

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

CLERK'S MINUTES

Before Special Master Vickie L. Gabin

Case No.: 01cv00072

Date: September 21, 2006

Title: United States v. A & R Productions, et al.

Courtroom Clerk: J. McCabe

Court Reporter: P. Baca

Court in Session: 1:00 p.m.

Court in Recess: 2:19 p.m.

Type of Proceeding: Status Conference

Order No.: 793

Attorneys: See attached

Proceedings:

Agenda item 1: The plans of the State of New Mexico, ex. rel. State Engineer (State) to assume its full share of responsibility for the conduct of this case.

Since the General Counsel for the State, D.L. Sanders, is unable to attend today, the State will address this subject in a Status report to the Special Master.

This Status Report is due no later than October 3, 2006.

Agenda item 2: The progress of the adjudication of water rights in Sub-Areas 4 and 8, 9 and 10, and 7, and supplemental scheduling, including proposed schedules for litigating contested subfiles.

The progress of the adjudication of water rights in Sub-Areas 4 and 8, 9 and 10, and 7, :

The U.S. submits raw statistics indicating progress to date. 357 service packets have been mailed out, many w/ multiple defendants. The break down per Subarea is: Subareas 4 & 8 – 107, Subareas 9 & 10 – 89, and Subareas 7 – 161. There are few more service packets to be mailed in sub-areas 4 & 8, and 9 & 10; these are from address corrections. The U.S. is waiting for the Court to file the Procedural and Scheduling Order before they can mail the remaining packets in these sub-areas. 320 Defendants have Waived Service of Process; process server has served 46 people. Of those, 26 failed to answer or respond. A larger total of people served service packets have failed to respond. The U.S. is evaluating how many

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people have not complied with instructions in the service packets; it is difficult to determine if they are in default as a result of their non-compliant responses. The U.S. has begun reviewing every subfile; to date, the process is halfway complete. The U.S. has held 98 consultations with respect to subfiles. A total of 116 Consent Orders have been accepted by owners and filed with the Court. 25 defendants have filed Answers with the Court and a number that have sent *Answers* to the U.S., sometimes those are incomplete *Answers* and since they were not filed with the Court they are not counted in the total. The U.S. will deal with these *Answers* on a case-by-case basis when it is time to address motions for default.

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Background and Discussion:

The developments during the past year caused the need for revision to the process, hence the *Motion to Amend Procedural and Scheduling Orders* filed recently. The first *Procedural and Scheduling Order* for Subareas 4 & 8 did not include a deadline for a *Request for Consultation*. In the proceeding *Procedural and Scheduling Order* (s) for Subareas 9 & 10, and 7 a deadline was included. The question is how to enforce default if there was no deadline set? The U.S. is open to guidance on how to deal with pending subfiles served and do not have any responses. A possible solution is to submit a retroactive procedural order. The procedural order will place the burden on plaintiffs to inform the defendants when the consultation time has ended and this will trigger a deadline for the defendants to respond. An order allows the U.S. to complete necessary follow-up work because it has been difficult to schedule consultations and the U.S. prefers not to file extensions for consultation.

The U.S. has developed a Microsoft Access database to track details and deadlines for each subfile. They are short-staffed and have limited resources to hire additional staff; they are behind on data entry but are making progress regardless.

During the next three months the U.S. extremely pressed for. They are setting-up the service packets for Subareas 1, 2, & 3, Excluding Ramah, which the amount served in this area, exceed in number the total number of packet served last year. BB is also committed to file the Indian Claims on behalf of the Zuni Tribe by December 31, 2006. Given these deadlines, the U.S. does not expect any large-scale proceedings for default until early 2007.

Conclusions:

The Special Master has no objections to the *Motion to Amend Procedural and Scheduling Orders* and has not received any comments or suggestions from counsel to the Motion. There are no objections today either, the Order will be filed.

By the end of the year the U.S. will file a motion on a proposed procedural order, not substantive order, on the subfiles in question. The Special Master would like all subfiles in question from Subareas 4 & 8, 9 & 10, and 7, compiled and presented with one more chance to make a choice. A deadline will be attached to this option. Some options are: to file an *Answer*, or file a *Request for Consultation*, or to schedule a pretrial conference, the Court is amenable to various methods of resolution. After that point a default order can be filed in good conscience.

Agenda item 3: The status of the hydrographic survey report for Sub-areas 1,2, and 3 [Excluding Ramah] and a proposed scheduling order for those sub-areas;

The hydrographic survey report (HSR) for Sub-areas 1, 2, and 3, excluding Ramah have been filed with the Court. The proposed scheduling order is fine with everyone and will be entered. The Consent Orders are ready to be generated. The U.S. and the State are looking into developing a more efficient process for getting them signed. The 75-day window is time enough to have the Consent Orders signed; there are approximately 350 subfiles.

Agenda item 4: the proposed adjudication procedures for the adjudication of the water rights in the Ramah Sub-area (established by Order entered July 21, 2006, Docket No. 766);

The ownership of the surface irrigation rights is not clear. Counsel for the Ramah Irrigation District, Ms. Scott, is presently working on the issue. Ms. Scott will file a Status Report clarifying the ownership issue in order for the plaintiffs to clearly know the nature ownership. Until it is resolved the Special Master cannot enter the Order on the proposed Procedural and Scheduling Order. The HSR can be filed by the end of the year. The Special Master is concerned about the special circumstances laid out in the *Proposed Procedural and Scheduling Order*, not to include CIR in the Consent Orders. The CIR was omitted due to the time constraint; the initial goal was to join all claimants prior to the filing of the Zuni Tribe claims (12-31-06 deadline for filing). The issue will be addressed after the ownership of surface rights is clear and prior to the filing of the procedural and scheduling order.

The Status Report is due in 30 days.

Agenda item 5: the information session held July 26, 2006, and suggestions for further such session;

The information session was very successful, 60 people attended. The session was a positive experience and a good way to disseminate information. The HSR maps were helpful. Provided handout for frequently asked questions.

The next information session (public meeting) will be held in Ramah after the Consent Orders are sent out.

The Special Master addressed Ms. Marx's concern about information being disseminated before the Zuni claims are filed. In the FAQ there was information provided about the nature of an Indian Right. Very few questions about the nature of these claims were raised.

Agenda item 7: the status of the September 10,2004, Declaration of State of New Mexico Trust Reserved Water Rights filed by the Commissioner of Public Lands for the State of New Mexico; and

The claim has been brought in the San Juan adjudication, they are in the briefing schedule now. Briefing is due by December 2006 and will yield a final decision shortly thereafter. Mr. Hughes requests this Court to postpone any consideration for this claim in this proceeding for two reasons, the Public Lands for the State of New Mexico has limited resources to address both claims, and to initiate the claim in this case might lead to the prospect of a different decision in the State Court.

The Special Master is concerned about the length of time this is taking because the Statement of Claim was filed two years ago and there has not been any factual searches done. There is question what constitutes fact in this claim. The claim in the State Court is called a purely legal basis; this requires the examination of historical facts, including the congressional record. The Public Lands Office have not had resources to investigate these claims on the ground, their focus is on historical facts rather than field work on the ground. On the ground work field work will occur after a legal basis of the claims have been made.

The Special Master would like a Status Report as soon as Judge Sanchez makes his decision in State Court. The matter is stayed other than the Status Report

The State Trust Lands are being surveyed by the U.S. and are included in the HSR and each HSR report there is a subfile generated. The existing uses are being identified and treated in regular subfile work.

Agenda item 8: any other matter relevant to the adjudication of individual water rights claims.

CM/ECF: The Special Master encourages counsel to call the Court to request CM/ECF training courses in their area of the state. Her staff is in the process of developing the protocol for noticing the *pro se* defendants when CM/ECF is live.

Certain *pro se* responses have been added to the counsel of record general distribution. These names will be removed unless a *pro se* defendants enter an official entry of appearance.

The next Status Conference will be held after the Zuni Indian Tribe claims are filed and prior to filing the Consent Orders in the Ramah Sub-area.

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