

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

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JAN 31 2008  
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UNITED STATES,

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Plaintiff,

vs.

CIV-No. 01-0072 **BB/WWD**

STATE OF NEW MEXICO, *ex rel.*  
STATE ENGINEER, A&R Productions et al.,

ZUNI RIVER ADJUDICATION

Defendants.

**COMMENTS OF THE NEW MEXICO COMMISSIONER  
OF PUBLIC LANDS ON:**

- (1) THE "STATE OF NEW MEXICO'S ALTERNATIVE PROPOSALS  
FOR AN ADJUDICATION SCHEDULING ORDER; and**
- (2) THE UNITED STATES' "STATEMENT OF THE ISSUES AND  
NATURE OF THE CASE"**

The New Mexico Commissioner of Public Lands ("Commissioner") hereby provides comments to the latest scheduling proposals independently submitted by the Office of the State Engineer (OSE") and the United States. Although the Commissioner agrees with much of the "Proposed Adjudication Scheduling Order" ("OSE's Proposed Scheduling Order") attached as Exhibit B to the State of New Mexico's Alternative Proposals for an Adjudication Scheduling Order, neither OSE's nor the United States' proposals go far enough or provide sufficient guidance to the Court. The Commissioner is submitting an alternative proposed order for the Court's consideration, which, in the Commissioner's opinion, provides an efficient and fair procedure for advancing this adjudication.

The discussion below presents the law and argument supporting the Commissioner's Proposed Scheduling Order, as well as the Commissioner's comments on the United States and OSE proposals. The Commissioner's Proposed Scheduling Order is attached to this pleading as Exhibit A.

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## DISCUSSION

1. The Scheduling Order Should Expressly Describe the United States' Lawsuit as a "Comprehensive General Stream Adjudication" Governed by New Mexico Statutes.

The Commissioner agrees with OSE that the Court's Scheduling Order should expressly provide that "[this] proceeding is a comprehensive general stream adjudication pursuant to NMSA 1978, §§ 72-4-13 to 72-4-20", (OSE's Proposed Scheduling Order at 1), and that New Mexico's adjudication statutes and the case law interpreting them govern the proceedings in this adjudication. *See, e.g., State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 99 N.M. 699, 663 P.2d 358 (1983); *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 508 P.2d 577 (1973); *State ex rel. Reynolds v. Allman*, 78 N.M. 1, 427 P.2d 886 (1967); *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959); *see also U.S. v. Bluewater-Toltec Irr. Dist.*, 580 F.Supp. 1434 (D.C.N.M. 1984). The United States' description of this case as "an action to quiet title" (Complaint ¶ 1) is consistent with this conclusion and does not in any way distinguish this case from any other stream system adjudication in the State. *See, e.g., Lewis* at 770, 508 P.2d at 579 (*Lewis* adjudication initiated by complaint requesting court to "quiet title to defendants' appropriation and use of" water); *cf. Pecos Valley Artesian Conservancy Dist. v. Peters*, 52 N.M. 148, 154, 93 P.2d 418, 421 (1948) ("An action of this kind is of the nature of a suit to quiet title to realty."). Accordingly, the Commissioner's Proposed Scheduling Order includes language similar to the introductory language of OSE's Proposed Order. (Commissioner's Proposed Order, Page 1.)

2. The Commissioner Is Properly Aligned as a Defendant in this Case.

The United States' Statement of the Issues and Nature of the Suit ("U.S.'s Proposed Scheduling Order") includes a provision for the Commissioner to "petition the Court to realign as plaintiff." There is no basis for this provision, and therefore, it is not included in the Commissioner's Proposed Scheduling Order.

The Commissioner has no regulatory or administrative jurisdiction over water rights in New Mexico and had no part in initiating this lawsuit. The Commissioner has "direction, control, care and disposition of all [State] public lands" (N.M. Const. Art. XIII, § 2), and his

authority over State public lands under the State Constitution parallels Congress' plenary authority over federal public lands under the United States Constitution. *See, e.g., Heimann v. Adee*, 122 N.M. 340, 349, 924 P.2d 1352, 1361 (1996) (noting Legislature's recognition of Commissioner's "plenary authority over state lands"). The Commissioner and courts often refer to State public lands as "State trust lands" or "school lands" because these lands were taken from the federal public domain and granted to the State of New Mexico by the federal government, subject to an express charitable trust (*Forest Guardians v. Powell*, 2001-NMCA-028, 130 N.M. 368), for the purpose of supporting New Mexico's public schools and other public institutions. (Organic Act Establishing the Territory of New Mexico, Act of September 9, 1950, 9 Stat. 446, Chap. 49; Enabling Act for New Mexico, Act of June 20, 1910, 36 Stat. 557, Chap. 310.)

The Commissioner has jurisdiction over more than 100,000 acres of State trust lands within the Zuni River surface water basin and, consistent with his fiduciary duties, he may assert and pursue various interests in water associated with these lands. *See generally Dept. of State Lands v. Pettibone*, 702 P.2d 948 (Mont. 1985) (discussing Montana's State trust lands and various interests asserted by State in Montana stream adjudication). Accordingly, the Commissioner is properly aligned with the other defendants who may claim an interest in the waters of the Zuni River Stream System. Like them, the Commissioner did not initiate this case and has no statutory or other duty to administer water rights.

### 3. The United States Could Complete the Hydrographic Survey in Phases.

New Mexico's adjudication statutes allow the Court and parties substantial flexibility in how this adjudication proceeds. *See, e.g., Pecos Valley Artesian Conservancy Dist.*, 99 N.M. 699, 663 P.2d 358 (affirming adjudication procedure that allowed expedited priority administration prior to final decree); *Sharp*, 66 N.M. 192, 344 P.2d 943. In *Sharp*, the OSE conducted a hydrographic survey of the Roswell Artesian Basin in phases, obtaining orders to join additional defendants to the adjudication as the OSE completed each phase of the survey. *Sharp* at 194, 344 P.2d at 944. Defendants added by the 13<sup>th</sup> such order challenged this procedure, arguing that OSE's phased approach violated the adjudication statutes and that the

Court had no jurisdiction until the OSE completed the hydrographic survey of the entire Basin and added all defendants. *Id.* at 194-195, 344 P.2d at 944. Ironically, the United States made essentially the same jurisdictional argument in *Bluewater-Toltec*. Both the New Mexico Supreme Court in *Sharp* and the United States District Court in *Bluewater-Toltec* endorsed the OSE’s phased approach, holding that it substantially complied with the adjudication statutes. *Sharp* at 197, 344 P.2d at 945-46; *Bluewater-Toltec* at 1438. The *Sharp* Court held:

[The] “step by step procedure employed in this case, which will, before it is completed, encompass the entire Roswell Artesian Basin . . . is a substantial compliance with the requirements of the adjudication statutes, and a reasonable and practical way to accomplish the desired purposes.

*Sharp* at 197, 344 P.2d at 945-46. Accordingly, the United States’ proposal to complete the hydrographic survey of the Zuni River Stream System in phases is acceptable (Commissioner’s Proposed Order ¶ 2.), so long as each phase meets the reasonable standards of the OSE and provided that the United States ultimately completes the survey for the entire Stream System.<sup>1</sup>

4. All Current Defendants Should be Dismissed Without Prejudice and Proper Defendants Later Re-Joined After the United States Completes, and the OSE Approves, the Hydrographic Survey.

The Commissioner appreciates the importance of water adjudications and does not advocate complete dismissal of this case. However, it should be undisputed that the United States put the “cart before the horse” by suing everyone and their neighbor before completing even a partial hydrographic survey or coordinating with the OSE. This rushed and irrational manner of proceeding conflicts with New Mexico’s adjudication statutes and provides sufficient grounds to dismiss all defendants (other than the OSE), without prejudice, subject to later rejoinder. The purpose of a hydrographic survey is to obtain basic data for the “determination, development and adjudication” of water rights, NMSA 1978, § 72-4-13 (1907), and to identify the proper defendants in an adjudication. *Sharp, supra*. It is only “[upon] the completion of a

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<sup>1</sup> The Commissioner is *not* advocating that the Court *adjudicate* defendants’ rights in phases, but only that the United States could, if it so chooses, complete the hydrographic survey in phases and join defendants to this suit in corresponding phases. Adjudication on the merits should not begin until all defendants are joined.

hydrographic survey” that a “suit . . . for the determination of all rights to the use of . . . water” should be initiated. NMSA 1978, § 72-4-15.

Accordingly, the Commissioner’s Proposed Scheduling Order, if adopted by the Court, would dismiss all defendants (other than the OSE), without prejudice, subject to later joinder as the United States completes and the OSE approves the hydrographic survey. (Commissioner’s Proposed Order ¶ 1.) If the United States chooses to complete the survey in phases, then proper defendants could be joined (or re-joined) in corresponding phases and required to file answers and assert affirmative defenses within the usual time frames, but with dispositive motions deferred until all defendants have been joined. (Commissioner’s Proposed Order ¶ 4.) A defendant would be joined only if the hydrographic survey or other information provided a good faith basis for believing that the defendant claims an interest in the waters of the Zuni River Stream System, as defined in the Court’s order. This process would keep the case alive, extract the current improperly joined defendants from their existing procedural limbo, save the court and litigants from premature motions to dismiss, and reasonably assure that only proper defendants are parties to this adjudication.

5. The Scheduling Order Should Identify the Water Source (or “Stream System”) at Issue in this Adjudication as the Main Stem of the Zuni River and All Surface and Groundwater Tributaries of the Main Stem Within New Mexico.

New Mexico’s adjudication statutes logically contemplate a separate hydrographic survey and corresponding adjudication for each separate water supply/stream system in the State. *See, e.g.*, NMSA 1978, § 19-4-13 (1907) (“The state engineer shall make hydrographic surveys . . . of each stream system and source of water supply”). It is reasonably clear from the United States’ complaint that the only “stream system” at issue in this adjudication is the main stem of the Zuni River in New Mexico, its surface tributaries and all groundwater (if any) that contributes, or historically contributed, flow to the Zuni River’s main stem or surface tributaries. (Complaint ¶ 1—seeking to “quiet title” to water rights “within the Zuni River basin”; Complaint ¶ 9—alleging that the “surface and groundwater sources within the Zuni River basin . . . are hydrologically connected to each other.”). Thus, groundwater should be included in this adjudication only if two criteria are met: (1) someone claims an interest in the groundwater; and

(2) the groundwater currently contributes, or historically contributed, flow to the Zuni River or its surface tributaries.<sup>2</sup> The Commissioner's Proposed Scheduling Order, therefore, attempts to accurately identify the stream system at issue in plain English. (Commissioner's Proposed Order, Page 1.)

6. To Conserve Judicial Resources and Promote Efficiency, the Court Should Not Entertain Dispositive Motions Until the Hydrographic Survey for the Entire Zuni River System is Complete and All Known Defendants Joined.

The decisions of this Court obviously bind only the parties that are provided sufficient notice and the opportunity to be heard and present argument and evidence. *See, e.g., Allman* at 3, 427 P.2d at 888. Therefore, it would be inefficient for this Court to entertain any dispositive motion before all the proper defendants have been joined, since any defendant could challenge any finding of fact or conclusion of law made prior to the defendant becoming a party. Moreover, by waiting until all defendants have been joined, filed answers and asserted affirmative defenses, the Court will most effectively be able to organize and schedule the various motions for hearing and decision. The Commissioner's Proposed Order, therefore, would not allow the filing of dispositive motions until the Court is reasonably satisfied that the hydrographic survey is entirely complete (all phases) and that all proper defendants have been joined. The Court would then enter a subsequent order to govern the briefing and hearing of all dispositive motions. (Commissioner's Proposed Order ¶ 5.)

7. To Conserve Judicial Resources and Promote Efficiency, the Court Should Require the Federal Plaintiffs to "Prove Up" Their Alleged Rights Immediately Following The Court's Resolution of all Dispositive Motions.

Adjudications work better (or should) when the plaintiff is merely an administrator and not an advocate asserting water rights and threatening to shut down the other claimants. When the plaintiff is the OSE, for example, it is practical to have separate "subfile" mini-trials to

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<sup>2</sup> The phrase "hydrologically connected groundwaters" is ambiguous, and therefore, does not sufficiently define the water supply at issue in this adjudication. Depending on how you define it, all the waters in New Mexico could be "hydrologically connected".

adjudicate the rights of each defendant as against the State, since the OSE is not asserting any water rights that it must establish as against each and every defendant.

That is not the case in this adjudication. The federal plaintiffs are alleging that they possess superior water rights, and therefore, they bear the burden of establishing these alleged rights as against each and every defendant claiming rights to the common water supply. And every defendant, in turn, must be given the opportunity to present argument, evidence and testimony against the plaintiffs' alleged rights and in favor of their own. *Cf. Pecos Valley Artesian Conservancy Dist. v. Peters*, 52 N.M. 148, 193 P.2d 418 (1948) (setting out burden and order of proof of alleged senior appropriator attempting to enjoin alleged junior appropriator). Accordingly, the Commissioner's Proposed Order would require the federal plaintiffs to more fully enumerate and describe each of their alleged rights immediately following the Court's resolution of all dispositive motions (assuming the Court denies all such motions). (Commissioner's Proposed Order ¶ 6.)

Then the adjudication could proceed as follows: First, the Court enters a subsequent scheduling order that establishes an efficient process governing discovery, motion practice and trial of the federal plaintiffs' various alleged rights, and all defendants would be given the opportunity to participate in this procedure. Second, after adjudicating federal plaintiffs' rights and resolving interlocutory appeals, the Court enters another scheduling order to govern the adjudication of defendants' alleged rights as against the federal plaintiffs and *inter se* as against each other. (Commissioner's Proposed Order ¶ 7.) This proposed procedure sets up the proper order of adjudication, promotes efficiency and conservation of resources, assures due process and that all parties will be bound by the Court's final decree.

### CONCLUSION

The Court should adopt a scheduling order that assures "a reasonable and practical way to accomplish the desired purposes" of New Mexico's adjudication statutes. *Sharp* at 197, 344 P.2d at 945-46. To help accomplish this goal, the Commissioner offers for the Court's consideration the proposed scheduling order attached to this pleading as Exhibit A.

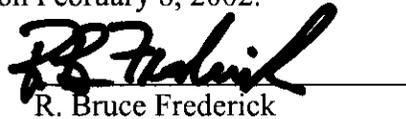
Respectfully submitted,



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Certificate of Service

I certify that a true and correct copy of the foregoing pleading was mailed by first class mail to the persons appearing on the attached service list on February 8, 2002.



R. Bruce Frederick

THE EXHIBITS ATTACHED TO THIS  
PLEADING ARE TOO VOLUMINOUS TO  
SCAN. SAID EXHIBITS ARE ATTACHED  
TO THE ORIGINAL PLEADING IN THE  
CASE FILE WHICH IS LOCATED IN THE  
RECORDS DEPARTMENT, U.S.  
DISTRICT COURT CLERK'S OFFICE.