

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

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01cv00072-BDB/WWD (ACE)
ZUNI RIVER BASIN

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.)
)
 STATE OF NEW MEXICO, ex rel. STATE)
 Engineer, A&R Productions, et al.,)
)
 Defendants.)
 _____)

**TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.'S
OBJECTIONS TO THE SPECIAL MASTER'S REPORT AND RECOMMENDATIONS
ON ZUNI RIVER BASIN ADJUDICATION PROCEDURE**

INTRODUCTION

Tri-State Generation and Transmission Association, Inc. ("Tri-State"), pursuant to Fed.R.Civ.P. 53 ("Rule 53"), objects to the Special Master's Report and Recommendations On Zuni River Basin Adjudication Procedure filed April 26, 2002 ("Report"), in part because the Recommendations do not recommend that Tri-State be dismissed *with* prejudice and that this action be dismissed *without* prejudice.

Tri-State has been incorrectly joined. In fact, the State's letter of April 26, 2001 attached to the United States Report of May 31, 2001 confirms that "[t]here is agreement that a majority of defendants were named in err [sic]." See, Tri-State's Dismissal Response (p.2). From the outset, Tri-State has shown that it has been erroneously joined and should be dismissed *with* prejudice. See, Tri-State's Response to United States' Report and State's Proposal for Proceeding Once the Stay Is Lifted ("Tri-State's Dismissal Response") filed August 24, 2001. To summarize, Tri-State

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showed that its water rights are located outside the exterior boundaries of the Zuni River Basin, as shown by the Hydrologic Map of the Basin dated April 2001 and the Narrative Description of the Adjudication Boundary submitted by the United States. See, the Affidavit of Frederick R. Allen attached as Exhibit A to Tri-State's Dismissal Response. These same water rights are, instead, subject to an ongoing adjudication in the adjoining Rio San Jose Basin/Bluewater Adjudication styled *State ex rel. State Engineer v. Kerr McGee Corporation, et al.*, Nos. CB-83-190 and CB-83-220 CV (Consolidated). See, Allen Affidavit. These water rights cannot be subject to both adjudications. (Transcript ("Tr.") of February 14, 2002 Adjudication Meeting, 12, 22-24). If they are, they are subject to inconsistent results, which would be judicially and administratively unworkable. The State agreed that including water rights in this Zuni River Basin adjudication that are subject to adjudication in the Rio San Jose/Bluewater Adjudication is improper. (Tr., 12) Therefore, Tri-State should be dismissed *with* prejudice from this Zuni River Basin action.

Secondly, this action should be dismissed *without* prejudice until the United States and State can agree to the boundaries of the adjudication and have completed the hydrographic survey. As the Report (p.2) correctly notes, "The United States and State, having been unable to agree with each other on virtually any point, filed separate proposals" for the conduct of the adjudication. Most recently, the Report (p.4) goes on to note, that "[p]otentially significant questions regarding the boundaries of this adjudication appeared relatively late in the proceedings, apparently during discussions between the State and United States." In short, the State and United States now take

different positions on the fundamental matter of boundaries in the adjudication.

This case should not be permitted to linger on the Court's docket, arguably clouding the non-Indian defendants' water rights claims, including Tri-State's, resulting in a waste of resources and time to Tri-State and other non-Indian defendants to protect their water rights. In its present state of disarray, this action serves no good purpose and only clutters the Court's docket.

Background

As noted, the State's letter of April 26, 2001 by D. L. Sanders, Special Assistant Attorney General, to Charles E. O'Connell, Jr., attached to the United States' Report of May 31, 2001, confirms that "[t]here is agreement that a majority of the defendants were named in err [sic]." (p.2) Tri-State is one of those defendants wrongly named and joined. This same letter also stated that "[t]his adjudication cannot proceed with erroneously named defendants" essentially because these defendants own no water rights within the basin and therefore will have no standing. The State's letter (p.2) also emphasizes:

The state has adopted the procedure of identifying the proper defendants from the hydrographic survey before the filing of an adjudication and the lis pendens. The course chosen by the US postures this adjudication without a survey, proper defendants, or a lis pendens.

Id. Finally, the State's letter (p.3) documents that "the United States has recognized the general inaccuracy of those named."

Tri-State is the successor by merger to Plains Electric Generation and Transmission Cooperative, Inc. (Plains), which was an erroneously named defendant in this action. As discussed, *supra*, Tri-State's water rights are located outside the exterior

boundaries of the Zuni River Basin. See, Allen Affidavit. Adjudications normally do not adjudicate groundwater uses located outside of the downwardly extended vertical boundaries of the perimeter of the particular stream system subject to the adjudication, which in this case is the Zuni River Basin, and with points of diversion outside the basin involved in the adjudication. *Id.* The points of diversion and place of use for all of Tri-State's water rights are outside the Zuni River Basin. Moreover, as noted, Tri-State's water rights are subject to the on-going adjudication in the Rio San Jose Basin. *Id.*

Moreover, the State's position at the outset, as set forth in its April 26, 2001 letter attached to the United States' Report of May 31, 2001 was:

"The State's position is that the US' filing of this adjudication was ill-conceived and should be withdrawn or dismissed and filed at a time when the State has the resources to dedicate to it through its completion;...."

The State's and United States' disagreement has been on-going, so that they have not agreed on an adjudication procedure and, most recently, have not agreed on the boundaries for the Zuni River Basin. Unfortunately, the non-Indian defendants, including Tri-State, are caught in the middle of this disagreement and have been forced to spend valuable time and resources to devote to it, which has been wasteful to the parties and contrary to judicial economy.

ARGUMENT

Point I. Tri-State Should Be Dismissed *With Prejudice*.

The Report's Recommendation in Section 3 provides in part that "The United States should move to dismiss all defendants *without prejudice* (naming "unknown claimants to the surface and underground waters of the Zuni River Basin" instead)...

(emphasis supplied) Tri-State objects to this recommendation because, as to Tri-State, it does not go far enough. Tri-State should be dismissed *with* prejudice.

Tri-State's water rights are subject to the on-going Rio San Jose/Bluewater Adjudication (*State v. Kerr McGee et al., supra*) in the adjoining basin. Therefore, Tri-State's water rights cannot and will not be included in the Zuni River Adjudication without infringing upon an existing adjudication. The State concurred that water rights subject to adjudication in the Rio San Jose/Bluewater Adjudication should not be subject to this Zuni River Adjudication. (Tr., 12) The Zuni River Adjudication boundaries cannot, by definition, extend within or impinge upon the boundaries of the on-going Rio San Jose/Bluewater Adjudication boundaries.

To simply dismiss Tri-State *without* prejudice is insufficient. Unless Tri-State is dismissed *with* prejudice, it is still subject to the specter of another misjoinder, pending the completion the hydrographic survey. Accordingly, Section 3 of the Recommendations in the Report should be revised to add the following sentence: "The United States should move to dismiss Tri-State Generation and Transmission Association, Inc. *with* prejudice, as Tri-State is a party to the water rights adjudication suit, *State ex rel. State Engineer v. Kerr-McGee Corporation, et al.*, CB-83-190 and CB-83-220 CV (Consolidated), Thirteenth Judicial District, Cibola County, New Mexico (Rio San Jose/Bluewater Adjudication) and it has shown that its water rights are included in that adjudication. Any other defendants that can show that all of their water rights are subject to an on-going water rights adjudication should also be dismissed *with* prejudice." A conforming change should be made to the first sentence of Section 3 by

adding the words “except for those to be dismissed *with* prejudice as described below” following the parenthetical.

Point II. This Zuni River Adjudication Should Be Dismissed Without Prejudice.

Tri-State objects to the Recommendations in the Report to the extent that they do not recommend that the entire Zuni River Basin Adjudication should be dismissed *without* prejudice. The Recommendations simply do not go far enough. The deficiencies in this adjudication warrant dismissal *without* prejudice. This case should not be permitted to linger on the Court’s docket and cloud the water rights claims of non-Indian defendants. Various parties echoed this point. (Tr. 34-36, 41-42, 46-48).

The most blatant deficiencies are:

1. United States/State Disagreements.

Throughout this adjudication, the United States and State have not agreed on the conduct of this adjudication. In fact, as the Report notes, “The United States and State, having been unable to agree with each other on virtually any point, filed separate proposals.” (Report, p.2) The Report continues to confirm that “The United States’ and State’s February proposals demonstrate sharply differing views on how this adjudication should be conducted.” This disagreement is hardly surprising, considering the State’s initial comment in its April 26, 2001 to the United States attached as an exhibit to the United States’ May 31, 2001 Report that “[t]he State’s position is that the US’ filing of this adjudication was ill-conceived and should be withdrawn or dismissed and filed at a time when the State has the resources to dedicate to it through its completion;....”

Non-Indian defendants, like Tri-State, that have been incorrectly named and

joined, have been prejudiced by the United States'/State's disagreements because they are caught in the middle and have been forced to spend valuable time and resources to protect their positions. Since the United States and State cannot agree, this case should be dismissed *without* prejudice until they are able to iron out their differences and until other preliminaries, such as boundaries and the hydrographic survey, discussed *infra*, are determined and prepared.

2. United States'/State's Disagreement On Exterior Boundaries Of Adjudication.

As the Report (p.4) notes, the most recent disagreement between the United States and State that "appeared relatively late in the proceedings" is the disagreement on the boundaries of the adjudication, detailed in the Report. The boundaries of an adjudication are so fundamental that they should be decided before a complaint is filed. This boundary disagreement underscores the reasons that this case should be dismissed *without* prejudice until the United States and State can agree on preliminaries, including the fundamental question of the boundaries of the adjudication. The issue of boundaries, however, should not affect Tri-State's proposed dismissal *with* prejudice, because the boundaries cannot impinge upon the exterior boundaries of the on-going Rio San Jose/Bluewater Adjudication, in which Tri-State's water rights are subject to adjudication. This case should be dismissed and not permitted to linger on the Court's docket or to prejudice the non-Indian defendants until the United States and State can decide on the boundaries and conduct the hydrographic survey.

3. Hydrographic Survey.

As the Report notes (p.11), the United States estimated that the hydrographic

survey of the entire basin might “take as long as **three to four years**. Tr. at 9-10.” (Emphasis supplied) Tri-State objects to maintaining this case on Court’s docket pending the three to four year preparation of the hydrographic survey. This extended period for preparation of the hydrographic survey is one more reason to dismiss this case *without* prejudice. Its pendency during the extended period will continue to cloud water rights claims of non-Indian defendants. The Report recommends in Section 3 that the United States should name “unknown claimants to the surface and underground waters of the Zuni River Basin” instead of named defendants and should move to dismiss all defendants *without* prejudice. The mere dismissal of defendants *without* prejudice and naming “unknown claimants to the surface and underground waters of the United States” arguably will not remove the cloud on water rights claims of non-Indian defendants that have been wrongly named in the first instance. Moreover, this case likely will no longer qualify as a case or controversy once defendants are dismissed, which similarly supports its dismissal *without* prejudice.

Furthermore, Tri-State objects to the Report’s recommendation in Section 6 that “I recommend that the Court order the United States to conduct the hydrographic survey of the entire basin,....” Tri-State agrees that the United States should “bear the costs of the hydrographic survey and the fees of the Special Master and the necessary staff during the hydrographic survey phase”, but submits that New Mexico’s statutory scheme requires the State Engineer to prepare the hydrographic survey. See Tri-State’s Dismissal Response, pp. 3-5.

4. Stay.

Tri-State concurs with Section 2 of the Report and Recommendations regarding retention of the stay.

CONCLUSION

For the foregoing reasons Tri-State objects to the Special Master's Report and Recommendations. Tri-State submits that it should be dismissed *with* prejudice. In this respect, Tri-State submits that the Report and Recommendations do not go far enough. Tri-State also objects to the extent that the Report and Recommendations do not recommend that this case be dismissed *without* prejudice at this juncture.

Respectfully submitted,

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