

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

UNITED STATES OF AMERICA)	
)	
Plaintiff,)	
)	01cv00072-BDB-ACE
-v-)	
)	ZUNI RIVER BASIN
STATE OF NEW MEXICO, ex rel. STATE)	ADJUDICATION
Engineer, A & R Productions, et al.,)	
)	
Defendants.)	
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SPECIAL MASTER’S REPORT AND RECOMMENDATIONS
ON THE GEOGRAPHIC SCOPE OF THE ADJUDICATION

To: The Honorable Bruce D. Black
United States District Judge

From: Vickie L. Gabin
Special Master

This Report recommends that the scope of the Zuni River Basin be defined by the surface water drainage area as proposed by the United States

THIS MATTER is before the Special Master pursuant to Fed. R. Civ. P. 53 and the Court’s Order entered December 4, 2002 (Docket No. 153), directing the Special Master to provide recommendations concerning the geographic scope of the adjudication.

I. BRIEF PROCEDURAL HISTORY

Following the April 26, 2002, filing of the Special Master Report on the Zuni River Basin Adjudication Procedure (No. 123), the Court entered its July 15, 2002, Scheduling Order (No. 147). This Order directed the United States of America (“United States”) to confer with the State of New Mexico, ex rel. State Engineer (“State”) and determine the 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.

Once the boundaries were agreed upon, they were to be included in the United States' December 2, 2002, Status Report and circulated among counsel of record.

The United States' December 3, 2002, Progress Report (No. 154) stated that the matter was still under review by the United States and State. The Court then entered its December 4 Order to which this Report responds. The Order granted the United States an extension of time to complete work on the boundaries, and required the United States to reach agreement with the State, circulate the results among counsel, and file a report no later than December 31, 2002. Parties were given 10 days to raise issues and disagreements. On January 6, 2003, the United States filed its Identification of Zuni River Stream System Boundary (No. 156), as supplemented by the Supplemental Identification of Zuni River Stream System Boundary, filed January 14 (No. 158), and further explained by February 3 filings (Nos. 174, 175). The State responded with two pleadings, the January 14 Objection to and Clarification of the United States' January 6, 2002 Pleading Proposing Geographical boundaries for this Adjudication (No. 159), and Written Comments with Regard to the United States Supplemental Identification of Zuni River Stream System Boundary, filed January 31 (No. 169).

I held a status and scheduling conference January 16 (transcript filed February 19, 2003). Because not all counsel had received the United States' submission in time to review it adequately before the conference, I extended the response and comment time to January 31. The recommendations expressed in this Report have taken into consideration the parties' pleadings which

address this issue, and the comments received at the January 16 conference. Transcript references are to that conference. Pleadings specifically referenced below are referred to by number in brackets [] as listed in the Appendix.

The scope of this Report excludes objections to the United States' Proposed Order re: Adjudication Procedures and Schedules, which was submitted in response to the December 2, 2002, Notice of Status and Scheduling Conference (No. 152), and comments and objections regarding a rough draft interim procedural order which I circulated on January 16. A procedural and scheduling order is forthcoming.

II. THE UNITED STATES' AND STATE'S PROPOSED BOUNDARIES

The United States' proposed geographic boundary is illustrated by a boundary map and a legal description of every full and partial township included within the boundary, as well as the statement: "The above-described Zuni River stream system shall include groundwater in hydraulic continuity with the surface waters of the basin." [1] This statement provoked possibly the greatest number of objections from other parties, because it appeared to be contrary to the Court's July 15, 2002, instruction that the extent of groundwater included in the system is "limited to that which lies within the surface boundaries, as though their lines were drawn vertically through the earth." At the conference, however, counsel for the United States clarified that the statement in question was not what was intended, and agreed that the sentence should be stricken. Tr. 20

The United States' proposed geographic boundary describes what the State agrees is the surface water drainage boundary of the Zuni River Basin. The State, however, believes that this

boundary fails to adequately address the hydrologic reality of the system, and ignores current events.¹

The State urges that the geographic boundaries of the Zuni River Basin should be extended beyond that mapped by the United States to boundaries which coincide with the State Engineer's declaration of the Gallup Groundwater Basin. [3,9] The State offers several grounds for doing so. The Gallup Groundwater Basin encompasses the Puerco River and the Carrizo Wash basins which are hydrologically connected to the Zuni River; acknowledging this relationship and including these areas in the adjudication would facilitate water rights administration in the region. The 1982 and 1984 suits brought by the Zuni Indian Tribe and the City of Gallup to adjudicate this region were filed expressly to address the impact of groundwater pumping in the Puerco area. The Zuni Tribe has participated in technical discussions respecting the City of Gallup's pending application to appropriate groundwater. Further, the United States has recognized that the Zuni River surface waters are impacted by groundwater pumping in the Puerco Basin.

With respect to the Carrizo Wash surface drainage, the State offers a newspaper article in which a former Zuni governor is reported to have stated that the Pueblo would consider forcing an adjudication of the Carrizo Wash to protect its rights from the impact of a proposed mine site. Neither the United States nor the State had consulted with the Zuni Indian Tribe regarding the boundary issues. Tr. 11

In the alternative, the State requests that the Court include language a) explaining why the Puerco River is not included in this case, b) describing how the Zuni River stream system, without the hydrologically-connected Puerco River, can be administered, and c) delegating responsibility to

¹ This Report excludes discussion of the continuing communication difficulties between the United States and the State, as those difficulties are illustrated by the State's objections regarding the United States' alleged misrepresentation of the State's position, and the United States' responses.

the United States for adjudicating the Puerco River should future administration require the same. [3, 9]²

The State's concerns appear primarily resource-driven. The United States now bears the costs of surveying the basin. The existing hydrologic relationships described above lead to the State's fears that at some unspecified time in the future, the Zuni Tribe or some other party could attempt to include those areas to this adjudication. Tr. 12 - 18, 24 - 26. Or, the State may in the future be required to administer the rights defined in this basin in conjunction with those outside of, but hydrologically connected to, this basin. As a result, the geographic scope of this case would expand; and the State might be held responsible for the costs of the additional hydrographic surveys. The State asks the Court for protection now "from the prospect of having to pay for the adjudication of these regions that otherwise will clearly become part of this adjudication at some point." Tr. 24

III. THE PARTIES' OBSERVATIONS AND OBJECTIONS

The following summarizes the responses to the United States' and State's proposals.

A. Objections

1. Objections to the United States' delineation of the Zuni River surface drainage basin.

Defendant Paul Petranto filed three submissions regarding the United States' proposed boundary. [2, 10] Robert Shafer, a retired science teacher who has lived in the Oso Ridge area since 1977 and has studied the geology of the area within the proposed boundaries, prepared an affidavit concluding that the proposed surface water drainage boundary is incorrectly described. Certain areas

² The State initially stated that its proposals would "limit the scope of this adjudication to the Zuni River surface drainage, now and in the future." [3 at p. 5] The State later limits its position to that of relegating the costs of any future expansion to the United States.

within the boundary do not drain into the Zuni river system; rather, the surface water flows into a number of closed basins and forms lakes. Further, the sub-surface geology and hydrology indicate that the groundwater flow patterns do not necessarily follow the flow patterns of the surface flow patterns. Also, not all aquifers are in hydraulic communication with each other within the boundaries. Consequently, there may be two or more surface water systems and two or more groundwater systems within the proposed area. [2]

Mr. Petranto also lodges several objections. [10] First, the absence of an explanation regarding how the proposed boundary was determined leaves water rights claimants unable to assess whether they should object to the boundaries.³ Second, the United States' proposed boundaries extend into Arizona; that state, therefore, must be included in the case. Third, if the State's position regarding expansion of the boundaries is scientifically sound, those areas should be included in the adjudication. Robert W. and Linda L. Ionta object that the proposed adjudication area is incomplete, and that the United States' map indicates that at least 1/3 of the area lies in Arizona. Consequently, the Court should hold a Rule 19(B) hearing to determine whether this action, without the necessary parties located in Arizona, should proceed. [6]

2. Objections to the United States' language regarding hydraulic conductivity.

Tri-State Generation and Transmission Association, Inc., joined by the Quivira Mining Company, object to the United States' language quoted above, "[T]he above-described Zuni River stream system shall include groundwater in hydraulic continuity with the surface waters of the basin." [4, 5] As noted above, this language was stricken by Mr. O'Connell on January 16.

³ The United States and State will be requested to provide a brief explanation of the process at the upcoming April 12 status conference.

3. Objection to the exclusion of the Puerco River

The Navajo Nation asserts that both hydrology and public policy mandate the inclusion of the Puerco River system. [14] Such inclusion not only provides a forum for consideration of conflicting claims to a common aquifer, but is necessary to protect Navajo interests in both the Zuni and Puerco stream systems. Notwithstanding the limited resources available, the Navajo Nation asserts that the United States' trust obligations extends to ensuring that all Navajo water rights claims in the Little Colorado River system in New Mexico are adjudicated at once.

B. Observations and Agreements

New Mexico's Commissioner of Public Lands states that before any hydrologic investigation is completed, the boundary of this adjudication should be limited to the surface drainage basin of the Zuni River. Subsequently, any party could request the Court to expand those boundaries with a showing of the scientific basis for such expansion, the ability to fund and perform a hydrographic survey within a reasonable time, the absence of conflict with any other adjudication, and the lack of prejudice to this adjudication. [11]

The Salt River Project Agricultural Improvement and Power District states that the United States' proposed boundaries are the most reasonable under the present circumstances; and that those issues which might support an expansion are speculative, and should be addressed at the time they arise. [7]

Plaintiff-Intervenor Zuni Indian Tribe explains why, notwithstanding the Tribe's water-related interests in both the Puerco Basin and the Carrizo Wash, it believes that this adjudication should be limited to the surface water drainage: a) stream system adjudication boundaries are typically drawn to reflect surface water drainage; b) the surface waters of the Carrizo Wash drain into Arizona's

Little Colorado River and there has been no assertion that proposed pumping in the Fence Lake Mine/Zuni Salt Lake will affect the Zuni River system in New Mexico; and c) despite the likelihood that groundwater pumping in the Puerco Basin will affect the Tribe's water rights in the Zuni Basin, the Tribe supports the United States' decision to focus its resources on adjudicating the rights of the water users within the Zuni stream system. [8] Further, the newspaper article cited by the State, above, describing the Zunis' concern with a new mining development is no longer germane.

The Tribe desires to preserve its right (and that of the United States, as trustee), to take necessary actions in the future regarding the scope of the adjudication. Consequently, the Tribe objects to the State's initial suggestion that this Court expressly exclude those areas from this adjudication at any future time.

IV. DISCUSSION

A. Surface water drainage boundary

The United States and State agree on the definition of the surface water drainage area of the Zuni Basin within New Mexico. Only one party, Paul Petranto, objects to the boundary as agreed to by the United States and State. Defendants Robert and Linda Ionta argue that because the Zuni River Basin extends into Arizona, the issue whether this adjudication may proceed without necessary parties [in Arizona] should be heard by the Court.

The United States' map of the Zuni River Basin clearly illustrates that the basin extends into Arizona. That fact, by itself, does not mandate an inquiry into whether this adjudication may proceed without the Arizona water users and is generally irrelevant for purposes of defining the scope of a stream system adjudication. State adjudications of only a portion of an interstate stream are typical.

See, e.g., United States v. District Court In and For County of Eagle, 401 U.S. 520, 523 (1971) (for purposes of the McCarran Amendment, “river system” is that portion of a multi-state river which is contained within a state’s boundaries). With respect to Mr. Petranto’s objection, the State Engineer has broad powers to implement and enforce the water laws of this state, State ex rel. Reynolds v. Aamodt, 111 N.M. 4, 800 P.2d 1061 (1990), and New Mexico courts give due deference to the Engineer’s technical determinations. See, e.g., State v. Myers, 64 N.M. 186, 326 P.2d 1075 (1958). The point of an adjudication is to determine all claims to a stream system to aid in the administration of waters and the determination of the amount of unappropriated water available. State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District, 99 N.M. 699, 663 P.2d 358 (1983). Nothing in Mr. Petranto’s objection, or in Mr. Shafer’s affidavit, suggests that the proposed boundary of the surface water drainage area fails to accomplish that goal.

B. Expansion beyond surface water drainage

The Navajo Tribe objects to excluding the Puerco River surface water drainage from the scope of this adjudication. [14] The Tribe finds itself involved in five separate adjudications which cover only portions of the reservation, and maintains that by including the Puerco River system, the adjudication of all Navajo water rights claims in the Little Colorado River System would be accomplished. I am sympathetic with the Navajo Nation’s position, but do not believe this Court should at this time question the United States’ decision to proceed with its proposed adjudication boundary. While the United States cannot commit future administrations to a particular course of action, “the United States will take whatever action is appropriate to protect its interests in the Zuni River Basin.” [12 at p. 8 and Attachment No. 4]

The State’s position is puzzling. On one hand, there exists a very real possibility that the State

Engineer will be called in to administer water rights in the region. If the scope of this adjudication were to be expanded now, administration would be aided by having adjudicated rights. Tr. 12-17 On the other, the State characterizes this suit as “the United States’ adjudication,” Tr. 23 - 24, and since the filing of the Complaint has objected strenuously to committing any resources to the case.

In the nearly two decades since the first attempts at adjudicating this basin, to my knowledge the State has not yet been called upon to administer water rights in the greater Gallup Groundwater Basin. In fact, during these proceedings the State has argued repeatedly that this area is not one within its internal adjudication priorities. If the prospect of region-wide water rights administration is truly likely, then the State should integrate this case into its planning process and begin to secure the resources necessary for its full participation.

The State’s request that the Court somewhere include explanatory language regarding the absence of the Puerco River Basin from this suit, the methodology by which the Zuni River stream system can be administered, and future costs, is unreasonable. If the boundary is appropriate for proceeding, this Court need not offer additional explanation. The methodology for administering the system is far beyond the scope of this adjudication. The allocation of future costs is a question which should be addressed if and when the need to expand the scope of this suit arises.

In my view, the United States’ proposed boundaries are reasonable and the State’s arguments are too speculative for this Court to address at this time.

V. RECOMMENDATIONS

I recommend that:

A. the Court define the adjudication boundaries as lying within the surface water drainage

basin as depicted on the map dated December, 2002, which is appended to the January 6, 2003, United States' Identification of Zuni River Stream System Boundary, and as described in the January 14, 2003, Supplemental Identification of Zuni River Stream System Boundary [1];

B. deny the State's proposed language regarding the exclusion of the Puerco River Basin, administration, and future costs; and

C. order the United States to file its amended complaint and re-align the Navajo Nation and Zuni Indian Tribe as Plaintiffs-in-Intervention, pursuant to the Court's July 15, 2002, and December 4, 2002, orders.

Respectfully submitted,

 /electronic signature/
SPECIAL MASTER VICKIE L. GABIN

APPENDIX

1. United States' Identification of Zuni River Stream System Boundary, filed January 6, 2003, (Docket No. 156), and Supplemental Identification, filed January 14, 2003 (Docket No. 158)
2. Objection by Defendant Paul Petranto to Proposed Boundary of the Zuni River Stream System, filed January 12, 2003, (No. 157), and Affidavit of Robert Shafer in Support of Objection, filed January 16, 2003 (No. 160)
3. State of New Mexico's Objection to and Clarification of United States' January 6, 2003 Pleading Proposing Geographical Boundaries for this Adjudication, filed January 14, 2003 (No. 159)
4. Tri-State Generation and Transmission Association, Inc.'s Objections....filed January 27, 2003 (No. 162)
5. Quivira Mining Company's Joinder in Objections of Tri-State....filed January 28, 2003 (No. 164)
6. Objections of Robert W. Ionta and Linda A. Ionta....filed January 31, 2003 (No. 166)
7. Salt River Project Agricultural Improvement and Power District's Response to State of New Mexico's Objections [No. 159]....and Comments on Issues Addressed at January 16, 2003 Scheduling Conference, filed January 31, 2003 (No. 167)
8. Plaintiff-Intervenor Zuni Indian Tribes' Comments on Proposed Geographic Boundaries and Response to State of New Mexico's Objections, filed January 31, 2003 (No. 168)
9. State of New Mexico's Written Comments....filed January 31, 2003 (No. 169)
10. Defendant Paul Petranto's Supplemental Objections to Proposed Boundary...and Proposed Interim Procedural Order....filed February 1, 2003 (No. 171)
11. New Mexico Commissioner of Public Lands Comments re: Interim Procedural Order....filed January 31, 2003 (No. 173)
12. United States' Response to State of New Mexico, filed February 3, 2003 (No. 174)
13. United States' Description of Identification of Boundary of the Zuni River Basin....filed February 3, 2003 (No. 175)
14. Comments of the Navajo Nation on the Designation of the Proposed Geographical Boundary for the Adjudication, filed February 6, 2003 (No. 176)