic survey performed solely by the United States pursuant to the 2004 Order could not have been completed by the United States by the October 1, 2010. To the contrary, the Settling Parties advised the Special Master that the hydrographic survey (ordered in 2004) could have been completed by October 1, 2010, but the additional requirements of the Settlement Agreement, for State concurrence, require more time.

At page 17, the Report implies that the Settling Parties intentionally withheld information to the detriment of these proceedings:

> They knew at the time (April 19, 2005) that, from their perspective, there was no longer a need for a hydrographic survey of the Appendix 1 Rights. .... It was not until the Settling Parties filed their Joint Motion ... that the Court was alerted to the Settling Parties' position that there was no need for a hydrographic survey ...

Such a description confuses the nature of the hydrographic survey contemplated in the Court's 2004 Order with the hydrographic survey contemplated in Paragraph 4.2 of the Settlement Agreement. The hydrographic survey ordered by the Court in 2004 would have been prepared by the United States in support of a litigation claim on behalf of the Navajo Nation, not in support of a negotiated settlement. Consequently, the State would have no say in the content of

that hydrographic survey. In contrast, the hydrographic survey to be prepared pursuant to the Settlement Agreement must be prepared with approval of the State. If the United States were to file its hydrographic survey by October 1, 2010, this survey would not satisfy the requirements of the Settlement Agreement and serve no obvious purpose. To satisfy the Settlement Agreement, the State must still review and approve the hydrographic survey. Simply put, the Settling Parties did not create or intend to create a delay associated with the hydrographic survey nor have they withheld any information regarding the proceedings.

Prior to 2009, the passage of proposed federal legislation was highly uncertain and, over the course of five years, both the draft legislation and the proposed settlement agreement were subject to revision. The Settling Parties had nothing to inform the Court of before March 30, 2009. Ultimately, within months of the Settlement Act's passage, the Settling Parties came together and submitted their Joint Motion.

3. **Discussion of Standard of Approval in the Report should be deferred.**

As the Special Master's Report correctly recounts, the Joint Motion sought initially to include a statement of standard of approval of the settlement decrees in both the proposed notice and the proposed order governing initial procedures. Because this Court previously established the standard of approval for the Jicarilla Apache settlement decree, the Settling Parties believed re-statement of the standard would be a routine matter. Following questioning by the Special Master at the November 17, 2009 hearing, the Settling Parties agreed that inclusion of the standard in the notice and proposed order is not needed to establish initial procedures for and to give notice of the proposed settlement decrees. The Settling Parties struck the standard of approval provisions from the proposed notice and order submitted on December 15, 2009.

Accordingly, the Settlement Parties believe the discussion of settlement approval standards beginning on the bottom of page 19 and continuing through page 21 of the Report should not be considered at this time. The Settling Parties recognize that the Report cites such legal authority only for the purpose of explaining the need for disclosure of sufficient information for the Court and other parties to perform a limited merits-based review, and not for the purpose of deciding the standard at this time. Nonetheless, the point is made in the Report without this discussion. Because standard of approval was deferred and not fully briefed, consideration of that issue should also be deferred this time. Absence of any comments or objections regarding the discussion of this issue in the Report should not be viewed as concurrence by the Settling Parties at this time.

4. **Until objections are filed, it is unclear whether any discovery will be necessary and what issues will need to be addressed.**

Paragraph 11 of the Proposed Order contemplates the Rule 1-016 Scheduling Order will authorize discovery. The Settling Parties do not concede discovery will be needed and share the view expressed on page 23 of the Report that the Additional Disclosures by the United States and Navajo Nation may be sufficient to evaluate the reasonableness of the settlement. Until objections are filed, we will not know what discovery, if any, will be necessary.

Because objections to the settlement decrees will define the issues before the Court, the Settling Parties believe that a deadline for filing objections should be set very early in the process. In the Jicarilla Apache settlement, the deadline for objections occurred before the Rule 1-016 Scheduling Conference. Paragraph 10 of the Proposed Order contemplates that the deadline for filing objections will occur sometime after the Scheduling Conference. The Settling Parties request that the deadline occur not later than 30 days after the Scheduling Conference and be stated in the Notice.

Respectfully submitted this 30th day of April 2010.

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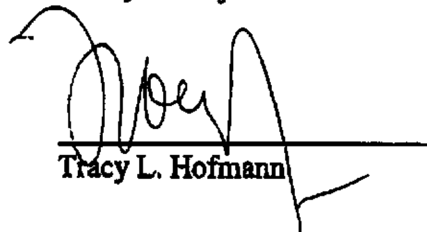
CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the *Settling Parties' Objections to the Special Master's Report Concerning Joint Motion for Order Governing Initial Procedures for Entry of Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* was emailed this ___ day of April 2010 to counsel participating in this subproceeding and by email and to counsel electing email service at: wrattorney@11thjdc.com.



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