IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

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

Plaintiffs,

And

ZUNI INDIAN TRIBE AND NAVAJO NATION,

Plaintiffs-in-Intervention

v.

A & R Productions, *et al.*,

Defendants.

CIV No. 01 0072 BB/WDS ~~WWD~~-ACE

ZUNI RIVER BASIN

STATE OF NEW MEXICO'S RESPONSE TO ORDER TO SHOW CAUSE

The State of New Mexico on the Relation of the State Engineer ("State") hereby responds to the Special Master's Order to Show Cause and Notice of Hearing re: Stream System-Wide Issues (Docket No. 370) ("Show Cause Order").

The State is in agreement with the comments made by the United States in its Response to Order to Show Cause. In particular, the State agrees that initiating such a proceeding at this point in the adjudication would be a very inefficient use of the resources of the parties and the Court, that the suggestion by the Special Master that the initial settlement offer the State and the United States propose to make to domestic well owners "appears to conflict with the statute" is not well founded, and that a stream

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system-wide proceeding to quantify domestic well rights will impede rather than promote the efficient and expeditious resolution of this adjudication.

By way of a series of procedural and scheduling orders dating back to 2003, the Special Master has set this adjudication along a path of hydrographic survey work and the adjudication of individual water right claims on a subfile basis. January 5, 2005 Procedural and Scheduling Order for the Adjudication of Water Right Claims in Sub-Areas 4 and 8 of the Zuni River Stream System (No. 355); April 5, 2004 Procedural and Scheduling Order for Federal and Indian Water Right Claims (No. 323); July 21, 2003 Procedural and Scheduling Order (No. 215); June 24, 2003 Interim Procedural Order Requiring All Water Rights Claimants to Update Their Water Rights Files With the State Engineer (No. 208). Substantial work along the lines required by those orders has already been done: large amounts of field work have been completed, hydrographic surveys have been filed, and Consent Orders for sub-areas 4 and 8 have been prepared and are ready to be served. The Show Cause Order now suggests that this process should halt, and the adjudication should change course to address instead "the quantification of domestic well rights . . . in a stream system-wide proceeding." Show Cause Order at 3. Such a change will result in delay; the data accumulated and processed to date will become increasingly stale. The resources of the Court and the parties would be much better spent completing the work originally ordered by the Special Master.

The Special Master notes that "[t]he State and the United States have agreed that the amount of water to be offered for each domestic well owner should be 0.7 acre-feet per annum, or an amount equivalent to beneficial use, whichever is higher," and goes on to observe that "[w]ithout commenting on the merits of any potential challenge, I note

that on its face, this offer appears to conflict with the statute . . ." Show Cause Order at 2. This statement is not well founded. Nothing in the New Mexico's domestic well statute is at odds with an initial offer of beneficial use up to 0.7 acre-feet per annum. § 72-12-1.1 NMSA 1978.

Additionally, a substantial number of domestic well rights in the Zuni River stream system were developed from pre-basin wells, and any rational regarding quantification relating to the statute would of course be inapposite to those.

More to the point, however, in terms of the adjudication of those domestic well rights, it is well established that a permit is not a water right. Hanson v. Turney, 136 NM 1, 94 P.3d 1 (Ct. App. 2004). The Constitution of the State of New Mexico requires that beneficial use, not a permit, define the quantity of a water right. *See* N.M. Const. Art. 16, § 3.

The notion that the quantity of beneficial use associated with a domestic well is typically on the order of 0.7 acre-feet per annum or substantially less is well supported by a variety of sources. On October 4, 1999, in the Aamodt adjudication lawsuit, the Court, entered its order approving a settlement on the basis of a maximum quantification of 0.7 acre-feet per annum for domestic wells. New Mexico ex rel. State Engineer v. Aamodt, et al., 66cv6639 (D.N.M.) (October 4, 1999 *Order re Adopting Post-82 Well Settlement Agreement*). In that same adjudication, on April 25, 2005, the State filed its Water Master Report, which included meter reading for hundreds of domestic wells which indicated an average use of 0.3 acre-feet per annum. Aamodt, 66cv6639 (April 25, 2005 *Notice of Filing 2004 Report of Post Moratorium Wells Water Master*). On December 1, 1988, in the Red River adjudication, the Court, in identifying certain water uses which it

deemed de minimus, and which were to be excluded from the subject matter jurisdiction of that adjudication lawsuit, included domestic wells which it characterized as "diverting a maximum of 0.50 acre-feet per annum." New Mexico ex rel. State Engineer v. Molycorp, Inc., et al., cv9780 (D.N.M.) (December 1, 1988 *Order re Adopting Post-82 Well Settlement Agreement*) (attached hereto as Exhibit A).

Further, the 0.7 acre-feet quantification is the United States' and the State's initial offer. Another way to state this would be to say that the offer simply includes a "cap" of 0.7 acre-feet per annum, and that this represents the most the United States and the State will accept in terms of an adjudicated quantity for a domestic well without any actual proof of beneficial use. This is not equivalent to limiting the amount that can be put to beneficial use, as the Special Master suggests on page 2, paragraph 2 of the Show Cause Order; rather, the Plaintiffs are just limiting the amount they are willing to recognize in their initial settlement offers for an adjudicated right without proof of beneficial use. Any claimant has the right then to come back with actual evidence of greater beneficial use if more than 0.7 acre-feet per annum is being used. In fact, the procedures described in the Special Master's January 5, 2005 Procedural and Scheduling Order provides for a fairly streamlined consultation process for doing just that.

The Special Master also suggests that Mullane notice would be appropriate to join domestic well owners to the lawsuit. Show Cause Order at 3 (citing Mullane v. Central Hanover Bank & Trust Co., et al., 339 U.S. 306 (1950)). This approach would be at odds with the notice provisions required by the Special Master's January 5, 2005 Procedural and Scheduling Order. The State believes the Court should not normally adjudicate the

amount of a claimant's water right until that claimant is joined and served in the usual way under Rule 4 of the Federal Rules of Civil Procedure.

Respectfully submitted this 18th day of August, 2005.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, ex rel. S.E. REYNOLDS, State Engineer, and THE UNITED STATES OF AMERICA, Plaintiffs, -vs- MOLYCORP, INC., et al., Defendants.	No. CIV ~~7980~~ SC RED RIVER ADJUDICATION ENTERED ON DOCKET 12-1-88

ORDER

This matter having come before the court on the Joint Motion to exclude water users that are de minimis filed by the plaintiffs State of New Mexico and United States of America on November 19,1988, the court having considered it, finds:

1. The water users described below are de minimis, are not necessary for a comprehensive stream adjudication, and should be excluded from the subject matter jurisdiction of this adjudication suit.

(a) Domestic well uses, with purposes limited to indoor, single household, drinking, and sanitary uses, with a closed conduit system for conveying the water from the well to the place of use and returning the effluent underground and diverting a maximum 0.50 acre-feet per annum and causing a maximum consumptive use of 0.10 acre-feet per annum.

(b) Irrigation from a well of not more than 1,300 square-feet of land and diverting a maximum of 0.07 acre-feet per

EXHIBIT - A

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year and causing a maximum consumptive use of 0.04 acre-feet per year.

(c) Livestock watering use from a metal storage tank supplied by a well diverting a maximum of 0.25 acre-feet per year and causing a maximum consumptive use of 0.25 acre-feet per year.

(d) Any or all of the above uses combined, provided that the total diversion for all uses does not exceed 0.82 acre-feet per year and the resulting consumptive use does not exceed 0.39 acre-feet per year for all uses.

(2) The exclusion of these water uses that are de minimis from the subject matter jurisdiction in this adjudication suit will not materially affect the rights of the existing parties, and will further the purpose of Fed.R.Civ.P. 19 by improving the court's ability to provide complete relief to the parties to this suit.

IT IS THEREFORE ORDERED that those water uses described above are de minimis and need not be adjudicated in this case.

IT IS FURTHER ORDERED that these de minimus water uses described above are exempt from priority call by any water right adjudicated in this suite, unless and until there is clear and convincing evidence showing that such uses adversely affect senior water rights.

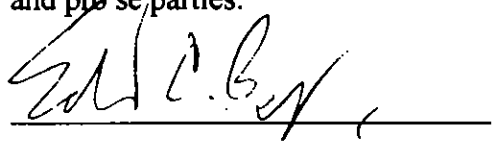
Santiago E. Campos
CHIEF DISTRICT JUDGE

Recommended for Adoption:

Special Master

Certificate of Service

I certify that on this 18th day of August, 2005, 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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