

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

U.S. DISTRICT COURT
DISTRICT OF NEW MEXICO
SANTA FE

03 JAN 31 PM 2: 22

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

CIV No. 01 0072 BB/WWD-ACE

ZUNI RIVER BASIN

**STATE OF NEW MEXICO'S WRITTEN COMMENTS WITH REGARD TO THE
UNITED STATES SUPPLEMENTAL IDENTIFICATION OF ZUNI RIVER
STREAM SYSTEM BOUNDARY**

THE STATE OF NEW MEXICO, by and through its counsel of record, pursuant to the Special Master's Order in open Court of January 16, 2003, and in response to the United States January 9, 2003 Supplemental Identification of Zuni River Stream System Boundaries ("Supplemental Identification") (No. 158), hereby makes its written comments and objections:

The United States again, in its Supplemental Identification, proposes that this adjudication be limited to the surface water boundaries of the Zuni River. The United States pleading fails to acknowledge the Zuni River's hydrological interrelationship with the Puerco River region to the north, and the Carrizo Wash region to the south. The Zuni River, Puerco River and Carrizo Wash basins should all be included in this adjudication, or some explanation should be included in the record for their exclusion.

169

- I. The Geographical Boundaries of This Adjudication Should be Defined to Include the Surface Drainages of the Puerco River and the Carrizo Wash**
- A. The Zuni Indian Tribe's 1982 Adjudication Lawsuit was Directed Against the City of Gallup**

Despite the fact that Gallup lies in the Puerco River surface drainage basin and the Zuni Indian Tribe's lands are mostly located in the adjacent Zuni River surface drainage basin, the Zuni Indian Tribe's first attempt to force an adjudication was via a federal lawsuit directed primarily against the City of Gallup. On October 5, 1982, the Zuni Indian Tribe filed a Complaint in this Court for the adjudication of their water rights in Zuni Tribe of New Mexico v. City of Gallup, et al., CIV 82 1135 M. 1982 Zuni Complaint (attached hereto as Exhibit A). The Zuni's Complaint recognized that although Gallup was located in another drainage basin, its groundwater pumping was nevertheless impairing the Zuni's ability to exercise their water rights. The Zuni's Complaint specifically named the City of Gallup as a defendant, and alleged that:

If Defendant City of Gallup is permitted to have unrestricted use of water from the Gallup Sag aquifers [including the San Andres-Glorieta aquifer], present Zuni wells will be drawn down, depleted, and otherwise adversely affected; and the Zuni Sacred Spring, and Ash Spring will be threatened with running dry, thereby preventing religious practice and destroying timeless religious and cultural values, all to the irreparable damage of the Zuni Tribe and its members.

1982 Zuni Complaint, ¶36, p. 9-10. Clearly, one of the Zuni's principal concerns, even then, was that groundwater diversions by the City of Gallup were adversely impacting their exercise of water rights within the Zuni River surface drainage basin.¹

¹ It should be noted, however, that the United States' "Zuni River Basin in New Mexico Adjudication Boundary Map," filed with the United States' January 6, 2003 Identification of Zuni River Stream System Boundary (No. 156), reflects that a small portion of the Zuni Indian Reservation does extend into the River Puerco surface drainage basin.

B. The City of Gallup Responded in 1984 With its own Complaint for a General Stream Adjudication of the Same Region

The City of Gallup seemed to recognize the same thing. In 1984 the City of Gallup brought its own Complaint for a General Stream Adjudication in State court, naming the Zuni Indian Tribe and claiming rights to “impound, divert and/or use” public water of the Zuni River and its “tributaries and aquifers.” 1984 Gallup Complaint, ¶1, p. 1 (attached hereto as Exhibit B). Clearly, both the Zuni Indian Tribe and the City of Gallup understood that their water sources were hydrologically interrelated, and therefore their water rights should be addressed in the same adjudication, despite the fact that they overlapped two surface drainage basins. The Zuni’s 1982 Complaint in federal court was ultimately dismissed in favor of the City of Gallup’s 1984 lawsuit in State court, which itself was dismissed in 1990. Nonetheless, the Zuni still continue to keep a close eye on the City of Gallup’s groundwater diversions.

C. The Zuni Indian Tribe Has Been Involved in the City of Gallup’s Current Application to Pump Groundwater

Although the both the Zuni’s 1982 Complaint, and the City of Gallup’s 1984 Complaints were ultimately dismissed, the Zuni Indian Tribe continues to recognize the direct impact of Gallup’s groundwater pumping on the surface waters of the Zuni River. The Zuni Indian Tribe has shown significant interest in the City of Gallup’s pending application filed with the State Engineer to pump groundwater. Although the Zuni have not intervened in that administrative action, they have participated in technical discussions, and have maintained regular contact with this office with regard to it. The Zuni Tribe has been and continues to be concerned with the City of Gallup’s diversion of groundwater within the geographical boundaries of the River Puerco.

D. The United States Itself Recognizes that the Surface Waters of the Zuni River are Directly Impacted by Groundwater Pumping in the Puerco River Drainage Basin.

In October of 2002 the United States served on the State a map of the Zuni area which identified the region where significant pumping from the San Andres-Glorieta Aquifer would deplete Zuni River or spring flow. Zuni Area Map (attached hereto as Exhibit C). The region so depicted is beyond the geographical boundaries of the Zuni River surface drainage basin, comprising a significant portion of the Puerco River surface drainage basin, to the north of the Zuni River, and including the City of Gallup. Thus, the United States itself clearly acknowledges that significant pumping in that area will deplete, and likely already is depleting, the surface waters of the Zuni River. The resulting impairment of water rights within the Zuni River surface drainage is obvious, but the United States' Supplemental Identification seeks to exclude this region from the adjudication, a limitation which would make any resulting Zuni adjudication final decree unenforceable as against Puerco River groundwater diverters.

The United States reiterated its recognition of the direct relationship between groundwater pumping from within the Puerco River surface drainage basin and the flows of the Zuni River in a draft pleading faxed to the State on November 5, 2002:

The United States and the State of New Mexico's Engineer's Office [sic] recognize that the San Andres-Glorieta Aquifer underlies and is in hydraulic continuity with the surface waters of the Zuni River Basin, the Upper Puerco River Basin and the Rio San Jose River Basin. As such, the United States and the State of New Mexico's Engineer's Office [sic] further recognize that withdrawals [sic] from the San Andres-Glorieta Aquifer could impact adversely the ability to exercise valid right(s) to the use of surface flows in the Zuni, Upper Puerco, and Rio San Jose River Basins.

Charles O'Connell November 5, 2002 Fax, p. 5 (Attached Hereto as Exhibit D). This was the United States' suggested language, which it presented to the State as part of a proposed joint pleading to identify the geographical boundaries of this adjudication. As the above language shows, the United States admits, and even urges that groundwater pumping from within the Puerco River drainage basin, including the area around Gallup, could "impact adversely the ability to exercise valid right(s) to the use of surface flows in the Zuni." The Puerco River for that reason should be included in this adjudication.

E. The Carrizo Wash Surface Drainage Should be Included in this Adjudication

As the State noted in its January 14, 2003 Objection to and Clarification of the United States' Proposed Geographical Boundaries (No. 159), the Carrizo Wash surface drainage basin, to the south of the Zuni River, should be included in this adjudication as well. The Zuni Indian Tribe has publicly stated that it may sue to force an adjudication of its water rights in the Carrizo Wash. December 21, 2002, the Santa Fe New Mexican (Attached Hereto as Exhibit E). The Tribe's concern is that pumping by the Salt River Project at its proposed Fence Lake mine site will impair the flow of water to the Zuni Salt Lake, which they consider sacred. The location of the Salt River Project's pumping was reported as being "on the border of Catron and Cibola Counties," and that the Zuni Salt Lake was to the south of that. *Id.* Both are outside the geographical boundaries of the Zuni River surface drainage basin, but within the geographical boundaries of the Carrizo Wash basin. The article stated that the Zuni were prepared to force an adjudication of the area impacted by the pumping proposed by Salt River Project:

Zuni Governor Malcolm Bowekaty says the Pueblo will consider suing to force a full adjudication of its water rights in [the Carrizo Wash] if the state ultimately proposes to allow pumping for the mine project.

Id. As the Carrizo Wash is part of the Gallup Groundwater Basin, the same administrative area as the Zuni River, and as the Zuni Indian Tribe has related water right interests in both, it follows that a final decree which includes both would be desirable. The Carrizo Wash should be included in this adjudication. If it is not included now, it appears almost certain that it will be forcibly added to this adjudication by the Zuni at their later convenience.

F. The Geographical Boundaries of This Adjudication Should be Those of the Gallup Groundwater Administrative Basin

It appears undisputed that groundwater pumping which takes place within the geographical boundaries of the Carrizo Wash and the Puerco River surface drainages will impact the exercise of both surface water and groundwater rights within the geographical boundaries of the Zuni River surface drainage. It seems that it will only be a matter of time before parties whose water rights are so impacted will seek enforcement of their rights as against those diverting ground water in the Carrizo Wash in Puerco River areas. The Puerco River, the Zuni River, and the Carrizo Wash cannot be effectively separated out for purposes of adjudication or administration. The State Engineer recognized this interrelationship when it made the River Puerco, the Zuni River, and the Carrizo Wash part of a single administrative geographical unit called the Gallup Groundwater Basin. They are administered together and they should be adjudicated together as well. The Gallup Groundwater Basin also presents the additional advantage of already being legally fully defined, with a definition which is entirely consistent with that of the adjacent adjudications and the borders of the State of Arizona.

II. If the Adjudication is Limited to the Zuni River, Then The Exclusion of the Puerco River and Carrizo Wash Should be Addressed in the Record

If the Court ultimately adopts the position of the United States, and orders that the geographical scope of this adjudication shall be limited to the Zuni River surface drainage, than the record should reflect why the Puerco River and the Carrizo Wash were excluded, particularly given the Zuni Indian Tribe's acute concern with groundwater pumping by the City of Gallup to the north and the Salt River Project to the south. The State respectfully suggests that in the record some attention be given to the following questions:

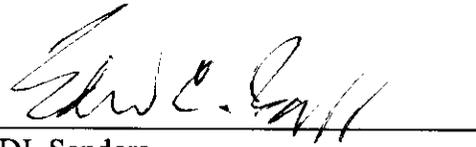
- 1) Why the surface drainages of the Puerco River and the Carrizo Wash are not being included within the geographic boundaries of the Zuni River stream system for purposes of this adjudication;
- 2) How the Zuni River stream system can be administered without a final decree which includes the hydrologically connected Puerco River and the Carrizo Wash; and
- 3) Who will be responsible for the cost of the hydrographic survey and adjudication of the Puerco River and the Carrizo Wash if that becomes necessary to administer water rights adjudicated pursuant to the instant matter.

The States' is concern that these issue be addressed are twofold. First, that the State not be left to complete the adjudication of the Puerco River and Carrizo Wash areas if they are added to this adjudication at a later time, when the United States has become meaningfully involved. Second, that a Zuni adjudication final decree be possible to administer with respect to all those whose exercise of their water rights impacts the stream system.

III. Conclusion

The State respectfully requests that the Court include the entire Gallup Groundwater Basin within the geographical scope of this adjudication. If the Court ultimately determines to exclude the River Puerco and the Carrizo Wash areas, and limit this adjudication to the Zuni River surface drainage basin, the State asks that the Court include language in the record which addresses the exclusion.

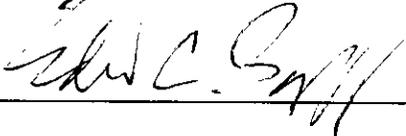
Respectfully submitted,



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Certificate of Service

I certify that on this 31st day of January, 2003, 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:



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THE EXHIBITS ATTACHED TO THIS
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SCAN. SAID EXHIBITS ARE ATTACHED
TO THE ORIGINAL PLEADING IN THE
CASE FILE WHICH IS LOCATED IN THE
RECORDS DEPARTMENT, U.S.
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