

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NO. CIV-01-00072-BB/WWD ACE

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

ZUNI RIVER ADJUDICATION

Defendants.

**COMMENTS BY THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT TO THE PROPOSED SCHEDULING ORDERS OF THE
UNITED STATES AND THE STATE OF NEW MEXICO.**

Pursuant to the Notice of the Court dated January 15, 2002, Salt River Project Agricultural Improvement and Power District (“SRP”) submits these comments on the United States’ Proposed Adjudication Scheduling Order submitted January 31, 2002 and the State of New Mexico’s Alternative Proposals for an Adjudication Scheduling Order, dated January 31, 2002.¹

SRP has many of the same concerns regarding the proposed scheduling orders as it expressed in its previous comments to the Reports of the United States and the State of New Mexico. See SRP Comments, dated August 24, 2001. In structuring its Scheduling Order, this Court should address the following issues: First, the boundaries of the Adjudication have been set, and may not be altered by a procedural order. Second, the Adjudication should continue

¹ SRP did not receive the State of New Mexico Proposal until February 4, 2002 and did not receive the United States’ proposal until February 5, 2002. Given the limited time that SRP had to review these proposals, it reserves its right to comment further at the Adjudication meeting scheduled for February 14, 2002.

with sensitivity to the resources of the State Engineer. Third, state claimants should not be forced to litigate their claims or engage in motion practice until the federal parties make their water rights claims known. Fourth, the Court should dismiss this case unless the United States is willing to fund its completion. Fifth, any Hydrographic Survey Report (“HSR”) should address all the water uses in the basin; a partial HSR will create jurisdictional problems for the Court. Finally, this Court should immediately lift the stay for the limited purpose of allowing Defendants who were improperly named to be dismissed from this action.

A. The Adjudication Boundaries Cannot be Expanded in a Scheduling Order.

Both the United States’ and New Mexico’s proposed Scheduling Orders impermissibly attempt to expand the boundaries of this adjudication, and should be rejected unless revised. The United States, as plaintiff, originally defined the boundaries of this adjudication in its Complaint filed January 19, 2001. Since that time, the United States has further defined those boundaries in its Zuni River Basin United States’ Report filed June 4, 2001, and in oral representations to this Court. In clarifying any ambiguity in its earlier filings, the United States told this Court at the September 7, 2001 hearing, that:

It is the intent of the United States that the boundary of this suit, the limit be limited to the surface water boundary of the Zuni River basin and extending straight downward in a vertical line into the aquifer underlying that basin, that is the only way this case could proceed.

Otherwise, we would be getting into other basins, other surface water basins, other claimants coming in, and that would be unworkable.

Transcript of Proceedings at 36. Given this statement, no doubt exists that the Adjudication boundaries extend only to the boundary of the Zuni River surface water basin.

The United States and the State of New Mexico now attempt to expand the Adjudication boundaries to include certain groundwater users located outside the basin through the Court’s

Scheduling Order. A scheduling order is not the proper place to expand this litigation. A scheduling order is not a pleading; it creates a procedural process only, and cannot make substantive changes to the case. See F.R.C.P. Rule 16(b). To expand the boundaries of the adjudication, the United States, as Plaintiff, would need to amend its Complaint, which it has shown no inclination to do. See United States January Proposal. New Mexico is not the Plaintiff in this case and cannot adjust the boundaries of the adjudication by manipulating the scheduling order.

Moreover, expanding the boundaries of this Adjudication to include groundwater uses located outside of the Zuni River basin raises numerous problems. Besides adding untold numbers of claimants, including the City of Gallup, the expanded adjudication area would encroach on other future adjudications. SRP and other parties with water uses outside the boundaries of the Zuni River basin could find themselves subject to two separate adjudications for the same water use. For instance, in addition to the suggested expanded Zuni River Adjudication, SRP's water uses will be subject to an adjudication of the Carrizo Wash/Largo Creek River basin, while northern defendants will be subject to an adjudication of the Puerco River basin. This duplication of effort wastes everyone's resources, and exposes SRP and other like parties to possibly inconsistent outcomes. If SRP's use of groundwater is adjudicated only against surface water and hydrologically connected groundwater uses in the Zuni River basin, SRP could have one water right in the Zuni Adjudication, and be adjudicated an entirely different water right for the same use against surface water users in the Carrizo Wash/Largo Creek River basin.

Perhaps to address this encroachment problem, the United States' proposal claims that it would not serve groundwater users who are parties to "any other pending general water rights

adjudication.” But this is not a solution—a groundwater user is either subject to the jurisdiction of this Court, or it is not. Jurisdiction is determined by the Adjudication boundaries, not by a party’s outside litigation status. Even if the United States proposal was workable, however, it does not protect those Defendants who will be subject to other future adjudications.

New Mexico, for its part, has consistently stated that it does not have the resources to move forward with an adjudication of the Zuni River basin. New Mexico January Proposal at 3, 5; State’s Proposal for Proceeding Once the Stay in this Case is Lifted, dated July 6, 2001 at 8. But by adding one sentence to the scheduling order, the State now tries to add to that burden, by addressing water rights here and now that will be subject to other adjudications. The United States has consistently stated that the boundaries of the Adjudication do not extend to water users outside the Zuni River surface water basin. This Court should not expand the adjudication boundaries as those boundaries are currently set forth in the Complaint.

B. The Adjudication Should Proceed in Accordance with the State Engineer’s Resource Constraints.

In comments to the Reports filed by the United States and the State of New Mexico, SRP discussed Adjudication boundaries and other issues. See SRP Comments, filed August 24, 2001. In those comments, SRP argued that federal claims should be adjudicated first. SRP now understands that the State of New Mexico does not have the resources to proceed with an adjudication of federal claims at this time, and believes that federal water rights should be adjudicated when the State of New Mexico is able to fully participate. The adjudication of state claims should, likewise, proceed in accordance with the State Engineer’s resource constraints.

Under New Mexico law, any HSR, whether funded by the United States or by the State of New Mexico, must be completed in cooperation with the State Engineer. The law states that the

“state engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the state... for the determination, development and adjudication of water supply of the state.” N.M. Stat. Ann. § 72-4-13 (emphasis added). The State Engineer may cooperate with the United States in performing the HSR or even “accept and use in connection with the operations of [its] office the results of the agencies of the United States.” Id. But any cooperation with the United States or acceptance of its HSR results is discretionary. See id. The State Engineer has a duty to investigate and perform HSRs in water rights adjudications. This Court should not allow the United States to proceed with any HSR without the full cooperation of the State Engineer. That cooperation is not possible, however, unless the State Engineer has the resources to proceed with this case.

C. The United States and the Intervenor Should State their Claims Before the Adjudication Continues.

SRP’s other comments to the United States and New Mexico reports have not changed. Specifically, this Court should order the United States and the Intervenor to state their claims in the basin before an HSR for state water users is completed. Id. The United States complains that the “Defendants’ use of surface and groundwater in the Zuni River basin in New Mexico constitutes an unlawful interference with the Plaintiff’s right to the use of that water.” Complaint at 17. Presumably, the Intervenor will have similar claims. As Plaintiff, the United States has the burden of proving its case, as do the Intervenor. The Defendants cannot be expected to defend themselves against federal claims that have not even been articulated.

Without an indication by the federal parties as to the amounts and sources of water they expect to claim in this Adjudication, a Defendant cannot discern if its water rights might interfere with federal claims. Likewise, until the federal parties have calculated their claims, they will be

forced to oppose all state water rights on the basis that they “might” interfere with a future federal claim. Similarly, the Defendants cannot be expected to engage in motion practice before the federal parties’ have made their claims known. The Defendants cannot defend their interests properly until they know their own stake in the litigation. This Adjudication cannot proceed efficiently until the federal parties state their claims to water.

The State of New Mexico proposes, as an alternative to moving forward with an HSR, that the stay be lifted so that motions directed towards the United States’ Complaint may be filed. The United States suggests that pretrial motions be filed after it completes the first two HSRs. SRP opposes litigating pretrial issues before the United States and the Intervenors have submitted their statements of claim. Under both the United States and the New Mexico proposals, the Defendants would be forced to litigate all issues in the abstract—with no way to measure the risk that their water rights will interfere with federal claims. Pretrial motions should be delayed until the HSR(s) are complete and the federal parties have submitted their claims, with one exception. That exception would allow a process for improperly named Defendants to be dismissed from this Adjudication. We take the United States at its word—the boundaries of this litigation have been set. Defendants located outside of those boundaries, or those landowners within the basin who do not claim a water use, should be dismissed.

D. The Court Should Dismiss this Adjudication Unless the United States Agrees to Fund its Completion.

The United States has proposed to fund two partial-basin HSRs, expecting that at least three more HSRs will be needed in the future to complete an adjudication of the Zuni River basin. Yet, the United States does not propose a plan for completing any future HSRs. Instead, the United States suggests that the Court, at a later date, address “responsibility for the future

conduct of the remaining portion of the hydrographic survey and the allocation of its costs.”

United States January Proposal at 6. SRP agrees with the State that

the United States filed this adjudication with no plan for its completion. Rather, it appears the U.S.’ strategy was to file this adjudication and attempt to place responsibility for the cost of its completion upon the shoulders of New Mexico.

New Mexico January Proposal at 6. If the United States cannot commit to finishing this litigation, it should not be allowed to begin this litigation. The Court should dismiss this case without prejudice.

E. Only a Comprehensive HSR Addressing all Water Uses in the Zuni River Basin is Workable.

The State further argues that unless the United States commits to fund an HSR that includes the entire basin, this Adjudication should be stayed until the State has the resources to proceed. SRP agrees that the most efficient use of everyone’s resources would be an adjudication of the entire basin at one time. In adjudicating water rights, the Court cannot bind all water users in the basin until they have been identified and served. An HSR addressing only a part of the basin will not identify all parties, and the Court will face jurisdictional problems. Without a commitment by the United States to fund a complete HSR, naming all parties to this Adjudication, this Court should dismiss this case. The United States could refile its case when it can fund a workable HSR.

F. Conclusion

The Adjudication boundaries were defined by the Plaintiff in previous filings and in statements made to this Court. This Court should not allow the United States or Defendant, State of New Mexico, to substantively change those boundaries in a procedural order. The Court’s Scheduling Order should address procedures for moving forward with this case with

consideration for the resource constraints of the State of New Mexico. In addition, the Court's Scheduling Order should force the federal parties to state their claims to water before the first HSR is complete and before pretrial motions are allowed. If the United States is unwilling, however, to commit to completing this litigation by funding an HSR of the entire Zuni River basin, then this case should be dismissed, allowing the United States to refile its Complaint when funding is available. As a final matter, SRP requests that the Court temporarily lift the stay to allow improperly named Defendants to be dismissed.

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