

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

FILED
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UNITED STATES OF AMERICA,

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Plaintiff,

vs.

NO. CIV-01-00072-BB/WWD ACE

STATE OF NEW MEXICO, *ex rel*
State Engineer, A & R Productions, *et al.*,

ZUNI RIVER ADJUDICATION

Defendants.

**OBJECTIONS BY THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT TO THE SPECIAL MASTER'S REPORT**

Pursuant to Federal Rules of Civil Procedure, Rule 53(e)(2), Salt River Project Agricultural Improvement and Power District ("SRP") submits these comments to the Special Master's Report and Recommendations on Zuni River Basin Adjudication Procedure, dated April 26, 2002.

SRP strongly supports the Special Master's recommendations and urges the Court to adopt them, along with the modifications suggested herein. Special Master Gabin has obviously listened to the parties in forming her recommendations, and has produced a reasoned and practical blueprint for adjudicating the entire Zuni River basin. In particular, SRP agrees with the Special Master that the United States should fund a hydrographic survey report ("HSR") that addresses all water uses in the basin. As also recommended, the United States should define its water rights claims by the time the HSR is complete. Given these recommendations, SRP's objections to the Special Master's Report are limited. SRP suggests that this case would benefit from adding specific procedures that would hold the United States accountable for moving

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forward with its case. SRP also proposes that the Court allow all parties to participate in discussions regarding the boundaries of the adjudication.

I. Hydrographic Survey Report

SRP agrees with the Special Master that the Federal Government, the initiator of this suit, should be responsible for funding a HSR of the entire Zuni River Basin. Any other result would allow the United States to pick and choose its Defendants, while other water users in the basin are forced to wait years until the State of New Mexico is able to fund the United States' case. While in the past the United States has shown reluctance to survey the entire basin, at the last hearing the United States seemed prepared to move forward. Transcript, February 14, 2002 Meeting at 10. Nevertheless, to guarantee that this Adjudication will move forward in a timely manner, the Court should insist that the United States commit to funding the entire HSR before this case is allowed to proceed. If the United States is unwilling to make this commitment, now, to the Court, then this case should be dismissed without prejudice. The United States has many demands on its time and resources—if it cannot proceed in earnest with this case at this time, then it should refile its case when it is prepared to move forward.

Similarly, if the United States begins the HSR process, the Court should insist on periodic status reports. If it appears that progress has stalled or that funding will not be forthcoming, then the Court should dismiss this case without prejudice at that time. As above, the United States could, of course, refile its case when it is ready to vigorously proceed.

If the United States fails to initiate or proceed with the HSR, dismissing this case would not create any undue hardship for the United States. The Special Master has already recommended that all defendants be dismissed until identified in the HSR, and that all motion practice be delayed until after the HSR is complete. If the Special Master's recommendations

are followed, this case will apparently remain viable for the limited purpose of court oversight over the HSR process. With oversight, and the remedy of dismissal, the Court can ensure that the United States proceeds diligently.

II. Federal Statements of Claim

The Special Master properly recommends that the United States prepare its Federal and Indian water rights claims during the time that it is preparing the HSR. Special Master's Report at 11, 8. This Adjudication simply cannot proceed efficiently until the Federal and Indian parties state their claims to water. At this time the United States claims that every "Defendants' use of surface and groundwater in the Zuni River basin in New Mexico constitutes an unlawful interference with the Plaintiff's right to the use of that water." Complaint at 17. Defining federal claims will allow the Federal and Indian parties to narrow their focus. Moreover, as a matter of due process, the State parties should not be expected to defend themselves against federal and Indian claims that have not even been articulated. Finally, by forcing the Plaintiff to define its claims at the beginning of litigation, the Court may avoid the delays inherent in other adjudications that have failed to follow this model. Special Master's Report at 8

The United States has estimated that it will take two to three years to prepare federal and Indian claims. Special Master's Report at 11; Tr., Feb. 14, 2002 Meeting at 11. As with the HSR, the Court should insist that the United States make regular progress towards this goal. That progress can be ensured if the Court requires periodic status reports. If at any time it appears that the United States is not making a reasonable effort to identify its claims, the Court should dismiss this case.

III. Adjudication Boundaries

According to the United States, its Complaint defines the boundaries of this Adjudication as the surface water boundaries of the Zuni River surface water basin, extending downward in a straight line through the aquifer. Special Master's Report at 4; Transcript, September 7, 2001 Hearing at 36. Any change to these boundaries would require an amendment to the Complaint. F.R.C.P. Rule 15. The State of New Mexico has suggested that these boundaries should perhaps extend to include the Gallup Aquifer. Special Master's Report at 4. If the scope of the United States' Complaint is expanded to include the entire Gallup Aquifer in this Adjudication, then arguably, its hydrologically connected surface water should also be included. If that is true, the adjudication boundaries could double, or even triple, adding untold numbers of claimants to this Adjudication. Tr., Feb. 14, 2002 Meeting at 13.

The Special Master has recommended that the State and the United States meet to investigate and determine the Adjudication boundaries. Special Master's Report at 9. She recommends that the Zuni Tribe and the Navajo Nation also be allowed to participate. All of the current and future parties to this Adjudication have an interest in how the adjudication boundaries are defined, and any interested party should be allowed to join in the boundary discussions. For example, the majority of SRP's water uses are located outside of the boundaries of the Zuni surface water basin, where they will be subject to any future adjudication of the Carrizo Wash/Largo Creek River basin. If the parameters of this Adjudication are changed, SRP may find itself litigating its water rights in the Zuni River basin adjudication, and then relitigating its water rights in a future Carrizo Wash/Largo Creek River basin adjudication. To properly protect its rights, SRP and any interested party should be allowed to take part in discussions that seek to change the scope of this Adjudication.

IV. Conclusion

SRP urges the Court to adopt the Special Master's Report and recommendations for proceeding with this case, with limited modifications. As part of those modifications, SRP suggests that the Court assure itself and the parties that the United States will diligently proceed with this case by insisting that the United States commit to funding a HSR of the entire basin, by insisting that the United States prepare its water rights claims, and by insisting on periodic evidence of progress. As a final matter, SRP proposes that the Court allow all interested parties to join discussions regarding the boundaries of this Adjudication.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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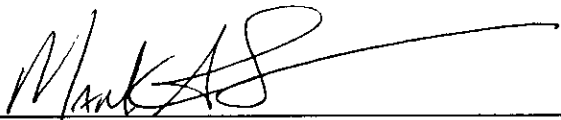
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