

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

STATE OF NEW MEXICO, *ex rel.*
State Engineer

Plaintiff,

vs.

R. LEE AAMODT, *et al.*,

Defendants,

and

UNITED STATES OF AMERICA,
PUEBLO DE NAMBÉ,
PUEBLO DE POJOAQUE,
PUEBLO DE SAN ILDEFONSO,
And PUEBLO DE TESUQUE,

Plaintiffs-in-Intervention.

No. Civ. 66-06639 MV/WPL

Subfile: PM-39822

**STATE OF NEW MEXICO'S OBJECTION TO RECOMMENDATION OF SPECIAL
MASTER ON MULTIPLE-USER DOMESTIC WELLS**

The State of New Mexico, *ex rel.*, State Engineer ("State"), pursuant to Fed. R. Civ. P. 53(f)(2), hereby objects to the *Recommendation of Special Master on Multiple-User Domestic Wells* (No. 9540) ("*Recommendation*"), within 20 days of service of the *Recommendation*.

I. Introduction.

On June 18, 2014, the Special Master entered his *Order Requiring Briefing on Multiple-User Domestic Wells* ("*Order*") (Doc. No. 9455) ("*Order*") requiring briefing on issues associated with multiple user domestic wells. The *Order* notes that "Plaintiff the State of New Mexico has tendered proposed forms of orders for various pre-1982 domestic wells where, notwithstanding that the claimants have not objected to Plaintiff the State's proposed forms of

orders, five or more claimants are individually entitled to .7 acre-feet per year, but the well is limited to a total diversion of 3.0 acre feet per year.” *Order* at 2. The *Order* required the State to brief issues “with respect to domestic wells that are a single point of diversion for multiple claimants, where the total allowed diversion from a single well is less than the allowed cumulative diversions of the individual water users.” *Order* at 2. On August 1, 2014, the State timely filed its *Briefing on Multiple-User Domestic Wells* (No. 9500) (“*Briefing*”), and on August 22, 2014, the Special Master filed his *Recommendation of Special Master on Multiple-User Domestic Wells* (No. 9540). The Special Master recommended that:

[T]he Court reject any forms of orders tendered by Plaintiff the State with respect to multiple-user domestic wells where the total diversion proposed to be adjudicated would be less than the sum of the allowed diversions of each individual user of the wells.

Id. at 2.

The Special Master consistently mischaracterizes the proposed forms of order tendered by the State, which propose to adjudicate a water right for multiple households from a single well as one water right, to one claimant, with multiple users. The State has not tendered any proposed orders to the Special Master that purport to adjudicate a water right “for multiple claimants” to each household, or user, from a multiple household domestic well. The State objects to the Special Master’s *Recommendation*, and requests that the orders it has submitted to the Special Master be approved by this Court.

II. The Proposed Forms of Orders Are Not Facially Inconsistent and Fully Comply With the Laws of New Mexico.

A. THE PROPOSED FORMS OF ORDERS ARE CONSISTENT WITH NEW MEXICO LAW.

The proposed forms of orders adjudicate the elements of a claimant’s water right consistent with New Mexico statutes. New Mexico law describes the elements which must be

declared in an order to adjudicate a water right:

Upon the adjudication of the rights to the use of waters of a stream system, a certified copy of the decree shall be prepared and filed in the office of the state engineer by the clerk of the court, at the cost of the parties. Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use . . .together with such other conditions as may be necessary to define the right.”

NMSA 1978, § 72-4-19 (1907) (emphasis added). The proposed forms of orders submitted by the State of New Mexico, and in particular the proposed order adjudicating the Casas de San Juan Condominium and Master Association subfiles¹, unambiguously include all those elements required by statute. The proposed orders also reflect such “conditions as may be necessary to define the right and its priority,” and in particular the permit conditions legally associated with the right. Id.

Moreover, the Court has adopted a process for adjudicating pre-1983 domestic wells that is entirely consistent with State statute. See August 2, 2012 *Procedural and Scheduling Order for the Adjudication of Water Rights for Domestic Wells, Including Pre-Basin Wells, Drilled or Permitted Prior to the Court’s Order of January 13, 1983* (No. 7736). The Court’s March 18, 2013 *Order to Show Cause* (No. 7861) provides that claimants of unadjudicated water rights under Pre-Moratorium Domestic Wells appear and show cause, if any:

1. Why the Respondent’s water rights should not be adjudicated in the quantity of 0.7 acre feet per annum per household; and
2. Why the Respondent’s water rights should not otherwise be adjudicated consistent with the terms of the domestic well permit.

March 18, 2013 *Order to Show Cause* at 2 (No. 7861). These terms of the *Order to Show Cause* apply to all domestic Pre-Moratorium domestic wells, including multiple household wells. The quantity of a multiple household domestic well water right is 0.7 acre feet per annum per

¹ Proposed Order adjudicating Casas de San Juan multiple-user wells include those adjudicating permits RG-39163, RG-39166, RG-39390, RG-39391, RG-39392, RG-39394, RG-39395 and RG-39396.

household, consistent with the *Order to Show Cause*, but in no event more than the permit limit of 3.0 acre feet per annum. The proposed forms of orders submitted by the State of New Mexico are entirely consistent with, and track the language of, the *Order to Show Cause*.

B. THE PROPOSED FORMS OF ORDERS ARE NOT INCONSISTENT ON THEIR FACE.

One of the proposed orders submitted to the Special Master is for the multiple household domestic well water right developed pursuant to Office of the State Engineer (“OSE”) permit number RG-39391. On January 12, 1983, Richard A. Peck applied to the OSE for a multiple household domestic well permit. See Permit RG-39391, attached hereto as Exhibit A. On May 16, 1983, the OSE granted that permit application, with the following remarks:

Well will be shared among 7 or less condominium owners pursuant to provisions of property covenant. Well owner is owner of one of seven or less condominium units being served by this well. Use of this well will be governed by the provisions of Section 72-12-1 NMSA.

Id. Permit RG-39391 further provided, under its General Conditions, that “[t]he maximum amount of water that may be appropriated under this permit is 3 acre feet in any year.” Id. On September 10, 2012, Casas de San Juan Master and Condominium Associations filed change of ownership with the State Engineer, identifying itself as the new owner of permit RG-39391.

On December 15, 2013, the State served Defendant Casas de San Juan Master and Condominium Associations with a proposed order adjudicating its multiple household domestic well water right under permit RG-39391. See proposed Order Adjudicating Pre-1982 Domestic Well Water Right (“proposed Order”), attached hereto as Exhibit B. The proposed Order provided that the amount of water to be adjudicated was:

Not to exceed a diversion and consumption of 0.7 acre feet per year per household, and not to exceed a total of 3.00 acre foot per year, unless a more restrictive diversion limit applies pursuant to court order, covenant or ordinance.

Id. Defendant Casas de San Juan Master and Condominium Associations did not object to the

proposed Order.

The proposed Order unambiguously states that diversion and consumption may not exceed 3.00 acre feet per year, measured by the amount used from the well, not from each individual household. Individual users may divert and consume up to 0.7 acre feet per household, but in no event may the aggregate use of those households served by the well exceed 3.00 acre feet per year. This is similar to the adjudication of water rights to water utilities, or other water service providers, where the water is put to use by the end users, but the water right is held by the provider. The limit per household applied to the multiple household domestic wells here derives from the Court's 2013 *Order to Show Cause*. The quantity of water in the proposed orders is not facially inconsistent, and is fully consistent with this Court's 2013 *Order to Show Cause*.

III. The Proposed Forms of Orders Are Consistent With New Mexico Equitable Principles.

The Merriam-Webster Dictionary defines "equity" as "fairness or justice in the way people are treated." In the above example, the permittee and owner of the water right is defendant Casas de San Juan Master and Condominium Associations, not the occupants of the condominium units being served by the well. Like water users from a water utility or other water service provider, these owners of the condominium units have no separate rights to the use of water. Their only right is as a user of the water provided under the water right of defendant Casas de San Juan Master and Condominium Associations. If the users of water diverted from RG-39391 dispute this, they will have the opportunity to raise their challenge to the claims of defendant Casas de San Juan Master and Condominium Associations in the *inter se* portion of this water rights adjudication. It is premature for the Special Master to raise this potential issue now, when there is no case or controversy, and where there will be an opportunity, in later *inter*

se proceedings, for any potential conflict or controversy to be addressed.

The Special Master summarizes the State's argument at pg. 4 of his *Recommendation* as, "...circular: an adjudication court cannot consider equitable principles because it is an adjudication court." The Special Master oversimplifies and misstates the State's argument. The State did not make the broad statement that an adjudication court cannot consider equitable principles because it is an adjudication court. The State argued that a claimant must exhaust administrative or legal remedies in order to have standing to seek redress in a court of equity (citing *Atlas Life Ins. Co. v. W.I.S., Inc.*, 306 U.S. 563, 569, 59 S. Ct. 657, 660, 83 L. Ed. 987 (1939)), and that if there is a dispute, the condominium water users being served by the well have a legal remedy in the *inter se* portion of this water rights adjudication. *Briefing* at pg. 6.

IV. The Controversy Put Forth by the Special Master is Not a Justiciable Controversy and is Not Ripe for Review by the Adjudication Court.

In his *Recommendation* at pg. 3, the Special Master concludes:

Ripeness is not at issue in this instance. Rather, at issue is whether the Court should enter ambiguous and facially inconsistent orders that do not, consistent with this Court's statutory obligation, "determine all questions necessary for the adjudication of the water rights within the stream system involved." N.M.S.A. 1978, § 72-4-17 (1965).

The State respectfully disagrees with this conclusion. The Special Master did not provide any authority or analysis in reaching the above conclusion, other than relying on his perceived potential, equitable conflicts. In *Morgan v. McCotter*, 365 F.3d 882, 890 (10th Cir. 2004), the Tenth Circuit described the ripeness doctrine as follows:

...[r]ipeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Nat'l Park Hospitality Ass'n v. Dept. of Interior*, 538 U.S. 803, 807, 123 S.Ct. 2026, 2029, 155 L.Ed.2d 1017 (2003) (internal quotation marks omitted); see *New Mexicans for Bill Richardson v. Gonzales*, 64 F.3d 1495, 1499 (10th Cir. 1995). Like standing, the ripeness inquiry asks whether the challenged harm has been sufficiently realized at the time of trial. The ripeness issue, however, focuses not on whether the plaintiff was in fact harmed, but rather

“whether the harm asserted has matured sufficiently to warrant judicial intervention.” *Warth v. Seldon*, 422 U.S. 490, 499, n. 10, 95 S.Ct. 2197, 45 L.Ed.2d. 343 (1975).

The Special Master’s June 18th *Order* and August 22nd *Recommendation* bring to the forefront exactly what the above Tenth Circuit warned against: entangling the Court in an abstract disagreement because of premature adjudication. In the situation before the Court, the harm is not realized between the parties, further, there is no harm on which to go to trial. When the permit in our example was issued there was no appeal by the water right holder. The proposed Order, based on the permit, is fully consistent with New Mexico law. If there is no harm, it cannot mature to the point of warranting judicial intervention, as described by the Tenth Circuit above. The current situation created by the Special Master is the definition of an abstract disagreement entangling this Court.

V. The State’s Position Will Not Shoe-Horn the Adjudication Court into a *De Minimis* Role Inconsistent With the Constitution and the Law.

At page 3 of his *Recommendation*, the Special Master argues that the State’s position “would shoe-horn the Court into a *de minimis* role inconsistent with the Constitution and the law.” Specifically, the Special Master believes the State’s position would not allow this Court to meet its obligation to “hear and determine all questions necessary for the adjudication of all water rights within the stream system involved...” under N.M.S.A. 1978, § 72-4-17 (1965).

The State has no intention to limit the Court’s obligation to hear all questions necessary to adjudicate the elements of all water rights. As stated in the State’s August 1, 2014 *Briefing*, the State does not believe that the Court, in its role as neutral arbiter, should remain silent in every instance when it identifies conflict or potential issues during the adjudication. The State simply stated that the Court should exercise discretion, to address actual conflicts or controversies, within the limits of its jurisdiction.

In its *Briefing*, the State identified one of its major concerns regarding the Special Master inserting issues *sua sponte* into the adjudication as the State not be required to expend its limited resources in areas where there is not a ripe case or controversy, or on issues that are more appropriately addressed in the administration of the water rights.

As to this concern, this Court need not look any further than the current example involving Casas de San Juan Condominium and Master Association. In this example, we have a proposed Order between the State and Casas de San Juan Condominium and Master Association that resolves all issues between the named parties. There are no other issues identified or presented by the parties, nor are there any other issues that are ripe for review by the adjudication Court. The proposed Order adjudicates all the elements of the water right as between the State and the defendant. The Special Master's recommendation that the Court not enter the proposed Order is based on the Special Master's misperception of potential inequities to individuals who are not parties to the proposed Order, not on any actual or potential conflict between the parties. (*See June 18, 2014 Order*).

The proposed forms of orders are not inconsistent with the statutory mandate of § 72-4-17, and contrary to the Special Master's belief, in signing the proposed forms of orders this Court will still be able to exercise its statutory obligation of hearing and determining all questions necessary for the adjudication of all water rights within the stream system. The Special Master suggests at pg. 4 of his *Recommendation* that there is the possibility that the property covenants between the Casas de San Juan Condominium and Master Association and the condominium water users could provide reassurance to the Court that the perceived facial conflict in the proposed order was not an actual conflict, thus this Court would not be "enshrining" an actual conflict of rights. The potential conflict, however, is not a conflict of rights, but a potential conflict between water users. The only claimant to the water right is the

Casas de San Juan Condominium and Master Association. There is no dispute between the parties to the proposed Order, so there is no dispute or controversy before the Court. The issues proposed by the Special Master in his June 18, 2014 *Order* do not address an actual case or controversy between the parties regarding the elements of the water right submitted to the Court, and this Court will not run afoul of its statutory obligation under §72-4-17 by adopting the proposed Order.

WHEREFORE, the State respectfully requests that the proposed Orders adjudicating multiple household domestic well rights submitted to the Special Master be approved by the Court.

Respectfully submitted this 15th day of September, 2014.

/s/ Edward C. Bagley
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I HEREBY CERTIFY that on the 15th day of September, 2014, I filed the foregoing electronically through the CM/ECF system which caused the parties on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail.

/s/ Edward C. Bagley
EDWARD C. BAGLEY