

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

UNITED STATES OF AMERICA,)
ET AL.,)
))
PLAINTIFFS,)
))
))
v.)
))
STATE OF NEW MEXICO)
COMMISSIONER OF PUBLIC)
LANDS, ET AL.,)
))
DEFENDANTS.)

CIV NO. 01- 00072 BDB/WDS

**ZUNI RIVER BASIN
ADJUDICATION**

**REPLY BRIEF IN SUPPORT OF MOTION TO WITHDRAW GENERAL ENTRIES OF
APPEARANCE FOR MEMBERS OF THE
WESTERN NEW MEXICO WATER PRESERVATION ASSOCIATION AND FOR
LEAVE TO ENTER LIMITED APPEARANCES FOR ASSOCIATION
MEMBERS WHEN GLOBAL ISSUES ARISE (Doc 1763)**

The Western New Mexico Water Preservation Association (“WNMWPA”) by and through its attorneys of record, Law & Resource Planning Associates, P.C. (“LRPA”) hereby submits this Reply Brief in Support of its pending motion that seeks leave for its counsel to withdraw general entries of appearance for its membership, and for leave to file limited entries of appearance on issues of global concern to WNMWPA if and when they arise [Doc. 1763]. This reply brief responds to the answer briefs filed by the United States (“USA”) [Doc. 1777], the New Mexico State Engineer (“OSE”) [Doc. 1776], the Zuni Indian Tribe (“Zuni”) [Doc. 1779] and the Navajo Nation (“Navajo”) [Doc. 1778]. The foregoing parties are collectively referred to as the “Plaintiffs.” The OSE, the Zunis and the Navajos all essentially adopt and incorporate

the Answer Brief of the USA as their answer to the Motion. The OSE raises additional arguments in its brief that will also be answered.

INTRODUCTION

Each of the four respondents to the motion filed by the WNMWPA indicate their approval in principle of the use of limited appearances on behalf of members of the WNMWPA to handle matters that would be of global concern to those defendants. *See* USA Brief at pg 2; Zuni Brief at pg 1; Navajo Brief at page 1; OSE Brief at pg 1 (concurring in all respects with the United States' Motion). Any opposition to the Motion that emerges from reviewing the responses stems not from the notion that a limited appearance is not appropriate under the circumstances, but only that WNMWPA has not correctly filed a motion to withdraw or requested leave to file a limited entry of appearance in the future.

As the Court is no doubt aware, the genesis of this effort was expressions of concern by Court personnel regarding the administrative headache they were facing by an avalanche of motions filed by LRPA to withdraw from representation of WNMWPA members who had left the membership and had not maintained any contact with WNMWPA or its attorneys. In trying to update the Court's records in that regard, it became apparent that the ever-evolving nature of membership of the WNMWPA would require frequent entries of appearance and motions to withdraw as the membership fluctuated.¹ In recognition of the administrative hurdles the Court personnel were facing, the Special Master requested the WNMWPA attorneys to contact the USA for discussions about the situation, employing creativity to reach a permissible solution. The pending Motion is WNMWPA's attempt to both accommodate the Special Master's request, and to resolve the WNMWPA's concerns in being responsible for attorney's fees expended in

¹ For example, between the time of the filing of the Motions for Withdrawal and the filing of this Motion, there have been a number of members who have left the WNMWPA or failed to pay their dues, as well as a number of new members as well.

defending matters related to individual member's subfile. The rapid influx of a number of Motions for Default Judgments, some involving past members of the WNMWPA, also spurred the effort. See WNMWPA's Motion specifying the concerns of the Special Master and the WNMWPA itself. After submitting the proposal reflected in the pending Motion for comment and discussion, the Special Master instructed counsel for WNMWPA to schedule a joint telephone conference to discuss the proposal, any concerns of the Plaintiffs, and any other suggestions for handling both the Court's concerns and WNMWPA's concerns. Each of the four parties responding to the Motion demurred, insisting that WNMWPA must reduce the proposal to a Motion before they could offer any input on a solution advanced for discussion. Thus the objections raised as to WNMWPA's form of motion are rather disingenuous given the Plaintiffs' collective insistence that the *proposal* be submitted in the form of a Motion before they could comment upon it.²

I. This Motion is Not Brought Pursuant to D.N.M. LR-Civ. 83.8.

WNMWPA readily concedes that the Motion does not meet all the specific requirements of D.N.M. LR-Civ. 83.8. WNMWPA has not filed consents of its individual members for the withdrawal of the general entry of appearance pending a determination as to whether the proposal will be acceptable to the Court. When the consents for withdrawal are filed, they will provide all specific information required under the rule.

The Plaintiffs also fail to appreciate, however, that this Motion does not purport to be brought pursuant to D.N.M. LR-Civ. 83.8. Because of the direction by the Special Master that the parties be creative in their approach to the pending issue, the specific nature of a stream

² The USA is particularly disingenuous given its counsel's statement to the Special Master that it "will ultimately be more productive for all involved if Ms. Scott files a motion making a specific proposal and, after everyone interested has an opportunity to make comments, we have a hearing/working session to try to sort the matter out." E-mail from Bradley Bridgewater to Vickie Gabin, attached hereto as Exhibit A.

adjudication with multiple parties, most of whom are unrepresented by counsel, and the insistence of the Plaintiffs that a Motion must be filed before they could possibly comment on the proposal, the Motion was filed.

In addition, as the local rules for the District of New Mexico Federal District Court specifically provide, the “rules may be waived by a Judge to avoid injustice.” D.N.M. LR-Civ. 1.7. *See also* D.N.M. LR-Civ. 1.3(b). (“These rules supersede all previous local civil rules and govern all actions pending on or filed after their effective date, unless the Court otherwise orders”). The WNMWPA submits that stream adjudications, with hundreds of party defendants, demand creative solutions to allow limited representation on specific issues of global concern. The requirements of the Federal Rules of Civil Procedure, the Local Rules of the Federal District Court, and the Rules of Professional Responsibility for the State of New Mexico can all be observed under the proposal suggested by WNMWPA.

II. WNMWPA Has Never Suggested That Any Other Party Or The Court Not Be Apprised Of The Identities Of The Parties Affected By Any Withdrawal Of A General Entry Of Appearance, A Limited Entry Of Appearance Or The Specific Matter Covered By A Limited Entry Of Appearance

WNMWPA is frankly perplexed by the argument, set forth in the brief of the USA, and adopted by the other parties, that it seeks to allow its attorneys to “make a limited appearance in a case without having to specify both the clients who are represented and the scope of the representation, and, if there are changes to either the clientele or the scope, to promptly advise the court and other parties of such.” USA Brief at pg. 3. The WNMWPA has never made such a suggestion, either in any informal proposal to the Plaintiffs or in its Motion. On the contrary, the Motion specifically states “WNMWPA and its counsel will assume the responsibility of obtaining the consent of all individual members of the organization for such limited

representation.³ Such consent will be in writing and can be filed with the Court if the Court requires.” WNMWPA Motion at ¶ 15. The Motion further proposes that any future limited entries be on a specific, defined matter, thus allowing counsel to fully communicate with opposing parties on any matter outside the defined representation. WNMWPA Motion at ¶¶ 13-16. As proposed by the WNMWPA in its Motion as well, any limited entries would either expire when the specific issue was decided, or WNMWPA’s attorneys would file a notice with the Court that the limited representation had ended.⁴ WNMWPA Motion at ¶ 13. All parties would be able to communicate freely with any member of WNMWPA or their specific counsel on any matter outside of the limited area of representation.

The Plaintiffs also wrongly assert that they will not be apprised of the “identities of the parties to this case who would be affected by the withdrawal of appearance it seeks.” USA Brief at pg. 4. Again, as previously proposed to the Plaintiffs and discussed in the Motion, counsel for WNMWPA will obtain the consent of the individuals involved, in writing, and file those consents with the Court. WNMWPA Motion at ¶ 15. Any individual defendant can choose to opt out of the group representation, hire his or her own attorney, or participate in the group endeavor. *See* WNMWPA Motion at ¶ 16. Once the Consents are obtained and filed with the Court, the Plaintiffs will have the specific identities of the parties for whom the general entry of

³ The USA also makes the totally unsupported assertion that the attorneys for the WNMWPA do not know the identities of the membership of the organization. USA Brief at pg 4. On the contrary, WNMWPA attorneys are well aware of WNMWPA members and receive periodic membership list updates. A major point of this exercise is to alleviate the need to continually burden the Court through notification of frequent membership changes and the concomitant changes in the legal representation of the members.

⁴ A further erroneous assertion by the USA, without any supporting information whatsoever, is that the parties who will be affected have not been given notice of this motion. USA Brief at pg 5. Again, contrary to this assertion, the matter was discussed with the membership at the WNMWPA’s annual meeting, and instructions were given by the Board to go forward with the proposal.

appearance has been withdrawn.⁵ In the future, any limited entry of appearance will contain the specific identities of the individuals for whom a limited entry of appearance is filed.⁶ Any limited entry would also specify the specific, limited issue, which is covered by the limited entry of appearance thereby giving the Plaintiffs notice of its sweep. It is further proposed that such entry will then expire on its own accord or upon notification of counsel.

WNMWPA has absolutely no disagreement that the Court, opposing counsel, and all defendants involved be fully and completely apprised of all aspects of any withdrawal of a general entry of appearance and the specifics of any limited entry of appearance. These are non-issues that could have been completely dispelled had the Plaintiffs made any effort whatsoever to engage in the discussion requested by the Special Master.

III. Utilizing One Member of the Organization With Standing to Advance the Interests of All Members of the Organization Is Not an Acceptable Solution.

The USA suggests that WNMWPA should have chosen one of its members who is a Defendant with standing in the adjudication, to advance the collective interests of the all members. The sentiment is echoed by the OSE brief, which suggests this as the ultimate solution. *See* OSE Brief at ¶ 5. While this is certainly a possibility to be considered, it fails to address a core question also raised in the OSE's brief in this matter. That is, who will be bound by any ruling on any particular motion? If only one member of the organization is advancing an argument in a motion or response to a motion on behalf of all members pursuant to a side agreement within the WNMWPA, will the opposing parties be willing to stipulate that a ruling adverse to their interests benefits all members of the organization? In other words, will these

⁵ WNMWPA envisions an Order of the Court allowing the withdrawal upon the filing of the Consents by the individual defendants.

⁶ Because any specific motion is generally filed and briefed within a matter of a few weeks, it is not anticipated that there will be significant changes in the membership list requiring notification to the Court during the pendency of any motion.

Plaintiffs (and other parties) agree that all WNMWPA members have the benefit of a favorable ruling on an argument advanced by the designated member? Similarly, will all members of the WNMWPA be willing to stipulate that a ruling adverse to their member representative also applies to them? Both scenarios are highly unlikely without a prior stipulation filed with the Court.⁷ Any party will want to take advantage of a ruling that is favorable to it, yet disclaim any adverse ruling. A clear limited appearance naming specific individuals would identify the parties to be bound by any Court ruling from the beginning. There would be no subsequent questions of who will be bound by any specific ruling from the Court.

IV. Limited Entries of Appearance Will Alleviate Administrative Concerns of Court Personnel.

The OSE wrongfully concludes that the proposal offered by the WNMWPA will do “exactly nothing” to alleviate the administrative concerns expressed by Court personnel concerning frequent motions for withdrawal and new entries of appearance. WNMWPA clearly disagrees with such a broad dismissal of the proposal. The proposal will mean that each member of the WNMWPA will either represent himself or herself or will obtain independent counsel for representation.⁸ This representation will likely remain very stable. Under limited circumstances, the WNMWPA attorney may enter a limited entry of appearance for specified members for a specified legal issue. Under the proposal, the limited entry will last a short period of time and will either expire or notice of its withdrawal will be filed. Individual members of the WNMWPA will continue to either represent themselves or have counsel for all other aspects of the adjudication. This cannot help but be an improvement for Court personnel.

⁷ Having members of the WNMWPA either opt in or opt out of each Motion would be an administrative nightmare.

⁸ Neither the Special Master nor Court personnel have had the opportunity to weigh in on the proposal as the Plaintiffs refused to enter into informal discussions regarding it that would have included the Special Master and presumably representatives of Court personnel.

V. The Parties Essentially Agree That Limited Entries Of Appearance Are Appropriate In This Stream Adjudication If Structured Properly.

In its brief, the United States concedes that limited entries of appearance “can provide economical legal counsel to the represented parties without prejudice to other parties to the case” so long as there is adequate notice to the parties, the record indicates the identities of the parties represented, the scope of the representation is identified, and the parties have given informed consent. This is precisely what WNMWPA has proposed in its Motion. It appears that the only real dispute between the WNMWPA and the Plaintiffs is the timing of these events. The WNMWPA has sought through this Motion permission to withdraw its general entries of appearance presumably to become effective upon the filing of the individual consents with the Court. WNMWPA also seeks leave, in the future, to file limited entries of appearance on behalf of the current membership of the WNMWPA, the specific individuals to be identified at that time. The USA, with the approval of the other Plaintiffs, on the other hand, wants any general withdrawal to be done first, with future limited entries of appearance to be determined on an *ad hoc* basis after filing a motion each time.⁹ WNMWPA, through its proposal, is seeking assurances that, in the future, it can have attorneys appear on behalf of its membership’s collective interest on a limited basis, before filing numerous consents to the withdrawal of general entries of appearance. The USA’s proposal would only compound the administrative burden by requiring a motion each time a global matter arises.

As counsel for WNMWPA continually stressed to the USA when making this proposal, the WNMWPA welcomed the input of the Plaintiffs as to how such limited entries could be structured, all in accordance with the Special Master’s request that a solution be discussed and that the parties be creative in their discussions. The Special Master sought a joint telephone

⁹ Although not specified, the Plaintiffs presumably wish such limited entries of appearance to terminate only upon a motion brought under D.N.M. LR-Civ. 83.8 and an order approving the withdrawal.

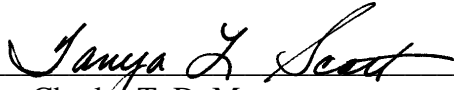
conference to discuss the proposal and the ideas of any other party. Sadly, the USA declined, insisting that the proposal be reduced to a motion before it could provide any input or comment. The remaining Plaintiffs joined in that demand. Given the modicum of disagreement among the parties concerning the proposal, probably based upon a misunderstanding of the specifics, it is likely that an agreement could have been worked out among the Special Master, the WNMWPA and the Plaintiffs and that such agreement would be acceptable to the Court.

CONCLUSION

The parties appear to be in general agreement concerning the value of using a limited entry of appearance in this stream adjudication to provide cost effective representation to defendants who are members of the WNMWPA. The model is equally applicable to other individuals or groups within the adjudication. Given the objections raised by the Plaintiffs, it is apparent that the disagreements are based primarily on a misunderstanding of the specifics of the proposal. WNMWPA has no disagreement that each individual defendant for whom a general entry of appearance has been filed must be identified and give his or her consent for the arrangement. It also has no disagreement that any future limited entry of appearance must specify the individuals represented and the scope of the representation. WNMWPA only seeks leave of the Court to file such limited entries in the future before it undertakes the process of filing individual consents to the withdrawal of the general entries of appearance for its members. The WNMWPA has no desire to have its attorneys withdraw from the representation of individual members unless it can be assured that an alternative arrangement passes muster with the Court.

Respectfully submitted,

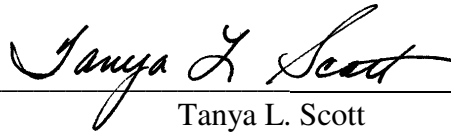
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on June 23, 2008, I filed the foregoing pleading electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Filing to be served by electronic means.


Tanya L. Scott