

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,)
)
 Plaintiffs-in-Intervention.)
 _____)

NO. 66cv6639 WJ/WPL
 Chupadero Irrigation Company Ditch
 Subfile No. 17.1

**LAS ACEQUIAS DE CHUPADERO’S REPLY TO STATE’S REPOSE TO
MOTION TO CORRECT SUBFILE ORDER [DOC. 11433, 3/16/17]**

The Christian Brothers Major Superiors (“Christian Brothers”) failed to timely file a response to Las Acequias de Chupadero’s *Motion to Correct Subfile Order (Subfile No. 17.1)* (Doc. 11433, March 16, 2017) (“Motion” or “Las Acequias’ Motion”). Las Acequias de Chupadero (“Las Acequias”) hereby replies to the State of New Mexico’s (“State”) Response to its Motion (“Response”).

Most if not all subfile orders in this adjudication contain the following finding:

“The defendant John Doe has a right to withdraw public surface and/or underground waters from the Nambe-Pojoaque River System for all purposes as follows.”

After describing the defendant’s water right, the subfile orders go on to say:

“IT IS THEREFORE ORDERED that the defendant John Doe be and hereby is adjudicated to have a good and valid water right as set forth above.”

The fact that on the face of thousands of subfile orders in this case, named defendants are adjudged *by name* to have a good and valid water right, belies the State's primary argument that the Court is without jurisdiction to establish who owns the various water rights in this stream system. The Court has done it literally thousands of times. The language is unmistakable.

By the same token, this Court has from time to time corrected subfile orders to clarify exactly who owns what water rights. The case of the Acequia de los Ojitos Community Ditch has been discussed in both the Las Acequias' Motion and the State's Response. The salient fact, despite the State's attempt to downplay its relevance, is that the Court ultimately determined that the Acequia de los Ojitos Community Ditch was the owner of the overlap area, i.e., the pond, not Ramon Montoya. The result was that the subfile order for Ramon Montoya was modified so as to reduce his acreage by the amount of the pond. He was no longer the owner of water rights on that acreage, based on the determination by the Court. The Acequia was the owner of those water rights. Out of all the ownership configurations that the Court could have determined, the Court determined that a particular party owned those rights and another party did not. And in the end both subfile orders reflected that those parties were "adjudicated to have good and valid water rights as set forth above" – i.e., with the respective changes incorporated. It was a clear resolution by the Court of an ownership error, similar to what is being sought in this case. It was the State that filed that particular *Motion to Correct Subfile Order (Subfile No. 21.34)* (Doc. 9437) and it tacitly invoked the jurisdiction of the Court in doing so. The State sought no other relief in its Motion other than this set of corrections. The State expressly sought its relief pursuant to Section A.2 of the procedural order on error and omissions, just as Las Acequias is doing here. *Motion to Correct Subfile Order (Subfile No. 21.34)* (Doc. 9437) at 1.

As in this case, it appears there was no response filed to the State's Motion by any party with a

potential ownership claim contrary to what was sought in the motion. See *Order Granting Motion to Correct Subfile Order [Doc. No. 9437]* (Doc. 9548) (First paragraph of the Order cites to the State's *Motion to Correct Subfile Order* and does not reference any other pleading filed in the matter).

D.N.M.LR-Civ. 7.1(b), unambiguously states "The failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion." Therefore this situation does not present a case of a "dispute" over ownership of a water right, as erroneously referenced by the State. Response at ¶ 4. Rather it is a case where there is consent as between the two claimants to grant the motion and thereby establish ownership of the water rights associated with 0.72-acre pond in Las Acequias as against the Christian Brothers. The Christian Brothers do not dispute that the water in the pond is for use on all 27 adjudicated tracts on the Chupadero Irrigation Company Ditch and for all the members who irrigate off of that ditch. Given that this is not disputed, the granting of the motion to correct the ownership of the water rights associated with the pond is in order so that those rights are not erroneously deemed to be the private exclusive rights of the landowner. This narrow set of procedural facts, where a motion was filed and not responded to by the other claimant, is distinct from a disputed ownership claim.

Significantly, the State's arguments are jurisdictional and procedural, but not directed to the merits of the ownership question, although the State mistakenly suggests in several places that Las Acequias could submit a deed or other conveyancing instrument showing ownership and have its ownership determined administratively. Response at ¶¶ 9, 4. The State misapprehends the substance of Las Acequias' Motion. The Motion does not contend that Las Acequias ownership of the pond is based upon a conveyance from a previous owner, but rather that the 0.72-acre pond has historically been part

and parcel of Las Acequias' delivery system, and that it was erroneously adjudicated under the name of the Christian Brothers. Therefore there would not be a deed or instrument of conveyance, just as there presumably was not for the Acequia de los Ojitos pond – no such document is referenced in the Motion or Order on that particular matter. In response to this concern of the State's, an affidavit by Dan Martinez is attached as Exhibit 1, which states that the water in the pond has historically been used by all the parciantes on that ditch and not exclusively by the landowners. Under these circumstances where the pond and the water in it has been used and managed under the common ownership of the acequia, and the Christian Brothers do not dispute that fact, the granting of the motion is appropriate.

Las Acequias is not insistent that the Proposed Order attached to its Motion is the only way to properly adjudicate its ownership claim. If the Court is persuaded to grant relief to Las Acequias, Las Acequias is open to an alternative Order other than a Consent Order, if the State does not consent.

The language in the subfile orders is not without meaning. It establishes who has an enforceable right to divert the public waters of the stream system and the extent of the right, versus those unnamed persons would be liable for an unlawful act if they diverted water because they have no right. Where there is an error in those sentences that name such owners and establish such ownership, particularly where ownership is not contested, the Court clearly has jurisdiction to correct the adjudication record.

Electronically Filed,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 30, 2017, 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 on May 31 I served the following person(s) by U.S. mail and also by electronic mail where an electronic mail address is indicated below:

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