

FIFTH JUDICIAL DISTRICT COURT  
CHAVES COUNTY, NM  
FLEETING OFFICE

**FIFTH JUDICIAL DISTRICT  
COUNTY OF CHAVES  
STATE OF NEW MEXICO**

2016 OCT -7 AM 10: 57

DISTRICT COURT CLERK

STATE OF NEW MEXICO, <i>ex rel.</i>	)	Nos. 20294 and 22600
STATE ENGINEER	)	Consolidated
and PECOS VALLEY ARTESIAN	)	
CONSERVANCY DISTRICT,	)	Hon. James J. Wechsler
	)	Presiding Judge
Plaintiffs,	)	
v.	)	Pecos River Stream System
	)	Cow Creek Section
L.T. LEWIS, <i>et al.</i> , and	)	
THE UNITED STATES OF AMERICA	)	
	)	Court No. CV-WS-19000001
Defendants.	)	

**COW CREEK RANCH, LLC, RANCH O’RAINBOW, LLC, LOS PUEBLOS ALTOS CORP., COW CREEK BASIN ACEQUIA ASSOCIATION AND RUSSELL TUCKEL, JR. AND PENNY TUCKEL’S JOINT OBJECTIONS TO THE SPECIAL MASTER’S REPORT RECOMMENDING THAT ALL WATER RIGHTS IN THE COW CREEK SECTION BE ADJUDICATED IN EXPEDITED *INTER SE* PROCEEDINGS AND MOTION TO REJECT THE REPORT**

Pursuant to Rule 1-053(E)(2) NMRA, claimants Cow Creek Ranch, LLC, Ranch O’Rainbow, LLC, Los Pueblos Altos Corp., Cow Creek Basin Acequia Association and Russell Tuckel, Jr. and Penny Tuckel (collectively, “Claimants”), through undersigned counsel, hereby submit these objections to the Special Master’s Report Recommending That All Water Rights In The Cow Creek Section Be Adjudicated In Expedited *Inter se* Proceedings (Sept. 26, 2016) (“Report”). Claimants oppose the Report’s recommendation to adjudicate all water rights in expedited *inter se* proceedings because the record does not show that the findings required by Rule 1-071.2(B)(3) NMRA are met as the proposed procedure will not “promote judicial efficiency and expeditious completion of the adjudication.” To the contrary, the adjudication of all water rights in expedited *inter se* proceedings will increase the time and expense required to

conduct adjudication of the Cow Creek Section. Accordingly, Claimants move the Court to reject the Report.

### **I. Background**

On May 10, 2016, the Special Master ordered the State of New Mexico to serve on all parties drafts of a procedural order that would adjudicated all water rights in expedited *inter se* proceedings. *See* Report 4. On June 23, 2016, the Special Master conducted a hearing to take comments from interested parties regarding whether the Special Master should recommend that each water right be adjudicated in a separate expedited *inter se*. *See id.* Claimants participated in that hearing, advised the Special Master of their objections to the proposed expedited *inter se* procedure and requested the opportunity to submit written objections. The Special Master subsequently entered an order providing interested parties the opportunity to submit objections in writing. Special Master's Order, June 24, 2016.

Claimants submitted written objections to the Special Master's proposal to conduct this adjudication as an expedited *inter se* proceeding. *See* Los Pueblos Altos Corporation's Objections to Expedited *Inter se* Proceedings for All Water Rights (July 22, 2016); Cow Creek Ranch, LLC, Ranch O'Rainbow, LLC, and Russel Tuckel Jr. and Penny Tuckel's Joint Statement of Objections to Adjudicating All Water Rights in Expedited *Inter se* Proceedings (July 25, 2016). As indicated in the Report, Claimants contended:

that the adjudication of all water rights in expedited *inter se* proceedings will not promote judicial efficiency and the expeditious completion of the adjudication, that they will be prejudiced if they are forced to object to the water rights of other claimants before their own water rights are adjudicated in subfile proceedings with the State and that the method for giving notice of expedited *inter se* proceeding by means of the Monthly Adjudication Report, as described in the Proposed Order, does not comply with Rule 1-071.C [*sic*] NMRA.

Report 5. Claimants also asserted that they “will be prejudiced if persons who, according to the Hydrographic Survey, have no water rights are permitted to object to [their] water rights during expedited *inter se* proceedings.” *Id.*

**II. Rule 1-071.2(B) NMRA requires certain findings to be made before an expedited *inter se* proceeding, and such findings cannot be made here.**

In the standard stream adjudication procedure, subfile orders are first entered adjudicating claimants’ rights as between the State and each claimant and *inter se* proceedings among all claimants are conducted only after all subfile orders have been entered. Expedited *inter se* proceedings deviate from this standard procedure and Rule 1-071.2(B) sets forth the procedure that must be followed in order to establish an expedited *inter se* proceeding in a stream adjudication. “The plaintiff or any claimant may file a motion requesting that the court designate an expedited *inter se* proceeding. The motion shall include a short, concise description of the defendant’s claims and the reasons why such a proceeding is necessary. The court *sua sponte* may consider designating an expedited *inter se* proceeding.” Rule 1-071.2(B)(2). An expedited *inter se* proceeding “may proceed” only upon a finding by the Court “that such a proceeding will promote judicial efficiency and expeditious completion of the adjudication.” Rule 1-071.2(B)(3). Rule 1-071.2 sets forth three factors that shall be considered by the Court:

- (a) whether failure to proceed will injure the party asserting the claim;
- (b) whether proceeding will injure those parties opposing the claim; and
- (c) the expense and delay resulting from the failure to proceed.

*Id.* The record does not show that these factors are present here.

In this case, the Special Master has recommended *sua sponte* that all water rights be adjudicated in expedited *inter se* proceedings. No party spoke in favor of this proposal and no pleading or evidence has been submitted providing reasons why such proceedings are necessary or would “promote judicial efficiency and expeditious completion of the adjudication.”

Under the standard stream adjudication procedure where all individual water rights are first adjudicated as between the State and the water right owner before *inter se* as between all water rights holders commences, each water right owner knows the elements of their water right as agreed to by the State. Based on that knowledge, claimants can make informed decisions whether to participate in the *inter se* process to challenge the rights of other owners. Each water right owner knows not only what he or she is entitled to but how their right fits in the overall stream system with regard to priority, amount, and the ultimate exercise of that right. As a result, *inter se* challenges among individual right holders rarely result in litigation.

In contrast, if the Court reverses the standard adjudication procedure contemplated by Rule 72.1(B) and conducts an expedited *inter se* for each water right, claimants will have to decide whether to challenge other claimants' rights without knowing what right they are likely to be adjudicated. This will create judicial inefficiencies and delay in completion of the adjudication because claimants will likely file precautionary objections against other claimants in order to preserve their right to make such objections, depending on the adjudication of their own water rights. When subfile orders for all rights have been entered before *inter se* commences, claimants can see the overall context of the stream system, i.e., the amounts and priorities of all the competing rights and how their own rights fit into that context. When the process is reversed as the Special Master proposes and *inter se* commences before all subfile orders have been entered, there is no context within which an individual claimant can place his or her water right to determine whether it is necessary to file an objection or otherwise become involved in an *inter se* proceeding which an individual claimant may otherwise sit out. The proposed procedure will encourage precautionary litigation of claims by neighbors against their neighbors. Such a

procedure will be inefficient and consume the limited resources of the water claimants to the Cow Creek, the State, the Special Master and this Court.

Consideration of the factors enumerated in Rule 1-071.2(B)(3)(a)-(c) demonstrates that the proposed expedited *inter se* procedure does not satisfy the requirements of the Rule. Failure to proceed by expedited *inter se* will not injure any party, as all parties will retain the right to participate in *inter se*; no claimant or party has asserted they would be injured if expedited *inter se* proceedings are not imposed. Proceeding by expedited *inter se*, however, would harm the claimants in the form of time and expense to participate in the expedited *inter se* of their own rights and those of other claimants. Claimants in this adjudication opposing the Special Master's proposed expedited *inter se* procedure are concerned about the unnecessary time and expense they would incur from having to defend against challenges to their own water rights and from participating in challenges to other claimants' water rights, both of which could be obviated if the subfile orders for each claimants' rights were available. As a result the findings required by Rule 1-071.2(B)(3) are not demonstrated here.

**III. The expedited *inter se* process is not "inherently more efficient" than the standard stream adjudication procedures utilized in New Mexico.**

An expedited *inter se* for each individual water right would likely be time-consuming, expensive, and inefficient. If all water claimants know the rights they have been adjudicated by the State, they will be less likely to object to the rights of others, saving the time and resources of all involved. The limited number of water rights claimants in the Cow Creek Section further underscore that no efficiencies would be gained by imposing an expedited *inter se* process.

The Report states "that the adjudication of water rights in expedited *inter se* proceedings is inherently a fairer, more efficient and more expeditious method of adjudication water rights than the customary approach." Report 8. There is, however, no evidence that the use of expedited

*inter se* proceedings will be efficient or expeditious. While the Report states that the procedure recommended here has been used in other adjudications, *id.* 6, it has only been used to a limited extent in the Animas adjudication. There is no record, either in that adjudication or elsewhere in the state, that adjudicating each water right in an expedited *inter se* proceeding is more efficient. The adjudication of the water rights of the Cow Creek section would essentially be a guinea pig for reversing the standard adjudication procedure contemplated by Rule 1-071.2(B).

The Report states that “[a]n expedited *inter se* is inherently more efficient than [sic] the conventional approach to adjudicating water rights because it ensures that the same dispute over the validity of the claimant’s water right is not litigated twice” Report 8. That the increased efficiency claimed by the Report is not “inherent” is demonstrated by the fact that Rule 1-071.2(B)(3) explicitly requires a finding that an expedited *inter se* will promote efficiency before the Court may order that the proceeding be commenced. If the Supreme Court considered an expedited *inter se* proceeding to be inherently more efficient, such a finding would not be required. Conversely, no findings are required to follow the standard adjudication procedure. The Rule presumes that the standard procedure will be followed; findings of increased efficiency and expedition in completion of the adjudication are required only to deviate from the standard adjudication procedure by using expedited *inter se* proceedings. The Rule does not impose the burdens of persuasion and going forward on proponents of the standard procedure but rather on the proponents of expedited *inter se* proceedings. Rule 1-071.2B(2).

The Report at 8-10 states that the Special Master’s findings and conclusions about the inefficiency of the standard adjudication procedure and superior efficiency of the expedited *inter se* procedure for all subfiles is based on the Special Master’s experience in the Carlsbad Irrigation District Section. But no basis is provided for the assumption that the CID adjudication

and the Cow Creek adjudication are comparable and would lead to similar results. The Cow Creek section is a very small adjudication both in numbers of claimants and total number of water rights, whereas the CID Section involved many more water rights. There are no municipal or substantial, if any, industrial or commercial rights. The one volume Cow Creek Hydrographic Survey Report, p. xi, found only 62 acres of irrigation rights. The comparison to the adjudication of all the rights in the CID Basin is inapplicable and unavailing.

The Report also relies on rules governing the joinder of claims to support its position that an expedited *inter se* proceeding is preferable to a standard adjudication. Report at 9. The Report's statement that "[e]xpedited *inter se* proceedings, by ensuring that all objections to a water right are asserted in the same proceeding, are in accord with the liberal joinder policy of the Rules of Civil Procedure" does not establish an advantage in efficiency; under the standard adjudication process all parties and claims are similarly joined to the adjudication before it reaches the *inter se* process.

The Report concludes by addressing Claimants' concerns of prejudice and delay if all water rights were adjudicated by an expedited *inter se* process. The factors the Report identifies as causing delays under the "conventional approach"—appeals, unavailability of claimants to participate in hearings, probate proceedings, the failure of new owners to file change of ownership papers—would also apply to cause delay in the expedited *inter se* process. *See* Report 10-11. While other subfiles may proceed to *inter se* if there is a delay in one subfile, *see* Report 11, delays in even a few subfiles may prevent the timely entry of a final decree, the ultimate goal of this adjudication. Indeed, the Report recommends that the Court defer the *inter se* processes for subfiles in which objections have been made by individuals who "in fact have no water rights" until after the objecting claimants' water rights have been resolved in separate trials.

Report 13. This would result in a procedure similar to the conventional adjudication process—awaiting the final *inter se* process until all subfile orders have been entered. Fundamentally, the Report describes the drawbacks of the standard adjudication approach as a reason for adopting expedited *inter se*, but fails to demonstrate how expedited *inter se* would be superior. Report 11.

The Report suggests that, even before a subfile order has been entered, a claimant has “all of the information it needs to decide whether to object.” Report 13. But, claimants will not have information as to the elements of their own or other claimants’ water rights, to which the State is bound, which each of the parties to these objections believe is necessary to make informed decisions about whether to challenge other claimants’ rights in *inter se*. Further, as the exhibits to the Report demonstrate, *see* Ex A, ¶ B, the adjudication provides a procedure for people to make a claim if their water right has not been included in the hydrographic survey. This demonstrates Claimants’ concern that they will have to defend against objections that may be filed by individuals who do not have a water right recognized by the State.

**IV. The separate *inter se* process also will cause delay in any appellate proceedings.**

As indicated in the State’s Proposed Procedural Order, Section G, at the conclusion of each *inter se*, a final, appealable judgment will be entered pursuant to Rule 1-054(A) NMRA. Pursuant to Rule 12-201(A)(2) NMRA, an appeal of the judgment must be made within thirty (30) days of entry of judgment. The inefficiencies that would be present in the proposed *inter se* process would be exacerbated in the appeals process. Rather than all appeals having the same deadline, and possibly being consolidated for the purpose of briefing and/or consideration, appeals from this stream system adjudication could be spread out over an extended period of time. Appeals could potentially be ruled on before the *inter se* process was completed, raising the specter that the law could change during the *inter se* process.



V. Conclusion.

For the foregoing reasons, Claimants request that the Court reject the Report's recommendation to adjudicate all water rights in expedited *inter se* proceedings.


Respectfully submitted,

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[Certificate of Service to follow]

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on October 7, 2016, I submitted the foregoing to the clerk of the court by facsimile for filing.

I FURTHER CERTIFY that on such date, I also served the foregoing document to the participants/counsel in the manner indicated below to ensure that they will receive copies of the pleadings submitted for filing.

Via electronic mail:

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