

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2011 JAN -3 PM 4:16

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

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
JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

**REPLY TO MOTION TO STRIKE FOOTNOTE 1 OF SPECIAL MASTER'S
NOVEMBER 22, 2010 ORDER**

Plaintiff, the State of New Mexico *ex rel.* State Engineer ("State") by and through its counsel hereby replies to *Gary L. Horner's Response to the OSE's Motion to Strike Footnote 1 of the Special Master's November 22, 2010 Order* ("Response"). The *Response* incorporates "the arguments and reasoning" made in Mr. Horner's November 16, 2010 email to the Special Master and, now that those arguments have been formally pled before the Court, the State hereby replies as follows:

I. The State's Email Correspondence Did Not Constitute an *Ex Parte* Communication Because All Counsel Received The Email

The State's *Motion to Strike Footnote 1 of the Special Master's November 22, 2010* ("Motion") plainly sets forth the State's position that it correctly contacted the Special Master under Rule 1-071.4 NMRA 2010, and the State will not reiterate its argument on that matter in this *Reply*. However, the State notes in response to Mr. Horner's request that Ms. Hofmann be "reprimanded or admonished for *ex parte* communications" that the State's email simply was not

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ex parte. The term *ex parte* refers to a communication in which one party has no notice of the communication by another party to the judge, juror, or other official. See Rule 16-305 NMRA 2010, Rule 21-300(B)(7) NMRA 2010. The State copied all the parties to the Navajo subproceeding in its November 10, 2010 email to the Special Master, so the State, by definition, did not engage in any *ex parte* communication by its email.

In addition, in response to Victor Marshall's email request that the parties be allowed some time to email comments and suggestions to the Special Master, the Special Master did not determine that a motion needed to be filed in order to address the State's suggested procedure. Instead, the Special Master requested that "all counsel who would like to comment on the Settling Parties suggested procedure for finalizing the Notice provide me with their comments by return email (with a copy of [sic] other counsel). . . ." See the November 11, 2010 email from Steve Snyder, attached as Exhibit A. By requesting responses by email, and communicating by email himself, the Special Master did not in any way indicate that he perceived any *ex parte* nature to the email communication. Rather, only after the Special Master had considered the State's email and allowed all involved parties to respond did he suggest in his Order for the first time that the communication should have been made under Rule 1-007 NMRA.

II. The Special Master Should Only Have Considered Mr. Horner's Substantive Request that Counsel for the State be Reprimanded or Admonished If That Request Had Been Made Under Rule 1-007 NMRA


Mr. Horner's November 16, 2010 email to the Special Master stated that "[t]he OSE's present characterization of such procedural issues as merely administrative, such that the OSE should now be able to deal with such issues *ex parte* (simply between the OSE and the Court) without any manner of notice to other affected parties, is outrageous." See the November 16, 2010 email from Gary Horner to the Special Master et al, attached to the *Special Master's Order*

Specifying Procedure for Finalizing Forms of Notice of Navajo Inter Se and Notice of Intent to Participate. Mr. Horner does not cite any rule or law to support his allegation, upon which he bases his request that the State's proposal should be denied, that the State's request should be made by motion, and that Ms. Hofmann should be "reprimanded or admonished for ex parte communications." *Id.* However, the Special Master clearly did not consider the State's email communication to be *ex parte*, and in fact invited counsel to continue to communicate by email. Each participating party's receipt of the State's email communication necessarily precludes a finding that the communication – even if the communication were not allowed under both Rule 1-071.4 NMRA and Rule 21-300(B)7(a) NMRA of the Code of Judicial Conduct – was *ex parte*. Correspondingly, Mr. Horner's request that counsel for the State be reprimanded or admonished is legally unsupported and has no merit.

The Special Master's conclusion that "Mr. Horner's objection is well taken" was in error. It is Mr. Horner's request, that counsel for the State be reprimanded or admonished, that should have been made under Rule 1-007. Rule 1-071.4 allows communications only between the State and the Court, and only then for matters that are administrative or procedural. Mr. Horner's request was neither administrative nor procedural in nature. As a result, the Special Master should not have considered or commented on the relief sought by Mr. Horner in the absence of a motion filed by Mr. Horner.

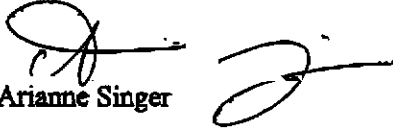
WHEREFORE, the State respectfully requests that the Court strike footnote 1 of the *Special Master's Order Specifying Procedure for Finalizing Forms of Notice of Navajo Inter Se and Notice of Intent to Participate*, and deny any requests for relief in Mr. Horner's November 16, 2010 email, as incorporated in his *Response*.

Respectfully submitted,


 Arianne Singer
 Special Assistant Attorney General
 New Mexico Office of the State Engineer
 P.O. Box 25102
 Santa Fe, NM 87504-5102
 (505) 827-6150
 Attorney for Plaintiff State of New Mexico
ex rel. State Engineer

CERTIFICATE OF SERVICE

I certify that on *January 3*, 2010, a copy of the foregoing paper was served by first class mail on the persons identified below.


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Singer, Arianne, OSE

From: Steve Snyder [sesnyder@a.com]
Sent: Thursday, November 11, 2010 10:24 AM
To: 'Victor R. Marshall'; Hofmann, Tracy, OSE
Cc: Singer, Arianne, OSE; 'John W. Utton'; 'Bidtah Becker'; 'spollack'; 'Guarino, Guss (ENRD)'; 'GARY RISLEY'; 'Gary L. Horner'; 'Maria O'Brien'; 'San Juan Keleher atty'; 'Bradley Bridgewater'; 'Herb Becker'; 'Herb Becker'; shenan.atcity@hklaw.com; 'Jolene McCaleb'; 'Jolene McCaleb'; 'Liz Taylor'; 'Liz Taylor'; crm@keleher-law.com
Subject: RE: Administrative Issue Raised by Judge Wechsler's August 19, 2010 Order (Navajo Nation's Water Rights)

Dear Counsel:

I have read Ms. Hoffman's email memo concerning the Settling Parties suggested procedure for finalizing the Notice of the Navajo Sub-Proceeding and I have Mr. Marshall's request that the other parties be provided with an opportunity to comment on the Settling Parties suggestion.

I request that all counsel who would like to comment on the Settling Parties suggested procedure for finalizing the Notice provide me with their comments by return email (with a copy of other counsel) by the close of business on Tuesday, November 16.

Steve Snyder
 4 Manzano Road
 Corrales NM 87048
 (505) 890-7550
 sesnyder@a.com

From: Victor R. Marshall [mailto:victor@vrmarshall.com]
Sent: Wednesday, November 10, 2010 12:32 PM
To: Hofmann, Tracy, OSE
Cc: Steve Snyder; Singer, Arianne, OSE; John W. Utton; Bidtah Becker; spollack; Guarino, Guss (ENRD); GARY RISLEY; Gary L. Horner; Maria O'Brien; San Juan Keleher atty; Bradley Bridgewater; Herb Becker; Herb Becker; shenan.atcity@hklaw.com; Jolene McCaleb; Jolene McCaleb; Liz Taylor; Liz Taylor; crm@keleher-law.com
Subject: Re: Administrative Issue Raised by Judge Wechsler's August 19, 2010 Order (Navajo Nation's Water Rights)

Special Master Snyder -

We have received Ms. Hoffman's email below, and we would like a little time to consider and make suggestions on the issues she raises. We would request until next Tues or Weds (Nov 16 or 17) for other parties to email you their comments and suggestions.

Regards,
 Victor Marshall

On 11/10/2010 11:46 AM, Hofmann, Tracy, OSE wrote:
 Special Master Snyder,

We write this email under Rule 1-071.4 (instead of filing a motion) concerning an administrative issue we noted right after receiving Judge Wechsler's Order Establishing Initial Procedures for Entry of a Partial Final Judgment and Decree of the Navajo Nation (filed August 19, 2010) ("Order"). The Order creates a timing issue, specifically that the pro

EXHIBIT

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and suggestions on the Notice provided under III (A) in the Order occurs during the 60-day time period that we have to mail and complete publication of the Notice following the filing of the Additional Disclosures. Your April 15, 2010 Report did not contemplate this additional time required for finalizing the Notice and Notice of Intent to Participate. While the Order does specify 10 days after service for the parties to file comments and suggestions, the Order does not provide for a procedure for finalizing the form of Notice once the comments have been filed, so it is not clear when the final form of Notice and Notice of Intent to Participate will be ready for the Settling Parties to begin mailing and publication. These are not small feats, and we will require at least the 60 days provided in your Report to complete them.

As you may know, we are in the process of compiling the mailing list for the Notice. We have spoken about this issue with the other Settling Parties to arrive at the following proposed solution. To resolve the problem, it seems to us that Section III(A) of the Order should be amended to provide for the resolution of any additional comments to the Notice and Notice of Intent to Participate, before the 60 days begin for the parties to mail and publish the Notice. If possible, we would suggest that you enter an order amending the Order to include the following administrative provisions to address the finalization of the Notice and Notice of Intent to Participate:

- Settling Parties serve the proposed forms of Notice and Notice of Intent to Participate on counsel involved in the Navajo proceeding by January 14, 2011
- Section III(A) comments and suggestions by counsel to be filed by January 24, 2011
- Settling Parties file responses to the comments and suggestions by January 31, 2011
- Judge Wechsler holds a final hearing on the Notice and Notice of Intent to Participate on February 7, 2011 to finalize the documents

Judge Wechsler's decision on the final Notice and Notice of Intent to Participate from the February 7 hearing would then be the trigger date for the timelines governing service and publication of the Notice and public meetings under III(B), instead of having the trigger date be the filing of the Additional Disclosures. The Order would also then have to be amended under III(B)(4) and IV(A) to change all trigger dates from the filing of the Additional Disclosures to the Court's entry of the final Notice.

Although the rule provides for us to contact you without notice to the other parties involved in the Navajo subproceeding, we have nevertheless cc'd the other counsel simply to make them aware of this administrative issue.

We look forward to your response.

Tracy L. Hofmann
Special Assistant Attorney General
Office of the State Engineer
(505) 827-6150

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