

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

STATE OF NEW MEXICO, ex rel. STATE )  
ENGINEER, )  
)  
Plaintiff, )  
v. )  
)  
R. LEE AAMODT, et.al., )  
)  
Defendants, )  
)  
And )  
)  
UNITED STATES OF AMERICA, )  
PUEBLO DE NAMBE, )  
PUEBLO DE POJOAQUE, )  
PUEBLO DE SAN ILDEFONSO, )  
and PUEBLO DE TESUQUE, )

No. 66cv6639 WJ/WPL

Plaintiffs-in-Intervention.

**STATE’S REPLY IN OPPOSITION TO RESPONSE TO PLAINTIFF’S MOTION FOR  
DEFAULT JUDGMENT AND RESPONSE TO PLAINTIFF’S MOTION TO BAR  
UNTIMELY “ERROR AND OMISSION AAMODT LITIGATION WATER RIGHTS  
TOWN OF JACONA LAND GRANT” [DOC. 10834]**

Plaintiff State of New Mexico *ex rel.* State Engineer (“State”) hereby submits this Reply memorandum in opposition to the *Response to Plaintiff’s Motion for Default Judgment and Response to Plaintiff’s Motion to Bar Untimely “Error and Omission Aamodt Litigation Water Rights Town of Jacona Land”* [Doc. 10834, August 24, 2016] (“Response” or “Jacona’s Response”) filed by the Town of Jacona Land Grant (“Jacona” or “Land Grant”). This Reply is also filed in support of the following motions:

(1) the State’s *Motion for Default Judgment* [Doc. 10789, August 10, 2016]; and

(2) the State’s *Motion to Bar Untimely “Error and Omission Aamodt Litigation Water Rights Town of Jacona Land Grant”* [Doc. 10793, August 12, 2016] (“Motion to Bar Notice”).

As shown below, Jacona's objections to the foregoing motions are unfounded, and both motions should be granted.

### **BACKGROUND**

The State's Motion for Default Judgment seeks default judgment against unknown claimants of interest who failed to meet the mandatory deadline for filing claims to surface or groundwater rights within the Nambe-Pojoaque-Tesuque ("NPT") stream system that were not included in the 1964 hydrographic survey or otherwise adjudicated. That mandatory deadline was November 10, 2013. *See Proof of Publication of Notice of Deadline for Unknown Claimants of Interest to File Water Rights Claims* [Doc. 7981, October 25, 2013] ("Proof of Publication"). The State's proposed procedures for joining and providing notice by publication to unknown claimants of their opportunity and deadline for filing omitted claims were approved by the Court's *Procedural Order for Notice by Publication of Claims Deadline* [Doc. 7919, August 15, 2013] ("Court's Procedural Order"). Following entry of the Court's Procedural Order, the State published the *Notice of Deadline for Unknown Claimants of Interest to File Water Rights Claims*<sup>1</sup> ("Notice to Unknown Claimants") for four (4) consecutive weeks in three newspapers of general circulation in the geographic area of the NPT stream system which includes the Town of Jacona Land Grant. *See Proof of Publication*. Unknown claimants then had forty (45) days in which to file their claims to water rights within the NPT. *See id.*

The *Error and Omission Aamodt Litigation Water Rights Town of Jacona Land Grant* [Doc. 10768, July 26, 2016] ("Notice"), was filed by Paul Ortiz as President of the Land Grant on July 26, 2016, nearly three (3) years after the November 10, 2013, claims deadline established by the Court's Procedural Order and the Notice to Unknown Claimants to file any and all claims

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<sup>1</sup> The Notice to Unknown Claimant was attached as Exhibit 2 to the State's *Motion to Adopt*

to water rights within the NPT stream system. The Notice alleges an “error and omission” because Jacona “is not included in the Aamodt litigation.” *See* Notice. The Notice also states that Jacona “claims water rights and will submit a declaration of water rights to the New Mexico State Engineer,” but fails to describe the use of water on which Jacona’s alleged water right is founded. *See id.*

Because there is no record in this case of beneficial use or claim to beneficial use of surface or groundwater in the NPT by or on behalf of the Land Grant, Jacona is an unknown claimant within the scope of NMSA 1978, Section 72-4-17 (1907), and the Court’s Procedural Order. Accordingly, the State moved to bar Jacona’s untimely Notice pursuant to the Court’s Procedural Order because, as an unknown claimant, Jacona was required to file any and all claims to NPT water rights on or before the Court’s November 10, 2013 deadline.

Jacona’s opposition to both of the State’s motions boils down to the contention that it is not bound by the Court’s 2013 claims deadline because, according to Jacona, its geographic location and status as a Spanish land grant confirmed by the United States Surveyor General makes it an “easily ascertainable claimant” that should have been personally served and joined rather than through publication to unknown claimants of interest. *See* Response at ¶¶5-8, 13, 15, 17, 20. Both of the State’s motions should be granted because neither controlling law nor the procedural history of this stream system adjudication case supports Jacona’s argument.

### **ARGUMENT**

**I. THE STATE IS ENTITLED TO DEFAULT JUDGMENT AGAINST JACONA AND ALL UNKNOWN CLAIMANTS OF INTEREST THAT FAILED TO FILE CLAIMS TO SURFACE OR GROUNDWATER RIGHTS WITHIN THE 2013 DEADLINE ESTABLISHED BY THE COURT.**

**A. The State was Not Required to Personally Join Jacona as a Party in this Case Based on its Status as a Land Grant or Land Owner within the Geographic Boundary of the NPT Stream System.**

In its Response, Jacona does not dispute that the Office of the State Engineer's hydrographic survey, filed with the Court in 1966, identifies no beneficial use of water by or on behalf of the Land Grant. Jacona also clarifies that its alleged water rights referenced in the Notice are not founded on the irrigation, domestic and livestock uses by individuals on a number of tracts within the boundaries of the Land Grant that were referenced in the hydrographic survey. *See* Response at ¶14. Jacona admits that "those [are land grant] members' water rights individually" and are not "part of the Land Grant's water rights." *See id.* Jacona also does not dispute that prior to filing its Notice on July 26, 2016, no claim to surface or groundwater rights based on actual use of water was ever asserted by or on behalf of the Land Grant during the fifty (50) years this case has been pending. Nevertheless, Jacona mistakenly argues that it was entitled to personal service and joinder as a "known potential claimant" in this water rights adjudication case because it is a land grant and "the single largest owner of land within the NPT other than the Pueblos." *See* Response ¶¶15, 17. Black letter New Mexico water law undermines this argument.

New Mexico follows the constitutional doctrine of prior appropriation, under which water rights are based upon beneficial use of water. *See* NM Const. art. XVI, § 3 (beneficial use is "the basis, the measure, and the limit of the right to use water"); *see Walker v. United States*, 2007-NMSC-038, ¶22, 142 N.M. 45 ("water rights are both established and exercised by beneficial use"); *State ex rel. State Engineer v. Aamodt*, 537 F.2d 1102, 1106 (10<sup>th</sup> Cir. 1976) ("The New

Mexico constitution, adopted in 1911, establishes the doctrine of prior appropriation to control the use of water....One acquires a right to water by diversion and application to a beneficial use.”). Under NMSA 1978, Section 72-4-13 (1907), the Office of the State Engineer conducts and files a hydrographic survey of irrigation and other beneficial uses of water within the stream system at issue. It is the beneficial use of water as reflected in the hydrographic survey that provides the basis for joining known water rights claimants of record or those “that can be ascertained, with reasonable diligence” in this and all other stream system adjudication cases. *See* § 72-4-17. Additionally, Section 72-4-17 requires that “unknown persons who may claim any interest or right to the use of the waters of [the NPT] stream system[,]” who were not joined in this proceeding and whose claims are not reflected in the hydrographic survey, be given notice of their opportunity to appear, answer, or otherwise submit any statement of claim. *Id.* Section 72-4-17 provides for notice and joinder of these unknown claimants through publication. *Id.*

Jacona appears to be claiming a water right based solely upon its status as a land grant established under the laws of Spain and confirmed by the United States Surveyor General, not upon any identified beneficial use of surface or groundwater. *See* Response at ¶¶5-7. By Jacona’s own admission there is no record of such beneficial use in the hydrographic survey or elsewhere in this case. Likewise, neither the Notice nor the Response describes any use of water or elements necessary to state a cognizable claim to water rights under New Mexico law which requires proof of beneficial use of water. *See* NM Const. art. XVI, § 3. *See also* NMSA 1978, § 72-1-2 (“Beneficial use shall be the basis, the measure and the limit of the right to use water....”); *cf. State v. Aamodt*, No. Civ. 66-6639 MV/WPL, Subfile PM-67833, Doc. 8119 at 6 (D.N.M. Feb. 24, 2014) (unpublished) (“The burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on the defendant, or the user of the water

right.”). Nor does Jacona assert facts or law to support a claim to water rights established under federal law. *See, e.g., Cappaert v. United States*, 426 U.S. 128, 145 (1976) (the federal reserved water rights doctrine applies to Indian reservations and other federal enclaves and provides that when the federal government reserves land it impliedly reserves sufficient water rights to accomplish the purpose of the reservation). And in this case, the Court has not recognized any water rights based solely upon a claim of rights appurtenant to a grant of land from Spain as alleged by Jacona. *See* Response at ¶5. In its 1985 Memorandum Opinion and Order, the Court held that the Pueblos have water rights based upon their aboriginal title to land, that had not been extinguished by the prior Spanish or Mexican sovereign, but not as rights appurtenant to land conveyed by a deed from the King of Spain. *See State v. Aamodt*, 618 F. Supp. 993, 1010 (D.N.M. 1985). More recently, the adjudication court in the Jemez River adjudication case held that Pueblo water rights are protected by federal law including the Treaty of Guadalupe Hidalgo, but patents to Spanish land grants confirmed by the United States pursuant to the Treaty do not grant or reserve any additional rights including water rights. *See United States v. Abousleman*, No. Civ. 83-01041 MV/ACE, Doc. 4051 at 24 (D.N.M. Oct. 4, 2004) (unpublished).

Nevertheless, Jacona perfunctorily contends that land ownership and its legal status as a land grant mandated personal service and joinder of the Land Grant as a “known potential claimant” with “potential water rights.” *See* Response at ¶¶20, 23. That is not the legal standard for notice or joinder in this case. Rather, it is evidence of beneficial use of water, or a timely claim to a right based on beneficial use, that allows the State to identify and serve known “claimants of record and all other claimants, so far as they can be ascertained, with reasonable diligence.” *See* § 72-4-17. *See also* Rule 1-071.2C NMRA (“Notice of a stream system issue proceeding ... shall be given by first class mail ... to all known claimants whose names and

addresses are reasonably ascertainable .... For all unknown claimants and claimants whose addresses cannot reasonably be determined, notice shall be calculated under all the circumstances to apprise claimants of the proceeding and shall be approved by the court”).

Without a beneficial use of water to be identified in the hydrographic survey, or the assertion of a timely claim to water rights by or on behalf of Jacona, the Land Grant was neither a known or reasonably ascertainable claimant. *See id.* Instead, Jacona is an unknown potential claimant of interest within the compass of both Section 72-4-17 and Rule 1-071.2C.

The Court approved the State’s proposed procedures for providing notice to Jacona and other unknown claimants of their opportunity and deadline to file omitted claims and the State complied with those procedures in publishing its Notice to Unknown Claimants. *See generally* Court’s Procedural Order; Proof of Publication. Jacona made no claim to surface or groundwater rights within the 2013 deadline established by the Court, and the State is entitled to default judgment against Jacona and all other unknown claimants of interest.

**B. Entering Default Judgment Against Jacona and Other Unknown Claimants Comports with Due Process.**

The Fourteenth Amendment to the United States Constitution provides that no state shall “deprive any person of life, liberty, or property ...without due process of law.” U.S. Const. amend. XIV. The United States Supreme Court held in the *Mullane v. Central Hanover Bank & Trust Co.*, that a fundamental requirement of due process in any proceeding to be accorded finality “is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” 339 U.S. 306, 317 (1950). This Court explicitly found that the State’s procedures for adjudicating the claims of unknown persons not parties to this adjudication, including procedures for providing notice by publication to such unknown persons of the final deadline for filing any and

all claims to surface or ground water rights within the NPT stream system that were not included in the 1964 hydrographic survey or otherwise adjudicated, meet the requirements of due process articulated in *Mullane*. Procedural Order at ¶¶2-3. Jacona does not challenge the State's compliance with these Court approved procedures. Instead, citing *Mullane*, Jacona argues that the State violated its right to due process by failing to personally serve it as a "known potential claimant." See Response at ¶¶20-23. Neither *Mullane* nor the record in this case support Jacona's argument.

There is no obligation under *Mullane* to identify and personally serve unknown claimants with no record of an interest that may be affected. See *Mullane*, 339 U.S. at 317 (notice by publication is an acceptable substitute for personal service in the case of persons "missing or unknown ... and creates no constitutional bar to a final decree foreclosing their rights"). The State Engineer's hydrographic survey found no beneficial use of water associated with the Land Grant, and Jacona does not claim that the irrigation, domestic and livestock uses on tracts within the boundaries of the Land Grant are the basis of its water rights. See Response at ¶14. Even with notice of its obligation to have made a claim, Jacona presents no facts to state a claim for water rights in this proceeding. Neither the Notice nor the Response identify any elements of a claimed water right based on beneficial use of water by or on behalf of the Land Grant. Indeed, never in the fifty-year history of this case has Jacona asserted a claim to water rights within the NPT system based on actual use. Instead, Jacona makes vague reference to a constitutionally protected property interest in "potential water rights" without providing any basis in fact or law to support that claim. See Response at ¶23. For claimants whose interests are not established, as here, the *Mullane* Court explained, "Nor do we consider it unreasonable for the State to dispense with more certain notice to those beneficiaries whose interests *are either conjectural or future.*"

*Mullane*, 339 U.S. at 317 (emphasis added). Absent any evidence or claim to beneficial use of water by or on behalf of the Land Grant, service by publication on Jacona comports with due process. *See id.*; Procedural Order at ¶3.

Furthermore, the record in this case casts significant doubt on Jacona's assertion that it never received notice of the *Aamodt* litigation or its right to assert a timely claim for surface or groundwater rights based on beneficial use of water. *See* Response at ¶2. The *Aamodt* case is the oldest active case in the federal court system, having been filed in 1966. The case has received near constant local publicity since at least the 1980s over a variety of case-related issues including the adjudication of Pueblo water rights claims, domestic well rights, and the *Aamodt* Settlement Agreement; and over 50 public meetings have been conducted in the basin since 2005. It is against this backdrop that Jacona claims to have received no notice of this case, while nevertheless acknowledging that its members are parties who own surface and groundwater rights adjudicated in this case. The voluminous docket in this case shows that the State has provided notice to these members and other individuals in the basin for nearly fifty years in connection with the adjudication of their surface water rights in the 1960s and 1970s, partial *inter se* proceedings on their surface water rights during the 1980s, and proceedings to adopt surface water priority dates for their surface water rights between 2009 and 2014. These individuals also received notice of proceedings to adjudicate the Pueblos' water rights during the 1980s and 1990s, and settlement of the Pueblos' water rights from 2001 to the present. Moreover, the adjudication of domestic well rights on the Land Grant and elsewhere in the basin has been ongoing since the 1980s. It thus strains credulity that Jacona, the "single largest owner of land within the NPT other than Pueblos," Response at ¶17, was unaware of its opportunity to

assert a claim for surface or groundwater rights in the NPT for nearly fifty years despite these ongoing proceedings involving its members' water rights.

Based upon this long record, while the Land Grant may never have been received notice as a "known claimant," the members of the Land Grant certainly received actual notice over the course of the five decades that this adjudication has been actively prosecuted. In addition, Jacona received constitutionally sufficient notice of its opportunity and deadline to file a claim to water rights in this adjudication. Having failed to comply with that deadline, Jacona has no due process right to assert a water rights claim three years late, with no basis in fact or law. The Court should bar Jacona's untimely Notice and enter default judgment against all unknown claimants of interest including Jacona.

**C. The State Did Not Move For Default Judgment Against Unknown Claimants of Interest in Response to Jacona's Notice, But to Comply with the Adjudication Statutes and the 2017 Deadline in the Aamodt Litigation Settlement Act.**

Jacona alleges, without any good faith basis, "suspect" motives on the part of the State in filing the Motion for Default Judgment "on the heels" of the Land Grant's filing of the Notice. Response at ¶10. As the Court is aware, the Motion for Default Judgment is simply one of the final steps toward the completion of the adjudication of the NPT stream system. Toward that end, the State moved pursuant to Section 72-4-17 and the Court's Procedural Order for default judgment against unknown claimants of interest to surface or groundwater rights within the NPT who failed to file claims to such rights within forty-five (45) days after the last publication of the State's Notice to Unknown Claimants. That claims deadline was November 10, 2013, nearly three years ago, and was intended to allow sufficient time for the adjudication of any omitted claims within the September 2017 deadline for entry of a Final Judgment and Decree established in the December 8, 2010, Aamodt Litigation Settlement Act, Pub L. No. 11-291, 124 Stat. 3134.

As of the filing date of this Reply, the State is finalizing adjudication and reconciliation work in preparation for filing the proposed Final Judgment and Decree and final *inter se* proceedings, all of which is on the agenda for the September 13, 2016 status conference before this Court. See *Amended Order Setting Status Conference* [Doc. 10794, August 16, 2016]; *Order Granting Plaintiff State of New Mexico's Motion to Establish Procedures for Final Inter Se Proceeding and Entry of a Final Judgment and Decree* [Doc. 10849, September 9, 2016].

Jacona's unsupported and untimely claim violates the Court's Procedural Order, and, if allowed to proceed, the claim will frustrate the efforts of both the State and the Court to meet the Congressionally-mandated deadline for entry of a Final Judgment and Decree in this decades-long case. Jacona's Notice should therefore be barred, and default judgment entered against Jacona and all unknown claimants of interest.

WHEREFORE, for the foregoing reasons and the reasons set forth in the original motions, the State requests that the Court grant the State's *Motion for Default Judgment* [Doc. 10789, August 10, 2016], and *Motion to Bar Untimely "Error and Omission Aamodt Litigation Water Rights Town of Jacona Land Grant"* [Doc. 10793, August 12, 2016].

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 9, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means, and served the following by U.S. Mail:

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