

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

UNITED STATES OF AMERICA,)	
and)	
STATE OF NEW MEXICO, <i>ex rel.</i> State)	
ENGINEER,)	
Plaintiffs,)	
)	
and)	01cv00072-BB-ACE
ZUNI INDIAN TRIBE, and NAVAJO NATION,)	
Plaintiffs-in-Intervention,)	ZUNI RIVER BASIN
)	ADJUDICATION
-v-)	
)	
A & R PRODUCTIONS, <i>et al.</i>)	
)	
Defendants.)	
)	

**ORDER TO SHOW CAUSE
AND NOTICE OF HEARING RE: STREAM SYSTEM-WIDE ISSUE**

THIS MATTER is before the Special Master pursuant to Fed. R. Civ. P. 53 and the March 12, 2001 Order of Reference (Docket No. 14). This Order is entered pursuant to Fed. R. Civ. P. 16(b) to guide the course of the adjudication of water rights in the Zuni River Basin efficiently and expeditiously, while taking into account the resources of the parties and the Court. A hearing on this Order to Show Cause is set for Tuesday, August 23, 2005, at 1:30 p.m. in the Jury Assembly Room of the United States District Court, 130 Federal Place, Santa Fe, NM..

At the July 18, 2005, status conference and working session, co-Plaintiffs United States of America (“United States”) and the State of New Mexico, *ex rel.* State Engineer (“State”) reported that they were prepared to join water rights claimants in Sub-areas 4 and 8 in the manner prescribed by the January 1, 2005, Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-areas 4 and 8 of the Zuni River Stream System (No. 355). The service packet to be

mailed to claimants includes consent orders which describe the nature and extent of the claimants' water rights as found by the hydrographic survey of the sub-areas.

A large number of water rights claims are for domestic wells, which are water rights permitted pursuant to NMSA § 72-12-1. The State and the United States have agreed that the amount of water to be offered for each domestic well should be 0.7 acre-feet per annum, or an amount equivalent to claimant's actual beneficial use, whichever is higher. Apparently, the State had determined that this amount was appropriate as a matter of policy in February, 2005. The plaintiffs plan to negotiate the actual amount of the domestic well right with each claimant who objects to the amount set forth in the consent order.

It is clear to me that the resolution of this issue will affect a significant number of water rights claimants throughout the stream system. It is also clear that this issue will be controversial. Without commenting on the merits of any potential challenge, I note that on its face, this offer appears to conflict with the statute, which does not expressly limit the amount of water which may be used for household or other domestic use and which permits the irrigation of no more than one acre of noncommercial trees, lawn or garden. I note also that the question of whether § 72-12-1 should be amended to refine the existing limitations has been the subject of lively debate in the New Mexico legislature in the last several sessions.

Under these circumstances, litigating or even negotiating this issue on a case-by-case basis is certain to cause delays in the orderly adjudication of rights. As one example, if even half of the claimants in Sub-areas 4 and 8 dispute the 0.7 acre-feet amount, the time and effort expended by plaintiffs in their mandatory "consultation" process will be great. The Court will then be faced with a number of disputed subfile objections which would be consolidated for decision. Similarly situated

claimants in other sub-areas would likely have a basis for intervention. In the meantime, the consent orders for the next several sub-areas to be adjudicated would issue, only to be subject to the same lengthy process.

Further, proceeding on a subfile-by-subfile basis could create the risk that otherwise “final” consent orders entered early in the process may have to be re-adjudicated if in the future a judicial resolution of the issue results in an different amount for others. Due process requires that all water rights claimants in a stream system must be subject to the same standards. *State ex rel. Reynolds v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967).

When asked why this matter should not be heard in the context of a stream system-wide proceeding, counsel for the United States responded that such a proceeding would be difficult to conduct because not all water rights claimants have been joined to the suit; providing adequate notice under the circumstances would be difficult. While I am not unsympathetic to this reasoning, I believe that in this adjudication, providing constitutionally adequate notice to potential claimants may be accomplished relatively easily. *Mullane v. Central Hanover Bank & Trust Co., et al.*, 339 U.S. 306 (1950).

IT IS ORDERED, THEREFORE, that the State and United States come forward and SHOW CAUSE, if any they have, why the quantification of domestic well rights is an issue which should not be heard in a stream system-wide proceeding. In particular, the Court is interested in (1) whether, under the present circumstances, the parties can identify and join potential water rights claimants using accessible data sources, and (2) the approximate costs to do so.

IT IS FURTHER ORDERED that plaintiffs shall not issue consent orders for domestic well rights until further instructions from the Court.

IT IS FURTHER ORDERED that comments relating to these procedural matters - and not to the merits of the Plaintiffs' proposed offer - may be filed by counsel or any defendant appearing *pro se* no later than Thursday, August 18.

IT IS SO ORDERED.

/electronic signature/
SPECIAL MASTER VICKIE L. GABIN