

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW MEXICO, ex rel.
STATE ENGINEER, et al.,

Defendants.

CIV No. 01 0072 BB/WWD-ACE

ZUNI RIVER BASIN

STATE OF NEW MEXICO'S WRITTEN COMMENTS WITH REGARD TO THE
PROPOSED INTERIM PROCEDURAL ORDER FOR THE ADJUDICATION OF
WATER RIGHTS IN THE ZUNI RIVER BASIN

THE STATE OF NEW MEXICO, by and through its counsel of record, pursuant to the Special Master's Order in open Court of January 16, 2003, hereby makes its written comments and objections to the proposed Interim Procedural Order for the Adjudication of Water Rights in the Zuni River Basin ("Proposed Interim Order"):

I. Consent Orders

The Proposed Interim Order contemplates that the United States will serve a proposed Consent Order on claimants. Proposed Interim Order, ¶ I. B, p. 2. Because the Court's previous orders contemplate the State being realigned as a Plaintiff by the time proposed consent orders are served on claimants, and because the State will be bound by the orders if they are agreed to by the claimants and entered by the Court, due process would be served by the State having an opportunity to comment on the proposed Consent Orders before they are served on the claimants. To accomplish this, the State proposes the following substitute language for paragraph I.A:

A. For each of the subsections delineated by the United States of America (“United States”), a hydrographic survey report and hydrographic survey maps shall be filed when the survey is completed. After the hydrographic survey for a subsection has been filed with the Court, the quantified water rights and hydrographic survey maps would be used to formulate a consent order. A copy of each consent order shall be served upon the OSE, and the OSE shall have thirty days to object to it. If the OSE does not object to a consent order within thirty days of service, the consent order may be served on individual claimants by the United States. Water rights claimants identified in each report who have not been joined to the suit, shall be joined by the United States as those surveys are completed, and within thirty days of the conclusion of the OSE consent order objection period. Unknown claimants shall not be joined as parties at this time.

2. Returns of Service

The Proposed Interim Order states that “[i]f no Request for Waiver of Service is returned to the United States within 60 days, the Claimant shall be personally served with the summons, Complaint and other information in the packet.” Proposed Interim Order, ¶ I. B, p. 2. If the claimants are put on notice by the Court that they will then be responsible for the associated costs of service, they will be more likely to return the Requests for Waiver of Service to the United States. This will result in a faster, more efficient, and less costly adjudication. For that reason the State suggests that language to that effect be included in paragraph I.B.

3. Claim Forms

Although the proposed Interim Order makes no reference to claim forms, the Joint Technical Progress Report (No._____) contemplates them as being a significant part of the hydrographic survey. Claim forms would be prepared and mailed to individual property owners within the relevant Sub Areas during the hydrographic survey of the sub area, and the property owners would be required to identify the elements of the water

right they are claiming. Joint Technical Progress Report, Section 5, Task 5, p. 5. The accuracy, efficiency and speed of the hydrographic survey would be increased if the Court were to expressly order this, and provide that failure of the claimant to provide the information would be the basis for the court to assess the resulting costs of evaluating that claim against the claimant. This could be ordered as part of the proposed Interim Order, or as a separate stand alone order which would be served and published extensively.

4. Domestic Wells

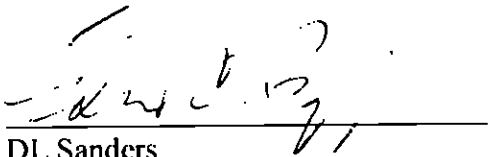
The proposed Interim Order makes no particular provision for domestic wells. Domestic wells present a particular difficulty for this adjudication. As the Gallup Underground Administrative Basin was not declared until very recently, in 1994, it is likely that the majority, and probably a significant majority of the domestic wells in the Zuni area were dug prior to that. These are pre-basin wells which will, for the most part, have no permits or declarations associated with them. Abstracting of OSE permit files will therefore not reflect their existence. Locating such wells from aerial photography, Landsat imaging or DOQQs will be similarly impossible.

For that reason, the speed and efficiency of the adjudication would be significantly advanced if the proposed Interim Order did one of two things: either exclude domestic wells from this adjudication as being de minimus uses; or require that a person with a domestic well make their claim by returning a claim form during the hydrographic survey (as contemplated by the Task 5, on page 5 of the Joint Technical Progress Report (No. __)) by a reasonable date, following extensive publication and service of notice of that deadline, or be deemed to have waived their claim.

5. Agreement

Section II.A.2 of the propose Interim Order states that “[a]s between the State and the Claimant, the Consent Order finally adjudicates the water rights elements contained therein.” However, the Court’s previous orders contemplate that both the United States and the State will be Plaintiffs at this point in the litigation. As such, this sentence would be more consistent with their joint Plaintiff status if it commenced with “[a]s between the Plaintiffs and the Claimant,” or “[a]s between the United States, the State and the Claimant.” This would result in all involved parties being bound.

Respectfully submitted,



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Certificate of Service

I certify that on this 21st day of February, 2003, a true and correct copy of the foregoing pleading was mailed by first class mail to the attached list of counsel of record and pro se parties:



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