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

UNITED STATES OF AMERICA,

Plaintiff,

-vs- 01cv00072 BDB-ACE

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

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS YATES' MOTION FOR EXPEDITED ORDER TO COMPEL STATE ENGINEER TO ACCEPT STATEMENT OF CLAIMS.

Defendants Yates Petroleum Corporation, Trust Q Under the Last Will and Testament of Peggy A. Yates, Deceased, and John A. Yates ("Yates") having moved for an expedited order compelling the Defendant State Engineer to accept for filing the Declaration of Ownership of Water Right of Surface Waters Perfected Prior to March 19, 1907, which was tendered to the State Engineer by Yates on March 31, 2004, and rejected by letter dated April 21, 2004, and the motion being opposed by the State Engineer, Yates submits the following memorandum in support thereof.

Facts, Point and Authorities in Support of the Substantive Portion of the Motion

The Court's Special Master, Ms. Gabin, on June 24, 2003, by document No. 208, ordered that:

A REQUIREMENT TO SUBMIT WATER RIGHTS FORMS

> 1. No later than October 31, 2003[1], all water rights claimants in the Zuni River stream system **shall** file with the State Engineer the documents necessary . . . . to create such files to accurately reflect the current ownership, nature and extent of their claimed water right.
>
> 2. The documents **shall** be those used in the ordinary course of business by the Water Resource Allocation Program of the Office of the State Engineer ("WRAP"). WRAP documents include, but are not limited to, surface and groundwater declaration forms (forms wr-03 or wr-21). . . .
>
> 3. A declaration form **shall** be completed by any water right claimant whose use of a surface water right was initiated prior to March 19, 1907 and continues through the present . . . and that water right is not reflected by an existing WRAP file. . . . As its title suggests, its purpose is to allow the claimant an opportunity to "declare" their water right. . . . (All bold added.)

On March 31, 2004, Yates presented to the State Engineer for filing their declaration of ownership of water right of surface waters perfected prior to March 19, 1907 for Atarque Lake, (hereinafter "the declaration"). A true copy of the declaration is attached as Exhibit 1 to the motion.

On April 21, 2004, the State Engineer rejected and returned the declaration, apparently attempting to deny the claim of Yates asserted in the declaration, and seeking to prevent the assertion of that claim in this Court. A true copy of the State Engineer's letter is attached as Exhibit 2 to the motion. The letter was sent by first class U.S. Mail, not certified. The basis stated in the letter was that:

> Said declaration has **not** been accepted for filing for the reason water has not been beneficially and continuously used. (Emphasis in State Engineer's letter.)

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[1]Subsequently extended to March 31, 2004 and April 12, 2004 by various orders of the Special Master.

The State Engineer is without discretion to decline to receive the declaration:

Section 72-1-3 NMSA (1961) provides:

> Any person, firm or corporation **claiming** to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed **shall** be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents. (Emphases added.)

As a matter of statutory law the State Engineer is without discretion to reject the declaration. In addition, the Courts have held that "Shall" means shall:

> The Supreme Court and this circuit have made clear that when a statute uses the word "shall," Congress has imposed a mandatory duty upon the subject of the command. See United States v. Monsanto, 491 U.S. 600, 607, 105 L. Ed. 2d 512, 109 S. Ct. 2657 (1989) (by using "shall" in civil forfeiture statute, "Congress could not have chosen stronger words to express its intent . . .” . . . Congress' use of "shall" . . . constitutes "mandatory language . . . . It is a basic canon of statutory construction that use of the word 'shall' . . . indicates mandatory intent. . . . Black's Law Dictionary 1233 (5th ed. 1979) ("As used in statutes . . . [shall] is generally imperative or mandatory.").
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> * * *
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> "If, after studying the statute and its legislative history, the court determines that the defendant official has failed

> to discharge a duty which Congress intended him to perform, the court should compel performance. . . . . [W]e must 'compel agency action unlawfully withheld or unreasonably delayed.'" . . . . Administrative agencies do not possess the discretion to avoid discharging the duties that Congress intended them to perform." "[T]rial court must 'compel'" agency action unlawfully withheld . . . .
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> We believe our [10th Circuit] "shall"-means-shall approach has been implicitly recognized by the Ninth Circuit. FOREST GUARDIANS, a non-profit New Mexico corporation, and DEFENDERS OF WILDLIFE, a non-profit Washington, D.C. corporation, Plaintiffs-Appellants, v. BRUCE BABBITT, Secretary of the Interior, Defendant-Appellee, 174 F.3d 1178; (10th Cir., 1998).

The New Mexico decisions are the same:

"The word 'shall' is mandatory." Kelly v. State, 94 N.M. 74, 607 P.2d 612 (S. Ct. 1980) (A case determining that even courts in the face of a statutory "shall" are deprived of discretion.)

Nor does the State Engineer have power to adjudicate a water right, as he has attempted to do here by short-circuiting the process set up both by the Special Master and by the New Mexico Legislature. He would not have that power even if the Court had not become involved in and taken jurisdiction over the adjudication of Zuni basin water rights.

The adjudication of water right, i.e., the determination of the factors set out in NMSA 72-4-19 (1907), which is the subject matter of this action, is an exclusively judicial function. State ex rel. Reynolds v. Lewis, 84 N.M. 768, 508 P.2d 577 (1973); City of Albuquerque v. Reynolds, 71 N.M. 428, 379 P.2d 73 (S. Ct. 1962). In the latter case the New Mexico Supreme Court's opinion reflects the genesis of the rule that the State Engineer cannot adjudicate water rights:

> The state engineer contends: That the powers and duties imposed upon him are administrative in character and that he therefore had no jurisdiction to adjudicate the claim of the city that it is the owner of a pueblo water right; and that the district court, on appeal to it under the provisions of 75-6-1, N.M.S.A., 1953 Comp., has no greater jurisdiction than the state engineer and hence no power or jurisdiction to adjudicate such claim of the city in the proceedings.

After so stating the State Engineer's position, the Supreme Court agreed and held for the Engineer.

The only reason for rejecting Yates' declaration is the State Engineer's determination that the water right is not valid because it had not been "beneficially and continuously used". Presumably he means to say that the water right, although once valid, has been lost either by forfeiture or abandonment. That determination, at least in the context of this case, is beyond the power of the State Engineer. In the statutory scheme adopted by New Mexico, the State Engineer's role is limited. He:

> has supervision over the acquisition of water rights and distribution of water pursuant to licenses and court adjudications, His role in the determination of water rights is limited to making hydrographic surveys and requesting the Attorney General to commence determination proceedings or to intervene in private adjudication proceedings. III Hutchins, Water Rights Laws in the Nineteen Western States 385-386.

The division of authority between the State Engineer and the Court is well established:

> Statutory adjudications of water rights in New Mexico are made exclusively in the courts. The State Engineer is directed to make hydrographic surveys of stream systems in the State and to deliver to the Attorney General, upon completion of such a survey, the portion thereof necessary for a determination of all water rights on the stream system. On request of the State Engineer, the Attorney General is required to initiate suit on behalf of the State

> for such determination unless a suit therefor has been begun by private parties. III Hutchins, Water Rights Laws in the Nineteen Western States 405.

See also Eldorado at Santa Fe, Inc. v. Cook, 113 N.M. 33, 822 P.2d 672 (Ct. App. 1991):

> an adjudication of the petitioners' water rights must be made in the first instance by the district court. See State ex rel. Reynolds v. Lewis (only courts are given the power and authority to adjudicate water rights).

Here the State Engineer has crossed the line separating the functions of Court and litigant. He has attempted to receive the Yates claim, consider it, deny it, and decline to allow Yates to present evidence and argument in its support to the Court. It is a denial of due process for the Court to allow him to do so, and deprives Yates of their day in court. In New Mexico water cases it is all-important to afford that day in Court.

> due process entitles "all who may be bound or affected by a decree... to notice and hearing, so that they may have their day in court." State ex Rel. Reynolds v. Pecos Valley Artesian Conservancy Dist., 99 N.M. 699,701, 663 P.2d 358 (S. Ct. 1983), citing State v. Allman, 78 N.M. 1 at 3, 427 P.2d 886 at 888 (1967).

The determination of the validity of water rights is a matter exclusively for this Court and is not within the administrative jurisdiction of the State Engineer.

Request for Expedited Hearing

Yates will be prejudiced if the State Engineer attempts to act on the declaration by rejecting it prior to the consideration of the issues, which are exclusively vested in this Court as part of the water rights adjudication before this Court.

As shown by Exhibit 2, the State Engineer is attempting to apply state administrative law procedural standards to the assertion of Yates' claim under the declaration, by attempting to require Yates to enter into the State Engineer's administrative process by requiring him to file a notice of aggrieval within 30 days of the date of Exhibit 2, apparently in order to force Yates to defend their claim before the State Engineer, which would allow the State Engineer to assert the benefits of administrative res judicata or collateral estoppel based on the Engineer's own self-serving decision.

Section 72-2-16, NMSA (1973), provides that:

> The state engineer may order that a hearing be held before he enters a decision, acts or refuses to act. If, without holding a hearing, the state engineer enters a decision, acts or refuses to act, any person aggrieved by the decision, act or refusal to act, is entitled to a hearing, if a request for a hearing is made in writing within thirty days after receipt by certified mail of notice of the decision, act or refusal to act. Hearings shall be held before the state engineer or his appointed examiner. A record shall be made of all hearings. No appeal shall be taken to the district court until the state engineer has held a hearing and entered his decision in the hearing.

Under ordinary circumstances, it might be appropriate for the Engineer to conduct a hearing to determine whether he should or should not act in a proceeding properly before him, in an application for one of the matters over which he has administrative control. For example, an application to appropriate water or modify an existing appropriation of water by changing a point of diversion, or the use of the water. Over such matters he has administrative control. Section 72-2-1, NMSA

(1982). The cited statute is notable by the absence therefrom of any duty to determine the validity of a water right.

Under City of Albuquerque v. Reynolds, supra, the State District Court's jurisdiction on appeal is derivative from that of the State Engineer. I.e., it is the same as the State Engineer's. Hence neither the State Engineer nor the State District Court could on appeal from the Engineer determine the validity of the claim. If Yates are aggrieved by the State Engineer decision, appeal to the District Court, which is the only avenue open to them in that event, would be a useless gesture, going from an administrative agency without jurisdiction, to a judicial body without jurisdiction, leaving no forum in which to secure a determination of Yates' claimed water right. The State Engineer's rejection of Yates' declaration thus has the effect of defeating the claim without ever submitting it to judicial scrutiny in a forum with power to determine its validity.

Presumably the State Engineer will argue that he is not seeking to require Yates to request a hearing on the validity of the water right, but only on the refusal to receive the declaration. (Obviously the purpose of rejecting the declaration is to make the improper assertion that the water right is somehow invalid, see the discussion of the substantive issue, supra, or to avoid the statutory shift in the burden of proof afforded by Section 72-1-3, NMSA (1961), supra, and the shift in the quantum

of proof resulting from filing a declaration.[2]) If Yates slip into the trap of requesting a hearing under Section 72-2-16, NMSA (1973) in order to avoid the effect of the letter ruling of the Engineer, they will have conceded that the Engineer has some jurisdiction over the issue. If Yates does not slip into that trap, but declines to request the hearing, or fails to do so within the thirty days provided by that section, the Engineer will almost surely assert that Yates waived the right to assert that the declaration should have been received and cannot therefore claim the right in this adjudication.

Hence Yates believe this motion should be heard on an expedited basis, prior to the expiration of the 30 days from the date of the State Engineer's letter, exhibit 2, which expires on May 21, 2004.

WHEREFORE, Yates respectfully request that the Court order the State Engineer to receive and file the declaration, Exhibit 1, previously proffered by them, in accordance with the Special Master's order.

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[2] State ex Rel. Reynolds v. Mears, 86 N.M. 510, 525 P.2d 870 (S. Ct. 1974).

S/ Electronically filed (ACE)
By:_____
Attorney for Yates

CERTIFICATE OF SERVICE

On May 4,2004, I served a copy of the foregoing instrument on the following, those in italics by email, those not in italics, by first class U.S. Mail, and the State Engineer by hand-delivery.

S/Electronically filed (ACE)
_____

Service List

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