

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

UNITED STATES OF AMERICA and)	
STATE OF NEW MEXICO, ex rel. STATE)	
ENGINEER,)	
Plaintiffs,)	
)	
and)	No. 01cv00072 BB/WDS
ZUNI INDIAN TRIBE and NAVAJO NATION,)	
Plaintiffs-in-Intervention)	
)	
)	ZUNI RIVER BASIN
v.)	ADJUDICATION
)	
A & R PRODUCTIONS, et al.,)	

**MOTION FOR AN ORDER (1) DEFINING THE TEMPORAL SCOPE OF THIS
ADJUDICATION AND (2) CLARIFYING THE EFFECT OF CONSENT ORDERS
ENTERED HEREIN**

The Plaintiff United States of America (“United States”) hereby moves the Court to enter an order (1) establishing a specified cut-off date for the scope of this adjudication such that water rights junior to the specified date shall not be adjudicated in this civil action, and (2) providing that the terms of consent orders entered herein do not prohibit the defendants named in such consent orders from initiating new water rights junior to the adjudication scope ending date.

In support of this motion, the United States asserts:

I. THE COURT MUST LIMIT THE TEMPORAL SCOPE OF THIS ADJUDICATION

1. The April 26, 2002 *Special Master’s Report and Recommendations on Zuni River Basin Adjudication Procedure* (Doc. No. 123), at 10-11, recommended, *inter alia*, that the United States be required to undertake, and bear the costs of, the hydrographic survey of the entire area involved in this adjudication. The United States subsequently agreed to act in

accordance with that recommendation (Doc. No. 128). On May 21, 2003, the Court entered an order (Doc. No. 200) that, *inter alia*, defined the geographic scope of this adjudication.

2. United States surveyed all areas within the geographic scope of this adjudication, and, beginning July 16, 2004, submitted to the Court a series of five Hydrographic Survey Reports (“HSRs”) covering all the lands in the Zuni River Stream System that are not owned or held in trust by the United States (see Doc. Nos. 339, 393, 464, 805, & 961). These reports eventually must be amended to reflect additional information about surveyed, or omitted but previously existing, uses gained through the process of consultation with defendants and any evidentiary determinations made by the Court.

3. In the meantime, however, §§ 72-12-1 – 72-12-1.3 NMSA 1978 (governing certain ground water uses for domestic, livestock, and temporary purposes) and § 72-9-3 NMSA 1978 (governing stock water impoundments) continue to require the New Mexico State Engineer, relator of the Co-Plaintiff State, to issue permits for new appropriations of water within the Zuni River Stream System, and such permits have been issued and new appropriations have been initiated. To date, the United States has learned, via the State’s WATERS database, of a total of 81 permits for new ground water appropriations within areas covered by previously-filed HSRs, of which 57 have resulted in new wells evidenced by submission of drill logs to the State Engineer. Although not all permits result in new wells, given lag times between issuance of permits and submission of drill logs (which can be over 18 months), and for data entry in WATERS, it seems highly likely that, at any given point in time, the WATERS data understates the number of new appropriations in the stream system. In addition, new stock water impoundments may have been permitted and constructed within the stream system pursuant to § 72-9-3, although data concerning such permits is not available in WATERS and otherwise has

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not been provided to the United States.

4. The United States continues to attempt to survey these new uses as the data concerning their location becomes available, and, when necessary, to join new defendants and create and process new subfiles for these uses according to the applicable Special Master's Procedural and Scheduling Order. However, because these new appropriations can be widely scattered throughout the stream system, fieldwork to survey these uses is much less efficient and more resource-demanding than the original fieldwork, which involved inspection of a number of contiguous water uses during each field trip. In addition, this survey of new appropriations diverts personnel and other resources from the task of completing the adjudication of senior uses.

5. So long as the permitting of new appropriations under State law continues, it will not be possible to enter a final decree that literally encompasses all water rights in the Zuni River Stream System. Unless the Court enters an injunction effectively precluding new water rights, or this civil action is defined to have a temporal scope such that water rights junior to a specified date will not be adjudicated, the scope of this adjudication remains a moving target and this case cannot be concluded.

6. The United States is aware of evidence -- some anecdotal in character -- suggesting that, in discrete portions of the Zuni River Stream System, diversions of ground water from junior wells may have begun to adversely impact the supply available to satisfy senior rights. However, at this point in time, the United States is unable to present reliable testimony or documentary evidence sufficient to support a conclusion that new appropriations of ground water or impoundments of surface water in the Zuni River Stream System necessarily cause irreparable harm to senior rights, such that a blanket injunction prohibiting all such appropriations and impoundments can be justified.

7. In United States v Abouselman, No. 83cv1041 (D.N.M.), on March 18, 1987, the Special Master in that case, upon a joint motion of the parties, ordered “for reasons of logistical convenience in these proceedings, that any persons claiming water rights arising after April 1, 1987 will not have these rights adjudicated in this action” (Doc. No. 1599 in No. 83cv1041). The United States submits that the foregoing paragraphs of this motion demonstrate that the need for an order to similar effect in the present case is more fundamental than mere logistical convenience. Absent such an order, it will be impossible to enter a final decree, and consequently the intent of Fed.R.Civ.P. 1 “to secure the just, speedy, and inexpensive determination of every action and proceeding” will be entirely frustrated.

II. CONSENT ORDERS IN THIS ACTION SHOULD NOT PRECLUDE SIGNATORY DEFENDANTS FROM ESTABLISHING NEW WATER RIGHTS JUNIOR TO THE RIGHTS ADJUDICATED HEREIN.

8. All consent orders approved by the Court in this action to date contain language enjoining the signatory defendants, and the defendants’ “successors, representatives, heirs, and assigns . . . from any diversion or use of the public waters of the Zuni River Stream System” in a specified Sub-area or Sub-areas “except in strict accordance with this Consent Order and other orders of this Court in this cause.” This language is consistent with language in consent orders, subfile orders, and final decrees entered in all other water adjudications before this Court. However, as far as counsel for the United States has been able to determine, the language has never been interpreted to preclude defendants from developing junior livestock uses or domestic wells pursuant to permits issued in compliance with State law.

9. If, as requested in this motion, the scope of this adjudication is limited to water rights senior to a specified date, and the ability to initiate water rights junior to that date is not generally precluded, there is no just basis for enjoining defendants to this action from

initiating such junior rights solely because they have agreed to consent orders. Persons who currently have no water rights claims, and who thus will not be joined as defendants or have rights adjudicated herein,¹ will continue to be able to apply for permits and initiate new water uses. Defendants who have cooperated in the adjudication process should be as able to develop new uses as these non-parties. Otherwise, the injunctive language of the consent orders may provide defendants with a disincentive to agree to the orders.

10. Indeed, during the consultation process, some defendants have expressed reservations concerning the injunctive language and a few have refused to sign consent orders based on those reservations alone. An order expressly providing that the consent orders do not, by their terms, prejudice the ability of the signatory defendants to develop junior water rights in accordance with applicable law will remove a significant obstacle to resolution of these subfiles.

11. The portion of the consent order injunctive language referring to “other orders of this Court in this cause” clearly contemplates that the Court may enter one or more orders that allow consent order defendants to make other uses of water than those described in a particular consent order. Indeed, some subfile defendants are already parties to more than one consent order. The order requested herein will further emphasize that subfile consent orders must be interpreted in the context of other orders entered in the case as a whole.

12. The United States is not by this motion seeking to impair the ability of any owner of a water right in the Zuni River Stream System to move this Court to protect senior rights from the effects of junior appropriations. The United States expressly reserves for itself,

¹ Section 72-4-17, NMSA 1978, requires all “claimants” to be joined as parties to a stream system adjudication and permits unknown claimants to be joined and to be served by publication. However, to emphasize the obvious: joinder or service of process on all persons who may claim a right to use water in the indefinite future (including such persons who are not yet born) and who may never be in privity with any current claimant, would defy common-sense notions of Due Process.

both in its proprietary capacity and as Trustee, the right to seek such relief.

13. On November 12, 2008, counsel for the United States provided a draft of the present motion, and of the proposed order submitted herewith, to counsel of record via email.

Of those who responded, counsel representing the State, the Zuni Indian Tribe, the Navajo Nation, ORC, LLC, Jaralosa Cattle Company, LLC, and Tampico Springs 3000, LLC did not oppose the motion. Counsel for the Diocese of Gallup declined to take a position on the motion.

As of the time of filing this motion, there were no responses in opposition.

WHEREFORE the United States respectfully moves the Court to enter the order submitted herewith, providing that (1) water rights junior to the date of the order shall not be adjudicated in this civil action and (2) that the terms of consent orders entered herein do not prohibit the defendants named in such consent orders from initiating new water rights junior to the date of the order in accordance with applicable law.

Because the present motion seeks, *inter alia*, to define the subject matter over which the Court is exercising its jurisdiction in the present case, and in order to avoid any question concerning whether the imposition of such a limitation is within the authority that may be referred to a Special Master under Fed.R.Civ.P. 53, the United States respectfully requests that this motion be heard and decided by the United States District Judge assigned to this case.

Submitted November 14, 2008.

Electronically Filed

/s/ Bradley S. Bridgewater

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 14, 2008, I filed the foregoing *Motion For An Order (1) Defining The Temporal Scope Of This Adjudication And (2) Clarifying The Effect Of Consent Orders Entered Herein* electronically through the CM/ECF system, which caused CM/ECF participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/

Bradley S. Bridgewater