

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, <i>ex rel.</i> STATE)	
ENGINEER,)	
)	
Plaintiff,)	CASE NO. 66cv6639 MV/WPL
)	
v.)	
)	
R. LEE AAMODT, <i>et al.</i> ,)	
)	
Defendants.)	
)	
and)	
)	
UNITED STATES OF AMERICA)	
PUEBLO DE NAMBE,)	
PUEBLO DE POJOAQUE)	
PUEBLO DE SAN ILDEFONSO,)	
and PUEBLO DE TESUQUE,)	
)	
Plaintiffs-in-Intervention)	
_____)	

**PLAINTIFFS-IN-INTERVENTION RESPONSE OPPOSING
DEFENDANT-OBJECTORS’ MOTIONS FOR EXTENSION OF TIME AND
MODIFICATION OF CASE MANAGEMENT ORDER [DOCS. 9915 AND 9916]**

The United States and the Pueblos of Nambé, Pojoaque, San Ildefonso and Tesuque (collectively, the “Pueblos”), oppose the two motions seeking an extension of time to respond to the briefs filed in support of the *Settlement Agreement* (Apr. 19, 2012) (Doc. 7970-1) (“Settlement Agreement”), pursuant to the briefing deadlines established by the Court. *See Defendant-Objectors Motion for Extension of Time and Modification of Case Management Order* (Nov. 8, 2014) (Doc. 9915) (“Group 1 Objectors Motion”); *Defendant-Objectors Motion for Extension of Time and Modification of Case Management Order* (Nov. 10, 2014) (Doc. 9916) (“Atencio Group Motion”) (collectively, the “Motions” filed by “Movants”). The Motions ask

the Court to enlarge a deadline set in the Court's *Case Management and Service Order* (Aug. 8, 2014) (Doc. 9506) ("Case Management Order"). In the Case Management Order, the Court established a deadline for parties who filed an objection to the Settlement Agreement and the *[Proposed] Partial Final Judgment and Decree of the Water Rights of the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque* (Oct. 2, 2013) (Doc. 7970-3) and the *[Proposed] Interim Administrative Order* (Oct. 2, 2013) (Doc. 7970-2) (collectively "Proposed Partial Final Judgment and Decree") to file responses to briefs supporting the Settlement Agreement: briefs must be filed within 150 days of the date of the Case Management Order, or 60 days after the date briefs in support of the Settlement Agreement were filed. *See* Case Management Order at 7.

Good cause must be established before any change can be made to the Case Management Order and movants present none to justify their request. The Court should deny the Motions and require that all briefs objecting to the Settlement Agreement be filed within the time period established by the Case Management Order.

I. Background.

Pursuant to the *Court's Order to Show Cause and Notice of Proceeding to Approve Settlement Agreement and Enter Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Nambé, Pojoaque, San Ildefonso, and Tesuque* (Dec. 12, 2013) (Doc. 8035) ("Order to Show Cause"), approximately 700 objections to the Settlement Agreement were filed with the Court. *See* Case Management Order at 1-2. As required by the Court's *Memorandum Opinion and Order* (May 24, 2007) (Doc. 6236) and the Order to Show Cause, the Settling Parties filed proposed case management orders. *See State of New Mexico, Santa Fe County, and the City of Santa Fe Joint Motion for Entry of Case Management and Service Order* (May 7, 2014) (Doc. 9409); *United States' and Pueblos' Notice of Proposed Case Management*

Order (May 7, 2014) (Doc. 9411) (“Notice”). In order to provide an orderly and equitable process for the Court’s consideration of the Settlement Agreement and Proposed Partial Final Judgment and Decree and any objections thereto, the United States and Pueblos proposed that briefs filed in support of the Settlement Agreement should be filed 90 days after entry of the Case Management Order, and briefs on objections to the Settlement Agreement be filed 150 days after entry of the Case Management Order. *See* Notice Ex. A, at 6.

In response to the United States’ and Pueblos’ proposal, the Atencio Group filed objections to the briefing deadlines in the proposed case management orders. *See Response to Joint Motion for Entry of Case Management and Service Order and the United States’ and Pueblos’ Notice of Proposed Case Management Order* at 11 (May 21, 2014) (Doc. 9428) (“In light of the huge disparity in resources, Objectors request 120 days from the filing of any brief by a Plaintiff party regarding the resolution of the objections to file a response.”); *id.* at 3 (referring to the proposed time period for responses as “prejudicially short”). The Group 1 Objectors filed objections to the proposed case management orders, but did not address the briefing deadlines. *See Defendants’ Response in Opposition to Plaintiffs’ Joint Motions for Entry of Case Management and Service Order and Notice of Threshold Issues* (May 21, 2014) (Doc. 9430). After consideration of proposed case management orders and objections thereto, the Court entered the Case Management Order. The Court set a deadline of 150 days after entry of the Case Management Order for filing of briefs objecting to the Settlement Agreement, or 60 days after the filing of briefs in support of the Settlement Agreement. Case Management Order at 7-8. No party moved the Court to reconsider that deadline.

In accordance with the Case Management Order, four briefs were filed in support of the Settlement Agreement on November 6, 2014: the *United States’ and Pueblos’ Memorandum of*

Points and Authorities in Support of Entry of Partial Final Judgment and Decree (Nov. 6, 2014) (Doc. 9910); *The Rio de Tesuque Association, Inc.’s Memorandum in Support of Settlement Agreement and Entry of a Partial Final Decree on the Pueblos’ Rights* (Nov. 6, 2014) (Doc. 9911); *Certain Non-Pueblo Defendants’ Memorandum in Support of Entry of Partial Final Judgment and Decree Incorporating Settlement Agreement and Adjudicating Pueblos’ Water Rights* (Nov. 6, 2014) (Doc. 9912); and *State of New Mexico, Santa Fe County, and City of Santa Fe’s Joint Memorandum in Support of Settlement* (Nov. 6, 2014) (Doc. 9913) (collectively, the “Briefs in Support”). Not surprisingly, given the number and wide range of objections presented, the page-length of two of the Briefs in Support approached, but did not exceed, the Court’s page limitation. *See* Case Management Order at 4-5 (setting a 75-page limit per brief). With Briefs in Support filed on November 6th, the deadline for response briefs is January 5, 2015.

II. Objections to the Response Deadline and Case Management Order.

The Motions now seek an extension of time to respond to the Briefs in Support. Instead of filing any motion for extension of the Court’s briefing schedule immediately after the Case Management Order issued (either as an original motion or as a motion for reconsideration on this point), Movants chose to wait until after November 6th to file their Motions. Nothing in the Briefs in Support raises nor addresses any unexpected issue nor are the briefs any longer than anticipated.

The Group 1 Objectors give three reasons to extend the deadline for responsive briefs: (1) the briefing schedule is “unfair to objecting parties” because the parties favoring the Settlement Agreement had 90 days following entry of the Case Management Order to file opening briefs, and have the opportunity to file a reply; (2) the purported existence of draft

legislation for the upcoming New Mexico Legislature's 2015 session "that directly impacts and would serve to clarify issues pending before this Court"; and (3) allowing the parties objecting to the Settlement Agreement, most of whom are not represented by counsel, 150 days to respond to briefs supporting the Settlement Agreement "will not cause any undue prejudice to the parties and may serve to allow for time for further resolution or clarification of issues between the settling and objecting parties." Group 1 Objectors Motion ¶¶ 1-3. Of the three grounds articulated, the first and the third certainly existed at the time the Court was considering the Case Management Order and these circumstances remain unchanged. Only the second, concerning possible state legislation, appears that it may or may not have existed in August (separately addressed in subsection III.B, below).

The Atencio Group Motion adopts the reasons set forth in the Group 1 Objectors Motion, and also requests an extension of time until the Court rules on objections filed to the *Special Master's Order Denying Defendants Melissa Ortiz and Darren Quintana's Motion for Summary Judgment and Granting Plaintiff the State of New Mexico's Motion for Summary Judgment on the Claims of Melissa D. Ortiz and Darren B. Quintana under Subfile PM-68445* (Feb. 28, 2014) (Doc. 8140) ("Special Master Ortiz/Quintana Order").¹

¹ The Special Master Ortiz/Quintana Order addressed objections to the amount of water use permitted by a single permit issued by the New Mexico Office of the State Engineer, and resolved the issue based on a stipulation of the parties. *Id.* at 9-11, 16. The Special Master rejected the takings and due process objections arguments made by Ms. Ortiz and Mr. Quintana. *Id.* at 13. Objections to the Special Master Ortiz/Quintana Order have been filed, the objections were pending long before the Case Management Order issued, but the Court has not yet ruled on the objections.

III. Argument.

A. The Court's scheduling order is fair and reasonable, and any objections to the deadlines are untimely or have already been addressed.

The Court established the deadlines in the Case Management Order after considering several briefs addressing deadlines. Included among the briefs the Court considered was a brief from the Atencio Group that objected to the briefing deadlines, and a brief from the Group 1 Objectors, that did not. Most if not all of the circumstances articulated to justify an extension of time existed before the Case Management Order issued and nothing presented in the recently filed Briefs in Support can be considered so unexpected as to justify an extension at this late date. The Court should reject the Motions' belated complaint to the deadlines as "unfair" and their corresponding request for an extension of time. *See* Group 1 Motion, ¶¶ 1, 3.

The Case Management Order is a scheduling order that "may be modified only for good cause . . ." Fed. R. Civ. P. 16(b)(4).

The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements. Thus, . . . the Court may grant leave to modify the pretrial schedule . . . under Rule 16(b) only if the schedule cannot reasonably be met despite the diligence of the party seeking the extension. Moreover, carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.

Rowen v. New Mexico, 210 F.R.D. 250, 252 (D.N.M. 2002) (internal quotation marks and citations omitted). "If [the party seeking a modification] was not diligent, the inquiry should end." *ACC Consultants, Inc. v. Logistics Health, Inc.*, No. CIV. 09-1145 JP/RHS, 2011 WL 5212262, at *4 (D.N.M. Feb. 25, 2011) (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.1992)); *see also In re Bayer Healthcare & Merial Ltd. Flea Control Products Mktg. & Sales Practices Litig.*, 752 F.3d 1065, 1073 (6th Cir. 2014) (rejecting a motion

to modify a case management order because, *inter alia*, the moving parties “failed to object” to the order).

The circumstances that Movants rely on for an extension largely, if not completely, existed before the Case Management Order issued. Both objecting groups had the opportunity to propose an alternate scheduling order prior to the Court’s entry of the Case Management Order, but failed to do so. Indeed, the Group 1 Objectors did not file any objection to the deadlines proposed by the Settling Parties with respect to case management. Now, both groups of objectors fail to identify any additional “good cause” for a modification of the Case Management Order. There is no showing of new or heretofore unknown circumstances that any of the objectors cannot meet the Court’s deadline despite diligent efforts. *See Rowen*, 210 F.R.D. at 252.

The Motions both focus on the 60 days to file a brief in support of their objections, because this is the amount of time between the briefs filed on November 6th and the Objectors’ briefs. This focus, however, is inappropriate. It ignores that the burden of proof is, and has been long known to be, on the Objectors to demonstrate that the Settlement Agreement is “not fair, adequate, or reasonable.” May 24, 2007 Order at 6-7 (“Placing the burden of proof on the objectors implements the policy considerations of encouraging voluntary resolution of lawsuits . . .”). By April 7, 2014 the Objectors were required to state their objections in a legally cognizable way. Accordingly, irrespective of what the briefs filed on November 6, 2014 articulated, the Objectors have long known the reasons supporting their objections and that they would be required to establish and defend their objections to the Settlement Agreement. No reason exists why the Objectors cannot articulate a response to Briefs in Support within the time period established in the Case Management Order. If anything, it is those supporting the

Settlement Agreement who may be disadvantaged by the Court's briefing schedule: they will have only 30 days to respond to briefs of the Objectors, which could number in the hundreds. However, those supporting the Settlement Agreement raise no complaint to the briefing schedule, as no legitimate basis exists for its change at this time. Those supporting the Settlement Agreement are committed to taking the necessary steps to meet the Court's briefing schedule. The Motions, therefore, do not demonstrate "good cause" to modify the Case Management Order and should be dismissed.

Furthermore, an extension of the deadline would cause great prejudice to the Settling Parties. *See Magoffe v. JLG Indus., Inc.*, No. CIV. 06-0973 MCA/ACT, 2008 WL 2883152, at *1 (D.N.M. May 7, 2008) (stating that "[p]rejudice to the adverse party is also a factor to be considered" when considering whether to modify a scheduling order, and denying a motion to modify because to do so would be "unfairly prejudicial"). As the Court is well aware, Congress has set a deadline of September 15, 2017, for conditions precedent to occur, including the entry of a final decree in this matter. Aamodt Litigation Settlement Act, Pub. L. No. 111-291, § 623(a)(2), 124 Stat. 3064, 3134-56 (2010) ("Settlement Act"). If these conditions precedent are not met, Congressional authorization for the Settlement Agreement will be withdrawn. Extending the Court's briefing deadlines creates a risk of impairment to the ability of the parties and the Court to meet that deadline, causing great prejudice to the parties.

B. A stay for the duration of the 2015 Legislative Session would not be in accordance with law and therefore would be futile.

Group 1 Objectors provide no evidence in support of their bald assertion that "there is proposed draft legislation for the upcoming New Mexico Legislative Session that directly impacts and serve to clarify issues pending before this Court." Group 1 Objectors Motion at 2 ¶ 2. No information was presented concerning when the possibility of legislation became known and

what this proposed legislation might entail. Nevertheless, it is apparent that Group 1 Objectors assert the impossible and this Court should quickly dispense with the notion that any anticipated state legislation can affect any pending matter before the Court.

Article IV, Section 34 of the New Mexico Constitution states, “No act of legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.” The plain language of this Constitutional provision refutes the argument in the Motions, seeking additional time to file responses because the 2015 New Mexico Legislative Session may result in a law that affects this litigation. *See* Group 1 Objectors Motion, ¶ 1. As a matter of law, such an event cannot occur.

The purpose of Article IV, Section 34 “is to prevent legislative interference” in cases that have not been brought to a final judgment. *Stockard v. Hamilton*, 180 P. 294, 295 (N.M. 1919).

This provision of the Constitution was inserted for the purpose of curing a well-known method, too often used in the days when New Mexico was under a territorial form of government, to win cases in the courts by legislation which changed the rules of evidence and procedure in cases which were then being adjudicated by the various courts of the state.

Id.; *see also State v. Stanford*, 94 P.3d 14, 17 (N.M. Ct. App. 2004) (holding Article IV, Section 34 precluded application of an amendment to a statute to a pending case, because application would affect “a right or remedy of the State”). There is no doubt that this case has been “pending” since it was filed in 1966. As such, Article IV, Section 34 prohibits the application of a new statute that would affect the rights or remedies of any party, and therefore extending the briefing deadline to determine if any such legislation is passed is futile.

C. The Special Master Ortiz/Quintana Order does not present issues that must be resolved before briefing may continue.

Finally, the Atencio Group Motion also argues that the deadlines in the Case Management Order should be modified so that briefs objecting to the Settlement Agreement

need not be filed until the Court has ruled on exceptions to the Special Master Ortiz/Quintana Order, because “the rulings may likely have an effect on the issues relating to the objections to the settlement agreement and having guidance on that very critical issue would promote judicial efficiency.” Atencio Group Motion at 2. As described above, this circumstance certainly existed prior to the Case Management Order’s issuance. Nevertheless, were the Court to consider further this circumstance, the Court should also reject this argument.

The Special Master observed that the summary judgment motions “do not arise directly from the Settlement Agreement.” Special Master Ortiz/Quintana Order at 2. The Special Master Ortiz/Quintana Order addressed objections to the amount of water use permitted by a single permit issued by the New Mexico Office of the State Engineer, and resolved the issue based on a stipulation of the parties. *Id.* at 9-11, 16. And, while the Special Master rejected the takings and due process arguments made by Ms. Ortiz and Mr. Quintana, *id.* at 13, similar objections have been made to the Settlement Agreement by the Atencio Group, and can be efficiently addressed by the Court in ruling on the objections to the Settlement Agreement. *See Objection, Arsenio Trujillo* (Feb. 17, 2014) (Doc. 8112), Ex. A ¶¶ 1, 15, 23, 26; *Objection, Darren B. Quintana* (April 3, 2014) (Doc. 8452), Ex. A (objecting to the Settlement Agreement for reasons including due process and taking without compensation); *Objection, Melissa Ortiz* (April 3, 2014) (Doc. 8453) (same); *Objection, Mary Habeeb* (April 3, 2014) (Doc. 8515) (same). Rather than preserve judicial resources by delaying briefing until the Court has ruled on the Special Master Ortiz/Quintana Order, such effort would actually waste judicial resources and prejudice the parties by delaying resolution of this adjudication.

IV. Conclusion.

The Court should deny the Group 1 Objectors Motion and the Atencio Group Motion. No good cause exists to alter the Case Management Order in any way and Objectors should continue to be required to file briefs in accordance with the timeline established in the Case Management Order.

Respectfully submitted this 24th day of November, 2014.

/s/ electronic approval 11/21/14

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CERTIFICATE OF SERVICE

I hereby certify that, on November 24th, 2014, the **PLAINTIFFS-IN-INTERVENTION RESPONSE OPPOSING DEFENDANT-OBJECTORS' MOTIONS FOR EXTENSION OF TIME AND MODIFICATION OF CASE MANAGEMENT ORDER [DOCS. 9915 AND 9916]** was filed electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I further certify that, on November 24th, 2014, copies of the foregoing were mailed by first-class United States mail to the following non-CM/ECF Participants:

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