

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

NEW MEXICO DISTRICT COURT
02 JUN - 5 P.M. 9:50 M M

UNITED STATES OF AMERICA,

Plaintiff,

v.

CIV No. 01-0072 BB/WWD-ACE

ZUNI RIVER STREAM SYSTEM

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

Defendants.

STATE OF NEW MEXICO'S OBJECTIONS TO SPECIAL MASTER'S REPORT
AND RECOMMENDATIONS ON ZUNI RIVER BASIN ADJUDICATION
PROCEDURE

THE STATE OF NEW MEXICO on the relation of the New Mexico State Engineer ("State"), by and through its counsel of record, hereby respectfully makes the following objections, pursuant to Fed. R. Civ. P. 53(e)(2) and the Court's May 10, 2002 Order (No. 126), to the Special Master's April 26, 2002 Report and Recommendations on Zuni River Basin Adjudication Procedure (No. 123) ("Special Master's Report"). The State objects concerning the timing of the State's re-alignment as a plaintiff, and recommends, as a matter of consistency, that this action should be styled as the Zuni River stream system adjudication.

1. The State Objects to Being Re-aligned as a Plaintiff Until it Has the Resources to Participate as a Plaintiff.

The Special Master's recommendation three provides that "[t]he United States should . . . , along with the State, move to re-align the State as a co-plaintiff." Special Master's Report, p. 10, ¶ 3. The Special Master's Report itself makes clear, however, that the formatting of the Special Master's eight recommendations set forth on pages 9 to

12 of the Report should not be interpreted as recommending that the Court implement the eight recommendations in the order that they are presented. *See id.* at 9 (“[t]he order in which these steps should be taken . . . should be included in a comprehensive scheduling order which would be entered once the Court has resolved objections to this Report”). In addition, the Special Master’s recommendation four expressly recognizes the State’s resource limitations and its consequent inability to initiate another adjudication at this time. Special Master’s Report, p. 10, ¶ 4. The Special Master further expressly recognizes that the State will not be able to participate fully in post-hydrographic survey phases of this adjudication until it secures additional resources. *Id.* at 11. Recommendation three should be interpreted in a manner consistent with the acknowledgments contained in recommendation four, and consequently the State should not be re-aligned as plaintiff until it has the resources to participate fully as a plaintiff.

From the moment the United States filed its complaint in this matter, the State steadfastly has responded that it does not currently have the resources to conduct a hydrographic survey of the Zuni River stream system or to complete the adjudication of the stream system. Nonetheless, as directed by the Court’s December 20, 2001 Order (No. 92), on February 1, 2002 the State submitted a proposal designed to allow this adjudication to move forward in spite of the State’s resource limitations. The State proposed that it would move to re-align itself as plaintiff once 1) the United States had completed the hydrographic survey, and 2) one or more of the four water right adjudications currently pending before this District were completed. *See* New Mexico’s February 1, 2002 Alternative Proposals for an Adjudication Scheduling Order, No. 102, Exhibit B, ¶ IV. Given the Special Master’s acknowledgment of the State’s resource

limitations, *see* Special Master's Report, pp. 10-11, ¶ 4, the Court should not require re-alignment of the State as a plaintiff until the United States completes the hydrographic survey and one or more of the four water right adjudications currently pending before this District are completed.

The State's resource limitations notwithstanding, the State need not be re-aligned as a plaintiff until sometime after completion of the hydrographic survey for several reasons. First, the State will not be directly involved in the litigation until after that point. The Special Master recommends that the Court order the United States to conduct the hydrographic survey and bear the initial costs of the adjudication. *Id.* The express purpose of the Special Master's recommendation is to avoid the State's immediate involvement in this litigation:

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.

Id. at 11. The State's involvement during the hydrographic survey phase would be limited to being "responsible for insuring that the United States' proposed hydrographic survey methodology comports with State Engineer standards." *Id.* There is no need to re-align the State as a plaintiff for that very limited purpose.

Second, the Special Master's Report suggests that re-alignment of the State as a Plaintiff would help to "make clear that this case is a statutory stream system adjudication." *Id.* at 10, ¶ 3. Since the Special Master recommends that the United States dismiss all defendants, however, *see Id.*, at least during the hydrographic survey phase, there is no need to re-align the State for this purpose either. There will be no defendants

to educate about the nature of this proceeding until the joinder of parties and the service of offers of judgment are initiated after the filing of the hydrographic survey. Until that time, the nature of this adjudication can be made clear when, as Special Master recommends, copies of the pleadings with an explanatory letter are sent to the defendants, and public meetings are held. *Id.* at 10.

Finally, re-alignment of the State as a plaintiff before completion of the hydrographic survey likely would engender unnecessary confusion among water rights claimants in the stream system. In such a scenario, the State would be a co-plaintiff in the lawsuit, but the United States alone would be undertaking the hydrographic survey. This would blur unnecessarily in the eyes of the public the responsibilities of the State and the United States for completing various tasks in what is already a complex and often confusing species of litigation. The ability of individuals to understand the respective roles of the State versus the United States during the period of the hydrographic survey would be enhanced by the clarity that the respective titles of defendant and plaintiff provide.

2. The State Objects to Any Implication in Recommendation Four that the State Will Secure Additional Resources Within Five Years to Undertake this Adjudication

The State objects to the Special Master's recommendation four to the extent it implies that the State will secure or should be required to secure additional resources to undertake this adjudication. The Report recommends that the Court order the United States to conduct the hydrographic survey of the entire basin, thereby "affording the State perhaps five years to secure the resources necessary to participate fully in the post-hydrographic survey phases [of the adjudication]." Special Master's Report, p. 11, ¶ 4

(emphasis added). Earlier in the Report, however, the Special Master accurately sets out the State's position that the only resources available to it for this adjudication were not those which would come from any additional legislative appropriations, but rather were resources presently possessed by the State, but which were presently being utilized to complete other adjudications pending before this District: "As soon as one of the four on-going federal court adjudications is completed, the State proposes that the Court lift the stay entirely [and] re-align the State as plaintiff" *Id.* at 3 (emphasis added).

The Special Master later acknowledges the strength of the State's position, noting that the State "has made a persuasive case for its inability to initiate another adjudication at this time." *Id.* at 10. The State's present resource limitations leave the State not only unable to initiate a new hydrographic survey, but also unable to commit that in five years it will be able 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." *Id.* at 11.

Given existing drought conditions, litigation, and threatened litigation, there is every reason to believe that resources will be available for the State to participate fully in this adjudication only when one or more of the four adjudications currently pending in this District is completed. In its February 1, 2002 Alternative Proposals for an Adjudication Scheduling Order, No. 102, the State underscored the fact that legislative prioritization of existing stream system adjudications precludes the State from seeking any additional appropriation of funds from the legislature to undertake and conduct any new adjudication – including the Zuni – at this time:

[S]tatutory constraints demonstrate that the legislature was well aware that at no time would the State ever have the resources to simultaneously

adjudicate all the waters of New Mexico, and they clearly contemplate prioritization of adjudications at the discretion of the State Engineer. The State and the State Engineer have been and continue to be involved in this ongoing prioritization process, not only because it is provided for by statute, but because the legislature and executive mandate prioritization of the adjudications. One of the most visible examples of this prioritization process is the State Engineer's triaging of the agency's limited resources by focusing them on the Pecos and Lower Rio Grande adjudications. Similarly, the legislature has provided special project appropriations to increase progress on the two adjudications having priority: the lower Pecos River and the Lower Rio Grande. The United States' Complaint for the adjudication of the Zuni River stream system falls far from the priorities set by the New Mexico legislature and implemented by the State Engineer, and it is not likely to be given priority status.

New Mexico's Alternative Proposals for an Adjudication Scheduling Order, p. 5.

In short, the New Mexico legislature's prioritization of stream system adjudications precludes the State from undertaking any new adjudications at this time. The only resources potentially available to the State for the adjudication of the Zuni River stream system are those resources presently committed to the prosecution of the other northern New Mexico adjudications, of which four adjudications are presently proceeding in this District. The State therefore objects to the Special Master's Report to the extent that it recommends that the Court require the State to secure resources to undertake the adjudication of the Zuni stream system, beyond those resources which the New Mexico legislature has made available for the northern New Mexico adjudications.

3. The State Objects to the Subject of this Adjudication Being Styled the "Zuni River Basin" Rather than the "Zuni River Stream System."

The State objects to the Special Master's Report to the extent it styles and refers to the waters to be adjudicated by the instant lawsuit as the "Zuni River Basin" rather than the "Zuni River stream system." In addition to the use of the term "Zuni River Basin" in the case caption, for example, the Special Master's Report recommends that the

Court order the United States to dismiss all defendants, “naming ‘unknown claimants to the surface and underground waters of the Zuni River Basin’ instead” Special Master’s Report, p. 10 (emphasis added).

The term “river basin” is inconsistent with New Mexico’s statutory adjudication nomenclature. “Stream system” is the term of art prescribed by the adjudication statute, and it carries a corresponding legal significance. *See, e.g.*, NMSA 1978, § 72-4-17 (1965). In contrast, “basin” is a term of art reserved for identifying a body of groundwater declared by the State Engineer for his administration. *See, e.g.*, NMSA 1978, §§ 72-12-1 (2001) (water of underground streams, channels, artesian basins, reservoirs, or lakes having reasonably ascertainable boundaries declared to be public waters subject to appropriation for beneficial use); 72-12-20 (1983) (permit to appropriate underground waters required in basins declared by the state engineer to have reasonably ascertainable boundaries); 72-12-12 (1957) (without valid drillers license, unlawful to drill well for water from underground stream, channel, artesian basin, reservoir, or lake the boundaries of which have been proclaimed by the state engineer to be reasonably ascertainable); 72-12A-3 (A) (1980) (defining “declared underground basin”); *see also* New Mexico State Engineer, Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, § 1-2 (application to appropriate required where well to be drilled within declared underground water basin); Article 7 (defining boundaries of declared underground water basins).

The Special Master’s use of the phrase “unknown claimants” in the above referenced paragraph echoes the phraseology of section 72-4-17, which speaks to notice

to “unknown persons,” but which also prominently utilizes the “stream system” terminology:

The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved; . . . and all unknown persons who may claim any interest or right to the use of the waters of any such system, and the unknown heirs of any deceased person who made claim of any right or interest to the waters of such stream system in his lifetime, may be made parties in such suit

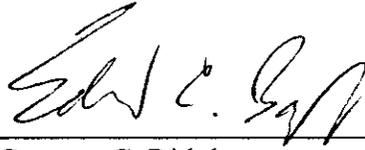
NMSA 1978, § 72-4-17 (emphasis added). Use of the term “stream system” is consistent with the New Mexico water code, and is likely to facilitate the understanding by all affected water right claimants of the scope of this adjudication.

Conclusion

The State appreciates the Court’s recognition that resource limitations inhibit its ability to undertake this adjudication at this time. Special Master’s Report, p. 10. As recognized in the Special Master’s Report, this is the United State’s lawsuit until the hydrographic survey is completed and the State has the resources to participate. As the State made clear in its February 1, 2002 proposal, the State has no objection to being re-aligned as a plaintiff upon the completion of the hydrographic survey and the completion of one or more of the four ongoing water right adjudications currently pending in this District. The State objects to Special Master’s Report and Recommendation to the extent it recommends re-alignment of the State prior to that time. Additionally, the State objects to any requirement that it secure additional resources to undertake this adjudication beyond those resources that will become available upon the completion of one of the ongoing adjudications pending before this district. Finally, the State recommends that this adjudication should be styled as the “Zuni River stream system” adjudication.

For the reasons set forth, the State asks the Court to adopt its objections when it acts on the Special Master's Report.

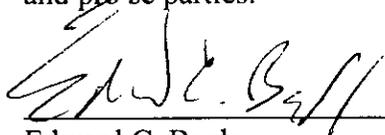
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gregory C. Ridgley", written over a horizontal line.

Gregory C. Ridgley
Edward C. Bagley
Special Assistant Attorneys General
Attorneys for the State of New Mexico
ex rel. State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
Telephone: (505) 827-6150
Fax: (505) 827-6188

Certificate of Service

I certify that on this 5th day of June, 2002, a true and correct copy of the foregoing pleading was mailed by first class mail to the attached list of counsel of record and pro se parties:



Edward C. Bagley

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Mark K. Adams, Esq.
Rodey, Dickason, Sloan, Akin &
Robb
P.O. Box 1357
Santa Fe, NM 87504-1357

Randolph H. Barnhouse, Esq.
Rosebrough & Barnhouse, P.C.
P.O. Box 1744
Gallup, NM 87305-174

Larry D. Beal, Esq.
Beall & Biehler, P.A.
6715 Academy Road, N.E.
Albuquerque, NM 87109

Bruce Boynton, Esq.
Boynton, Simms-West Law Office
P.O. Box 1239
Grants, NM 87020

Steven L. Bunch, Esq.
NM Highway & Trans. Dept.
P.O. Box 1149
Santa Fe, NM 87504-1149

Darcy S. Bushnell, Esq.
Water Rights Attorney
USDS-DCNM
333 Lomas Blvd., N.W. – Ste. 270
Albuquerque, NM 87102-2272

Ernest L. Carroll, Esq.
Losee, Carson, Haas & Carroll, P.A.
Box 1720
Artesia, NM 88211

Kenneth J. Cassutt, Esq.,
530-B Harkle Road
Santa Fe, NM 87505

Jeffrey A. Dahl, Esq.
Lamb, Metzgar, Lines & Dahl, PA
P.O. Box 987
Albuquerque, NM 87103

Tessa T. Davidson, Esq.
Swaim, Schrandt & Davidson, P.C.
4830 Juan Tabo, N.E., Suite F
Albuquerque, NM 87111

Jocelyn Drennan, Esq.
Rodey, Dickason, Sloan & Robb
P.O. Box 1888
Albuquerque, NM 87103

Charles T. DuMars,
Christina Bruff DuMars
Albuquerque Plaza
201 3rd Street, N.W., Ste. 1370
Albuquerque, NM 87102

Peter Fahmy,
Office of the Regional Solicitor
755 Parfet St., Suite 151
Lakewood, CO 80215

R. Bruce Frederick, Esq.
NM Attorney General's Office
P.O. Box 1148
Santa Fe, NM 87504-1148

Special Master Vickie L. Gabin,
U.S. District Court
U.S. Courthouse
P.O. Box 2384
Santa Fe, NM 87504-2384

David R. Gardner, Esq.
P.O. Box 62
Bernalillo, NM 87004

Deborah S. Gille, Esq.
Eastham, Johnson, Monnheimer etc
500 Marquette, NW, Suite 1200
P.O. Box 1276
Albuquerque, NM 87102

Raymond Hamilton, Esq.
U.S. Attorney's Office
District of New Mexico
P.O. Box 607
Albuquerque, NM 87103

Stephen G. Hughes, Esq.
NM Land Office
310 Santa Fe Trail
P.O. Box 1148
Santa Fe, NM 87504-1147

Robert W. Ionta, Esq.
McKim, Head & Ionta
P.O. Box 1059
Gallup, NM 87305

Mary Ann Joca, Esq.
U.S. Dept. of Agriculture
517 Gold Ave., S.W. Rm 4017
Albuquerque, NM 87102

Lynn A. Johnson, Esq.
USDJ-ENRD
999 - 18th St., Suite 945
Denver, CO 80202

M. Byron Lewis, Esq.
Salmon, Lewis & Weldon
2850 East Camelback Road
Suite 200
Phoenix, Arizona 85016

Roger Martella, Esq.
DOJ/ENRD-IRS
P.O. Box 44378
Washington, D.C. 20026-4378

Jane Marx, Esq.
Williams, Janov & Cooney
2501 Rio Grande Blvd., N.W.
Albuquerque, NM 87104-3223

Mark A. McGinnis, Lewis
Salmon, Lewis & Weldons
2850 East Camelback Road
Suite 200
Phoenix, Arizona 85016

Jeffrie D. Minier, Esq.
Law & Resources Planning Assoc.
Albuquerque Plaza
201 3rd Street, N.W., Ste. 1370
Albuquerque, NM 87102

Stephen R. Nelson, Esq.
Eastham, Johnson, Monnheimer &
Jontz
500 Marquette, N.W., St. 1200
P.O. box 1276

Sunny J. Nixon, Esq.
Rodey, Dickason, Sloan, Akin &
Robb
P.O. Bo 1357
Santa Fe, NM 87504-1357

Charles O'Connell, Esq.
United States Dept. of Justice
601 D. Street, N.W.
Room 3507
Washington, D.C. 20004

Dorothy C. Sanchez, Esq.
715 Tijeras, N.W.
Albuquerque, NM 87102

Mark A. Smith, Esq.
Rodey, Dickason, Sloan Akin &
Robb
P.O. Box 1888
Albuquerque, NM 87103

John B. Weldon, Jr., Lewis
Salmon, Lewis & Weldon
2850 East Camelback Road
Suite 200
Phoenix, Arizona 85016

Stanley M. Pollack, Esq.
Navajo Nation Dept. of Justice
P.O. Box 2010
Window Rock, AZ 86515-2010

Stephen P. Shadle, Esq.
Westover, Shadle, Carter &
Walsma, PLC
2260 S. Fourth Ave. #2000
Yuma, Arizona 85364

Neil C. Stillinger, Esq.
P.O. Box 8378
Santa Fe, NM 87504

Pamela Williams, Esq.
Division of Indian Affairs
Office of Solicitor for Interior
1849 C Street, NW, Rm 6456
Washington, D.C. 20240

Martella Rogers, Esq.
DOJ/ENRD-IRS
P.O. Box 44378
Washington, D.C. 20026-4378

Mark H. Shaw, Esq.
3733 Eubank Blvd., NE
Albuquerque, NM 87111

William G. Stripp, Esq.
P.O. Box 159
Ramah, NM 87321

Susan M. Williams, Esq.
Williams, Janov & Cooney
2501 Rio Grande Boulevard, N.W.
Albuquerque, NM 87104-3223

Ann Hambleton Beardsley, Pro Se
HC 61 Box 747
Ramah, NM 87321

Ted Brodrick, Pro Se
P.O. Box 219
Ramah, NM 87321

David Candelaria, Pro Se
12,000 Ice Caves Rd.
Grants, NM 87020

Louis E., Sr. DePauli, Pro Se
1610 Redrock Drive
Gallup, NM 87301

Sandra S. Drullinger, Pro Se
818 E. Maple Street
Hoopeston, IL 60942

Cheryl Duty, Pro Se
HC 61 Box 788
Rahma, NM 87321

Kimberly J. Gugliotta, Pro Se
158 W. William Casey Street
Corona, AZ 85641

Albert O., Jr. Lebeck, Pro Se
P.O. Drawer 38
Gallup, NM 87305

David R. Lebeck, Pro Se
P.O. Drawer 38
Gallup, NM 87305

Gerald F. McBride, Pro Se
2725 Aliso Drive, N.E.
Albuquerque, NM 87110

Myrrl W. McBride, Pro Se
2725 Aliso Drive, N.E.
Albuquerque, NM 87110

Stephen Charnas, Esq.
For Information Purposes
Sutin, Thayer & Browne PC
P.O. Box 1945
Albuquerque, NM 87103-1945