

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

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

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.'S  
OBJECTIONS TO THE UNITED STATES SUPPLEMENTAL IDENTIFICATION  
OF ZUNI RIVER STREAM SYSTEM BOUNDARY  
AND TO THE  
UNITED STATES PROPOSED ORDER RE: ADJUDICATION  
PROCEDURES AND SCHEDULES

I. Introduction

Tri-State Generation and Transmission Association, Inc. ("Tri-State") objects to portions of the United States Supplemental Identification Of Zuni River Stream System Boundary ("Supplemental Identification") and the United States Proposed Order Re: Adjudication Procedures And Schedules both served on January 9, 2003 ("United States Adjudication Procedure"). In short, Tri-State objects to both pleadings on grounds that the objectionable portions are not consistent with the Court's July 15, 2002 and December 4, 2002 Scheduling Orders ("Court's Scheduling Orders").

First, in its Scheduling Orders, the Court ordered the United States to "describe definite and specific geographic boundaries for the adjudication" in its December 2002 report. The Court also set forth the exact criteria to be followed in setting these

boundaries:

“Groundwater diversions which lie within the surface boundaries shall be included in the adjudication. The groundwater considered shall be limited to that which lies within the surface boundaries, as though their lines were drawn vertically through the earth. The boundaries shall not overlap those of any other adjudication. Conflicts which arise between claimants in this and other adjudications are beyond the scope of this case.

(Paragraph 1 of July 15, 2002 Scheduling Order.) The United States has exceeded these criteria in its Supplemental Identification.

Secondly, in the July 15, 2002 Scheduling Order the Court ruled that parties whose water rights are subject to another adjudication and/or who have no water rights to claim in this adjudication may be “dismissed at any time.” (Paragraph 4) The Court further ordered that a party may file a disclaimer of claims to water rights to effect a dismissal. Before filing a disclaimer, a mis-joined party must be assured of the final description of the definite geographic boundaries for the adjudication. The Court recognized such a need when it ordered the United States to identify “definite and specific geographic boundaries” in its December 2, 2002 Report. This deadline set by the Court was up-front and prior to completion of the Hydrographic Survey.

The United States Adjudication Procedure (Section II(C)(1)) would turn this up-front identification of boundaries on its head and instead assumes that identification of the boundaries would await completion of the Hydrographic Survey. Additionally, the United States Adjudication Procedure (Section III(A)(1)) may be interpreted to impermissibly delay dismissal of improperly joined parties until after completion of the hydrographic survey. These provisions are clearly inconsistent with the Court’s

Scheduling Orders. Accordingly, the language in Section II(C)(1) should be deleted and the Court's language in Paragraph 4 of its July 15, 2002 Scheduling Order should be inserted in Section III(A)(1) of the United States Adjudication Procedure.

## **II. United States Supplemental Identification of Zuni River Stream System Boundary**

The United States Supplemental Identification is inconsistent with and exceeds the specific criteria set forth in Paragraph 1 of the Court's July 15, 2002 Scheduling Order defining the geographic boundaries for the adjudication. The United States, rather than replicating the Court's criteria in their entirety, introduces an errant sentence. This sentence reads: "The above-described Zuni River stream system shall include groundwater in hydraulic continuity with the surface waters of the basin." (Page 5)

This extraneous sentence injects an impermissible ambiguity into the criteria set forth by the Court. If groundwater in "hydraulic continuity" with the surface waters of the basin is included in this adjudication, this inclusion could impermissibly extend into adjoining basins and result in inconsistent determination among on-going adjudications. This errant sentence is inconsistent with the Court's July 15, 2002 Scheduling Order (Paragraph 1) stating:

In the December 2, 2002 report, the United States shall describe definite and specific geographic boundaries for the adjudication. Groundwater diversions which lie within the surface boundaries shall be included in the adjudication. The groundwater considered shall be limited to that which lies within the surface boundaries, as though their lines were drawn vertically through the earth. The surface boundaries shall not overlap those of any other adjudication. Conflicts which may arise between claimants in this and other adjudications are beyond the scope of this

case.

If the United States' objectionable sentence remains in the United States Supplemental Identification, the boundaries could impermissibly extend into adjoining adjudications. Accordingly, this objectionable sentence should be deleted. Upon the objections of Tri-State and another party, the United States represented in open hearing before the Special Master on January 16, 2003 that the United States would delete this sentence.

### **III. United States Proposed Order Re: Adjudication Procedures and Schedules**

Tri-State especially objects to the United States' language in Paragraph II(C)(1) that the "geographic boundaries of the entire case area" will be determined and completed in the Hydrographic Survey, which the United States expects to finish in 2003. This language in II(C)(1) should be deleted. It is inconsistent with the Court's Scheduling Orders of July 15, 2002 and December 4, 2002, which unequivocally provide that the United States in its December 2, 2002 Report "shall describe definite and specific geographic boundaries for the adjudication." (Paragraphs 1) In other words, the Court made clear that the boundaries for the adjudication were to be set up front – not as part of the Hydrographic Survey. Accordingly, the language in II(C)(1) should be deleted.

Secondly, the language in Paragraph III(A)(1) implying that dismissal of improperly joined party-defendants should be dismissed "upon completion of the survey" is highly objectionable. It, too, flies in the face of the Court's Scheduling Order of July 15, 2002 (Paragraph 4) in which the Court specifies that "parties whose water

rights claims are subject to another adjudication and/or parties who have no water rights to claim in this adjudication may be **dismissed at any time.**" (Emphasis supplied) The Court's July 15, 2002 Scheduling Order in Paragraph 4 further provides that once such parties have identified themselves by filing a disclaimer, the United States "shall" take the necessary steps to effect dismissal. Of course, improperly joined parties cannot be assured that they have "have no water rights to claim in this adjudication" until the boundaries have been defined by the United States' 2002 December Reports, subject to objections and the Court's ruling thereon.

Therefore, the Court's language from Paragraph 4 of the July, 2002 letter should be added following the first sentence in Paragraph III(A)(1), so that the newly inserted sentence reads as follows:

Parties whose water rights are subject to another adjudication and/or parties who have no water rights to claim in this adjudication may be dismissed at any time. Once such parties have identified themselves by filing a disclaimer, the United States shall take the necessary steps to effect dismissal, if appropriate. The United States shall evaluate the answers and motions which have already been filed with this goal in mind.

The United States should be required to attach to any United States Adjudication Procedure or other operative procedural order a form of dismissal to acquaint parties disclaiming water rights in the adjudication with the form of the order of dismissal, so that the parties can rely upon this form once they file their disclaimers.

Finally, Tri-State objects to the suggestion by the United States in its Proposed United States Adjudication Procedure in Section I(B) that the defendants/claimants should provide information prior to the initiation of the Hydrographic Survey to the

United States on the Water Right Claim Form attached. This procedure impermissibly shifts the burden from the United States to the claimants. The United States is to prepare the Hydrographic Survey and present the claimants with an offer of judgment, setting forth the elements of their water rights. This Water Right Claim Form will impose a unnecessary burden on claimants. Tri-State especially objects, as this procedure may be argued by the United States to constitute precedent in another adjudication to which Tri-State is a party.

#### **IV. Interim Procedural Order For The Adjudication Of Water Rights Claims In The Zuni River Basin**

As to the draft Interim Procedural Order For The Adjudication Of Water Rights Claims In The Zuni River Basin, which the Special Master provided to the parties at the Status Conference on January 16, 2003, Tri-State suggests that the Interim Procedural Order would benefit from addition of a subsection setting forth the rights of mis-joined parties to disclaim water rights and the United States' obligation to dismiss such parties, replicating the Court's Paragraph 4 in its July 15, 2002 Scheduling Order.

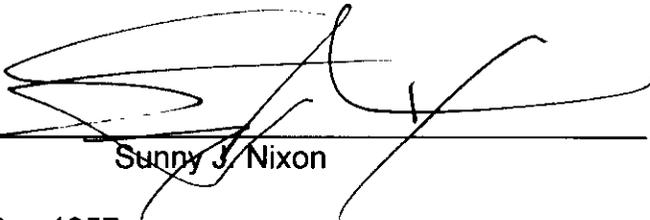
#### **Conclusion**

For the foregoing reasons, Tri-State objects to the referenced portions of the United States Supplemental Identification of Zuni River Stream System Boundary and Proposed Order Re: Adjudication Procedures and Schedules.

Respectfully submitted,

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