

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

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

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

Defendants.

RESPONSE OF DEFENDANT YATES TO NOTICE OF HEARING (138)

The Court ordered that the parties be prepared to address the issues set forth in the notice of hearing dated June 13, 2002. The comments of Defendant Yates are the following:

1. Should the US amend its complaint to clarify the nature of the lawsuit?

Yes. As pleaded, the lawsuit sounds as if it is a quiet title suit. It is not a quiet title suit and this is a very meaningful difference. It is a suit to adjudicate water rights, which is an in rem action. A quiet title suit is an action in personam. The importance lies in the fact that if the law of the case is allowed to develop as an in personam action, the lawsuit will never end. This is what has happened elsewhere. As parties die or convey their property, or parts of it, the State has joined their successors, who tend to reinvent the wheel with each round of joinder. This is not the office of an adjudication. The adjudication determines in rem what the water rights are. As a matter of due process it has to give everyone with known claims to the water the opportunity to be heard, but

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ZUNI RIVER ADJUDICATION

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that is as close as it comes to having any in personam aspects to it. Once a subfile order has been entered, it should be made final. State ex rel. State Engr. v. Parker Townsend Ranch Co., 118 N.M. 780, 887 P.2d 1247 (S. Ct. 1994) If it is an in personam action, then every time any property owner dies or conveys away his property before the judgment becomes final, the water rights appurtenant to his land are subject to going through the whole process again. Experience in a number of cases, particularly Aamodt, shows that this can add many years to the longevity of an already geriatric case.

2. Should defendants be dismissed?

No. Unless the Court determines that this is an in personam action, in which case the presence of the current defendants perhaps years from now will be of almost no importance or meaning to the process.

3. Should claims be dismissed?

Yes, if they involve anything other than the five elements set forth in the statute under which the action is brought as a water right adjudication, 72-4-19, and the preceding sections. The judgment is required to contain only the elements necessary to define the water right: Place of use; purpose of use; priority, point of diversion; and duty of

water ("priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.")

4. The Court inquires "whether distributing notice of dismissal of defendants and/or claims with an explanatory letter and notice of removal of lis pendens are sufficient to ease concerns about clouded title."

No. There should be no concerns about clouding of title anyway. If there are misplaced concerns which arise from the notice of lis pendens which has been filed, perhaps the answer is to withdraw the lis pendens (which remains on file forever anyway). If this is not an in personam action to quiet title, the lis pendens means nothing anyway, and even if it did, it is only effective against the people named in it and those who deal with them. Withdrawing it could comfort those who believe they are adversely affected by it, and will have no effect on the ultimate adjudication of the water rights anyway, which is effective as against the water rights.

6. Should the motions of Zuni and Navajo to intervene be granted?

Obviously, if they are claimants of water rights and this is a water right adjudication, they should be heard. If they do not voluntarily come into the lawsuit they would have to come in as defendants anyway. Its obviously a lot easier on the system if they come in on their own.

7. When should the State be realigned as plaintiff?

Now.

8. Other matters which should be brought to the Court's attention prior to the entry of the procedural order and direction to the Special Master.

Under the procedure set forth in State ex rel. Reynolds v. Sharp, 66 N.M. 192, 344 P.2d 943 (1959), this action should proceed on an area-by-area basis, one effect of which is to reduce the immediate expenditure of extremely large amounts of federal and state funds for complete hydrographic surveys, service of process, etc. Instead the amounts required to be spent will merely be large, and will be spread over time.

PETER B. SHOENFELD, P.A.
P.O. BOX 2421
SANTA FE, NEW MEXICO 87504-2421
(505) 982-3566; FAX (505) 982-5520

By: 
Attorney for Defendant Yates

CERTIFICATE OF SERVICE

I certify that on this July 3, 2002, I served a copy of the foregoing instrument upon the following by first class mail:

Stephen Charnas, Esq..
David R. Gardner, Esq.
Jocelyn Drennan, Esq.
Mary Ann Joca, Esq.
Susan Williams, Esq.
Jane Marx, Esq.
Robert W. Ionta, Esq.
Stanley M. Pollack, Esq.
Stephen P. Shadle, Esq.
Mark A. Smith, Esq.
William G. Stripp, Esq.
Pamela Williams, Esq.
Jeffrey A. Dahl, Esq.
Sandra S. Drullinger, Pro Se
Kimberly J. Gugliotta, Pro Se
Sunny J. Nixon, Esq
Dorothy C. Sanchez, Esq.
Steven L. Bunch, Esq.
Randolph H. Barnhouse, Esq
Kenneth J. Cassutt, Esq.
Darcy S. Bushnell, Esq.
Tessa T. Davidson, Esq.
Vickie L. Gabin, Special
Master
R. Bruce Frederick, Esq.
Stephen G. Hughes, Esq.
Bruce Boynton, Esq
Lynn A. Johnson, Esq.
Peter Fahmy, Esq.
Louis E. DePauli, Pro Se
Albert O. Lebeck, Pro Se

David R. Lebeck, Pro Se
Mark H. Shaw, Esq.
Myrrl W. McBride, Pro Se
Gerald F. McBride, Pro Se
John B. Weldon, Esq.
M. Byron Lewis, Esq.
Mark A McGinnis, Esq.
Ann Hambleton Beardsley, Pro
Se
Stephen R. Nelson, Esq.
Deborah S. Gille, Esq.
Ted Brodrick. Pro Se
Larry D. Beall, Esq.
DL Sanders, Esq.
Ted Bagley, Esq.,
David Candelaria, Pro Se
Charles O'Connell, Jr., Esq.
Charles T. DuMars, Esq.
Christina Bruff DuMars, Esq.
Jeffrey D. Minier, Esq.
Raymond Hamilton, Esq.
Roger Martella, Esq.
Mark K. Adams, Esq.
Cheryl Duty, pro se
Ted Broderick, pro se


Peter B. Shoenfeld