

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2017 DEC 20 PM 3:29

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

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

Plaintiff,

v.

D-1116-CV-75-184

Hon. James J. Wechsler
Presiding Judge

SAN JUAN RIVER STREAM SYSTEM
ADJUDICATION

THE UNITED STATES OF AMERICA,

et al.,
Defendants,

vs.

JICARILLA APACHE TRIBE and the
NAVAJO NATION,

Defendant-Intervenors.

**CITY OF AZTEC, BLOOMFIELD, AND FARMINGTON'S
RESPONSE TO (1) STATEMENT OF THE STATE OF NEW MEXICO
CONCERNING BRIEFING ON THE FIFTH AMENDED CASE
MANAGEMENT ORDER; AND (2) NAVAJO NATION'S PROPOSED
MODIFICATIONS TO THE FIFTH AMENDED CASE MANAGEMENT ORDER**

COMES NOW the Cities of Aztec, Bloomfield, and Farmington (collectively referred to as "the Cities"), by and through their counsel of record, and submit this Response to (1) Statement of the State of New Mexico Concerning Briefing on the Fifth Amended Case Management Order ("State's Motion"); and (2) Navajo Nation's Proposed Modifications to the Fifth Amended Case Management Order ("Navajo Nation's Motion"). The Cities do not take a position on either the Albuquerque Bernalillo County Water Utility Authority's Brief Concerning the Fifth Amended Case Management Order or the Response of the Middle Rio

Grande Conservancy District to the Order Concerning Briefing on the 5th Amended Case Management Order.

INTRODUCTION

On March 3, 2013, the State filed its original Complaint in this matter, seeking a “statutory adjudication of all known claims, of whatever character, to the right to impound, divert and/or use public waters of the San Juan River Stream System in the State of New Mexico.” See Compl., at 4. The State also recognized that water rights previously adjudicated on April 8, 1948, in Echo Ditch Co. et al., v. The McDermott Ditch Co., et. al., Cause No. 01690, (“Echo Ditch Decree”) are valid, stating:

6. That all known claims to the right to use waters of the said stream system in New Mexico were adjudicated in the final decree of the District court in and for San Juan County, New Mexico in Case No. 01690, the Echo Ditch Co., et al., v. The McDermott Ditch Co., et al., with the exception of the claims of the United States of America on its own behalf and on behalf of its wards, which claims have ever been determined and decreed by any court.

...

9. That the adjudication of all rights to the use of the waters of the San Juan River Stream System in the State of New Mexico, including those previously decreed in the said Cause No. 01690 as they may now exist, relative to the State of New Mexico, to the United States of America, and inter sese, is necessary in

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order to make possible the lawful and orderly administration of all of the public waters of the said stream system in New Mexico.

...

13. That all claimants to the right to impound, divert and/or use public waters of the said stream system in the State of New Mexico will be made known to the Court by the Plaintiff as soon as their names can be discovered, and the said claimants should thereafter be ordered joined as additional parties defendant herein.

Compl., at 2-3.

On June 19, 2003, the Cities filed their Motion and Brief by Cities of Aztec, Bloomfield and Farmington to Preclude the New Mexico State Engineer from "Re-Adjudicating" All Previously Adjudicated Water Rights Claims on the Basis of Res Judicata/Collateral Estoppel ("Cities' 2003 Motion"). The Cities filed the Cities' 2003 Motion because of the State's apparent intent to "re-adjudicate" ground water rights in the San Juan River Stream System, including Echo Ditch Decree rights. See State Engineer's Second Am. Plan for Administrative Data Development to Complete the San Juan River Basin Adjudication, filed April 3, 2003.

The Cities requested that the State Engineer be precluded from "re-adjudicating" water rights claims previously determined by the Echo Ditch Decree, on the grounds that "re-adjudication" of Echo Ditch Decree rights is barred by the doctrines of res judicata and collateral estoppel and New Mexico's statutory framework for adjudications, NMSA 1978, §§ 72-4-15 to 19. The State opposed the Cities' 2003 Motion, in State of New Mexico's, *ex rel.* State

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Engineer's Response to Pleadings Addressing the Issues of Res Judicata, Collateral Estoppel and Issue Preclusion, filed on August 12, 2003 ("State's 2003 Response"). The State argued that the Echo Ditch Decree should be "re-adjudicated." See State's 2003 Response.

The Court subsequently entered an Order on Motions Concerning the Issue of Res Judicata and Collateral Estoppel and Related Matters, on February 2, 2004 ("Court's February 2, 2004 Order"). The Court's February 2, 2004 Order held in part that "The Echo Ditch decree is valid. Those not parties to the Echo Ditch decree are not bound by the Decree." See Court's February 2, 2004 Order, ¶ 1. The Court also denied the Cities' 2003 Motion. Id., ¶ 9.

On February 22, 2008, the Court entered the Fifth Amended Case Management Plan ("5th CMO"). The Court certified certain general categories of water rights claims to be adjudicated within the San Juan River Stream System, including "Surface water irrigation rights that arise under state law and that were formerly adjudicated in the Echo Ditch Decree" and "Surface water domestic and stock water rights that arise under state law and that were adjudicated (but not quantified) in the Echo Ditch Decree." See 5th CMO, at 3, ¶¶ 1 and 2.

On May 20, 2016, the State filed the State of New Mexico's Motion that the Echo Ditch Decree Need Not Be Re-Adjudicated and to Amend the Scope of the February 2, 2004 Order. The State then withdrew this Motion on September 22, 2016.

On September 29, 2017, the Court entered its Order Concerning Briefing on the Fifth Amended Case Management Order, allowing parties to file briefs. Both the State and the Navajo Nation filed their respective Motions, taking different approaches to the Echo Ditch Decree. The State requests that the 5th CMO be "amended to omit the requirement for re-adjudication" of

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Echo Ditch Decree rights and to apparently limit the procedures in the 5th CMO to the application of adjudication of the La Plata. State's Mot., at 2. The State also asserts that it is administering all of the water rights (in the Echo Ditch Decree) according to the adjudication of those rights in the Echo Ditch Decree. *Id.* In contrast, the Navajo Nation requests that the 5th CMO be modified to allow that when applications are filed to transfer water rights previously recognized in the Echo Ditch Decree. Navajo Nation's Mot., at 1.

The Cities concur with the State's Motion in part, insofar as the Cities agree that Echo Ditch Decree rights should not be re-adjudicated. The Cities, however, oppose the State's Motion in part, insofar as it requests that Echo Ditch Decree rights not be considered in this matter. In regard to the Navajo Nation's Motion, the Cities request that the Court allow further briefing and consider the Navajo Nation's proposal that issues about requested transfer of water rights previously recognized in the Echo Ditch Decree be heard by this Court, as opposed to first being heard in an administrative proceeding.

ARGUMENT

I. **The Cities Continue to Assert that the Echo Ditch Decree Should Not Be "Re-Adjudicated."**

The Cities have previously asserted that the Echo Ditch Decree should not be "re-adjudicated." *See* Cities' 2003 Motion; *see* Cities' Reply to the State of New Mexico's, *ex rel.* State Engineer's Response to the Cities' Motion to Preclude the New Mexico State Engineer from "Re-Adjudicating" All Previously Adjudicated Water Rights Claims on the Basis of Res Judicata/Collateral Estoppel, filed on October 1, 2003 ("Cities' 2003 Reply"). The Cities adopt

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by reference their prior arguments, made in both the Cities' 2003 Motion and the Cities' 2003 Reply. See Rule 1-010(C) NMRA (statements in a pleading may be adopted by reference in another motion).

II. The State's Motion Should Be Denied In Part, Insofar as it Requests that this Court Not Consider Echo Ditch Decree Rights Within this Matter, which Concerns the Entire San Juan River Stream System.

The Cities oppose the State's Motion insofar that the State is requesting that this Court not include consideration of Echo Ditch Decree rights, in this case. Water rights are neither created nor obtained via adjudications; they are simply sorted out and affirmed. See N.M. Const. Art. XVI, sec. 3 ("Beneficial use shall be the basis, the measure and the limit of the right of the use of water ..."). Water rights are not to be adjudicated more than once. NMSA 1978, § 72-4-19 (1965) ("Such [water rights] decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods, and place for use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such conditions as may be necessary to define the right and its priority.").

Additionally, "[i]n any suit for the determination of a water right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties." NMSA 1978, § 72-4-17. "This system of general stream adjudications is designed to avoid piecemeal litigation." State v. City of Las Vegas, 2004-NMSC-009, ¶ 58, 135 N.M. 375 (internal citations omitted). "A comprehensive adjudication of water rights is highly important

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... Waters cannot be apportioned according to conflicting decrees or decrees covering less than all claims.” Id. (internal citations omitted).

The Cities are concerned that if the Court modifies the 5th CMO, as requested by the State, it will be contrary to NMSA 1978, § 72-4-17 (1965), because it could result in this case addressing the San Juan River Stream System, without reference to the Echo Ditch Decree. The more reasonable way to handle changes that may have followed the Echo Ditch Decree is to maintain the legal acknowledgement of that adjudication’s results and build upon it in this matter. This principle of maintaining the validity of adjudicated rights and using them as the basis for any further determinations is affirmed in State ex rel. Reynolds v. Allman, 1967-NMSC-078, 78 N.M. 1 and New Mexico v. Parker Townsend Ranch Co., 1994-NMSC-125, 118 N.M. 780. See Allman, 1967-NMSC-078, ¶ 4 (recognizing that decrees as to individual claims were “final and appealable”); see Parker Townsend, 1994-NMSC-125, ¶ 6 (“subfile orders” between individuals and the State are final and appealable). Therefore, the Cities request that the State be obligated to follow a procedure designed to preserve the Echo Ditch Decree and to reasonably carry on the process of formerly assessing water rights in this matter.

III. The Cities Request that the Court Consider the Navajo Nation’s Motion that This Court Hear Issues Regarding Transfer of Echo Ditch Decree Rights.

The Cities request that the Court consider the Navajo Nation’s Motion and determine if this Court may hear issues regarding transfers of Echo Ditch Decree rights, without there first being an administrative proceeding, and determine if it is allowed pursuant to the New Mexico statutory and administrative law. The Navajo Nation’s proposal could potentially expedite this

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entire case, while minimizing overall costs and expenses, by allowing this Court to hear issues regarding transfers of Echo Ditch Decree rights, without parties first having to first go through an administrative proceeding.

The Cities also request that the Court consider the Navajo Nation's Motion in part because the State's current position that the Echo Ditch Decree should not be "re-adjudicated" directly contradicts the position it took in the State's 2003 Response. While the Cities agree that there should not be re-adjudication, the Cities are also concerned about the State's change in position, without any stated basis. If the Court hears issues about transfers of Echo Ditch Decree rights, this could potentially prevent the State from taking a different position on Echo Ditch Decree rights in the future, at the administrative level, without Court oversight.

If the Court does allow the Navajo Nation's proposal and allows the Court to immediately consider issues of transfer of Echo Ditch Decree rights, the Cities request that interested parties be required to comply with certain deadlines and requirements, to be set by the Court, such as the statutory deadlines set forth in in NMSA 1978, § 72-5-5 (1985). See NMSA 1978, § 72-5-5 (1985) ("Any person, firm or corporation or other entity objecting that the granting of the application will be detrimental to the objector's water rights shall have standing to file objections or protests" and objections to applications are to be filed with the state engineer within ten days after the last publication of notice.") This could provide a framework that could minimize cost and expense, while expediting any issues heard by the Court.

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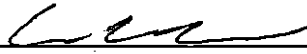
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CONCLUSION

WHEREFORE, for the foregoing reasons, the Cities request that the Court: (1) hold that Echo Ditch Decree rights are not to be "re-adjudicated"; (2) deny in part the State's Motion, insofar as it requests that this Court not consider Echo Ditch Decree Rights; (3) consider the Navajo Nation's Motion and allow additional briefing on the Navajo Nation's Motion; and (4) for such further relief as necessary.

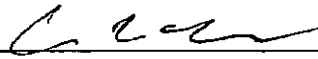
Respectfully submitted,

BROWNSTEIN HYATT FARBER SCHRECK, LLP

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 20, 2017, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of this document to an email sent to the service list: wrattorney-grp@nmcourts.gov.


Cassandra R. Malone

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