

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

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DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

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Plaintiff,

vs.

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

STATE OF NEW MEXICO, ex rel.  
STATE ENGINEER, et al.,

ZUNI RIVER BASIN

Defendants.

AMENDED RESPONSE TO  
PROPOSAL OF U.S. AND STATE AND COMMENTS OF  
ROBERT W. IONTA AND LINDA A. IONTA

NOW COME Robert W. Ionta and Linda A. Ionta (Defendants herein) and for their comments to the Proposals of the United States of America (United States herein) and State of New Mexico (State herein), and as their Proposals for a case management plan, state as follows:

INTRODUCTION

The proposal of the United States is unfair to the individual Defendants and deprive them of due process. Defendants generally concur with §II and III of the State's proposal. The Defendants do not concur with §IV of the State's proposal because all the Defendants in this lawsuit have not been served and it places an unfair burden on those who have been served (see below). Defendants' proposals below are stated first followed by relevant comments. These proposals are not intended to be all inclusive.

1. DISMISSAL/SEGREGATION:

The numerous individual Defendants shall not be dismissed nor action against any of them stayed, nor segregated into groups in 2

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areas of the basin, unless as a part of overall dismissal of the entire case. All parties of interest must remain parties and the basin must be defined before any individual Defendants' rights are affected.

#### COMMENTS

The plan of the U.S. to survey only 2 areas is unworkable. The revised proposal of the U.S. calls for a "stay" but provides for a survey only in 2 areas. This proposal is transparently unreasonable in the context of this litigation.

One cannot have a "comprehensive adjudication of the claims of all water users in the Zuni River Basin . . ." (US Proposal p. 1) without determining first the size and scope of the basin, the surface and underground waters to which it applies and the proper defendants therein.

The proposed "2 surveyed areas" are only part of this basin and do not include the areas from which the US alone claims rights, not even considering the Tribes or other parties.

United States admits in paragraph 5 of the Complaint that "all those who claim a right or an interest in the use of the waters of the Zuni River Basin . . . are necessary and indispensable parties . . .". If they are indispensable parties, then they cannot be dismissed or segregated at this stage and they all must be served with process.

Dismissal or segregation, by staying part of the action, into subgroups of individual Defendants as proposed by the US would deny them their right to participate in the litigation and to be heard

on the global issues and on formation of the course of litigation. Even though a dismissal or segregation of Defendants into subareas of the basin by staying part of the ligations nominally might be "without prejudice", the non-participating Defendants would be faced with a fait accompli in regard to the common issues, and procedural conduct of the case. All Defendants and all Plaintiffs within the basin have potential cross-claims and defenses against each other. All must be included in the assessment of how much water is available. The proposal of the US assumes that the interests purportedly represented by it have the primary rights to water use. This assumption is false. Further, it assumes that in the 2 areas to be surveyed, that the "judgments" which the U.S. "may" offer will somehow preclude other interested parties in the basin from intervening or being joined and claiming the very water which the U.S. has assigned to those with whom it may reach agreements. Further the Zuni Tribe at least is seeking to have its own counsel and is presumed to want to have a say in the matter. Its rights cannot be foreclosed by this device. If issues are attempted to be decided without the opportunity of all Defendants to participate, there is very little chance, given principles of collateral estoppel, that these decisions can be overturned or altered once the remaining Defendants actively participate. The proposal of the U.S. denies them due process and the right to be fairly heard on motions, interim matters or rulings which would have been made already before they were rejoined. On the other hand if some Defendants were really allowed to participate later

"without prejudice" the Court would be faced with the probability of multiple hearings/motions/appeals on the same or similar issues which had been previously decided. Just as important, the small group of Defendants in the included areas will be unfairly required to bear the whole burden of defending and raising the global issues. The same points apply to the hydrographic survey. It is vital that all affected parties be given a chance to have input into the methodology and the way in which on-the-ground activities are conducted. This document will determine the size of their rights and if they are not parties, they will be forced to seek to overturn it, and not have input as to its production. See further comments below under 5.

## **2. AMENDMENT OF COMPLAINT AND SERVICE**

**Within 30 days, the United States shall be required to amend its complaint to correctly state its claims and define the boundaries of the basin, then the U.S. shall identify and shall serve all Defendants within 6 months or face dismissal with prejudice of the action against all Defendants.**

### **COMMENTS**

All Defendants are legally and practically interested in the outcome of the case. The United States filed this action in January 2000. Now it is February 2001. With its resources it should be able to amend its Complaint within 30 days and to identify and serve all Defendants within six months.

The Complaint is not drafted as a complaint for a general

adjudication but as a complaint to quiet title and in trespass or ejectment. (See comments under §5). The U.S. should be required to formally amend its complaint to state exactly what it claims and what it wants and then serve everyone. This is no different from any other litigant's duties. The Amended Complaint must clearly define the boundaries of what the U.S. claims is included in the Zuni River basin, both from the stand-point of surface water and underground water. The basin is not defined in the original Complaint. The proper parties are not named in the original Complaint.

When the United States filed this suit it cast a cloud upon the titles of all landowners within the amorphous area which it referred to in the Complaint (see comments under paragraph 5). The filing alone has had adverse effects on the individual Defendants. Some realtors are now warning potential buyers about purchasing real estate in this area. Development plans of residents have been affected. Yet, the United States proposes to deny some individual Defendants a forum in which to defend their interests while increasing the burdens on others. Filing of this action without service can be cause for dismissal for lack of diligence (see discussion in (Murphy vs. Citizens Bank, 244 F2d 511 (10<sup>th</sup> Cir., 1957)). All Defendants within the basis are "indispensable parties" and must be served, or the suit should be dismissed.

Amendment of the Complaint and proper service is also important because it allows all parties to fully understand the

nature of the impact on them collectively (an understanding which the United States may wish to prevent). They are all part of the same hydrologic system and will share many common concerns. If some are served and some are not, it will be more difficult for collective action that protects the interests of the smaller water users as a whole. Further, the lack of service will certainly result in collateral attacks on existing rulings of the Court as new parties are added to the case.

**3. ANSWERS/RESPONSES/MOTIONS/COUNTERCLAIMS:**

- A. No Defendant shall be required to respond, counterclaim or file a motion in relation to the Complaint until 6 months after the deadline for service of all Defendants, or deadline extended for good cause, whichever occurs later.**
- B. Amended or supplemental motions and amended pleadings or counterclaims may be filed by any Defendant without leave of Court within 9 months after the deadline for initial disclosure and submission of the survey by the United States provided for below. If issues are separated (see below) no pleadings on the issues should be required until 9 months after the initial disclosure, production and establishment of a web-site (see below).**

**COMMENTS**

The comments below in paragraphs 4 and 5 should be reviewed in connection with this proposal. The United states has had 20 years or more to prepare a case for this litigation and has huge

resources at its disposal, while the individual Defendants have had relatively little to prepare, are of generally limited means, and have little or no knowledge of the issues.

They should be entitled to a reasonable time to arrange for defenses, assert claims and assert defenses in light of the overall circumstances.

Further, they should not be required to defend or raise claims in a vacume or on the basis of a complaint which inaccurately states the allegations and claims of the U.S. Information logically necessary to the forming of claims and defenses is in the possession or control of the United States or the Tribes (which the United States purports to represent). This information should be made available to Defendants well in advance of pleading deadlines (see proposal and comments under 5 below).

It would greatly simplify the administration of this case as to motions, interim matters, global issues, and procedural matters if there were a single deadline for responses which occurred after the Court was reasonably certain that all the Defendants had been served. Then the case should be divided by issues after all parties are served. For example, there will be major legal issues common to all of the parties. These issues should be specified only after all have been served, then they can be scheduled for hearing and briefed. In the order outlining those issues, parties will be given an opportunity to respond to the issues by answer or counterclaim or cross-claim. Those issues are unlike hydrographic survey issues, which are likely to involve factual errors,

abandonment and forfeiture, and priority dates. Those should be specified for trial separately, given a separate briefing schedule and answers on those issues should not be required until after the hydrographic survey of the whole basin.

4. PRO FORMA ANSWERS/DISCLOSURE:

The United States shall provide a pro forma answer and disclosure to all Defendants. Such form will be without prejudice to Defendants raising additional claims, answers, defenses, counterclaims, motions or other matters. The form shall: ask the Defendants to state whether they claim any interest in water rights or land or whether they disclaim any interest; request them to attach or produce a description of their interest in land, or separate water right if applicable, which shall be identified as a fee interest, real estate contract interest, a fractional interest or other interest; and ask them to identify any other parties of interest, if known, and to attach a legal description of the land or rights in which they claim interest. It shall clearly and conspicuously advise Defendants of their right to raise additional matters by pleading or motion. It should make clear that all parties have the right to amend their pleadings at any time and to withdraw their disclaimers. The burden would be placed upon the party opposing the amendment to demonstrate how such party is actually injured in fact by the allowance of the amendment. Any pro forma answers not specifically disclaiming rights shall be deemed to constitute denials of every material allegation of the Complaint without necessity for further pleading. The form shall

include information and an application form to access the Court's website and electronic information concerning the case.

#### COMMENTS

This proposal simplifies the burden of pleading to the Complaint for many individuals. It provides useful and necessary information for the United States and other parties, while preserving the rights of the individual Defendants. The burden of producing the required information on each Defendant is minimal and the information is of the type which should be provided early by discovery in any event. Further, this proposal facilitates the management of the case by creating separate records of: Defendants who disclaim any interest and therefore need not receive notices and pleadings; Defendants who have an interest but initially do not intend to raise affirmative defenses, motions or counterclaims (and therefore service on these in some cases may be omitted); Defendants who wish to participate more actively; and unserved or previously unidentified parties of interest.

#### 5. SURVEY/DISCLOSURE BY THE UNITED STATES:

A. Within four months and on pain of dismissal of this action with prejudice, the United States and the Tribes and persons which it purports to represent shall:

1. Provide the discovery/disclosure/web site provided below in the manner described; and

2. Commence, actively conduct, and produce when available a hydrographic survey including studies of current and historical uses, water uses and rights for which the United States

claims priority on behalf of itself, its agencies and/or the Tribes and persons which it purports to represent.

3. Establish a timetable for actively conducting a full basin survey and commence such survey within 6 months thereafter.

The disclosures, production, and survey shall comply with the following:

1. Initial Discovery Production:

A. The United States shall assemble and produce at designated locations in Albuquerque and Gallup a full statement of the facts upon which it bases each allegation in its Complaint and all prior surveys, reports, testimony, statutes, executive orders, analyses, agreements, settlements, memoranda, witnesses statements, investigative reports, correspondence, experts' reports and recommendations and other information upon which it bases any part of its allegations in paragraphs 3, 4, 5, 7, 8, 9, 12, 13, 14 (identifying specifically such property), 15, 16, 17, 18, 19, 20, 22, 23, 26, 27, 28, 29, 30, 32 and 33 of the Complaint (unless the Complaint is amended to delete these allegations) as well as a list of the names, addresses, telephone numbers and areas of expertise of all experts which it may use in preparation of its case or for testimony and other information required by the Court.

B. Such documents and things shall be indexed, identified, assembled, organized, and described in a reasonable manner to facilitate efficient examination and indexed also with specific references to paragraphs of the Complaint.

C. The disclosure and production shall be made available to all Defendants and their representatives throughout this litigation.

D. In addition, the United States shall establish a web site for electronic production and storage of all the discoverable information and shall store and make available all the information on such site.

E. The expense of the above shall be born by the United States. Arrangements for copying shall be made by the United States. The cost of the web site shall be born by the United States.

F. All the hydrographic survey results referred to below and backup documentation shall be made available at such locations and the web site as soon as performed in whole or in part.

G. The disclosure and production shall be regularly supplemented and amended as information becomes available.

H. This method of production shall not preclude others or production of other things by discovery request or Court Order.

I. Initial production and disclosure shall be completed before the deadline for service of all Defendants.

## 2. INITIAL SURVEY:

A. The hydrographic survey, which shall be conducted at the expense of the United States, shall include all of the geographic areas, uses, rights and people for which priority or rights superior to any other person or entity are claimed.

B. The time for amended pleadings, motions or counterclaims without leave of Court set forth above shall not commence to run until the survey is complete and documents provided in discovery.

C. Upon completion of the survey a schedule for motions, replies, and arguments not inconsistent herewith shall be established.

D. The survey and all back-up information shall be provided in disclosures above.

### 3. FULL SURVEY

The full survey of the basin should be commenced as soon as possible but not more than 6 months from the date the limited survey is commenced. The United States shall assemble and provide all information in the manner provided for above.

### COMMENTS

The provisions above are intended to put the Defendants on a reasonably level playing field with the United States and the Tribes and entities which it purports to represent. Gallup and Albuquerque are chosen as sites for physical placement of the documents because they are the most reasonably convenient.

There is no practical reason for not using the internet. Given the wide-ranging information and opportunity to utilize the internet and web sites, all parties in the action could be provided access to the web site containing all of the relevant hydrologic information from the hydrographic survey. Utilizing new technology, it would be a simple task for any group to have information, keeping them informed of the proceedings. The day has

past when a select few need only be joined to represent the rights of many. With internet technology, every Defendant could utilize the web site to be fully informed of the factual, legal and technical aspects of the case. Full involvement and disclosure might begin to undo some of the ill will that has been caused by the approach adopted by the United States in its pleadings and actions to date (see below). Finally, if there is any potential for informal dispute resolution, the sharing of extensive information and the involvement of all the parties will make this feasible. Exclusion of the many for the financial convenience of the few virtually forecloses this possibility.

The gravamen of the United State's action is contained in its Complaint:

- Paragraph 1: "This is an action to quiet title in its own right and on behalf and for the benefit of the Zuni Indian Tribe, the Navajo Nation, the Ramah Navajo Band, and various individual Indians";
- Paragraph 2: "Plaintiff . . . claims ownership of the right to the use of the surface water and ground waters . . .";
- Paragraph 5: "The Defendants' . . . use of surface and ground water in the Zuni River Basin constitutes an unlawful interference with the Plaintiff's right to use that water . . .".
- Paragraph 32: "Plaintiffs . . . claim a prior and paramount right to . . . the surface water and ground water . . .".
- Paragraph 33: "The Defendants' claims are adverse to and jeopardize the exercise of Plaintiffs' rights . . .".  
(Emphasis supplied)

In short, the United States claims that it, the Tribes, or individual Indians have all the water rights and the Defendants have none.

The proposal of the United States is to require surveys of Defendants' use of water in only 2 of what the U.S. now claims are 5 heavier water use areas and to dismiss or stay other the Defendants (realistically only until the survey is completed). It is unreasonable, and is an attempt to shape the entire case, by a procedural manouevre, to the advantage of the United States.

First, this proposed survey includes few of the areas or persons or uses for which the United States claims priority, and the United States does not offer to provide any information for those areas.

Second, it seems obvious that if the above allegations of the Complaint be true (strongly disputed by these Defendants) then there is no need whatsoever for a survey of the individual Defendants' uses, because they are all illegal. The United States can simply send out the Marshals and arrest them all or plug up their wells and cut open their stock tanks.

These Defendants believe that the alleged priority rights and uses and persons for which priority are claimed are limited and have been relatively limited historically. Thus, a survey first of all the historical and present uses (and persons) claimed by the U.S. on its behalf or on behalf of those it purports to represent will define them (which is the Plaintiffs' burden in any event) and will facilitate filing of motions and resolution of the claims made

by the United States. Depending upon the limits of the uses, there may not even be an issue with the present Defendants over water rights. Further, as the United States has alleged in its previous proposal: "[T]he United States' contractors have the necessary expertise to conduct such a survey . . .". The United States by implication affirms its ability to conduct a survey of its own uses and those for whom it claims expeditiously. So it is most efficient to have the United States survey the areas, uses and persons for which it claims priority first. The State denies that it has resources to do surveys presently.

To allow the United States make some of the Defendants prove their case and justify their uses of water first is not consistent with the duties the law assigns to the parties. The United States proposes to use a procedural scheduling device to effectively reverse the burden of going forward (since the United States has to produce nothing under its proposal and there would be no individual Defendants in the case left to demand that production outside of the "2" areas). It solicits the Court to affirm procedurally the claims of the United States to all the water without hearing, evidence or proof. We must not forget that the Plaintiff, not the Defendants, bears the burdens of going forward with the case, going forward with the evidence, and of ultimate proof.

The United States is in a unique position to provide surveys of the uses for which it claims priorities. Not only does it have great resources, but it has been assembling information and materials for many years. It also has access to documentary

evidence which should be made conveniently and quickly accessible to the Defendants.

It is more efficient and will lead to an earlier and less expensive conclusion of the case if the United States first surveys and supports its claims as provided in the proposals.

Not only should all parties wish to avoid the delays which have attended the Amodt and similar cases, but the Court also has a duty to protect the individual Defendants from unnecessary damage caused by what well may be unjustified assertions by the United States.

An example of such damage is the New York case filed on behalf of the Oneida Nation.

In that case the United States requested "ejectment", that is eviction, of some 20,000 homeowners in Central New York based on Oneida Tribal claims which did "little but to spread terror in the hearts of the landowners", followed shortly by a representation to the United States District Court in Syracuse, New York, made by the United States attorney, that "we never intended that tens of thousands of landowners would be forceable (sic) removed . . .". (Rome Sentinel Website report). In this case in New Mexico, the United States has now claimed that it and those it purports to represent have the right to all the water in the Zuni basin; yet in arguments to the Court and its proposal the United States appears to be trying to make the Court and the Defendants believe "not to worry", the United States doesn't really mean what it pled. The allegations made in the Complaint belie these assertions. As an aside, the Court should also not sanction any public informational

meetings to be conducted by the United States (as previously proposed). Such approval would wrongly suggest that the Court, a supposedly neutral decision-maker, is aligned with the position of the United States in the minds of the public and would provide an unregulated opportunity for the U.S. to mislead the Defendants, by communicating inaccurate information to them thereby discouraging them to protect their rights.

The United States has already done enough damage to the Defendants by claiming that they have no water rights. It shouldn't now be allowed delay these unproved claims for years while it, alone, possesses the resources to proceed with this case.

It is in the overall interest of the justice that if the United States intends to press these broad claims, it should be required to quickly demonstrate that they may have some substance.

**6. CENTRAL FILING/LIMITS ON NOTIFICATION AND SERVICE:**

The Court shall establish a separate registry and methods for service of notices and other papers on those who file "pro forma" answers and those who file more extensive pleadings or motions. The Court shall establish a limited registry and file for filing motions, responses and other interim matters in order to avoid unnecessary expense in and complications of service among the parties.

**COMMENTS**

With 3000 or more potential Defendants the burden of serving each other party is extreme for the individual Defendants. A method should be devised to limit the necessity of service of

papers to those who are actively involved in the issues. The first step is to exclude those who have only filed pro-forma answers. Other options, such as providing a periodic summary list of the filings of motions with provisions for obtaining copies only on request, should be considered. See further comments under item.

Respectfully submitted:

Date: February 5, 2002



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**CERTIFICATE OF SERVICE**

I hereby certify that I served one copy of Proposal and Comments of Robert W. Ionta and Linda A. Ionta along with a copy of this certificate on the attached list by depositing them in the United States mail postage prepaid this 5 day of February, 2002, addressed to them at their addresses of record.



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