

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

UNITED STATES OF AMERICA,

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.

**SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND
POWER DISTRICT S RESPONSE TO STATE OF NEW MEXICO S
OBJECTIONS TO AND CLARIFICATIONS OF UNITED STATES
JANUARY 6, 2003 PLEADING PROPOSING GEOGRAPHIC BOUNDARIES
FOR THIS ADJUDICATION AND COMMENTS ON ISSUES ADDRESSED AT
JANUARY 16, 2003 SCHEDULING CONFERENCE**

Pursuant to the Special Master's order in open court at the January 16, 2003 scheduling conference in this matter, the Salt River Project Agricultural Improvement and Power District ("SRP") submits its comments on certain issues discussed during that conference. In addition, SRP responds to the State of New Mexico's Objections to and Clarifications of United States' January 6, 2003 Pleading Proposing Geographic Boundaries for this Adjudication ("State's Objection"), which objection was filed on January 14, 2003.¹

¹ The State filed its objection on January 14 and served it by mail. Arizona counsel for SRP did not receive the State's objection prior to the conference on the morning of January 16. During the conference, counsel for SRP requested leave to file a written response to the State's objection, and the Special Master granted that request.

Specifically, SRP submits its comments on two important issues. First, SRP opposes the State's attempts to expand the geographic scope of this Adjudication beyond the boundaries identified by the Plaintiff United States in its December 27, 2002 Identification of Zuni River Stream System Boundary ("U.S. Boundary Identification") and corrected by its January 9, 2003 supplement and further corrected orally by counsel for the United States at the January 16 conference.² The boundaries proposed by the Plaintiff United States are the most reasonable geographic limits under the present circumstances, and no evidence supports the State's prognostication of possible future needs to expand those boundaries. Any issues that might support a need to expand the boundaries of this Adjudication in the future should be addressed if and when those issues arise.³

Second, SRP discusses the draft alternative scheduling order proposed by the Special Master at the January 16 conference. Although SRP suggests a few minor modifications to the draft order, SRP generally supports the Special Master's proposal.

² At the conference, counsel for the United States indicated that one sentence on page 5 of its December 27 pleading should be stricken: "The above-described Zuni River stream system shall include groundwater in hydraulic continuity with the surface waters of the basin." See U.S. Boundary Identification, *supra*, at 5. SRP agrees with and supports this revision.

³ Unlike certain other parties, deciding not to expand the boundaries beyond those identified by the United States will not necessarily remove SRP from the scope of this Adjudication. SRP owns land and uses water within the United States' proposed boundaries and, thus, likely will remain a party to this proceeding regardless of whether the State's proposed expansion is granted. SRP strongly believes, however, that the boundaries identified by the United States are the most reasonable and manageable geographic limitations to this case.

I. The Court Should Adopt the Adjudication Boundaries Proposed by the Plaintiff United States.

The United States initiated this Adjudication to address particular problems it perceived in the Zuni River Basin. The boundaries identified in the United States’ December 27 pleading, which was submitted in response to an order from this Court, fully encompass, in the United States’ opinion, the geographic area necessary to address those issues. See U.S. Boundary Identification, supra. At the January 16 hearing, counsel for the Zuni Tribe—the beneficiary of the United States’ trust responsibilities upon which this Adjudication was initiated—also indicated that the Zuni Tribe was not requesting that the Court expand the boundaries beyond those proposed by the United States. Indeed, the State of New Mexico appears to be the only party promoting any expansion of the scope of this case beyond those boundaries identified by the United States.

Much of the State’s January 14 objection relates to the continuing squabbles between the United States and the State of New Mexico in their attempt to reach agreement on the proposed boundaries. See State’s Objection, supra. Whether those two entities have reached an agreement is not, in the final analysis, important. What is important is that the United States, which initiated this Adjudication, has identified the boundaries of the Zuni River Stream System that are the most logical and proper under the circumstances. Although it would be preferable if those two governmental entities could reach an agreement on the issues, what matters is that the Court and the Special Master select the proper geographic limits to this case.

The State, being the only entity that proposes an expansion beyond the United States' identification of the boundaries, has not submitted sufficient evidence to support that expansion. In its objection, the State relies primarily upon the "Zuni involvement in administrative proceedings regarding groundwater pumping in the Puerco River area" and "newspaper reports of Zuni concerns regarding ground water pumping [in the] Carrizo Wash region." See State's Objection, supra, at 4. Because the State speculates that the Zuni Tribe will ask the Court "at some later date . . . to add both the Puerco River and the Carrizo Wash to this adjudication," the State proposes that both of those areas should be added now. Id. at 5.

The State has placed the proverbial cart several yards before the horse. At the January 16 hearing, counsel for the Zuni Tribe indicated support for the United States' proposed boundaries and specifically stated that the Tribe was not asking the Court to expand those boundaries to include the Puerco River and Carrizo Wash. At a time when the United States, the State, and the several private parties are strapped for financial resources, it simply makes no sense to expand the boundaries of this case based upon the State's unsupported speculation about what one or more parties might request in the future. The Court should draw the boundaries based upon the present conditions and should consider any future requests to expand the scope of this case if and when those requests are made.

With respect to the Carrizo Wash area, for example, the State asserts that one or more representatives of the Zuni Tribe has reportedly stated that, because of the alleged

interconnection between groundwater withdrawals from the Dakota Aquifer and surface flows in the Carrizo Wash Basin, the Tribe “may sue to force an adjudication of the Carrizo Wash.” State’s Objection, supra, at 6. The State cites and attaches a December 21, 2002 article from the Santa Fe newspaper. See id. at 7 & Exhibit F attached thereto. The State relies primarily upon a reported statement by Zuni Governor Malcolm Bowekaty that the Zuni Tribe “**will consider** suing to force a full adjudication of its water rights in the area **if** the state ultimately proposes to allow pumping for the [Fence Lake] mine project.” Id. at 7 (emphasis added). The State wholly ignores, however, another statement reported in that same newspaper article by Governor Bowekaty, who left office shortly after the article was published. According to the article, Governor “Bowekaty said it would be up to [incoming Governor Arlen] Quetawki and other incoming officials to determine how to respond to this issue.” See Exhibit F to State’s Objection, supra.

The State’s desire to broadly expand the scope of this Adjudication is based upon its own supposition resulting from a newspaper account that the Zuni Tribe “will consider suing . . . if” certain future events occur. See id. The State’s speculation and inference from rumor are not sufficient grounds upon which this federal district court should expand the scope of the present case to include the Carrizo Wash area.

The State’s basis for including the Puerco River and the other areas is no more concrete. With respect to the Puerco River, for example, the State asserts that,

although the Zuni have not intervened in th[e] administrative action [relating to groundwater pumping by the City of Gallup], they have participated in technical discussions and have maintained regular contact with [the State Engineer’s Office] with regard to it. They clearly have

some interest in the City of Gallup's diversion of groundwater within the geographical boundaries of the Puerco River.

State's Objection, supra, at 9. The Zuni Tribe's "participat[ion] in technical discussions," "regular contact" with the State Engineer's Office, and general interest in the City of Gallup's groundwater pumping are not an adequate basis for this Court to greatly expand the present scope of this Adjudication.

Curiously, despite strongly promoting the wholesale expansion of this proceeding, the State concludes its pleading with a discussion of its own resource limitations. The State contends that the possibility of future expansion of this Adjudication "threatens to place a greater potential resource burden on the State than the original prospect of just adjudicating the Zuni River surface drainage." Id. at 12. Unfortunately, the State is not alone in its present concerns about time and resources. The United States and other governmental and private parties also are facing substantial budget concerns at the present time. The Court also is not immune from resource constraints. In view of these facts, it would be illogical for this Court to accept the State's argument and act now to expand the scope of this case based upon unfounded speculation about future events that might never occur. As the Court and the Special Master are well aware, fully adjudicating only those rights with the boundaries presently proposed by the United States will not be an easy or inexpensive task. No reason exists to make this proceeding any more complicated and time-consuming than it needs to be.

Lastly, the State requests that, if these other areas are not immediately included within the scope of this Adjudication, the Court should issue some statement about why

they were not included. As is clear from the State's own pleading, the United States and the State have already had several disagreements about the form of such a statement. See State's Objection, supra, at 10-12. If the Court decided to undertake the task of formulating such language, many other parties to this proceeding almost certainly would likewise have their own positions on the subject, even if the United States and the State could ultimately reach agreement. One obvious reason for not including these other areas at this time is that the boundaries presently identified by the United States are sufficient to address all the issues raised in the Complaint. Any attempt to prepare a further explanation would do nothing more than give the present parties something else about which to disagree and give lawyers in future proceedings something else about which to argue.

As the Special Master noted during the January 16 conference, this case has been pending idly long enough and now needs to move forward. The Court should adopt the boundaries identified by the United States and get on with the task of adjudicating the rights and issues framed by the Complaint.⁴

⁴ SRP has reviewed the objections filed by Tri-State Generation and Transmission Association, Inc. ("Tri-State") on January 27. See Tri-State Generation and Transmission Association, Inc.'s Objections to the United States Supplemental Identification of Zuni River Stream System Boundary and to the United States Proposed Order Re: Adjudication Procedures and Schedules (January 27, 2003) ("Tri-State Objections"). SRP generally agrees with Tri-State's concerns. With respect to identification of boundaries of this Adjudication, SRP joins in the comments included in Section II of Tri-State's pleading. See id. II, at 3-4.

II. The Court Should Adopt the Draft Interim Procedural Order Proposed by the Special Master, Making Minor Editorial Corrections and Incorporating Certain Elements of the Order Proposed by the United States.

As directed by the Court, the United States submitted a Proposed Order re: Adjudication Procedures and Schedules on January 9, 2003 (“U.S. Proposed Order”). Although SRP recognizes the time and effort expended by the United States in preparing that proposed order, SRP also agrees with the Special Master’s comments at the January 16 conference that the United States’ proposal was not sufficiently detailed with respect to certain procedures and deadlines. SRP requests that the Court adopt the alternative order proposed by the Special Master at the January 16 conference, with certain minor clarifications and also incorporating some of the items contained in the United States’ January 9 proposal. See Interim Procedural Order for the Adjudication of Water Rights Claims in the Zuni River Basin (proposed and circulated by the Special Master at the January 16 conference) (“Special Master’s Proposed Order”).⁵

First, SRP agrees with the suggestion at the January 16 conference that Section I(B) of the Special Master’s proposal should be amended to specifically include language relating to the payment of cost of service if a party receiving a waiver of service does not complete and return it. Although this payment requirement likely applies under Rule 4 of the Federal Rules of Civil Procedure regardless of whether it is specifically incorporated into the Court’s Order, SRP agrees that the inclusion of such language could help avoid

⁵ In addition to the issues discussed herein, SRP requests that the Court address the issues raised in Sections III and IV of Tri-State’s pleading. See Tri-State Objections, supra, at 4-6.

future disputes on this issue. SRP suggests that Section I(B) of the Special Master's Proposed Order be amended to include:

Any party failing to complete and return a waiver of service within the time required under Rule 4 of the Federal Rules of Civil Procedure shall be assessed all costs subsequently incurred in effecting service under Rules 4(e), (f), or (h) of that rule, together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

See Fed. R. Civ. P. 4(d)(5).

SRP also agrees with the suggestion at the January 16 conference that the reference to "Section 7" in Section I(F) of the Special Master's Proposed Order be deleted, because no "Section 7" exists in that draft order. Similarly, SRP notes that the reference to the "Rio Chama Stream System" in Section VI(A) of the Special Master's Proposed Order is likely a typographical error that should be corrected.

SRP concurs in the Special Master's suggestion at the January 16 conference that the next scheduling conference, or at least some future such conference, in this proceeding be held in the Zuni River Basin or at such other location that is convenient to most claimants in this proceeding. See also Special Master's Proposed Order, III. Although it is more convenient for SRP's Phoenix counsel to travel to Albuquerque for these proceedings, SRP recognizes the need for parties in this case to have reasonable access to the Court's activities in determining their water rights. In order to make the process less burdensome for all parties, SRP suggests that the Court and the Special Master consider alternating the location of these initial proceedings between Albuquerque and some location closer to the homes and farms of the New Mexico-based parties.

Although SRP generally concurs in the Special Master's Proposed Order, SRP also sees some merit in including certain items contained in the United States' proposal. For example, Section I(A) of that proposal reiterates the Court's requirement that the United States file and serve an amended complaint in this action, specially stating that this is an adjudication of the Zuni River system, identifying the Zuni Tribe and Navajo Nation as plaintiffs-intervenors, and realigning the State Engineer's Office as a plaintiff. See U.S. Proposed Order, supra, I(A), at 1. Although the Court already has imposed this requirement on the United States, SRP agrees that it would be prudent to reiterate this requirement so as to help ensure that all affected parties receive notice of the forthcoming Amended Complaint.

In addition, Section II(C) of the United States' proposal contains information that the Court should consider including in its order. See id. II(C), at 3-4. That section sets forth additional basic information regarding the hydrographic survey process, which again might be helpful to certain parties in this Adjudication.

SRP also agrees with the United States' suggestion that the Court's order include as an attachment the Water Right Claim Form, if the Court decides to require the defendant/claimants to complete this form. See Tri-State Objections, supra, at 5-6; see also Note 5, supra (joining in Tri-State's comments on this issue). As discussed at the January 16 hearing, the Court has directed the United States to construct a web site and to establish a hard-copy repository of all papers filed in this proceeding. Attaching the

Water Right Claim Form to this Court's procedural order will further facilitate the ability of private parties to have early and convenient access to that document.

With these few minor modifications, SRP requests that the Court adopt the Interim Procedural Order proposed by the Special Master. That order provides for the timely and efficient conduct of this Adjudication over the next several months, while still allowing the parties sufficient time and notice to fully participate in the proceedings.

III. Summary and Requested Action

No reason exists for the Court to expand the present scope of this Adjudication based upon speculation about what might or might not happen in the future. The geographic boundaries proposed by the United States encompass a sufficient area to address the rights and issues outlined in the Complaint. Even the Zuni Tribe, the intended beneficiary of the United States' efforts in this case, has stated on the record that it is not proposing that the boundaries be expanded beyond those identified by the United States. SRP requests that the Court reject the State's effort to expand the geographic scope of this Adjudication beyond the United States' proposed boundaries.

SRP also supports the alternative scheduling order proposed and circulated by the Special Master at the January 16 conference. The Special Master's proposal is more specific and detailed than the order proposed by the United States and, if a few elements of the United States' proposal are incorporated and certain other issues are addressed, will serve the need of getting this Adjudication moving forward in a fair and efficient manner.

DATED this 31st day of January, 2003.

SALMON, LEWIS & WELDON, P.L.C.

John B. Weldon, Jr.

M. Byron Lewis

Mark A. McGinnis

2850 E. Camelback Road, Suite 200

Phoenix, Arizona 85016

Telephone: (602) 801-9060

Facsimile: (602) 801-9070

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: _____

Mark A. Smith

Tom Outler

Post Office Box 1888

Albuquerque, New Mexico 87103

Telephone: (505) 765-5900

Facsimile: (505) 768-7395

Attorneys for SRP

ATTORNEYS FOR SALT RIVER PROJECT

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed a true and correct copy of the foregoing pleading to the following counsel of record on January 31, 2003:

Raymond Hamilton, Esq.
U.S. Attorney's Office
District of New Mexico
P. O. Box 607
Albuquerque, NM 87103

Charles E. O'Connell, Jr., Esq.
Environment & Natural Resources
Division
United States Department of Justice
P. O. Box 44378
Washington, DC 20026-4378

Mary Ann Joca, Esq.
U.S. Department of Agriculture
517 Gold Ave., SW, #4017
Albuquerque, NM 87102

David Gehlert, Esq.
U.S. Department of Justice
999 18th Street, #945
Denver, CO 80202

Steven L. Bunch, Esq.
N.M. Highway & Transportation Dept.
P. O. Box 1149
Santa Fe, NM 87504-1149

Edward C. Bagley, Esq.
N.M. State Engineering Office
Legal Division
P. O. Box 25102
Santa Fe, NM 87504-5102

D. L. Sanders, Esq.
State of New Mexico
Engineer's Office
P. O. Box 25102
Santa Fe, NM 87504-5102

Mr. Albert O. Lebeck, Jr.
Mr. David R. Lebeck
P. O. Drawer 38
Gallup, NM 87305

Ms. Sandra S. Drullinger
818 E. Maple Street
Hoopeston, IL 60942

Kenneth J. Cassutt, Esq.
Cassutt, Hays & Friedman, P.A.
530-B Harkle Road
Santa Fe, NM 87505

Jeffrey A. Dahl, Esq.
Lamb, Metzgar, Lines & Dahl, P.A.
P. O. Box 987
Albuquerque, NM 87103-987

Ms. Kimberly J. Gugliotta
158 W. William Casey Street
Corona, AZ 85641

Mr. Gerald F. McBride
Ms. Myrrl W. McBride
2725 Aliso Drive, N.E.
Albuquerque, NM 87110

Mr. Ted Brodrick
P. O. Box 219
Ramah, NM 87321

Tessa T. Davidson, Esq.
Swaim, Schrandt & Davidson, P.C.
4830 Juan Tabo, N.E., #F
Albuquerque, NM 87111

Bruce Boynton, III, Esq.
P. O. Box 1239
Grants, NM 87020

William G. Stripp, Esq.
P. O. Box 159
Ramah, NM 87321

Robert W. Ionta, Esq.
McKim, Head & Ionta
P. O. Box 1059
Gallup, NM 87305

R. Bruce Frederick, Esq.
N.M. Attorney General's Office
Special Assistant
P. O. Box 1148
Santa Fe, NM 87504-1148

Stephen G. Hughes, Esq.
N.M. State Lane Office
310 Old Santa Fe Trail
Santa Fe, NM 87501

Mr. Louis E. DePauli, Sr.
1610 Redrock Drive
Gallup, NM 87301

Ernest L. Carroll, Esq.
7429 Roswell Highway
Artesia, NM 88210

Peter B. Shoenfeld, Esq.
P. O. Box 2421
Santa Fe, NM 87504-2421

Ms. Ann Hambleton Beardsley
HC 61 Box 747
Ramah, NM 87321

Sunny J. Nixon, Esq.
Rodey, Dickason, Sloan, Akin & Robb,
P.A.
P. O. Box 1357
Santa Fe, NM 87504-1357

Dorothy C. Sanchez, Esq.
715 Tijeras, N.W.
Albuquerque, NM 87102

Clara M. Mercer
1017 S. 10th Avenue
Yuma, AZ 85364

Randolph Barnhouse, Esq.
Rosebrough & Barnhouse, P.C.
P. O. Box 1744
Gallup, NM 87305-1744

Mark H. Shaw, Esq.
3733 Eubank, NE
Albuquerque, NM 87111

Stephen R. Nelson , Esq.
Johnson & Nelson, P.C.
PO Box 25547
Albuquerque, NM 87125-5547

Larry D. Beall, Esq.
Beall & Biehler
6715 Academy Road NE
Albuquerque, NM 87109

David Candelaria
12000 Ice Caves Rd.
Grants, NM 87020

Mark K. Adams, Esq.
Rodey, Dickason, Sloan, Akin & Robb
P. O. Box 1357
Santa Fe, NM 87504-1357

Jane Marx , Esq.
3800 Rio Grande Blvd., N.W.
PMB 167
Albuquerque, NM 87107

Jeffrie Minier, Esq.
Charles T. Dumars, Esq.
Christina Bruff Dumars, Esq.
Law & Resource Planning Associates
201 Third Street, N.W., Suite 1370
Albuquerque, NM 87102

Stanley M. Pollack, Esq.
Navajo Nation Department of Justice
P. O. Drawer 2010
Window Rock, AZ 86515

Vickie L. Gabin, Esq.
Special Master
United States District Court for the
District of New Mexico
P. O. Box 2384
Santa Fe, NM 87504-2384

Darcy S. Bushnell , Water Rights
Attorney
US District Court
District of New Mexico
333 Lomas Blvd., NW
Albuquerque, NM 87102

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: _____
Mark A. Smith