

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

FILED
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DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA)
)
 Plaintiff,)
)
 v.)
)
 STATE OF NEW MEXICO, ex rel. STATE)
 ENGINEER, et al.,)
)
 Defendants.)
 _____)

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CIV No. 01 00072-BB/WWD- ACE

ZUNI RIVER BASIN

RESPONSE OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. AND QUIVIRA MINING COMPANY TO STATE OF NEW MEXICO'S ALTERNATIVE PROPOSALS FOR AN ADJUDICATION SCHEDULING ORDER AND THE UNITED STATES' PROPOSED ADJUDICATION SCHEDULING ORDER

Tri-State Generation and Transmission Association, Inc. ("Tri-State") and Quivira Mining Company ("Quivira") hereby respond to portions of the State of New Mexico's Alternative Proposals for an Adjudication Scheduling Order ("Alternative Proposals") and the United States Proposed Adjudication Scheduling Order ("U.S. Order").

I. THE DEFINITION OF "STREAM SYSTEM" MUST BE REVISED

Tri-State and Quivira submit that the definition of "stream system" in the Proposed Order would make impossible the efficient administration of either this adjudication or the pending Rio San Jose and San Juan River adjudications. The first paragraph on page 2 of the Proposed Order provides that "[a] s used in this order 'stream system' refers to the surface waters of the Zuni River including all its tributaries within the State of New Mexico *and all hydrologically connected groundwater.*" Emphasis supplied.

The inclusion in the Zuni River stream system of "all hydrologically connected groundwater" would make it impossible (at least without extensive hydrogeologic evidence) for

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anyone -- the Court, the Special Master, any party, and anyone owning a groundwater right anywhere in Northwestern New Mexico -- to determine whether a particular groundwater right was included in the Zuni River “stream system” and thus subject to adjudication in this action. Consequently, it could not be determined, at least before the introduction of extensive hydrogeological evidence, either what groundwater rights are subject to adjudication in this action or who the parties to this action should be.

Moreover, attempting to adjudicate in this action “all groundwater hydrologically connected” to the “Zuni River including all its tributaries within the State of New Mexico” would inevitably interfere with the pending Rio San Jose and San Juan River adjudications. The areas covered by those adjudications are adjacent to the Zuni River basin. It is possible as a matter of science that some “groundwater hydrologically connected” to the Zuni River or one of its New Mexico tributaries is also subject to those pending adjudications. If “all groundwater hydrologically connected” to the Zuni River or one of its New Mexico tributaries were adjudicated in this action, some of the same groundwater would also be adjudicated in the Rio San Jose adjudication or the San Juan River adjudication. Uncertainty and chaos would result.

This suggested extension of stream system exceeds the Complaint, which, for example, confines the “surface water and groundwater *within* the Zuni River basin” as “hydrologically connected” to each other. *See*, paragraph 9 of the Complaint. The Complaint cannot be amended without filing a motion to amend the Complaint under the Federal Rules of Civil Procedure.

Uncertainty and chaos can be avoided. Instead of defining “stream system” to include “all hydrologically connected groundwater,” “stream system” should be defined simply to

include either (i) all groundwater in the Gallup Underground Water Basin declared by the State Engineer or (ii) all groundwater with points of diversion within the surface boundaries of the Zuni River basin. (The State Engineer has customarily used variations of the second suggested definition in pretrial orders.) Either suggested definition would make possible the determination without extensive hydrogeological evidence of what groundwater was subject to this adjudication and avoid the uncertainty and chaos which would result if the same groundwater was subject both to this action and to the pending Rio San Jose or San Juan River adjudications.

II. TRI-STATE AND QUIVIRA URGE THE UNITED STATES' DISMISSAL OF INCORRECTLY JOINED AND NAMED PARTIES, INCLUDING TRI-STATE AND QUIVIRA

Tri-State and Quivira urge revision of Paragraph 1 (on page 2) of the Case Management portion of the Proposed Adjudication Scheduling Order ("Proposed Order") attached as Exhibit "B" to the Alternative Proposals. Paragraph 1 provides that "[t]he Court will immediately suspend its Order to stay all further proceedings, dated March 1, 2001, as to all named defendants for the limited purpose of allowing named defendants who disclaim any interest in a water right to move for dismissal from this suit on that basis...."

Tri-State and Quivira have consistently asserted that they should be dismissed from this action because they were erroneously named as defendants. Neither owns water rights with points of diversion or places of use within the Zuni River basin. The water rights of both are already subject to the pending Rio San Jose adjudication. Consequently, both Tri-State and Quivira should promptly be dismissed from this action so that neither will continue to incur costs by being required to participate in litigation in which they have no interest. See, Tri-State's August 24, 2001 Response to the United States' Report and State's Proposal for Proceeding

Once the Stay is Lifted, Quivira's August 24, 2001 Response to the United States' Report and State's Proposal for Proceeding Once the Stay is Lifted, Quivira's January 14, 2002 Response in Opposition to State Engineer's Adjudication Scheduling Order and the United States' Statement of Issues and Nature of the Suit, and Tri-State's January 15, 2002 Response in Opposition to the State's Proposed Adjudication Scheduling Order With its Notice of Filing and the United States' Statement of Issues and Nature of the Suit. Those pleadings are incorporated by reference in this Response.

The State's Proposed Order in Paragraph 1 should be revised to provide as follows:

1. The Court will immediately suspend its Order to stay all further proceedings, dated March 1, 2001 as to all named defendants for the limited purpose of requiring the United States to immediately move to dismiss with prejudice all named defendants that have been incorrectly named and joined and of allowing any defendant to move for dismissal with prejudice on the basis that the defendant has been incorrectly named and joined.

The incorrectly named and joined defendants should not be forced to "disclaim any interest in a water right" when at the same time the State and United States propose to ambiguously extend the reach of the adjudication to encompass "all groundwater hydrologically connected." This designation should be changed as proposed in Point I., supra.

Then an incorrectly joined defendant should be permitted to move for dismissal with prejudice based on its evidence that its water rights are not diverted within the existing exterior boundaries of the Zuni River Stream System and basin. However, the United States should have the upfront burden of moving to dismiss with prejudice all wrongly named or joined defendants, as it incorrectly named and joined them in the first place.

Tri-State and Quivira also request that the dismissal procedure suggested in Paragraph 1 be supplemented to provide not only that the United States shall move for dismissal with

prejudice and that any defendant may move for dismissal with prejudice but also that the Court shall dismiss parties incorrectly named and joined.

The United States Proposed Adjudication Scheduling Order is subject to the same defects, although worded with slight variations. See p. 2 and Paragraph I on p. 3. Objections are likewise made to these and the same revisions urged.

CONCLUSION

For the reasons set forth above, Tri-State and Quivira (A) urge that the suggested definition of “stream system” in the Proposed Order be modified to include either groundwater in the Gallup Underground Water Basin declared by the State Engineer or groundwater with points of diversion within the surface boundaries of the Zuni River Basin, and (B) request revisions to Paragraph 1 of the Proposed Order as set forth above and to similar provisions in the U.S. Order.

Respectfully submitted,

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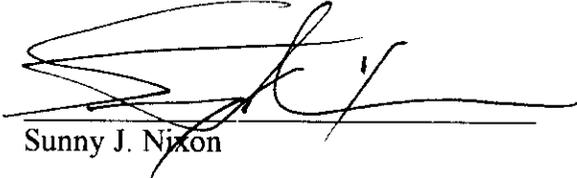
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 8, 2002, I mailed copies of the foregoing Response of Tri-State Generation and Transmission Association, Inc. and Quivira Mining Company to State of New Mexico's Alternative Proposals for an Adjudication Scheduling Order and The United States' Proposed Adjudication Scheduling Order to all persons on the attached mailing list.


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