

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

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UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW MEXICO, *ex rel.*,
STATE ENGINEER, A & R Productions,
et al.,

Defendants.

01-CV-00072-BDB/ACE

ZUNI RIVER BASIN

**COMMENTS OF THE NAVAJO NATION ON THE DESIGNATION OF THE
PROPOSED GEOGRAPHICAL BOUNDARY FOR THE ADJUDICATION**

THE NAVAJO NATION, by and through its counsel the Navajo Nation Department of Justice, submits the following comments on the geographical boundary for the adjudication proposed by the United States.

The United States proposes that the geographical boundary for this adjudication should be the "Zuni River stream system [including] groundwater in hydraulic continuity with the surface waters of the basin." *Identification of Zuni River Stream System Boundary* (Dec. 29, 2002) at 5. The limitation that only the "groundwater in hydraulic continuity with the surface waters of the basin" be included is contrary to the Court's scheduling Order of July 15, 2002 which specifies that the groundwater includes all of the groundwater "which lies within the surface boundaries, as though their lines were drawn vertically through the earth." *Scheduling Order* (July 15, 2002) at 1-2. At the January 16, 2002 Status and Scheduling Conference, Counsel for the United States agreed that the "hydraulic continuity" limitation should be stricken. Nevertheless, the United States is proposing to limit the geographical boundary for this adjudication to surface extent of the Zuni River stream system.

The Navajo Nation believes that the geographical boundary for this adjudication should include the Puerco River surface water drainage. Inclusion of the Puerco River system is justified

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by considerations of both hydrology and policy.

From a hydrologic perspective, the groundwater underlying the Puerco River surface water drainage is hydraulically connected to groundwater underlying the Zuni River basin. Both the State of New Mexico and the United States appear to agree with this characterization and seem to agree that groundwater withdrawals within the Puerco River basin “will adversely impact the exercise of water rights within the geographical boundaries of the Zuni River surface drainage.” *State of New Mexico’s Objection to and Clarification of United States’ January 6, 2003 Pleading Proposing Geographical Boundaries for this Adjudication* (Jan. 14, 2003) at 8. Rights to pump groundwater from the San Andres-Glorieta Aquifer within the Zuni River Basin may conflict with rights to pump from this same aquifer within the Puerco River system. Inclusion of the Puerco River system in this adjudication will allow for the consideration of conflicting claims to a common aquifer and for consideration of the surface water impacts in one basin that may be attributable to groundwater pumping in the other basin.

The Navajo Nation also requests that the Puerco River system be included in this adjudication for the reason that Puerco River system includes a significant amount of land held in trust by the United States for the benefit of the Navajo Nation.¹ Inclusion of the Puerco River system in this adjudication is necessary to protect Navajo interests in both the Puerco and Zuni systems.

The lands of the Navajo Nation lie in numerous surface water drainages within the states of Arizona, New Mexico and Utah. One consequence of the Supreme Court’s decision in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983), is that general stream adjudications are done on a state-by-state basis, rather than as comprehensive adjudications of stream systems that cross state boundaries. The basins lying within each state are then sub-divided into smaller sub-basins upon which adjudications are based. The Zuni River and the Puerco River are both tributaries of the Little Colorado River in New Mexico; however, the

¹ Such lands include lands reserved by Executive Order No. 709 of November 9, 1907, modified by Executive Order No. 744 of January 28, 1908. There are over 400,000 acres of lands held in trust for the Navajo Nation in the Puerco River watershed and about 150,000 acres of lands allotted to individual Navajos and lands held in fee by the Navajo Nation.

proposed boundary in this action is only the Zuni River system in New Mexico as opposed to the Little Colorado River system in New Mexico. As a result of this piecemeal approach, the Navajo Nation finds itself litigating water rights claims within five on-going general stream adjudications which only cover portions of the Navajo Reservation.² Enlarging the geographical boundary to include the Puerco River system is hydrologically sound and ensures the adjudication of all Navajo water rights claims in the Little Colorado River system in New Mexico, consistent with the United States' trust obligation to the Navajo Nation. *See: WATER IN THE WEST: CHALLENGE FOR THE NEXT CENTURY*, Report of the Western Water Policy Review Advisory Commission, June 1998 at xix ("The federal government needs to fulfill its trust responsibilities to Indian nations and tribes to secure and protect tribal water rights. . . .") If the Puerco River system is not included in this adjudication, it is not clear, when, if ever, the Navajo water rights in that basin will be adjudicated leaving Navajo water rights vulnerable to usurpation by other water users.³

The Navajo Nation is mindful of the limited resources available to the United States and the State of New Mexico to pursue this adjudication. Nevertheless, the limited availability of resources does not diminish the trust responsibility owed by the United States to Indian tribes. *See Jicarilla Apache Tribe v. Supron Energy Corp.*, 479 F.Supp. 536, 547 (D. N.M. 1979), *affirmed*, *Jicarilla Apache Tribe v. Supron Energy Corp.*, 782 F.2d 855 (10th Cir. 1986) (adopting Judge Seymour's

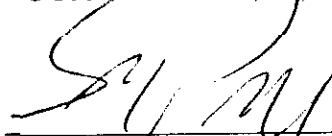
² In addition to the Zuni River Adjudication, the Navajo Nation is currently a party in four active general stream adjudications in Arizona and New Mexico: *In re the General Adjudication to Use Water from the Little Colorado River System and Source*, Civil Case No. 6417, Superior Court for Apache County, Arizona; *In Re: The General Adjudication of All Rights to Use Water in the Gila River System and Source*, Superior Court, W-1 through W-4 (Consolidated), Maricopa County, Arizona; *New Mexico v. United States*, No. 74-184, Dist. Ct., 11th Judicial District, San Juan County, New Mexico (San Juan Basin); *State of New Mexico, ex rel. Eluid L. Martinez, State Engineer v. Kerr-McGee, et al.*, Nos. CB-83-190-CV and CB-83-220-CV, Thirteenth District, Cibola County, New Mexico (Rio San Jose Basin). The Navajo water rights in Utah are subject to a general stream adjudication of the Colorado River in Utah. *In the Matter of the General Determination of rights to the Use of Water both Surface and Underground, within the Drainage Area of the Colorado River in San Juan, Grand and Uintah Counties, Utah, and exclusive to the Green River Drainage*, Grand County Civil No. 810704477.

³ In an attempt to protect Navajo groundwater resources in the Puerco River system, the Navajo Nation is a party to an administrative hearing before the New Mexico State Engineer concerning the Gallup Underground Water Basin. *In the Matter of the Applications of the City of Gallup for a New Appropriation and a Plan of Replacement in the Gallup Underground Water Basin, New Mexico*, Hearing No. 99-003, OSE file NO.s G-22 & G-22 Amended, *et al.*

dissenting opinion in *Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563-1573 (10th Cir. 1984). If this adjudication is to move forward, it should move forward in a manner consistent with the trust responsibility the United States owes to both the Zuni Tribe and the Navajo Nation. Therefore, the Navajo Nation respectfully requests that the Puerco River system be included in this adjudication.

Respectfully submitted this 31st day of January, 2003.

NAVAJO NATION DEPARTMENT OF JUSTICE
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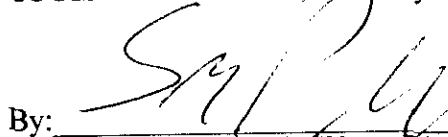


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CERTIFICATE OF SERVICE

I certify that on the 31st day of January 2003, a true and correct copy of the foregoing *Comments of the Navajo Nation on the Designation of the Proposed Geographical Boundary for the Adjudication* was sent to the following individuals by United States Postal Service first class, postage pre-paid mail.

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