

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

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

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

v.

D-1116-CV-75-184

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

San Juan River Adjudication

and

JICARILLA APACHE TRIBE and
The NAVAJO NATION,
Defendant-Intervenors.

NAME OF PARTY: United States of America (United States)

CONSULTATION: N/A

DESCRIPTIVE SUMMARY: Response of the United States to *Statement of the State New Mexico Concerning Briefing on the Fifth Amended Case Management Order (November 3, 2017)* (State's Proposal).

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RESPONSE TO THE STATE'S PROPOSAL

The United States responds here to the State's Proposal. For the reasons provided, the United States opposes the State's Proposal and, in this limited briefing, outlines the basis for its opposition. The United States requests that this Court reject the State's Proposal. To the extent the United States embraces any change to the Fifth Amended Case Management Order, as explained separately in the United States' *Response to the Nation's Proposal, the MRGCD'S Issues of Concern, and the ABCWUA'S Issues of Concern* (December 20, 2017), the United States embraces the proposal of the Navajo Nation.

I. Introduction

The Echo Ditch Decree was issued on April 8, 1948, in *Echo Ditch Company v. McDermott Ditch Company*, (NM 1st Dist. Ct., San Juan County, No. 01690). In that action, the decree established surface water rights between the parties; the United States and many others were not parties to that action and the decree is not binding on those parties not joined.¹ Almost a decade ago, this Court identified the water right claims of the Echo Ditch Decree as “the most significant claims” in this adjudication and made resolving those claims “a first priority” of this adjudication.² Those conclusions remain as true today as they were when issued, but the State’s Proposal ignores them.

Despite the acknowledged importance of the Echo Ditch Decree claims, the State requests that the 5th CMO be modified so that “surface water irrigation rights ... that were formerly adjudicated in the Echo Ditch Decree” be omitted from the 5th CMO and, thus, removed from consideration in this adjudication.³ The State’s Proposal is confounding because it flies in the face of the State’s prior representations to this Court. The State’s *Response to Pleadings Addressing the Issues of Res Judicata, Collateral Estoppel, and Issue Preclusion* (August 12, 2003) (State’s Res Judicata Response) argued at length that the Echo Ditch Decree was highly irregular, had not followed New Mexico’s general stream adjudication statute, and had incorporated “highly inaccurate boundaries and highly inflated acreages and amounts of

¹ *Order on Motions Concerning the Issue of Res Judicata and Collateral Estoppel and Related Matters* (February 2, 2004) (2004 Res Judicata Order).

² *Fifth Amended Case Management Plan* (September 22, 2008) (5th CMO) at 3.

³ CMO Proposal at 1.

water rights.”⁴ Further, the State recognized that a critical component of the decree, the referee’s report detailing each water right, is simply missing and, thus, there is virtually no way for any party in this adjudication to evaluate the claims emanating from that decree.⁵ Thus, based on the State’s previous representations alone, it is questionable how the Court or any party could give any credence to the Echo Ditch Decree. Nonetheless, the State now asks the Court and all parties to do just that.

If the State’s Proposal that the Echo Ditch Decree claims be omitted from this case were adopted, this lawsuit would cease to be a general stream adjudication authorized under New Mexico’s statute (NMSA 1978, § 72-4-15, *et seq.*). The State predicted this very outcome more than a decade ago.⁶ Consequently, embracing the State’s Proposal would result in the United States no longer being bound by this Court because the action would no longer constitute an action to determine “the rights to the use of waters of the river system” under the McCarran Amendment.⁷ Further, the State’s Proposal would constitute a breach of the Navajo Nation Water Right Settlement (2010) (Navajo Settlement Agreement). Finally, the State’s Proposal is unsupported by good cause and would unfairly inflict widespread injury.

⁴ State’s Res Judicata Response at 8 - 10.

⁵ *Id.* at 10.

⁶ *See id.* at 3 (“the legislature has written that the inclusion of all water right claimants is the hallmark of a statutorily valid adjudication.” emphasis added).

⁷ 43 U.S.C. § 666.

II. The CMO Proposal violates 1978 NMSA § 72-4-17.

The State's Proposal would vitiate the entire rationale for this adjudication, which, as the State previously informed this Court, the State initiated in 1975 because of the defects of the Echo Ditch Decree.⁸ Further, removal of the Echo Ditch claims would render this case no longer a general stream adjudication under New Mexico law. NMSA § 72-4-17 requires that "all those whose claim to the use of such waters are of record and all other claimants ... shall be made parties."⁹ This language is unambiguous. All of those who claim a right to use the waters of the stream system, *whether or not they claim pursuant to a previous decree*, must be made parties to the present action. Consistent with this statutory language, this Court specifically ordered that "all parties claiming water rights, whether previously adjudicated or not" shall be joined.¹⁰ Thus, the State's Proposal that "the most significant claims"¹¹ of the Basin be omitted from this adjudication contravenes both the plain language of the governing statute as well as this Court's specific, standing order.

1978 NMSA § 72-4-17 further provides that the state engineer shall "make or furnish a complete hydrographic survey of such stream system ... , in order to obtain all data necessary to the determination of the rights involved."

Again, the statute leaves no discretion. Compliance with the statute requires that the State provide a complete hydrographic survey of the Basin for a determination of all rights in the Basin. In its 2004 Res Judicata Order, this Court specifically

⁸ State's Res Judicata Response at 5 - 10.

⁹ NMSA § 72-4-17 (emphasis added).

¹⁰ See 2004 Res Judicata Order at ¶ 2 (emphasis add); see also *id.* at ¶¶ 7 and 8.

¹¹ 5th CMO at 3.

found that the State “has a statutory obligation to conduct a hydrographic survey [and that s]tate law requires that all parties claiming water rights, whether previously adjudicated or not, be joined in any lawsuit adjudicating the water rights in a stream system.”¹² Thus, the fact that a hydrographic survey may have been attempted in the Echo Ditch litigation¹³ and that the water right claims stem from a prior decree have little bearing on the actions required in this adjudication. Pursuant to statute and this Court’s previous orders, claims based on the Echo Ditch Decree are subject to evaluation and hydrographic survey today.

In short, the State’s Proposal that Echo Ditch Decree claims be omitted from this adjudication must be denied because it contravenes New Mexico’s general stream adjudication statute and the Court’s prior conclusions of law.

III. The United States has not waived its sovereign immunity to suits that do not constitute a New Mexico general stream adjudication.

The United States has appeared before this Court for decades because up until now this suit has constituted a general stream adjudication authorized under state statute. Adopting the State’s Proposal would cast aside the historic, fundamental nature of this suit as a general stream adjudication and deprive this Court of jurisdiction over the United States.

It is well established that the United States is immune from suit unless a specific waiver of the United States’ sovereign immunity exists.¹⁴ In other words, this Court has jurisdiction over the United States only to the extent that sovereign immunity has been expressly waived by

¹² 2004 Res Judicata Order at 1 ¶ 2 (emphasis added).

¹³ State’s Res Judicata Response at 8 - 9.

¹⁴ *United States v. Sherwood*, 312 U.S. 584, 586, 61 S. Ct. 767, 85 L. Ed. 1058 (1941).

Congress.¹⁵ In suits relating to water, the United States' sovereign immunity is waived, if at all, through the McCarran Amendment.¹⁶ The McCarran Amendment waives the United States' immunity for actions to determine "the rights to the use of waters of the river system" but *only* when such suits are "comprehensive water right adjudication[s]."¹⁷ The Supreme Court of New Mexico has recognized that the general stream adjudication statute is the only mechanism by which a "comprehensive water right adjudication" can be held in the State and thus compliance with the adjudication statute is the only means to ensure jurisdiction over the United States.¹⁸

The State's Proposal should be denied because it would remove the Echo Ditch Decree claims – "the most significant claims" in this suit – from this suit. As such, this suit would no longer constitute a general stream adjudication under state statute and this Court would no longer have jurisdiction over the United States.

IV. The State's Proposal Violates the Navajo Settlement Agreement.

Recently, the State, the Navajo Nation, the United States, and others presented the Navajo Settlement Agreement to this Court for approval. After the considerable expenditure of resources and thorough litigation, this Court approved the Navajo Settlement Agreement and entered its *Partial Final Judgment and Decree of the Water Rights of the Navajo Nation* (November 1, 2013) which incorporated the terms of the agreement.

¹⁵ *United States v. Idaho ex rel. Dir., Idaho Dep't of Water Res.*, 508 U.S. 1, 6, 113 S. Ct. 1893, 123 L. Ed. 2d 563 (1993).

¹⁶ 43 U.S.C. § 666.

¹⁷ *United States v. Idaho*, 508 at 8.

¹⁸ *See State ex rel. Reynolds v. Lewis*, 1976-NMSC-001, 88 N.M. 636, 545 P.2d 1014.

Throughout the time the Navajo Settlement Agreement was being negotiated, and as it was being reviewed by first Congress and then this Court, the 5th CMO informed all that the Echo Ditch Decree claims would be addressed in this adjudication and that the State would join all Echo Ditch Decree claim holders to this adjudication. The United States, like other parties, relied on this provision. Indeed, the State expressly, and repeatedly, agreed in the Navajo Settlement Agreement that at a minimum, the Navajo Nation and the United States, acting as the Nation's trustee, could challenge Echo Ditch Decree claims "in the Stream Adjudication" based on, among other things, "forfeiture or abandonment."¹⁹

The impact of the State's Proposal to the Navajo Settlement Agreement is obvious: if embraced, it would constitute a breach of the agreement. By its terms, the State's Proposal would unilaterally prevent the United States and the Navajo Nation from challenging Echo Ditch Decree claims in this adjudication in clear contravention of section 9.6 of the agreement.

The Court should not countenance any proposal that constitutes a breach the Navajo Settlement Agreement that this Court approved and incorporated into its related decree. The Court should reject the State's Proposal.

V. Good Cause Has Not Been Established to Alter the 5th CMO.

Finally, in presenting the analysis above of the legal consequences that would result from the State's Proposal, the Court should not lose sight of the injury that the State's Proposal would impose if embraced. First, the State's Proposal would unilaterally harm the interests of thousands of water users throughout the Basin. At its core, the State seeks the ability to administer as rights all potential Echo Ditch Decree claims against *all* other water users of the Basin whether or not

¹⁹ Navajo Settlement Agreement § 9.6.

they had been parties to the Echo Ditch litigation. Thousands of water users would effectively be subject to the senior Echo Ditch Decree claims without any opportunity for challenge.

Second, it goes without saying that once a scheduling order is issued, the Court and parties marshal resources to meet the short and long term goals of the order. The past expenditure of resources are threatened when the course of a case is changed by an alteration to a scheduling order. Here, numerous parties have already committed extensive resources based on the fundamental structure of this adjudication proceedings as articulated in the 5th CMO. As outlined above, for the better part of the past decade, parties spent considerable time and resources negotiating and litigating the Navajo Nation Settlement Agreement to resolution in express reliance on the 5th CMO's instruction that Echo Ditch Decree claims would be addressed in this adjudication as a first priority. The State's Proposal fundamentally jeopardizes this past expenditure of resources.

With such widespread potential injury apparent, it becomes self-evident why the ability to modify a scheduling order is limited. Under New Mexico law, the terms of a scheduling order can only be changed upon a showing of good cause for the change and a showing that the change will not result in unfairness or injustice.²⁰ A showing of good cause is particularly appropriate here where the 5th CMO was developed through the active participation of the Court and numerous parties, including the State, and has governed this proceeding for so long. Despite suggesting a radical departure from the measured, phased-approach of the 5th CMO, the State

²⁰ Rule 1-016(B) NMRA; *see also, Reaves v. Bergsrud*, 1999-NMCA-075, 127 N.M. 446, 982 P.2d 497, 501.

has offered no reason at all – much less good cause – for the Court to do so. Also, the State has simply ignored the injury that will necessarily result from its Proposal.

For these reasons alone, the State's Proposal should be rejected.

VI. Conclusion

For all the reasons articulated above, the Court should reject the State's Proposal.

Respectfully submitted this 20th day of December, 2017.

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CERTIFICATE OF SERVICE

I certify that I have caused a copy of the above to be served by E-mail to all Counsel on the Electronic Service List for D-1116-CV-7500184, and to wmnavajointerse@nmcourts.gov, on December 20, 2017.

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