IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,
and
STATE OF NEW MEXICO, *ex rel.*
STATE ENGINEER,

Plaintiffs,

and **No. 01cv0072 BB/WWD-ACE**

ZUNI INDIAN TRIBE AND NAVAJO NATION,

ZUNI RIVER BASIN

Plaintiffs-in-Intervention,

v.

A & R Productions, *et al.*,

Defendants.

UNITED STATES' RESPONSE TO ORDER TO SHOW CAUSE

The United States of America ("United States") hereby responds to the Special Master's July 26, 2005, *Order to Show Cause and Notice of Hearing Re: Stream System-Wide Issue* [Doc. No. 370] ("Show Cause Order"). In general, the United States asserts that no evidentiary hearing is necessary with regard to the central issue raised by the Show Cause Order because that issue must be decided as a matter of law. However, even assuming that the quantification of domestic well water rights is a matter that could be decided on a stream-system wide basis, without violating the due process rights of individual defendants or other law, the United States asserts that initiating such a

proceeding at this point in the adjudication would be an inefficient use of the resources of the parties and the Court.

The primary reason why "the quantification of domestic well rights is an issue which should not be heard in a stream system-wide proceeding," Show Cause Order at 3, is that it would be contrary to law to adjudicate domestic well rights, or any class of water rights arising under New Mexico state law, in a manner that assigns a uniform quantity to all rights in that class. "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." N. M. Const., art. 16, § 3. *See also*, McBee v. Reynolds, 74 N.M. 783, 787-88, 399 P.2d 110, 114 (1965) ("waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, are public and subject to appropriation for beneficial use. They are included within the term 'water' as used in Art. XVI §§ 1-3, of our Constitution."); *cf.*, Arizona v. California, 298 U.S. 558, 565-56 (1936) ("Under [the doctrine of appropriation], diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used." (Emphasis added.)). Unless it can be shown, contrary to common experience, that all domestic well owners in the Zuni River stream system do in fact make beneficial use of the exact same quantity of water, this proceeding, and the final judgment to be entered herein, must recognize that each domestic well use right is limited by the actual quantity used by the owner of that right. "'As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to

beneficial use.'" State *ex rel*. Martinez v. City of Las Vegas, 135 N.M. 375, 386, 89 P.3d 47, 59 (2004), (quoting State *ex rel.* Cmty. Ditches v. Tularosa Cmty Ditch, 19 N.M. 352, 371, 143 P. 207, 213 (1914)). Contrary to the Show Cause Order's statement, at 2, that "litigating or even negotiating this issue on a case-by-case basis is certain to cause delays in the orderly adjudication of rights," litigating or negotiating the quantity of domestic well rights on a case-by-case basis is the orderly adjudication of rights and is mandated by law.

The Show Cause Order asserts that the initial settlement offer the United States and co-plaintiff State of New Mexico *ex rel*. State Engineer ("State") propose to make to domestic well right owners "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 . . . ." Show Cause Order at 2. This statement cannot be reconciled with Article 12 of Chapter 72 of the New Mexico Statutes, which expressly states that "[b]eneficial use is the basis, the measure and the limit to the right to the use of waters described in this act." § 72-12-2 NMSA 1978 (emphasis added). Thus, the amount of water rights under that act is limited by the same standard that applies to every other water right arising under state law. There is no basis, on the face of the statute, for adjudicating the quantity of domestic well rights differently than, e.g., rights to appropriate groundwater for irrigation or other purposes pursuant to § 72-12-3 NMSA 1978. Applications for permits pursuant to § 72-12-1.1 do not require published notice and other procedural elements detailed in § 72-12-3, but the substantive basis for quantifying any right associated with permits under either statute is exactly the same: beneficial use. Setting aside for the moment the fact

that Plaintiffs clearly have discretion with regard to their settlement offers,[1] there is no conflict whatsoever between the language of the statute and the Plaintiffs' plan to offer owners of rights to make domestic use of water from wells – whether such wells are pre-basin, or permitted under § 72-12-1.1 or any other statute – a consent order specifying that their domestic use right be quantified as historic beneficial use, not to exceed 0.7 acre feet per year.

The United States is aware that some members of the public have an expectation that §72-12-1.1 permits grant an unequivocal right to use three acre-feet per year from their wells. That expectation is entirely unsupported by the plain language of the statute, or by any published New Mexico caselaw interpreting the statute. It is, in fact contrary to the requirement of beneficial use mandated by the provisions of New Mexico's Constitution and Statutes, and by the overwhelming weight of caselaw, cited *supra* at 2-3.

There is a reference to "an amount not to exceed three (3) acre-feet per annum, subject to limitation imposed by the courts" (emphasis added) in the rule concerning § 72-12-1 permits promulgated by the State at N.M. ADMIN. CODE § 19.27.1.22 (2001). "Not to exceed" does not mean "equal to," and the rule expressly acknowledges that courts may impose additional limitations on domestic well use. As this Court is well aware, the Order entered January 13, 1983 in New Mexico ex rel. State Engineer v. Aamodt, No. 66cv6639 (D.N.M.) enjoined the State from issuing permits pursuant to § 72-12-1 in the Rio Pojoaque stream system, except permits limited for "the

[1] Fed.R.Evid. 408 provides that "Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount." The Show Cause Order, by forcing Plaintiffs to justify their settlement offers on the record, is arguably in derogation of Rule 408.

use of water for household, drinking and sanitary purposes within a closed water system that returns effluent below the surface of the ground minimizing [any] consumptive use of water." This Court's subsequent October 4, 1999 *Order re Adopting Post-82 Well Settlement Agreement* in the Aamodt case approved an agreement providing that the domestic water rights of settling well owners are to be adjudicated the same 0.7 acre foot per year quantity that the United States and State propose to offer domestic well owners in the present case. This Court did not find any conflict between the 0.7 acre foot per year quantity and the language of the applicable statute in that case.

In addition, § 19.27.1.22 on its face, like the statute itself, concerns permits not water rights. New Mexico's courts have long drawn a distinction between permits and water rights. *See generally*, Hanson v. Turney, 136 N.M. 1, 94 P.3d 1 (Ct. App. 2004). A mere permit is only an "inchoate right" which must be "perfected by the application of the water to beneficial use." Id., 94 P.3d at 3.

The Plaintiffs' proposal to make domestic well settlement offers incorporating a 0.7 acre foot per year cap will not prejudice any defendant. For those rare individuals[2] who can show that their historic beneficial use for domestic purposes has exceeded 0.7 acre feet per year, the United States and the State will consider any evidence of such use and will attempt to negotiate a consent order that recognizes the actual historic beneficial use. If such negotiations are unsuccessful, the defendant will have a full opportunity to present his or her evidence to the Court. However, this Court is

[2] Data published by the U.S. Geological Survey at http://water.usgs.gov/watuse/data/2000/nmco2000.xls and by the U.S. Census Bureau at http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US35&-_box_head_nbr=GCT-PH1&-ds_name=DEC_2000_SF1_U&-format=ST-2 indicate that the average domestic self-supplied use per household in Cibola and McKinley Counties is 185 gallons per day, which translates to only 0.2 acre feet per year. Thus, the usage cap included in the offer the United States and State propose to make for domestic wells is, on average, a very generous one. If other parties believe it is excessively generous, they will, of course be entitled to make their challenge during *inter se*.

without authority to grant a water right in excess of historic beneficial use. § 72-12-2 NMSA 1978.

Turning to practical considerations, the United States has now spent over a million dollars making a detailed survey of water uses in the Zuni River Basin, including in excess of 700 wells having domestic use. Assuming a legal predicate, and due process justification, could be found for adjudicating domestic well rights in a basin-wide proceeding, the time for doing so was several years ago. The Court and all parties have been on notice since the filing of the Hydrographic Survey Report ("HSR") for Subareas 4 and 8 on July 16, 2004, that the United States and State intended to quantify domestic well rights at historic beneficial use, not to exceed an amount certain.[3] The United States has been ready to serve Consent Orders on defendants in Subareas 4 and 8 since February of this year and the two Plaintiffs have been in agreement concerning those offers since early July. Only the Special Master's instructions are now preventing the Plaintiffs from moving forward on those subfiles. The HSR for Subareas 9 and 10 is ready to file and, absent delays caused by the need to litigate issues in a preemptory manner not contemplated by the Special Master's previous scheduling orders, the HSRs for all remaining non-Indian water uses in the basin will be ready by the end of this year, with the consent orders to follow shortly thereafter. Proceeding to judicial resolution of the subfiles represented by those consent orders will require the United States to mail notice and service packages to all identified domestic well right owners. Proceeding to adjudicate domestic well rights on a basin-wide basis will require no less: "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons

[3] The conflict with the statute alleged on page 2 of the Show Cause Order would apply whether the amount of the cap proposed in Consent Orders was 0.7, 3 or even 6 acre-feet per year.

disappear for resort to means less likely than the mails to apprise them of its pendency." Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 318 (1950).

The United States agrees that "[d]ue process requires that all water rights claimants in a stream system must be subject to the same standards." Show Cause Order at 3. This is exactly what the United States and the State propose to do: make all claimants of water rights arising under state law in the Zuni River stream system subject to the same standard of beneficial use. However, while due process requires that all water rights claimants be subject to the same standard, neither due process nor any other law requires or permits that all such claimants have the same water rights. For this reason, a stream system-wide proceeding to quantify domestic well rights will impede, rather than promote, the efficient and expeditious resolution of this adjudication.

The United States respectfully urges the Special Master to maintain the schedule sequence mandated by her previous scheduling orders, and to enter the proposed *Amended Procedural and Scheduling Order For The Adjudication Of Water Rights Claims In Sub-Areas 4 And 8 Of The Zuni River Stream System* that counsel for the United States mailed to the Special Master and Counsel of Record on July 22, 2005.

Submitted this 18th day of August, 2005.

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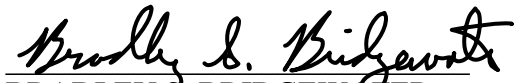
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *United States' Response To Order To Show Cause* were mailed to all persons on the attached distribution list on August 18, 2005.



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