6TH JUDICIAL DISTRICT COURT
HIDALGO COUNTY NM
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STATE OF NEW MEXICO
COUNTY OF HIDALGO
SIXTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO *ex rel.* **NEW MEXICO STATE ENGINEER** **Plaintiff,**	**No. D-623-CV 2005-0054** **Hon. J. C. Robinson**
v. **ROSETTE, INC., *et al.***	**ANIMAS UNDERGROUND WATER BASIN ADJUDICATION**
Respondents.	

SPECIAL MASTER'S REPORT RECOMMENDING THAT THE COURT GRANT THE STATE OF NEW MEXICO'S MOTION TO EXCLUDE DOMESTIC AND LIVESTOCK WATER RIGHTS FROM THE ADJUDICATION

The Animas Underground Basin Adjudication (this "Adjudication") is before the Special Master on the State of New Mexico's Motion to Exclude Domestic and Livestock Water Rights from the Adjudication, filed June 23, 2017. Notice of the motion (the "State's Motion") was served on counsel of record pursuant to the Court's Odyssey File Service System on June 23, 2017. Notice of the State's Motion was also served on all water rights claimants by means of the Court's Monthly Adjudication Report. *See* Procedural Order Governing *Inter Se* Adjudication of State Law Water Rights, filed April 22, 2014.

One water right claimant—J&C Victor Trust (the "Trust")—objected to the State's Motion. Response in Opposition to State of New Mexico's Motion to Exclude Domestic and Livestock Water Rights from the Adjudication, filed July 10, 2017. The State filed its Reply in Support of Motion to Exclude Domestic and Livestock Water Rights from the Adjudication on August 4, 2017. I heard oral argument on the State's Motion on September 20, 2017.

For the reasons stated in this Report, I recommend that the Court grant the State's Motion.

I. Introduction

A. Relief Sought by State's Motion

In its motion, the State of New Mexico (the "State") requests that the Court enter an order excluding from this Adjudication "all domestic and livestock water rights that are on record with the New Mexico Office of the State Engineer but were omitted from the Animas Basin Hydrographic Survey." State's Motion at p. 1. The motion states that the Hydrographic Survey (the "Hydrographic Survey") of the Animas Underground Basin (the "Basin") contains approximately 135 subfiles, that most of the water rights included in the Hydrographic Survey are irrigation rights, and that the only domestic and stock rights identified by the Survey are those associated with an irrigation use. The domestic and stock rights the State requests be excluded from the Adjudication are those not associated with an irrigation right described in the survey.

The State' Motion states that approximately 500 domestic and stock rights were omitted from the Hydrographic Survey. According to the motion, many of the omitted rights are evidenced by permits or licenses issued by the State Engineer. Others are evidenced by declarations attesting that water was put to beneficial use prior to the time a permit was required to appropriate groundwater in the Basin.

At the hearing on the State's Motion, I ask the State how many omitted domestic and stock rights were evidenced by declarations, as opposed to permits or licenses. Subsequent to the hearing, the State advised that approximately 100 unpermitted domestic and livestock wells were excluded from the Hydrographic Survey and that

declarations were filed for most of these well. The State also modified the request for relief contained in its Motion by stating it no longer seeks to exclude from the Adjudication the unpermitted domestic and stock water rights not identified by the Hydrographic Survey. State of New Mexico's Partial Withdrawal of Request for Relief, filed November 6, 2017. Thus, the only water rights the State seeks to exclude from the Adjudication are the permitted domestic and stock rights that are not described in the Hydrographic Survey. For purposes of reference, I will refer to those rights as the "De Minimis Rights."

B. Grounds for Relief Alleged in the State's Motion

The State's Motion argues that the De Minimis Rights should be excluded from the Adjudication because the adjudication of those rights will not "aid the State Engineer in his statutory duty to administer the waters of the State of New Mexico…" State's Motion, p. 1. According to the State, the adjudication of the De Minimis Rights will not facilitate the administration of water rights for four reasons: (i) the impact of the De Minimis Rights on the Animas Basin is negligible; (ii) the State Engineer has the authority to administer the De Minimis Rights regardless of whether those rights have been adjudicated by this Court; (iii) excluding the De Minimis Rights will not adversely affect other water rights owners; and (iv) the cost and time required to adjudicate the De Minimis Rights far exceeds the negligible benefits that would result from adjudicating them.

C. The Trust's Objections to the Motion

The Trust, citing NMSA 1978, § 72-4-17, argues that New Mexico law requires that all water rights claimants in a stream system be joined as parties to an adjudication

and that, as a consequence, it also requires that all water rights, including the De Minimis Rights, be adjudicated by the Court.

The Trust also argues that excluding De Minimis Rights from the adjudication is inconsistent with the purpose of an adjudication. The purpose of an adjudication, according to the Trust, is to identify and specify the elements of valid water rights claims and extinguish invalid claims. The failure to adjudicate the De Minimis Rights will allow those with invalid claims to continue to take water from the Basin, thereby injuring claimants (such as itself) with valid claims. Moreover the failure to determine the validity of the De Minimis Rights will impose an undue burden on the Trust (and other claimants) in administrative proceedings requesting authorization from the State Engineer to change the purpose or place of use of a water right.

II. Analysis and Conclusions of Law[1]

Two issues must be addressed to resolve the State's Motion. First, does Section 72-4-17 of New Mexico's Water Code require that all water rights claims, including de minimis rights, be determined in a general stream adjudication? If not, do good grounds exist for excluding the De Minimis Rights from this Adjudication?

A. Mandatory Joinder of All Water Rights Claimants

Section 72-4-17 provides in relevant part:

> In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties.

[1] Rule 1-053.E (1) NMRA requires that a report of the special master contain, when appropriate, findings of fact and conclusions of law. This report contains no findings of fact because no affidavits, exhibits, or testimony were offered in support of, or in opposition to, the Motion.

The statute is not ambiguous. If interpreted literally, it mandates that all water rights claimants in the Basin be joined as parties and their water rights adjudicated by this Court.

Surprisingly, the State does not address the question of whether adjudication of the De Minimis Rights is mandated by Section 72-4-17. Rather, citing *Tri-State Generation and Transmission Assn., Inc. vs. D'Antonio,* 2012-NMSC-039, 289 P. 3d 1232, the State argues that adjudication of the De Minimis Rights is unnecessary because the State Engineer has the power to administer the rights outside the confines of an adjudication. Thus, according to the State, there is no need for the Court and the State to expend the time, money and effort necessary to adjudicate water rights that it alleges have only a de minimis impact on the Basin. The State apparently assumes, without saying so expressly, that the Court need not interpret Section 72-4-17 literally and can, where good grounds exist for doing so, exclude certain water rights claims from the Adjudication.

A statute that is not ambiguous is to be interpreted in accordance with its plain meaning, except when a literal interpretation would cause the statute to be applied in an "absurd, unreasonable or otherwise inappropriate" manner. S*tate v. Rivera*, 2004 NMSC-001, ¶ 13, 134 N. M. 768. If a literal interpretation would cause the statute to be applied in an inappropriate manner, the court must examine the history and background of the statute to determine the meaning that best effectuates the legislature's intent when it enacted the statute. *Id*.

Section 72-4-17 is one of several provisions of the 1907 Water Code that govern the procedure for adjudicating water rights in a general stream system. The statutory

procedure for adjudicating water rights has not been amended, in any materially respect, since the Territorial Legislature adopted the Water Code more than a century ago.

The 1907 Water Code is based on the so-called "Bien Code" that was drafted by a lawyer employed by the United States Reclamation Service named Morris Bien. G. Emlen Hall, *The First 100 Years of the New Mexico Water Code*, 48 Nat. Resources J. 245, 246-248 (2008). Mr. Bien drafted his water code in response to requests that the Reclamation Service provide the states of Oregon and Washington with assistance in preparing legislation that would enable them to manage the water rights in their respective states. John E. Thorson, et al, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams Part I,* 81 U. Denv. Water L. Rev. 355, 413-415 (2005) [hereinafter Thorson I]

Mr. Bien's water code included a procedure for inventory and validating existing water rights. Such a procedure—referred to as a general stream adjudication-- was necessary because Oregon, Washington and the other Western States had no records that identified the water rights people claimed by prior appropriation. Water rights had been created in the West simply by putting water to beneficial use; many water rights pre-dated statehood; and, until a particular state enacted a water code, no documentation was necessary to create a water right. Thorson: I, 408-415; Lawrence J. MacDonnell, *Rethinking the Use of General Stream Adjudications*, 15 Wyo. L. Rev. 347, 349-356 (2015) [hereinafter " MacDonnell"]

When Mr. Bien drafted his water code, Colorado and Wyoming had already adopted procedures for adjudicating water rights. Mr. Bien's model code was a hybrid of the procedures in the two States. Thorson I, 414-416; MacDonnell, 349-356.

In Colorado all water rights in a judicial district were adjudicated in a single proceeding. All water users were required to file claims with the district court. The district court appointed a water referee to investigate the claims, and the judge, after all claims had been determined, issued a decree that could be used to administer water rights. Thorson I, 414-416; MacDonnell, 349-356.

Wyoming rejected Colorado's judicial approach to water management because of concerns that Colorado's judges had routinely adjudicated claimants more water than they historically had put to beneficial use. To guard against the risk that water rights would be adjudicated in excessive amounts, Wyoming placed the responsibility for adjudicating water rights in the hands of a professional engineer supervised by an administrative board. Wyoming required that all existing water rights be identified and documented by a hydrographic survey conducted by the state engineer. Disputes over the state engineer's findings were resolved in administrative hearings before district engineers and the supervising administrative board. Persons who wanted to establish a new water right had to first obtain a permit from the state engineer. The state engineer would issue a permit if sufficient water was available for appropriation and, following proof that water had in fact been put to beneficial use, the supervising board would issue a certificate declaring that the claimant had a perfected water right. Thorson I, 414-416; MacDonnell, 349-356.

As is apparent from the above discussion, the difference between Colorado's and Wyoming's procedures for adjudicating water rights relate to the role of the judiciary. Colorado believed that, because a water right was a property right, only a judge could adjudicate a water right. Colorado required that all water rights be adjudicated in the

same proceeding instead of "water right by water right" for two related reasons. It believed it would be more efficient to adjudicate all water rights in the same river or stream in the same proceeding. It also believed that, because each water user is impacted by the court's determination of the priority of the other water users, an adjudication decree would not be enforceable unless all claims were determined in the same proceeding. Thorson I, 414-416

Wyoming had no qualms about adjudicating water rights in administrative proceedings. Nor was it concerned about the necessity of adjudicating all water rights in the same stream in the same proceeding. It adjudicated existing water rights in one proceeding and subjected new water rights to a separate permitting and license process.

The Bien Code was a hybrid or amalgam of Colorado's judicial and Wyoming's administrative approaches to adjudicating water rights. It provided that existing water rights in a stream system would be identified by a hydrographic survey conducted by the state engineer. The water rights identified by the hydrographic survey were to be adjudicated in a judicial proceeding in which all water right claimants were named as parties. Persons who wanted to establish a new water right had to go through a permitting and licensing process similar to Wyoming's process. Thorson I, 413-416.

When the territorial legislature enacted Section 72-4-17 as part of New Mexico's version of the Bien Code, it likely assumed that a judge must (or at least should) adjudicate water rights. Although New Mexico adopted the Bien Code's permitting and licensing process for new water rights, it did not limit the scope of a general stream system adjudication to only those water rights created before a permit was required to initiate a new water right.

Why Section 72-4-17 did not limit the scope of a general stream adjudication to unpermitted and unlicensed water rights is not clear. Perhaps the territorial legislature believed that permits and licenses were inchoate rights until confirmed by a judicial decree. Perhaps the territorial legislature believed that a judicial decree could not be enforced until each claimant had the opportunity to contest the other claimants' claims. Whatever the reason, the requirement that all claimants be joined, if interpreted literally, required that the Court adjudicate water rights the validity of which had already been established, as between the claimant and the State, by a permit or license issued by the State Engineer.

The Supreme Court's *Tri-State* decision raises doubts about whether Section 72-4-17 should be interpreted literally to mandate joinder of all water rights claimants. *Tri-State* rejected the proposition that only a court can determine the validity of a water right. The Court stressed that it is not "improper for the Legislature to vest an agency with quasi-judicial functions". 2012 NMSC-¶ 35, 289 P. 3d 1241. Citing *Wylie Corp v. Mowrer*, 1986-NMSC-075, 104 N. M. 751, *Tri-State* reiterated "an administrative agency can address individual rights as a quasi-judicial body." *Id*.

Tri-State also puts in question the long held belief that a water rights decree is not administrable unless all water users have been joined as parties and provided with the opportunity to contest one another's claims. *Tri-State* does so because it rejected the assertion that water rights claimants have a constitutional right to an *inter se* adjudication of priority. 2012 NMSC ¶ 33 ("[n]othing in the New Mexico Constitution establishes a right to an inter se adjudication of priority").

Tri-State addressed water resource management regulations adopted by the State Engineer and not the procedural aspects of a general stream adjudication governed by the 1907 Water Code. However, *Tri-State's* conclusion that there is no constitutional right to an inter se adjudication of water rights raises a question about the correctness of the long held belief that all water rights in a stream must be adjudicated in the same proceeding.

The belief that all water rights must be adjudicated in the same proceeding is partially based on the belief that all water users have an interest in the same property, namely the stream from which they are diverting water. A critic of general stream adjudications has pointed out:

> Unlike under the riparian doctrine, prior appropriation water rights are not correlative—that is their use is not dependent on the needs of other users from the same source of supply. While the existence of a large senior use is potentially adverse to downstream junior water users, its existence and extent does not in any way depend on the downstream user's needs or interests. Other users may wish to participate in the determination of water rights, but their involvement extends only to ensuring that the facts upon which the determination is made are accurate and the law is being properly applied. Legal use of water by a senior appropriator, by definition, cannot injure a junior appropriator.

MacDonnell, p. 372.

Joinder of all claimants in the stream is not necessary if the validity of any particular water right is not dependent on the validity of the other water rights. Each water right that needs to be adjudicated can be adjudicated in its own expedited inter se proceeding. The adjudication of that water right will be binding on all water users in the stream system "regardless of whether they were served and joined as defendants, participated in, or received actual notice of the proceeding, provided [due process] notice was given" of the proceeding. Rule 1-071.3 NMRA. If each water right is adjudicated in

its own expedited inter se proceeding, the State can limit the scope of an adjudication to the water rights that actually need to be adjudicated.

If permitted and licensed water rights do not need to be confirmed by a judicial decree and if an inter se adjudication of all water rights in the same proceeding is not necessary to administer water rights, the adjudication of permitted and licensed water rights is redundant. Permitted and licensed water rights are presumptively valid. A particular permitted or licensed right may be challenged if it was subsequently forfeited or abandoned. But adjudication of permitted and licensed rights whose presumptive validity is not in question is unnecessary.

Water rights created by prior appropriation (i.e. those created before a permit was required to put water to beneficial use) are not presumptively valid. The validity and elements of appropriative rights can be determined conclusively under existing law only in a judicial proceeding.

Efforts to adjudicate all water rights in a stream system in a single proceeding have proven to be extremely problematic. General stream adjudications are costly, time consuming and excessively complex. The New Mexico legislature questioned the utility of general stream adjudications when it found "[t]he adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative …" NMSA § 72-2-9.1. A commentator summarized some of the many problems inherent in a general stream adjudication as follows:

> The sheer number of outstanding claims and rights is daunting. The problems of notice are manifold. Case management presents major challenges. The potential burden on each claimant/water right holder can be significant. Costs to all participants, including the general tax-paying public, are surprisingly high.

MacDonnell, 381-382; *see* Joseph M. Feller, *The Adjudication That Ate Arizona Water Law,* 49 Ariz. L. Rev. 405, 432–33 (2007) (" [t]he public interest might best be served by simply abandoning the quest for comprehensive determinations and devoting resources instead to developing an efficient mechanism for enforcement of water rights, while providing a forum for adjudication of water rights where such adjudication is needed to resolve actual disputes.").

As stated, a statute is not to be interpreted literally if doing so would cause it to be interpreted in an unreasonable or inappropriate way. S*tate v. Rivera*, 2004 NMSC-001, ¶ 13, 134 N. M. 768. Interpreting Section 72-4-17 literally, to require the adjudication of permitted and licensed water rights that have not been abandoned or forfeited, is an unreasonable and inappropriate interpretation in light of the *Tri-State* decision.

I recommend that the Court interpret Section 72-4-17 to require the joinder of only those persons whose appropriative rights were purportedly perfected prior to the time a permit was required to put water to beneficial use in the Basin. I caution the Court that, in making this recommendation, I am tacitly recommending that the Court update a statute that has been rendered obsolete by changes in the law. *See generally, State ex rel. Martinez v. Lewis*, 1993-NMCA-063, ¶ 27, 116 N.M. 194, 201 ("If, as the Water Defense Association asserts, this means that we are simply superimposing twentieth-century revisionist views onto nineteenth-century history, so be it. Legal requirements sometimes change to reflect the sensibilities of the times."); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F. 3d 339, 356 (7th Cir 2017) (" I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning …that the Congress that enacted it would not have

accepted. This is something courts do fairly frequently to avoid statutory obsolescence and concomitantly to avoid placing the entire burden of updating old statutes on the legislative branch. We should not leave the impression that we are merely the obedient servants of the 88th Congress carrying out their wishes. We are not. We are taking advantage of what the last half century has taught.") (J. Posner concurring)

B. Discretionary Joinder of Permitted and Licensed Water Rights

Good reasons may exist for adjudicating a water right that was previously validated by a permit or license. The owner of the water right may not have beneficially used all permitted amounts of water and may have partially or totally forfeited or abandoned its water right. The State Engineer's records concerning a particular water right may require updating because, for example, the land to which water right is appurtenant has been subdivided multiple times. [2] If Section 72-4-17 is interpreted to require the joinder of only those claimants who appropriated water before a permit was required, the State would not be precluded from adjudicating permitted and licensed rights whose validity was questioned.

In civil litigation, the plaintiff has the option of deciding who should be named as a defendant, except where joinder is required by Rule 1-019. Wright & Miller, 7 Fed Pac. & Proc. Civil § 1602 (3d ed.). The Trust does not argue that joinder of the owners of the De Minimis Rights is required by Rule 1-019.[3] Rather, the Trust argues that the

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[2] In fact, many of the persons who have been joined as claimants in this Adjudication based their claims on a permit or license.

[3] Rule 1-019 requires that a person who has not been joined as a party be joined in two circumstances: (i) Complete relief among the existing parties will not be possible unless the missing person is joined or (ii) the missing person claims an interest in the subject matter of the proceeding and certain other conditions are satisfied. In this Adjudication, complete relief among those who are already parties can be afforded without the joinder of the owners of the De Minimis Rights because each water right is being adjudicated in its own expedited inter se proceeding. *See* Rule 1-071.2B. Joinder of the owners of the De Minimis Rights is not required because they claim an interest in the subject matter of this proceeding. As stated in the text,

State Engineer will not be able to properly administer the Basin unless the De Minimis Rights are adjudicated.

The Trust's argument is based on the assertion that the hydrologic model the State Engineer uses to administer water rights in the Animas Basin will be deficient unless the amounts of water used by the owners of the De Minimis Rights is determined by adjudicating those rights. More specifically, the Trust argues that the hydrologic model the State uses to authorize a new water right or a change in an existing water right will overstate the impact of a proposed new water right or of a change in an existing right because the model will assume that the De Minimis Rights are using more water than they actually are using. The model will make this assumption because the Supreme Court required, in *Montgomery v. Lomos Altos*, 2007 NMSC-002, 41 N. M. 2, that the State Engineer assume that all existing water rights are being fully utilized when evaluating an application for a new water right or a change in an existing right.

Montgomery v. Lomos Altos has no relevance to the disposition of the Motion. The case only requires that the State Engineer assume all existing water rights are valid. It does not require that the State Engineer take the further step of validating all existing water rights to ensure they are being fully utilized. To require that the State Engineer adjudicate the De Minimis Rights based on *Montgomery v. Lomos Altos* is to require that the State Engineer undertake an obligation that the Supreme Court did not contemplate the State Engineer would assume.

Nothing in the record suggests that the actual water use of the De Minimis Rights is materially different from the authorized water use. The Trust's assertion that the

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appropriative water rights are not correlative rights and the owners of the De Minimis Rights have no interest in the particular water rights that are being adjudicated in this proceeding.

hydrologic modeling of the Animas Basis will be deficient if the De Minimis Rights are not adjudicated is pure speculation.

The State Engineer has concluded that the benefits realized from adjudicating the De Minimis Rights are minimal and not justified by the costs. His conclusion is based on a number of considerations. The De Minimis Rights can be administered without adjudicating the rights. *Tri-State* 2012-NMSC at ¶039. Quantifying the amount of water actually used by the De Minimis Rights will be challenging because the wells are not metered and no practical method for quantifying their historical use of water has been identified. The cost and time required to adjudicate the 400 wells in question will be substantial given their number and remote locations.

The decision about whether the De Minimis Rights should be adjudicated is a decision that should be informed by the State Engineer's particularized expertise. The Supreme Court has cautioned that an "agency's determination of matters within its special expertise is to be give heighted deference." *Albuquerque CAB Co., Inc. v. New Mexico Pub. Regulation Comm'n,* 2017-NMSC-028, ¶ 9 404 P. 3d 1. The Supreme Court has warned lower courts against "curtailing the State Engineer's administrative discretion and threatening sound water policy." *Herrington v. State of N.M. ex rel. Office of State Eng'r,* 2006-NMSC-014, ¶ 48, 139 N.M. 368, 379–80, 133 P. 3d 258, 269–70. It has cautioned courts against "unduly restrict[ing] the administrative authority of the State Engineer to evaluate the facts in each specific case." *Id.*

Although this is not an administrative appeal, the State Engineer's conclusion that the De Minimis Rights should not be adjudicated is entitled to some weight. Given the lack of any factual showing whatsoever by the Trust that any material benefits would be

realized from adjudicating the De Minimis Rights, the Court should grant the State's Motion and order that those water rights be excluded from this Adjudication.

Stephen E. Snyder
Special Master