UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES,

Plaintiff,

vs. **NO. CIV-01-0072 BB/WWD**

STATE OF NEW MEXICO ENGINEER, et al.,

Defendants.

SUPPLEMENTAL BRIEF OF MOTION BY DEFENDANT PAUL PETRANTO TO REVOKE REFERENCE TO SPECIAL MASTER AND TO STAY FURTHER PROCEEDINGS BEFORE SPECIAL MASTER

ISSUE: **Whether the Court must present Findings of Fact to support "a showing" that exceptional conditions require the appointment of a special master.**

At the hearing on Monday April 30, 2001, the Court gave Defendant Paul Petranto's counsel 10 days to file a supplemental brief on the issue above. Under Federal Rule of Civil Procedure 6, regarding the computation of time, the supplemental brief is timely filed.

Although Defendant Petranto has demanded a jury trial in this action, the nonjury standard should be used to analyze the reference to the special master. See Prudential Insurance Co. v. United States Gypsum Co., 991 F. 2d 1080 (3rd Cir. 1993).

In actions to be tried without a jury, a reference to a special master shall be made only upon **a showing** that some exceptional condition requires it. See Rule 53(b).

In Prudential Insurance, infra, the Court of Appeals for the Third Circuit, noted that the district court referred the matter to a special master "**without making any specific findings**, or giving explicit reasons as to the need for a special master.... (emphasis added)" The reasoning of the Third Circuit supports the position that specific findings of fact as to the reasons for the appointment of a special master are required.

In McCormick v. Western Kentucky Navigation, 993 F.2d 568 (6th Cir. 1993), the Court of Appeals reversed the appointment of a special master when the only finding of an exceptional circumstance was that "20% of the Judge-power of the court has been removed by the existing vacancy..."

In In Re United States, 816 F.2d 1083 (6th Cir. 1987), the Court of Appeals overturned an order of reference to a special master even though the district court articulated five reasons warranting the reference to a special master: (1) calendar congestion; (2) complexity of the issues; (3) possibility of a lengthy trial; (4) the extraordinary pretrial management required in a case with more than 250 parties; and (5) the public interest in the quickest feasible resolution of Superfund cases.

In this case, the only articulated reason or "finding" warranting the reference to a special master was that this is a "water rights adjudication". At the hearing on April 30, 2001, the district judge asked if Petranto's counsel had ever been involved in a water rights adjudication and was informed that he had not been. Charles O'Connell of the Department of Justice stated that he had been involved in a water rights adjudication,

and pointed to a case in Washington State that he is involved in that has been going on for over twenty years. O'Connell expressed his approval of the reference to a special master.

Rather than being a reason to refer a case to a special master, the ensuing delay is a reason not to refer a case to a special master. As stated in In Re United States, 816 F.2d 1083 (6th Cir. 1987):

> That references often delay the resolution of cases is well recognized in the case law and by the commentators. The La Buy Court, for example, noted the following commentary by former New Jersey Supreme Court Chief Justice Vanderbilt in Cases and Materials on Modern Procedure and Judicial Administration 1240-41 (1952):
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> "There is one special cause of delay in getting cases on for trial that must be singled out for particular condemnation, the all-too-prevalent habit of sending matters to a reference. There is no more effective way of putting a case to sleep for an indefinite period than to permit it to go to a reference with a busy lawyer as referee. Only a drastic administrative rule, rigidly enforced, strictly limiting the matters in which a reference may be had and requiring weekly reports as to the progress of each reference will put to rout this inveterate enemy of dispatch in the trial of cases."
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> La Buy, 352 U.S. at 253 n.5.
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> The La Buy Court further observed that the district judge's "knowledge of the cases at the time of the references, together with his long experience in the antitrust field, points to the conclusion that he could dispose of the litigation with greater dispatch and less effort than anyone else." Id. at 256. (emphasis supplied). See also TPO, Inc. v. McMillen, 460 F.2d 348, 361 (7th Cir. 1972) ("The handling of the preliminary motion practice by the district judge not only assures a fairer result to the litigants but actually serves to reduce the time spent on the case.") (footnotes omitted); 9 C. Wright and A. Miller, supra, §§ 2605, at 791 ("reference of a nonjury case . . . involves expense and delay"); C. Wright, Law of Federal Courts 656 (4th ed. 1983) ("the supposed procedural advantage [from a reference] must be considered in the light of the 'unbelievably long' delay and the increased expense to which the litigants will be subjected by a reference."). Moreover, adding another layer of review complicates the

> appellate court's task. See Krinsley v. United Artists Corp., 235 F.2d 253, 257 (7th Cir. 1956) ("The well-reasoned opinion of the trial judge indicated a careful and searching study of the voluminous record before the Master. Had the trial judge himself heard the evidence and then made the same findings and reached the same conclusions, this case could be disposed of here in a very short opinion."), quoted in McMillen, 460 F.2d at 361 n.66.
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> Finally, it seems to us that the interest in a quick resolution of the case is simply an alternative way of asserting calendar congestion and the possibility of a lengthy trial as exceptional conditions justifying the reference. Because these factors were rejected by the La Buy Court and because we believe the reference is as likely to delay as to expedite the case, we reject the district court's assertion that the interest in the speedy resolution of the action establishes and exceptional condition warranting the reference.

CONCLUSION

Rule 53(b) requires a “showing” of exceptional conditions prior to a reference to a special master. A blanket reference of any class of cases, whether water rights adjudications or other complex litigation, is improper. A reference should be made only upon specific findings articulating the propriety of the reference. This is especially the case when a reference will likely result in a delay in resolution of the matter, and resulting prejudice to the parties.

Date: May 14, 2001 Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that this pleading was served on the parties of record in this proceeding by placing it into envelopes with postage prepaid to the addresses of record and then placing the envelopes with the United States Post Office in Ramah, New Mexico for mailing.

----signed electronically-------

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