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.

RESPONSE BY DEFENDANT PAUL PETRANTO TO MOTIONS TO INTERVENE BY ZUNI TRIBE AND NAVAJO NATION

Introduction

While, in general, Indian tribes should be allowed to intervene in a water rights lawsuit as a matter of right under Rule 24(a) (see New Mexico v. Aamodt, 537 F.2d 1102, 1107 (10th Cir. 1976)), in the circumstances of this case, the motions should be denied, because this case should be dismissed. The U.S. is seeking relief under the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202, which is not the appropriate source of relief in a federal water rights adjudication. Therefore, this Court should use its discretion under 28 U.S.C. § 2201 to dismiss this matter *sua sponte*.

Argument

The U.S. has filed a complaint, which it has characterized as "an action to quiet the title... to the use of the surface water and groundwater in the Zuni River basin in New Mexico." (See paragraph 1 of U.S. Complaint under heading Nature of the Action.) The U.S. goes on in paragraph 2, under the heading of "Jurisdiction and Venue", to state: "Jurisdiction is conferred by 28 U.S.C. § 1345. Relief may be awarded pursuant to 28 U.S.C. § 2201 and 2202."

It is true that federal courts have jurisdiction under 28 U.S.C. § 1345 (1976) to adjudicate the water rights claims of the United States.[1] However the U.S. goes on to cite the federal Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202, as the source of the relief that it is seeking.

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[1]In Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-818 (1976), the Supreme Court stated that "the McCarran Amendment in no way diminished federal-district-court jurisdiction under §§ 1345 and . . . . the District Court had jurisdiction to hear this case." In Cappaert v. United States, 426 U.S. 128, 145-46, 96 S. Ct. 2062, 2072-73, 48 L. Ed. 2d 523 (1976), the Supreme Court stated: “Federal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts; federal courts have jurisdiction under 28 U.S.C. §§ 1345 to adjudicate the water rights claims of the United States. Colorado River Water Cons. Dist. v. United States, 424 U.S., at 807-809. The McCarran Amendment, 66 Stat. 560, 43 U.S.C. §§ 666, did not repeal §§ 1345 jurisdiction as applied to water rights. 424 U.S., at 808-809. Nor, as Nevada suggests, is the McCarran Amendment a substantive statute, requiring the United States to "perfect its water rights in the state forum like all other land owners." Brief for Nevada 37. The McCarran Amendment waives United States sovereign immunity should the United States be joined as a party in a state-court general water rights' adjudication, Colorado River Water Cons. Dist. v. United States, supra, at 808, and the policy evinced by the Amendment may, in the appropriate case, require the United States to adjudicate its water rights in state forums. Id., at 817-820.” In Arizona v. San Carlos Apache Tribe, 463 U.S. 545, fn 10, (1983), the Supreme Court reaffirmed that the McCarran Amendment did not do away with federal jurisdiction over water rights claims brought under section 1345 or section 1362: “The primary ground of jurisdiction for the suits brought by the United States is 28 U.S.C. 1345. The primary ground of jurisdiction for the suits brought by the Indians is 28 U.S.C. 1362, which provides in relevant part: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." Section 1362 was passed in 1966 in order to give Indian tribes access to federal court on federal issues without regard to the $10,000 amount-in-controversy requirement then included in 28 U.S.C. 1331, the general federal-question jurisdictional statute. Congress contemplated that 1362 would be used particularly in situations in which the United States suffered from a conflict of interest or was otherwise unable or unwilling to bring suit as trustee for the Indians, and its passage reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court. See S. Rep. No. 1507, 89th Cong., 2d Sess., 2-3 (1966); H. R. Rep. No. 2040, 89th Cong., 2d Sess., 2, 4 (1966). Just as the McCarran Amendment did not do away with federal jurisdiction over water rights claims brought under 1345, Colorado River Water Conservation District v. United States , 424 U.S. 800, 806-809 (1976), there is no reason to think that it limits the jurisdictional reach of 1362.”

Is the United States seeking to quiet title, as it states under “Nature of the Action” or seeking a declaratory judgment, as it states under “Jurisdiction and Venue”?

28 U.S.C. § 2409a, regarding real property quiet title actions, states in relevant part: “The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, **other than** a security interest or **water rights** (emphasis and underline added).” So, while the U.S. can be named as a party to a state water rights adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666, it apparently cannot be named a defendant in a “quiet title” action concerning water rights. On the other hand, some courts have characterized federal water adjudications as a suit to "quiet title," see, e.g., California v. United States, 235 F.2d 647, 652 (9th Cir. 1956). Nevertheless, it does not appear that such characterization is accurate.

Furthermore, it does not appear that the Federal Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202, is the appropriate source of the relief that the U.S. is seeking. In Transamerica Occidental Life Insurance Co. v. Digregorio, 811 F.2d 1249, fn. 4 (9th Cir. 1987), the Ninth Circuit Court of Appeals presented the following analysis:

> It is true, as the Mobil Oil court pointed, out that " Colorado River itself involved a complaint for declaratory relief." 772 F.2d at 542. But the suit in Colorado River was for an adjudication of water rights. Neither the appellate court nor the Supreme Court mentioned the Declaratory Judgment Act, because the federal courts' power to declare real property rights is independent of the Declaratory Judgment Act. The Supreme Court itself, exercising its original jurisdiction, entertained cases to adjudicate territorial disputes well before passage of the Act in 1934, even though these were "actions for a declaratory judgment in everything but name." E. Borchard, supra, at 142 n.20. In such cases decided after 1934, as in Colorado River, the court makes no reference to the Declaratory Judgment Act as the source of its authority. See, e.g., Arkansas v. Tennessee, 310 U.S. 563, 84 L. Ed. 1362, 60 S. Ct. 1026 (1940). Thus the fact that the United States sought a declaration of water rights in Colorado River does not mean that the case arose pursuant to the Declaratory Judgment Act. We have called a similar suit an action to

> "quiet title," California v. United States, 235 F.2d 647, 652 (9th Cir. 1956), and the Supreme Court has referred to suits for "equitable apportionment" or "judicial apportionment" of disputed water rights, Idaho v. Oregon, 444 U.S. 380, 381, 62 L. Ed. 2d 564, 100 S. Ct. 616 (1980); Arizona v. California, 298 U.S. 558, 560, 80 L. Ed. 1331, 56 S. Ct. 848 (1936). Whatever the proper denomination, it is at least clear that the Colorado River Court did not consider that case to be a Declaratory Judgment Act suit. Otherwise the four dissenters in Calvert (all of whom were members of the six-justice Colorado River majority) would not have distinguished the "discretionary" federal jurisdiction over declaratory judgment suits from the "non-discretionary" federal jurisdiction to which Colorado River applies. See Calvert, 437 U.S. at 671-73 (Brennan, J., dissenting).

Under the Ninth Circuit analysis, a federal action brought under 28 U.S.C. § 1345 for adjudication of water rights might be more aptly termed a lawsuit for "judicial apportionment" of disputed water rights, rather than a “quiet title” action or a “declaratory judgment” action.

As the U.S. has specifically requested relief under the Declaratory Judgment Act, this Court does not have to address the questions presented under the Colorado River doctrine, as to whether abstention from hearing this matter is in the interest of "wise judicial administration." Rather, the Declaratory Judgment Act specifically gives this Court the discretion to refuse to hear this matter at this time. (28 U.S.C. § 2201 states in relevant part: “...any court of the United States, upon the filing of an appropriate pleading, **may** declare the rights and other legal relations of any interested party...” (emphasis and underline added), while 28 U.S.C. § 2202 states in relevant part: “”Further necessary or proper relief based on a declaratory judgment or decree **may** be granted...” (emphasis and underline added).)

Although a district court cannot refuse to entertain a declaratory judgment action as a matter of whim, the exercise of declaratory relief jurisdiction is not automatic or obligatory. “In the declaratory judgment context, the normal principle that federal courts should adjudicate claims within their jurisdiction yields to considerations of practicality and wise judicial administration.” Wilton v. Seven Falls Co. (1995) 515 U.S. 277, 288, 115 S.Ct. 2137, 2143.

In the circumstances of this case, “considerations of practicality and wise judicial administration” should lead to a discretionary dismissal of this matter. The fact is that the U.S., the proposed interveners, and the State of New Mexico are not prepared to proceed at this time. The complaint is defective. Many indispensable parties have not been identified or named as defendants. A majority of the parties who have been named as defendants have not accepted service by mail, and have not otherwise been properly served. The parties cannot agree on whether the property at issue should be labeled the “Zuni River Basin”, as stated in the U.S. complaint, or as the “Zuni River Stream System” as preferred by the State of New Mexico. The boundaries of the “basin” or “stream system” have not been identified. A hydrographic survey has not been conducted. No offers of judgment have been prepared. The funding for the hydrographic survey and prosecution of this lawsuit is shaky at best.

While this Court does not have to look to the Colorado River doctrine, it can do so as further support for a decision to dismiss this matter. The Colorado River doctrine is an exception to the general rule that where a district court has statutory jurisdiction, it has a "virtually unflagging obligation" to exercise that jurisdiction. Colorado River, 424

U.S. at 817, 96 S. Ct. at 1246; see England v. Board of Medical Examiners, 375 U.S. 411, 415, 84 S. Ct. 461, 464-65, 11 L. Ed. 2d 440 (1964). Colorado River and Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983) should be read as counseling federal district courts to abstain from hearing the majority of water rights adjudications in the interest of "wise judicial administration".

In San Carlos Apache Tribe, at p. 569, the U.S. Supreme Court stated:

> The McCarran Amendment, as interpreted in Colorado River, allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications. Although adjudication of those rights in federal court instead might in the abstract be practical, and even wise, it will be neither practical nor wise as long as it creates the possibility of duplicative litigation, tension and controversy between the federal and state forums, hurried and pressured decisionmaking, and confusion over the disposition of property rights.

While it is true that there is not currently an action pending in state district court, there is “tension and controversy” between the federal and state actors, which cannot even agree on whether to call the subject property a “basin” or a “stream system”. Furthermore, the U.S. and the Indian tribes apparently want this Court to engage in “hurried and pressured decisionmaking” when they have not even defined what they are claiming (other than stating that they want all of the water), and have not conducted the hydrographic survey, which should have been completed prior to filing the complaint. Certainly, there will be “confusion over the disposition of property rights” unless someone identifies who the claimants are and properly brings them into the adjudication. All of these factors point to a discretionary dismissal of this matter in the interest of "wise judicial administration".

If this action is to be a “general stream adjudication” under New Mexico law, as suggested by the Special Master, rather then some form of "judicial apportionment" of disputed water rights under federal law, then the appropriate forum for the action is in state court, and not in federal court. The Court could enter a judgment ordering the U.S. to fund a hydrographic survey, and then dismiss the balance of the complaint. At that point, the normal process as described by the State could be followed:

The Water Rights Adjudication Process

1. The State Engineer or judge orders a hydrographic survey of a stream system or groundwater basin. OSE staff review water rights records, obtain ortho-rectified imagery, analyze water uses and verify land ownership records. OSE staff field check all water uses; produce final maps. Data compiled into a report and sent to legal staff. Lawsuit filed by state, federal government or interested person.

2. All water right owners joined in the suit.

3. Offer of judgment sent to each water right owner; owner can accept or reject offer.

4. After resolution, court confirms agreements reached.

5. Water right owners have opportunity to challenge water rights of others

6. Hearings held to resolve challenges

7. Judge issues final decree defining all water rights in the adjudicated area.

See New Mexico Office of the State Engineer webpage at **www.seo.state.nm.us/water-info/legal/adjud-process.html**

Once the hydrographic survey is completed, either the State or the U.S., or any other “interested person”, such as a tribe, could file a complaint in state district court.

CONCLUSION

The U.S. Supreme Court has noted that state courts are particularly capable of performing water rights adjudications. See Colorado River, 424 U.S. 800, 819, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976). Since the U.S. has deemed to seek relief under the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202, the Court should use its discretion, in the interests of "wise judicial administration" to order the U.S. to fund a hydrographic survey and then dismiss this matter. The motions to intervene can then be denied as being moot. A complaint can be filed in state district court after the hydrographic survey is completed.

Date: June 25, 2002

Respectfully submitted,

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

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CERTIFICATE OF MAILING

This is to certify that on June 25, 2002 this pleading was served on opposing counsel of record and parties pro se by placing it into envelopes with postage prepaid and addressed to the respective 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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