

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

UNITED STATES OF AMERICA )  
 )  
 Plaintiff, )  
 ) 01cv00072-BDB-ACE  
 -v- )  
 ) ZUNI RIVER BASIN  
 STATE OF NEW MEXICO, ex rel. STATE )  
 Engineer, A & R Productions, et al., )  
 )  
 Defendants. )  
 \_\_\_\_\_ )

SPECIAL MASTER'S REPORT AND RECOMMENDATIONS  
ON ZUNI RIVER BASIN ADJUDICATION PROCEDURE

To: The Honorable Bruce D. Black  
United States District Judge

From: Vickie L. Gabin  
Special Master

This Report outlines the Special Master's recommendations for  
proceeding with the adjudication of the Zuni River Basin.

THIS MATTER is before the Special Master pursuant to the March 12, 2001 Order of Reference (Docket No. 14) and Fed. R. Civ. P. 53. In reaching the following recommendations, I have relied both on my practical experience as a water rights adjudication special master for this District, and on the insightful comments and responses submitted by the private parties throughout the process; a list of those pleadings is attached to this report as the Appendix.

## I. BACKGROUND

### A. Brief Procedural History

On January 19, 2001, the United States of America ("United States") filed the Complaint initiating

this adjudication (Docket No. 1). Numerous defendants were served and joined to the suit. To permit the comprehensive planning necessary in conducting a stream system adjudication, the Court entered an Order staying further action in the case (No. 3) and appointed the Special Master (No. 14).

Following the first status conference, I entered the March 30, 2001 Scheduling Order (No. 31) which continued the stay with limited exceptions, gave the United States and the State of New Mexico, ex rel. State Engineer (“State”) an opportunity to reach agreement on the conduct of the adjudication and file a proposed order for proceeding, and permitted any other party to comment on the proposed order. The United States and State, having been unable to agree with each other on virtually any point, filed separate proposals: United States’ Report, filed June 4, 2001 (No. 60); State’s Proposal for Proceeding Once the Stay in this Case is Lifted, filed July 6, 2001 (No. 65). Other parties’ responses to these proposals are listed in the Appendix.

Both the Zuni Indian Tribe and the Navajo Nation have moved to intervene. Motion to Intervene of Zuni Indian Tribe and Memorandum in Support of Motion to Intervene, filed April 20, 2001 (Nos. 48, 49); Motion of the Navajo Nation to Intervene and Memorandum in Support of Motion to Intervene, filed September 7, 2001 (Nos. 88, 89). Responses to these motions are stayed along with the rest of the case.

I held a second status conference on September 7, 2001. During a pre-conference meeting with attorneys for the United States and State, the Court directed the United States and State to continue their discussions with a view toward structuring the adjudication in a manner acceptable to both parties. Order filed December 20, 2001 (No. 92). They responded February 1, 2002: United States’ Proposed Adjudication Scheduling Order (No. 103) and State of New Mexico’s Alternative Proposals for an Adjudication Scheduling Order (No. 102). The State also filed a February 8 Response to the United

States' Proposed Adjudication Scheduling Order (No. 110). For the next general adjudication meeting on February 14, 2002, I once again solicited comments on and alternative proposals to the newly proposed orders. Notice of Adjudication Meeting, filed January 15, 2002 (No. 101). Those responses are listed in the Appendix. Transcript citations below refer to the February 14, 2002 meeting.

**B. The United States' and State's Proposals for this Adjudication**

**1. Adjudication proceedings**

The United States' and State's February proposals demonstrate sharply differing views of how this adjudication should be conducted. Most notable is the disagreement as to the allocation of costs for conducting the hydrographic survey of the basin. The State has steadfastly maintained that its current resources, coupled with the need to complete the numerous adjudications which are already in progress (including four in this District), preclude the State's full participation in the hydrographic survey at this time.

The State proposes that the Court lift the stay in this case to permit limited dismissal and joinder of defendants, and order the United States to initiate and complete the hydrographic survey. The State's role would be limited to participating in an investigation of the extent of the hydrologically connected groundwaters (discussed more fully below), and ensuring that the survey work is consistent with Office of the State Engineer policies and procedures. As soon as one of the four on-going federal court adjudications is completed, the State proposes that the Court lift the stay entirely, re-align the State as plaintiff, dismiss and join appropriate defendants, and schedule responsive motions pursuant to Fed. R. Civ. P. 12. Subject to the Court's rulings on those motions, the substantive work of the adjudication - offers of judgment describing defendants' water rights - would begin. Should this proposal be rejected, the State would prefer that the Court lift the stay and schedule pleadings responsive to the United States' Complaint.

In pertinent part, the United States' proposal departs from the State's with respect to the conduct of the hydrographic survey. For the present, the United States offers to fund and conduct the survey of two areas of the basin. Once one of the four on-going federal court adjudications is completed (including appeals, but in any event no later than seven years from the entry of an adjudication order), the adjudication will proceed with the defendants in those two sections, and the United States and State will ask the Court to resolve the issue of responsibility for the future conduct of the hydrographic survey.

Neither proposal includes a provision for the submittal of the federal law-based claims. Likewise, neither party has proposed alternative strategies for identifying water rights claimants by methods other than a full-blown hydrographic survey, or for prioritizing the adjudication of certain classes or types of water rights.

## 2. Scope of the adjudication

Potentially significant questions regarding the boundaries of this adjudication appeared relatively late in the proceedings, apparently during discussions between the State and United States. Tr. 5-8, 12-13. The United States defines the boundary of this adjudication as the surface water boundaries of the Zuni River Basin, drawn straight downward through the aquifer; the State suggests that the groundwaters of the Gallup Aquifer, which lies below and extends beyond the surface water basin, are hydrologically connected to the surface flows.

Without adequately defined geographic boundaries, and an understanding of the hydrologic connections between groundwater and surface water, this Court can have no confidence that this adjudication will accurately include all groundwater and surface uses within the Zuni River Basin, and properly exclude those uses located within the boundaries of other stream systems. According to attorney

comments, the potential for overlapping adjudications in this area of the state is significant.

The United States and State have proposed that the hydrographic survey begin only after a joint investigation of the hydrologic boundaries. The Zuni Tribe and the Navajo Nation have expressed interest in participating in the investigation; one defendant has proposed that for such a study the Court appoint a committee of scientists, engineers, and lawyers selected by the parties

### C. Previous Adjudication Attempts

I note for the Court that my recommendations for proceeding with this adjudication stem in great part from the tortured history of previous adjudication attempts in this basin. Zuni Tribe v. City of Gallup, et al., 82cv01135M, was filed in this District in 1982, and was ultimately dismissed without prejudice in 1985 in deference to the comprehensive adjudication pending in state court - City of Gallup, et al. v. United States of America, et al., Eleventh Judicial District Court, No. CV 84-164. The latter was stayed upon request of certain governmental entities, and ended without a completed adjudication when the state district court dismissed it with prejudice for apparent lack of prosecution. The instant case, then, represents the third time the water rights claimants in this basin have faced the prospect of a comprehensive stream system adjudication.

## II. QUESTIONS CONSIDERED

### A. The nature of an adjudication

The United States' Complaint includes language suggesting that this case is a quiet title action, or an action for declaratory judgment; nonetheless, the body of the Complaint makes clear that the United States seeks a general stream system adjudication under New Mexico law. NMSA 1978, §§ Sections 72-

4-13 through 72-4-19 delegate primary responsibility to the State Engineer to gather data on water use and supply “for the determination, development and adjudication” of the water supply of the state. Section 72-4-13. This section also contemplates that agencies of the United States may be involved in similar endeavors, in which case the State Engineer is authorized to cooperate with those agencies.

The cited statutory scheme is noteworthy for the absence of guidance as to how adjudications are to be structured and conducted; New Mexico’s courts, however, have largely approved the Office of the State Engineer’s development of strategies and procedures. See, e.g., State ex rel. Reynolds v. Sharp, 66 N.M. 192, 344 P.2d 943 (1959); State ex rel. Reynolds v. Allman, 78 N.M. 1, 427 P.2d 886 (1967). Procedures which are in “substantial compliance” with the adjudication statutes and reasonably and practically accomplish “the desired purposes” may be adopted. State ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist., 99 N.M. 699, 701, 663 P.2d 358 (1983).

In New Mexico, the typical adjudication proceeds in stages. Once a stream system is identified and described, hydrographic surveys of discrete stream system segments are performed; this process identifies the individual water rights claimants who divert water and describes the observed statutory characteristics of the water use (priority, amount, purpose, location of diversion and, if the rights are used for irrigation, the location of the appurtenant land). Those claimants are consequently joined as defendants, and “offers of judgment” or consent orders which describe the right, as set out in the hydrographic survey report, are presented to the defendants. Typically, the vast majority agree with the description of their water rights claims; those who do not agree have the opportunity to challenge the offers in hearings before the Court. Once all the individual rights have been resolved, the case moves into an *inter sese* phase, where defendants may challenge others’ rights. Overlain on this process is the determination of water rights

claims governed by federal law, including claims made on behalf of and by Indian tribes, and federal agencies. Historically, the submittal of federal claims, and accompanying litigation, has occurred at or near the completion of the state law-based claims phases. In certain circumstances, courts have entertained “expedited *intersese*” actions, where proceedings to resolve objections to individual rights and federal claims are unified.

B. This Adjudication

In some respects, I am reminded of the rocky beginnings of the adjudication of the Jemez Stream System, which was initiated by the United States’ Complaint for trespass damages from junior water users upstream from three Indian Pueblos. See, United States v. Abousleman, 83cv01041, where eventually the State re-aligned as plaintiff and along with the United States undertook the hydrographic survey work. Here again, the United States’ Complaint was filed before necessary hydrographic survey work was performed, and without a statement describing the federal law-based claims which triggered the filing of the Complaint.

The comments filed by counsel of record amply illustrate the problems this Court faces in structuring this case as it stands presently. For example, with neither an adequate description of the geographic scope of this adjudication, nor a hydrographic survey as the basis for identifying water rights claimants, the Court can have no confidence that all the proper parties have been joined. Water rights claimants are indispensable parties to an adjudication. State ex rel. Reynolds v. W.S. Ranch Co., 69 N.M. 169, 364 P.2d 1036 (1961). To date, two defendants have asserted they were erroneously named as defendants (Tri-State Generation and Transmission Association and Quivira Mining Company), and comments received at the several status conferences suggest there are more.

In practical terms, the absence of all water rights claimants poses a host of problems with the timing of dispositive motions and procedural protocols. Should the adjudication proceed with the currently-named defendants, those joined at a later date would be precluded from taking part in the adjudication planning, and as a practical matter, be at an enormous legal and practical disadvantage with respect to litigating issues already decided between some of the parties. The Court and counsel would face the prospect of multiple rounds of hearings and motions, a waste of judicial and attorney resources.

Another difficulty is presented with the failure of the United States to describe specifically the federal law-based claims at the outset. As noted above, in the typical adjudication this phase occurs near the end of the process. Defendants, having settled their claims with the State and among each other, must remain in the suit for another period of years while the federal and Indian claims are prepared, submitted and reviewed for potential challenges. Further, some defendants in this and other adjudications have maintained that unless all claims are presented simultaneously, neither the non-federal claimants nor the federal claimants will be in a position to properly evaluate both the others' claims and their own interests *vis a vis* the others. In practical terms, I suspect that delaying the federal claims phase in this fashion has contributed in a large part to the infamous longevity of these suits.

One other matter should be noted here. Responses to motions to intervene filed by the Zuni Tribe and Navajo Nation have been stayed. On first glance, the scheduling of responses poses a similar problem to scheduling dispositive motions: the specter of duplicative rounds of pleadings, as defendants joined at this time would have the opportunity to challenge those motions, while those water claimants joined later would claim the same right. The question of whether Indian Tribes may intervene in a water rights adjudication, however, is well settled in federal law. See, State of New Mexico v. Aamodt, et al., 537

F.2d 1102, 1106-7 (10<sup>th</sup> Cir.), cert. den., 429 U.S. 1121 (1977); Jicarilla Apache Tribe v. United States, 601 F.2d 1116, 1127 (10<sup>th</sup> Cir.), cert. den., 444 U.S. 995 (1979). This federal district routinely permits tribes to intervene. See, e.g., Orders granting San Juan Pueblo's Motions to Intervene, entered October 21, 1994 in State v. Aragon, et al., No. 69cv07941, and October 21, 1997 in State v. Abbott, et al., No. 68cv07488.

### **III. RECOMMENDATIONS**

Many of the problems attendant to the decades-old adjudications on the federal docket<sup>1</sup> stem from adjudication strategies that might charitably be described as “piecemeal.” The following recommendations in my view provide the basis for a comprehensive, well-managed and efficient adjudication. The order in which these steps should be taken, a more expansive explanation of each step, and detailed schedules should be included in a comprehensive scheduling order which would be entered once the Court has resolved objections to this Report pursuant to Fed. R. Civ. P. 53(e).

#### **1. Define scope of adjudication**

Within two months of the entry of an adjudication scheduling order, the United States and State should begin a cooperative investigation into the scope of this adjudication. The Zuni Tribe and Navajo Nation should be permitted to participate so long as such participation does not unduly complicate or delay the progress of the investigation. Once the United States and State reach an understanding, their findings should be circulated to interested counsel for comment. An evidentiary hearing may be necessary if the

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<sup>1</sup> The adjudication of the Pojoaque/Tesuque/Nambé stream system began in 1966; the Rio Chama, 1969; the Rios Truchas/Santa Cruz, 1968; the Rios Taos/Hondo, 1969; and the Jemez River, 1973.

United States and State cannot agree. If the parties conclude that the area encompassed by this adjudication differs from that described in the United States' Complaint, the United States should be permitted to amend its complaint accordingly.

2. Retain the stay

Until defendants are dismissed, and a detailed scheduling order is entered, the Court's stay should be retained for the limited purpose of staying answers to the complaint and dispositive motions.

3. Dismiss defendants and re-align parties

The United States should move to dismiss all defendants without prejudice (naming "unknown claimants to the surface and underground waters of the Zuni River Basin" instead) and, along with the State, move to re-align the State as co-plaintiff. These actions should make clear that this case is a statutory stream system adjudication. Copies of these pleadings, along with an explanatory letter to defendants, and at least several public meetings held by the United States and the State, should be sufficient to allay existing community concerns that land titles are in jeopardy.

4. Allocate costs to the United States

The United States' Complaint states at pp. 16-17 that the request for a water rights adjudication is brought "in its own right and as trustee for and on behalf of the Zuni Indian Tribe, the Navajo Nation, the Ramah Band of Navajo and various individual Indians having interests in trust patents within the Zuni River basin ... and in its sovereign and proprietary capacity" for the United States' Cibola National Forest, national monuments and other public lands. The State of New Mexico has made a persuasive case for its inability to initiate another adjudication at this time. Under the circumstances, I recommend that the Court order the United States to conduct the hydrographic survey of the entire basin, and bear the costs of the

survey and the fees of the Special Master and necessary staff during the hydrographic survey phase. Doing so would allow this adjudication to begin while affording the State perhaps five years to secure the resources necessary to participate fully in the post-hydrographic survey phases of consent orders/offers of judgment, field offices and additional investigations, and day-to-day case management. Until then, the State would, however, be responsible for ensuring that the United States' proposed hydrographic survey methodology comports with State Engineer standards.

If the United States is unable to initiate and proceed with this adjudication as described above, the Court should permit the United States to withdraw its Complaint until it can assemble the resources to do so.

5. Prepare federal claims simultaneously

At the February 14 conference, Mr. O'Connell estimated that the hydrographic survey of the entire basin would take as long as three to four years. Tr. at 9-10. Preparation of the federal and Indian claims might take between two and three years. Tr. 11. I recommend that the hydrographic survey and the preparation of federal and Indian claims proceed on roughly parallel tracks. Optimistically speaking (and taking into account the inevitable delays which attend cases of this scope), this adjudication could be completed in as few as 10 years.

6. Grant Motions to Intervene

As noted above, the law in this area is well-settled. The Court should either permit the Indian interests to intervene without the benefit of further briefing, or announce an expedited briefing schedule for named defendants before they are dismissed.



## APPENDIX

### I. Round One - Comments on United States' and State's Proposals for Adjudication

- a. Proposal and Comments of Robert W. Ionta and Linda A. Ionta, August 21, 2001 (No. 75)
- b. Response of the Defendants John A. Yates et al. to the Reports..., August 23, 2001 (No. 76)
- c. Tri-State Generation and Transmission Association, Inc.'s Response..., August 24, 2001 (No. 77)
- d. Comments of the New Mexico Commissioner of Public Lands..., August 24, 2001 (No. 79)
- e. Zuni Indian Tribe's Response..., August 24, 2001 (No. 80)
- f. Response by Defendant Paul Petranto..., August 26, 2001 (No. 81)
- g. Response of the Salt River Project Agricultural Improvement and Power District..., August 24, 2001 (No. 82)
- h. Quivira Mining Company's Response..., August 24, 2001 (No. 83)

### II. Round Two - Comments on United States' and State's Proposals for Adjudication

- a. Tri-State Generation and Transmission Association, Inc.'s Response in Opposition..., January 14, 2002 (No. 98)
- b. Quivira Mining Company's Response in Opposition..., January 14, 2002 (No. 99)
- c. Comments of the New Mexico Commissioner of Public Lands..., February 8, 2002 (No. 104)
- d. Comments by the Salt River Project Agricultural Improvement and Power District..., February 8, 2002 (No. 105)
- e. Yates' Comments..., February 8, 2002 (No. 106)
- f. Defendant Richard Mallery's Comments..., February 8, 2002 (No. 107)
- g. Comments by Paul Petranto..., February 10, 2002 (No. 108)
- h. Amended Response ... and Comments of Robert W. Ionta and Linda A. Ionta, February 7, 2002 (No. 109)
- i. Response of Tri-State Generation and Transmission Association, Inc. and Quivira Mining Company..., February 8, 2002 (No. 111)
- j. Navajo Nation's Comments..., February 13, 2002 (No. 113).