

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

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

**OBJECTIONS OF ROBERT W. IONTA AND LINDA A. IONTA
TO UNITED STATES SUPPLEMENTAL IDENTIFICATION OF
ZUNI RIVER STREAM SYSTEM BOUNDARY AND PROPOSED
ORDER READJUDICATION PROCEDURES AND SCHEDULES**

NOW COME the abovenamed Defendants and state as follows:

1. **Incorporated objections and fairness:** Defendants adopt the objections of TriState Generation Association, Inc. and incorporate them herein by reference (a copy is attached hereto). Defendants strongly agree with TriState Generation Inc. that the United State's proposals unfairly shift the burden to individual non-governmental, non-Indian water rights claimants. The United States has consistently tried this approach and is continuing it here. Unfortunately realignment of the State of New Mexico as a Plaintiff does not cure the underlying fairness problem, as the State Engineer's office, although charged with the duty of protecting the rights of all water users and water resources, is a public agency. Thus, its battle flag must necessarily fly in

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accordance with prevailing political winds, which themselves are likely to change during the course of what is likely to be a very long litigation. Accordingly, at every stage of this proceeding and in every procedural order the Court and master must draft orders which protect the individual Defendants and assure that they are at least on a level playing field with the Plaintiffs.

2. **The proposed adjudication area is incomplete.** The map provided by the United States with its December 27 proposed identification of the Zuni River Basin shows clearly at least 1/3 of the area lies in Arizona. Although the State Engineer's powers may be limited to areas within New Mexico, it is obvious that the areas directly involved in this litigation are not. Rule 19 of the Rules of Civil Procedure provides for joinder of necessary parties and a determination by the Court when joinder is not feasible. In this case we are dealing with a finite pot of water which has to be divided. Failure to join interested parties on the Arizona side prevents complete relief among those already parties and impedes Defendants' ability to protect their interest. Prior to commencing anything the Scheduling Order should require the U.S. and State to explore the possibility of parallel litigation in the Arizona area of the basin and the effects on the rights of the parties if this is not possible. The Court should then hold a hearing under Rule 19B to determine whether and how this action should continue or whether it should be dismissed.

3. **The Order fails to provide for a time table for adjudicating Indian Claims.** The July Order provided for two schedules to be created (see paragraph 6). The proposed Order completely disregards the Court's clear mandate that adjudication of the various types of claims "proceed" on a "schedule". The draft Order also fails to deal with the Federal, State and Indian Law Claims. Once again, it appears from the draft Order and the proposed Order that the individual non-Indian, non-governmental claimants are being prejudiced. This Order should not be entered without a corresponding time-table and order for the Indian Law Claims and Governmental Claims. The nature of the Pueblo Water Rights claims is unclear at this stage. Yet the Pueblo of Zuni, for example, is the most densely populated area within the basin. It's uses should be evaluated along with those of the non-Indian Claimants.

Although there may be some difference in the origins of the competing water rights, historical Pueblo Water rights in large part are based upon equitable principals (such as priorities of sharing water in times of drought) which may apply to this entire litigation. Ignoring the largest population group in this basin and allowing issues to remain in limbo while proceeding with the adjudication of non-Indian rights is both unfair and contrary to expediting the litigation. The hydrographic survey must be extended within the boundaries of the Pueblo and Tribal areas. A

water adjudication is based on a sharing of water for beneficial use. Without such a survey it cannot be determined if there is waste of water in these areas and it is fundamental that the waste of water does form a basis for claiming enhanced rights of beneficial use.

4. The Order should be modified to require that the same criteria be used to adjudicate and evaluate Indian, Federal, State and non-Indian claims and procedures should be put in place to enforce this.

Because of the three major competing interests: Federal water claims (and other governmental claims) Indian (Pueblo and non-Pueblo claims) and Individual (mostly non-Indian claims but including some Native American fee holders or claimants) the legal issues relating nature and priorities of these claims are major central issues which must be litigated and decided quickly. Resolution of these competing issues is likely to simplify the litigation.

In fairness, the criteria for evaluation of beneficial use of water should be the same for all the users. The proposed order and draft order fail to provide for this.

There is nothing in the United States' proposal or draft order that even requires the State to define the underlying assumptions and criteria on which the survey is being conducted.

Defendants should, prior to the commencement of the

hydrographic survey, have a full and far opportunity to be accurately informed of and provide written comments on the initial assumptions and criteria used in all hydrographic surveys that will have the effect of determining priority dates, purposes and amounts of water used, periods and places of use, whether land has been irrigated and whether a use is beneficial. The Court should insert the following language at the end of paragraph II.B. Disagreement:

"Prior to the commencement of the hydrographic survey the Plaintiffs shall provide Defendants with a detailed written explanation of all criteria and assumptions to be used in all hydrographic surveys that will have the effect of determining priority dates, purposes and amounts of water used, periods and places of use, whether land has been irrigated and whether a use is beneficial. Defendants shall have a reasonable time to provide comments and objections and, if appropriate, a hearing and Court determination of such criteria and assumptions."

5. **Time.** The draft order states, in paragraph I.F., that the United States shall publish and post notices of public meetings at least one week prior to the meetings. One week is not a realistic advance notice to ensure that all interested claimants receive notice and are able to attend the meetings. Accordingly, the last sentence of paragraph I.F. of the draft order should be revised to provide for a minimum three-week notice period.

6. **Draft answers are too limiting:** The U.S. has proposed draft answer forms.

The Order should be modified to require the draft answers to

clearly state that no Defendant is required to use the form or to limit any pleading, motion or answer to the provisions of the form, but may file answers, pleadings and motions in was form permitted by the rules of civil procedures. The notice should further advise the Defendants that entry of a Consent Order does not protect their rights as set forth in the Order, as these rights are subject to later challenge by other parties. To do otherwise would constitute a misrepresentation of the purpose of the Consent Order.

7. The proposed/draft Order should not confirm in effect the areas delineated by the United States.

The draft Order states "[for] each of the subsection delineated by the United States of America . . . (emphasis supplied). The issue of what are appropriate areas in which to begin the survey or how the areas themselves are delineated is in dispute and, in any event, requires input from the State. This language should be replaced with neutral language which does not inadvertently approve that which is in dispute. The determination of the Order of proceeding should be subject to review and comment by the Defendants.

8. The United States should be ordered to set up a record repository now in Gallup.

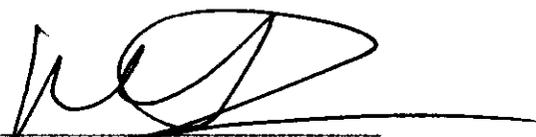
In the Scheduling Order of December (paragraph 3) the Court specifically stated that an Albuquerque repository is unacceptable. The Scheduling Order should provide for a repository in Gallup

(which is the closest large community to the area of adjudication) and it should specify a deadline date for compliance. This is necessary because of the prior failures of the U.S. to comply with Court-ordered deadlines.

9. The Procedural Order should provide for a deadline for determining the scope of the survey.

The Court ordered the U.S. to complete "definite and specific geographic boundaries for the adjudication". This issue is still unresolved. The Court should set a deadline for a determination of the boundaries and for filing pleadings or motions regarding the same prior to anything else.

Date: 1/30/2003


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CERTIFICATE OF SERVICE

I hereby certify that I served one copy of the Objections of Robert W. Ionta and Linda A. Ionta to United States Supplemental Identification of Zuni River Stream System Boundary and Proposed Order Readjudication Procedures and Schedules along with a copy of this certificate on the list attached, by depositing them in the United States mail postage prepaid this 30 day of January, 2003, addressed to them at their addresses of record.

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