

DISTRICT COURT  
SAN JUAN COUNTY NM  
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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.

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| <p><b>NAME OF PARTY:</b> United States of America (United States)</p> <p><b>CONSULTATION:</b> N/A</p> <p><b>DESCRIPTIVE SUMMARY:</b></p> <p>Response of United States to <i>Navajo Nation's Proposed Modification to the Fifth Amended Case Management Order</i> (November 3, 2017) (Nation's Proposal);</p> <p>Response of United States to <i>Response of the Middle Rio Grande Conservancy District to the Order Concerning Briefing on the 5<sup>th</sup> Amended Case Management Order</i> (November 3, 2017) (MRGCD Issues of Concern); and</p> <p>Response of United States to <i>Albuquerque Bernalillo County Water Utility Authority's Brief Concerning the Fifth Amended Case Management Order</i> (November 3, 2017) (ABCWUA Issues of Concern)</p> <p><b>NUMBER OF PAGES:</b> 10</p> <p><b>DATE OF FILING:</b> December 20, 2017</p> |
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**RESPONSE TO THE NATION'S PROPOSAL, MRGCD'S ISSUES OF CONCERN, AND  
ABCWUA'S ISSUES OF CONCERN**

The United States responds to the Nation's Proposal, MRGCD's Issues of Concern, and ABCWUA's Issues of Concern.

United States' Response to the Nation's Proposal and the MRGCD's/ABCWUA's Issues of Concern

The United States requests that the Court embrace the Nation's Proposal and that the Court order further briefing on the procedural steps that should be followed to pursue subfile actions on any identified Echo Ditch Decree water right claim in the future. Also, the United States requests that the Court order further briefing on the merits of further amending the *Fifth Amended Case Management Plan* (September 22, 2008) (5th CMO) to initiate an expedited *inter se* process for all Echo Ditch Decree water right claims that have been subject to administrative action by the New Mexico State Engineer since 1948.

The United States requests that the Court take no action on the MRGCD and ABCWUA Issues of Concern.

#### **I. Response to the Nation's Proposal**

The Nation proposes to amend the 5<sup>th</sup> CMO so that this Court can address Echo Ditch Decree claims now on a limited basis and only to the extent that an Echo Ditch Decree claimant voluntarily seeks administrative action in the future. Specifically, the Nation proposes that in the event administrative action is sought, the State would be required to join the Echo Ditch Decree claimant to this adjudication and a corresponding subfile action would be initiated. Subsequently, the Echo Ditch Decree claim would be expeditiously determined for the purposes of this adjudication and to the extent any party objected to the claim, such objections would be heard and resolved. The Nation's Proposal has significant merit and should be embraced by the Court.

Since approximately March 2014, the State has repeatedly expressed that it was without resources to comply with the 5<sup>th</sup> CMO and has even claimed that given the resources currently

dedicated to this adjudication, centuries would be required to complete the adjudication.<sup>1</sup> Today, the State goes so far as to make the remarkable proposal that Echo Ditch Decree claims simply be omitted from this adjudication.<sup>2</sup> Nevertheless, whether the State can address all Echo Ditch Decree claims in this adjudication, the fact remains that joining all Echo Ditch Decree claimants to this adjudication will take focused effort and time of the State.<sup>3</sup> In the meantime, persons claiming rights under the Echo Ditch Decree continue to voluntarily seek administrative action of the State Engineer outside of these proceedings.

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<sup>1</sup> See *Status Report on Completing the San Juan River Stream System Adjudication* (February 14, 2017).

<sup>2</sup> *Statement of the State [sic] New Mexico Concerning Briefing on the Fifth Amended Case Management Order* (November 4, 2017). As explained in the *United States' Response to the State's Proposal* (December 20, 2017), the State's Proposal is both contrary to New Mexico's general stream adjudication statute, NMSA 1978, § 72-4-17, *et seq.*, to this Court's previous findings, and to the Navajo Nation Water Right Settlement (2010).

<sup>3</sup> The claim that this adjudication will take centuries to complete reveals either the State's fundamental inability or unwillingness to complete this adjudication. To the extent that the Court will order the State to take any action in this adjudication, it may be necessary to hold an evidentiary hearing regarding the States' contentions that, heretofore, have been the representations of counsel.

Echo Ditch Decree claims are “the most significant claims” of this adjudication<sup>4</sup> and are of dubious origin;<sup>5</sup> understandably, they are of great concern to many including the United States. Specifically, long-unused Echo Ditch Decree rights have a tendency to “spring” back to life after their long period of non-use would otherwise result in abandonment/forfeiture under New Mexico law.<sup>6</sup> Pursuant to New Mexico’s general stream adjudication statute, NMSA § 72-4-17, all Echo Ditch Decree claimants must be joined to this adjudication; this principle has been specifically embraced by the Court.<sup>7</sup> And, under the Navajo Water Rights Settlement, the Nation and the United States, as the Nation’s trustee, have the express right to raise appropriate abandonment/forfeiture challenges to eligible Echo Ditch Decree claims.<sup>8</sup> All other parties to this adjudication, as well, have the right to raise challenges to any right claimed under the Echo Ditch Decree.

The advantages of the Nation’s Proposal are obvious and immediate: 1) Echo Ditch Decree claimants can be joined as needed and in the immediate future; 2) the State will not be burdened with the immediate responsibility of identifying any Echo Ditch Decree claimants because only those who voluntarily self-identify and seek administrative action need be joined in the immediate future; 3) the Court and the parties can timely address the most pressing Echo

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<sup>4</sup> 5th CMO at 3.

<sup>5</sup> State’s *Response to Pleading Addressing the Issues of Res Judicata, Collateral Estoppel, and Issue Preclusion* (August 12, 2003) at 8 - 10.

<sup>6</sup> See Nation’s Proposal at 3 - 4.

<sup>7</sup> *Order on Motions Concerning the Issue of Res Judicata and Collateral Estoppel and Related Matters* (February 2, 2004) (2004 Res Judicata Order).

<sup>8</sup> Navajo Water Right Settlement at § 9.6.

Ditch Decree rights, *i.e.*, those rights whose use is being contemplated today; 4) by taking up the Echo Ditch Decree claims in this adjudication, challenges to the claims can be expeditiously resolved and will be binding on the parties to this adjudication (unlike administrative proceedings initiated outside this adjudication, which would not be binding on the parties to this adjudication); and 5) given that the Echo Ditch Decree claims are the “the most significant claims” of this adjudication,<sup>9</sup> the Court can ensure that the most immediately pressing of the most significant claims can be addressed in this adjudication.

The only pause the United States has in embracing the Nation’s Proposal is that the proposal is presented without the Nation first articulating sufficient basis for the change; the Nation’s Proposal presumes without discussion that sufficient basis exists to change the 5th CMO as the Nation suggests. Under New Mexico law, scheduling orders, once established, are not to be changed absent a party establishing good cause for the change and that the change will not result in unfairness or injustice.<sup>10</sup> Nevertheless, although the Nation does not expressly address this requirement, the United States believes that the record before the Court plainly establishes that good cause exists for the Nation’s Proposal and that no unfairness or injustice will result from the Nation’s Proposal.

As the Court is aware, the 5th CMO was issued in 2008. Yet since then, and except for the water rights of the La Plata section, “the most significant claims” of this adjudication have gone unaddressed. But, throughout that time Echo Ditch Decree claims continue to arise in the

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<sup>9</sup> 5th CMO at 3.

<sup>10</sup> Rule 1-016(B) NMRA; *see also, Reaves v. Bergsrud*, 1999-NMCA-075, 127 N.M. 446, 982 P.2d 497, 501.

administrative context and are known by the State to be subject to this adjudication. The State ignores the undeniable, inseparable connection between its administrative actions and this decades-old adjudication. And, as detailed by the specific experiences of the Nation, unless a party takes on the additional, duplicative expense of tracking administrative requests, investigating every request, and intervening in the administrative process as a protestor, Echo Ditch Decree claims that should otherwise be rejected are administratively approved and given the *imprimatur* of legitimacy.<sup>11</sup> These circumstances establish the need for this Court to address in this adjudication those Echo Ditch Decree claims that are voluntarily brought to the attention of the State, but for no justifiable reason remain outside of this adjudication.

Further, by joining Echo Ditch Decree right claimants to this adjudication on an as-needed basis, no party can suffer unfairness or injustice. By statute and standing Court order, the State is already required to join Echo Ditch Decree Claimants to this adjudication.<sup>12</sup> And, only a limited number of Echo Ditch Decree claims are voluntarily presented to the State for administrative action. These very same claimants can suffer no injury because they are already required to be joined to this adjudication. Further, after being advised of this adjudication, these same claimants can, and should, be permitted to voluntarily withdraw their request for administrative action if they do not wish to participate in this adjudication at this time. Finally, the Nation's Proposal does not constitute a "stream system issue" as contemplated by NMRA, Rule 1-071.2.A; the resolution of the Nation's Proposal does not "directly affect the water rights

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<sup>11</sup> See e.g., Nation's Proposal at 3 - 4.

<sup>12</sup> NMSA 1978, § 72-4-17 and 2004 Res Judicata Order at ¶ 2.

of all or a significant number of water rights claimants.” At best, the Nation’s Proposal will affect only a self-selecting few claimants holding a specific, but important, claim.

In the end, the Nation’s Proposal holds great merit. It presents a measured, needed change to the 5th CMO that addresses a longstanding, real, and immediate concern. The Court should embrace the Nation’s Proposal and modify the 5th CMO as requested by the Nation.

**II. Additional Briefing on Initiating an Expedited *Inter Se* for Echo Ditch Decree Claims That Have Been the Subject of Administrative Action.**

In the United States’ Response to the State’s CMO Proposal (December 20, 2017), the U.S. establishes that the Echo Ditch Decree claims must be brought into this adjudication to satisfy the New Mexico general stream adjudication statute, this Court’s previous orders, and the Navajo Settlement Agreement. As stated above, the Nation’s Proposal is a measured, needed change to the 5th CMO that specifically addresses critical interests and affects the least number of concerned parties. But the Nation’s Proposal is limited to addressing yet-to-be-identified Echo Ditch Decree claims for which administrative action might be sought in the future. Missing from the Nation’s Proposal is any consideration of the Echo Ditch Decree claims that have been brought to the State Engineer for administrative action since 1948. These claims are important in their own right as they have largely been transformed from their original irrigation purpose and they are specifically relied on today by water users. It is imperative that these claims be brought into this adjudication as well. This Court should have the parties address the merits of initiating an expedited *inter se* proceeding to address and resolve these known Echo Ditch Decree water right claims.

Rule 1-071.2.B, NMRA permits this Court to initiate an expedited *inter se* to resolve a water right claim if resolution of such claim (or category of claims) would “promote judicial

efficiency and [the] expeditious completion of the adjudication.” This process is familiar to this Court and the parties here as this process was utilized to resolve Navajo Nation water rights.

The New Mexico Office of the State Engineer maintains records of the administrative action it has taken in the Basin, and from its records, it can specifically identify the Echo Ditch Decree claims (and parties) that have been subject to previous administrative action outside of this adjudication. The United States understands that since the Echo Ditch Decree issued and at the behest of various Echo Ditch Decree claimants, State administrative action has occurred approximately 100 times regarding these water right claims. The United States further understands that these claims are now largely held and currently exercised by municipal water suppliers of the San Juan River Basin (*e.g.*, the City of Farmington). The point here is simply that the subject of the expedited *inter se* process that the United States proposes is a small, finite, readily identifiable number of Echo Ditch Decree claims.

Like water right claims from the Echo Ditch Decree that might arise in the future through transfer, these water right claims that have been subject to past administrative action constitute a critical component of the “most significant claims” in this Basin.<sup>13</sup> In fact, these Echo Ditch Decree water right claims likely have the largest impact on water users in the Basin as these claims likely have regular use today.

The United States identified these Echo Ditch Decree claims as a potential subject for modifying the 5th CMO and an expedited *inter se* process only after fully considering the Nation’s Proposal. As such, no party has been given the opportunity to address whether the 5th CMO should be further modified to incorporate an expedited *inter se* process as provided for by Rule 1-071.2.B, NMRA. Using the procedures previously embraced in *Order Concerning*

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<sup>13</sup> 5th CMO at 3.



*Briefing on the Fifth Amended Case Management Order* (September 29, 2017), this Court should direct that the United States submit a proposal to amend the 5th CMO as outlined here and give other parties the opportunity to respond to the proposal presented.

### III. Response to the MRGCD's / ABCWUA's Issues of Concern

Finally, the MRGCD's Issues of Concern and the ABCWUA's Issues of Concern both identify longstanding issues of concern that they believe are implicated by the 5<sup>th</sup> CMO. But these Issues of Concern are not responsive to the Court's *Order Concerning Briefing on the Fifth Amended Case Management Order* (September 29, 2017). The District and the Authority make no proposal that the 5th CMO be amended and instead ask only that the longstanding issues they identify be addressed in this adjudication. The 5<sup>th</sup> CMO already contemplates that those issues will be addressed in the course of this general stream adjudication at the appropriate time. Therefore, no change to the 5th CMO should be made as a result of these Issues of Concern.<sup>14</sup>

### IV. Conclusion

For the reasons articulated in the paragraphs above, the Court should modify the 5th CMO as requested by the Navajo Nation. Subsequently, the Court should instruct the State and the active parties to this adjudication to prepare and present a proposed standing scheduling order that would establish a process to expeditiously open, evaluate, and resolve any subfile action for an Echo Ditch Decree claimant seeking administrative action from the State on their claim. Further, the Court should direct the United States to submit a proposal to amend the 5th CMO to

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<sup>14</sup> Consistent with the Court's Order, the United States does not address the merits of the contentions underlying MRGCD's and ABCWUA's Issues of Concern.

address the merits of initiating an expedited *inter se* process for Echo Ditch Decree claims that have previously been subject to state administrative action.

For the reasons articulated in the paragraphs above, the Court should take no action on the MRGCD's Issues of Concern and the ABCWUA's Issues of Concern.

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 wmavajointerse@nmcourts.gov, on December 20, 2017.

/s/ Andrew "Guss" Guarino  
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