

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

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

Plaintiff,

v.

No. Civ. 66-06639 WJ/WPL

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.

**ORDER OVERRULING PLAINTIFF
THE STATE OF NEW MEXICO'S OBJECTIONS [DOC. NO. 11495]
TO
MOTION TO CORRECT SUBFILE ORDER (SUBFILE NO. 17.1) [DOC. NO. 11433]
AND ORDERING FURTHER BRIEFING**

THIS MATTER is before the Special Master, entered pursuant to the Order of Reference [Doc. No. 6336], as amended [Doc. No. 7736]. In its Order of Reference, the Court directed the Special Master to “hear and determine all claims and contentions of the parties... relating to...any errors and omissions process which may follow.” Order of Reference at 4. Movant Las Acequias de Chupadero (“Chupadero”) characterizes its motion [Doc. No. 11433] as one to correct a subfile order. Plaintiff the State of New Mexico disagrees under its reading of the Court’s Procedural Order

for Correcting Subfile Errors [Doc. No. 7909]. For the reasons outlined here that objection is overruled, and the Special Master concludes that the motion is within the Order of Reference, subject to review by the Court as provided in its Order of Reference, as amended, and Fed. R. Civ. P. 53.

The party to whom Chupadero's motion is addressed, The Christian Brothers Major Superior ("Christian Brothers") did not file a response to the motion, despite several extensions of time to file such a response. *See* [Doc. Nos. 11449, 11452, 11472].

Chupadero's motion asserts that a .72 acre irrigation pond already adjudicated to Christian Brothers is really and solely part of the infrastructure of the acequia "for the supplying of irrigation water to all of its members," including Christian Brothers. Motion at 2. As Chupadero puts it: "In other words, this is not a pond that has a diversion from the main ditch in order to fill it; rather this pond is part of the ditch itself." *Id.* Chupadero seeks a subfile order that would "split off" the pond from the Christian Brothers rights and that would "be recognized as owned by [Chupadero]." *Id.* at 3

Plaintiff The State of New Mexico bases its objections to the motion on two points. First, Plaintiff asserts that the Court's Procedural Order is narrow in scope, allowing, other than for clerical mistakes, the correction only of the description of a water right that affects the nature and extent of the right. Response at 3. Plaintiff The State asserts that ownership is not an element of a water right as contemplated in the Order, and thus does not fall within the scope of the Procedural Order. To buttress its argument, Plaintiff the State asserts that New Mexico's adjudication statutes do not confer jurisdiction on this Court to hear the motion since the statutes only allow this Court to determine elements of water rights, and Plaintiff The State asserts that ownership is not an element

of a water right as defined by New Mexico law. Response at 2-4, citing N.M.S.A. 1978, §§ 72-4-17, 72-4-19 (1965).

Without reaching the question of whether ownership is, under New Mexico law, an “element” of a water right, I conclude that the State applies too narrow a reading of both the State’s adjudication statutes and this Court’s Procedural Order, and that both allow the motion Chupadero presents to be considered by the Special Master and the Court.

The adjudication statutes confer exclusive jurisdiction on an adjudication court “to hear and determine all questions necessary for the adjudication of all water rights within the stream system.” N.M.S.A. 1978, § 72-4-17. The statute also allows the joining of any unknown persons, and heirs thereof, who claim a right within the stream system being adjudicated, allowing also service by publication. *Id.* N.M.S.A. 1978, § 72-4-19 mandates that adjudication decrees

shall in every case declare, as to the water right adjudged *to each party*, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with *such other conditions* as may be necessary to define the right and its priority.

Id. (emphasis added).

Unquestionably, therefore, even assuming that “ownership” is not an element of a water right being adjudicated, the statutes confer sufficient jurisdiction upon the Court to decide to whom a water right should be assigned, in the event of a disagreement between two subfile claimants.

The Procedural Order mandates that for corrections that “affect the nature and extent of the right,” service on an affected right owner is required. The instances where service would be required set out in the Procedural Order are not exclusive, since the Order states: “Such corrections include *but are not limited to* the following.” Procedural Order at 3 (emphasis added). Chupadero’s

proposal to carve out .72 acres from Christian Brothers and assign that area to Chupadero affects the extent of Christian Brothers' rights. It also affects the extent of Chupadero's rights. The Procedural Order applies on its face, therefore, to Chupadero's motion.

In addition, the Procedural Order requires service of a motion to correct on a party that "may have an interest in the right." *Id.* Christian Brothers has an interest in whether a .72 acre pond on its land represents a water right of Christian Brothers or a water right of Chupadero. Finally, the Procedural Order directs the Special Master to "hear evidence or legal argument on the motion and report his recommendations to the Court," and allows the Special Master, "either on motion or *sua sponte*, modify the procedures set forth in this Order." *Id.* at 3, 4. The State's reading of the Procedural Order, therefore, is too limited and is overruled.

The Special Master held two telephonic conferences with all counsel involved in Chupadero's motion on June 9, 2017 and on June 14, 2017. At those conferences Christian Brothers was represented by counsel, who has since entered an appearance in this case. [Doc. No. 11518]. At those conferences, counsel for Christian Brothers explained difficulties in communicating with Christian Brothers, and requested leave to file a response to Chupadero's motion. Chupadero asserted that time to respond had passed, and that this Court's Local Rule, D.N.M. LR-Civ. 7.1(B) required the Special Master, and the Court, to grant the motion. Chupadero represented that it had communicated with an attorney who spoke for Christian Brothers, but that attorney had not entered an appearance for Christian Brothers in this case. The Special Master disagreed with Chupadero's position, noting that such strict application of the rule, even assuming Chupadero had properly served its motion on Christian Brothers, would elevate procedure over substance, and would be

prejudicial to Christian Brothers given the circumstances of the motion and communications difficulties.

After considering the pleadings in this matter and the positions of counsel at the two telephonic status conferences, the objections of Plaintiff the State of New Mexico are overruled, Christian Brothers should be allowed to file a response to the motion, and Chupadero should be allowed to file a reply, if any.

THEREFORE,

IT IS HEREBY ORDERED that Plaintiff the State of New Mexico's objections to Motion to Correct Subfile Order (Subfile No. 17.1) [Doc. No. 11495] are hereby **overruled**.

IT IS FURTHER ORDERED that Christian Brothers shall file a response to Motion to Correct Subfile Order (Subfile No. 17.10) [Doc. No. 11433] on or before **noon on Wednesday, June 21, 2017**. Christian Brothers is directed to include in its response argument and authority on whether Chupadero properly served its motion, such that D.N.M. LR-Civ. 7.1(B) would be triggered in this instance. Christian Brothers is also directed to include in its response argument and authority on whether D.N.M. LR-Civ. 7.1(B), assuming it applies, requires the Special Master, and the Court, to grant Chupadero's motion for the failure of Christian Brothers to file a timely response.

IT IS FURTHER ORDERED that Chupadero shall file a reply to Christian Brothers' response on or before **5:00 p.m. on Friday, June 23**, addressing any points and arguments raised in the response.

THE PARTIES ARE NOTIFIED THAT WITHIN 14 DAYS OF SERVICE [Doc. No. 10791] of a copy of this order, report, or recommendation, they may file written objections with the Clerk of the Court pursuant to Federal Rule of Civil procedure

53(f)(2). A party must file any objections with the Clerk of the Court within the fourteen day period if that party wants the District Judge to hear their objections. If no objections are filed within the fourteen day period, the District Judge may adopt the order, report of recommendations in whole. .

/s/ Pierre Levy

Pierre Levy, Special Master

June 16, 2017

I hereby certify that on the date of filing, I caused the foregoing to be filed electronically through the CM/ECF system which caused the parties on the Court's service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail,

/s/ Pierre Levy

Pierre Levy