

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

UNITED STATE OF AMERICA

03 APR 25) PM 12:40

Plaintiff,

-v-

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

Defendants.



01cv00072-BDB-ACE

ZUNI RIVER BASIN  
ADJUDICATION

**COMMENTS OF THE NEW MEXICO COMMISSIONER  
OF PUBLIC LANDS re: DRAFT PRELIMINARY  
PROCEDURAL AND SCHEDULING ORDER**

The Commissioner of Public Lands ("Commissioner") appreciates the opportunity to review and comment on the draft Preliminary Procedural and Scheduling Order prepared by the Special Master. The draft Order is attached to this pleading with proposed additions and deletions shown by underscoring and strikethroughs, respectively. The Commissioner has very few proposed changes. The bases for the few proposed substantive changes<sup>1</sup> are as follows:

Introduction: 1<sup>st</sup> Page, 1<sup>st</sup> Paragraph: The Commissioner proposes two changes to this paragraph<sup>2</sup>:

First, as discussed at the status conference on April 12, 2003, the Court should expressly define the temporal scope of the Zuni River Basin Adjudication. The proposed change would limit the scope of this adjudication to water rights claims arising on or

<sup>1</sup> Non-substantive changes to correct clerical errors and omissions are also shown on the attached draft Order.

<sup>2</sup> These proposed changes may be more appropriate in an Order of the Court (as opposed to a procedural order entered by the Special Master). The Commissioner submits them here in response to discussions at the status conference.

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before January 19, 2001, the date the United States filed its complaint. However, notwithstanding this general limitation, the United States could for good cause file a motion to join a particular claimant falling outside the proposed scope; similarly, such claimants could file motions to intervene. The Court would decide such motions in accordance with the usual rules of federal civil procedure.

Second, the Commissioner proposes exclusion of all groundwater uses permitted by the Office of the State Engineer pursuant to Section NMSA 1978, 72-12-1(1931). Unlike pre-basin water rights, the place and purpose of use, point of diversion, priority date, and amount of appropriation under Section 72-12-1 are expressly limited and reasonably ascertainable from the statute and the records of the OSE. There is, therefore, little reason to bring Section 72-12-1 claimants into this adjudication.<sup>3</sup> However, as discussed above, the Court could entertain motions filed for good cause to join or to intervene with respect to particular claimants. Moreover, the exclusion would not apply to unpermitted pre-basin wells.

Paragraph II.C (Domestic Wells): The Commissioner assumes that “domestic wells”, as used in the draft Order, refers to wells permitted by OSE pursuant to Section NMSA 1978, 72-12-1 (1931) and not to unpermitted pre-basin wells. The Commissioner proposes to expand this provision to include all groundwater uses permitted under the statute and would allow dismissal of those parties whose water rights claims arise solely under Section 72-12-1. As discussed above, these water rights are defined and limited by

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<sup>3</sup> A court order requiring such claimants to install and maintain flow meters, as may be required by OSE, may be of value. However, this should already be a condition of their permit and, in any case, is within the OSE’s authority to require.

statute, and the attributes of such rights are ascertainable from the statute and the records of the OSE. It would also appear that very few domestic wells in the Zuni River Adjudication area will turn out to be Section 72-12-1 wells; most will likely be pre-basin wells.

Paragraph II.D (State Trust Lands): The Commissioner will provide the United States with information to identify all state trust lands within the Zuni River Adjudication. However, the Commissioner proposes to strike the last sentence in this paragraph. The Commissioner would strenuously object to being required to identify any “general claim regarding water rights on state trust lands ... within six months of entry of this order”, unless the same requirement is imposed on the federal government with respect to Indian lands and federal reservations. Placing this requirement on the Commissioner alone would violate Due Process and fundamental notions of fairness. Like all other parties in this adjudication, the Commissioner should only be required to submit any “additional claims” pursuant to paragraph VI of the draft Order.

Paragraph X.C: The Commissioner proposes clarifying language that would require the Commissioner and the individual water user (i.e., “individual claimant”) to be copied on all proposed consent orders, pleadings, correspondence and all other papers relating to water rights associated with state trust lands.

### Conclusion

The Commissioner appreciates very much the opportunity to comment on the draft procedural Order prepared by the Special Master.

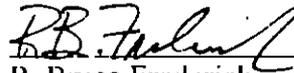
Respectfully submitted,



R. Bruce Frederick  
Stephen G. Hughes  
New Mexico State Land Office  
P.O. Box 1148  
Santa Fe, New Mexico 87504-1148  
(505) 827-5758

Certificate of Service

In accordance with the instructions of the Special Master, the foregoing comments on the draft Preliminary Procedural and Scheduling Order was filed of record only and not mailed to any party. A copy was also mailed to the Special Master at P.O. Box 2384, Santa Fe, New Mexico 87504-2384.



R. Bruce Frederick

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

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	)	ZUNI RIVER BASIN
STATE OF NEW MEXICO, ex rel. STATE	)	ADJUDICATION
Engineer, A & R Productions, et al.,	)	
	)	
Defendants.	)	
_____	)	

PRELIMINARY PROCEDURAL AND SCHEDULING ORDER

This Order is entered by the Special Master pursuant to Fed.R.Civ.P. 16(b) to guide the course of the adjudication of the non-federal water rights claims in the Zuni River Basin that were established on or before January 19, 2001, the date the United States filed its original complaint. Water rights claims vesting after January 19, 2001, are beyond the scope of this adjudication except as otherwise provided by order of this Court. Also beyond the scope of this adjudication are groundwater uses permitted by the Office of the State Engineer ("OSE") pursuant to NMSA 1978, § 72-12-1 (1931), except as may otherwise be ordered by the Court.

Having considered the comments and suggestions of interested counsel and defendants *pro se*, and being fully advised in the premises, it is hereby ordered that the following, general outline of procedures will govern the course of the adjudication.

Procedural and scheduling orders for each sub-area will issue following the filing of the hydrographic survey report for the sub-area; the following provisions may be modified to accommodate specific requirements for each sub-area.

## **I. PUBLIC ACCESS TO CASE INFORMATION**

### **A. Website**

The United States has established a public website - [www.zunibasin.com](http://www.zunibasin.com). All documents (except maps) that have been filed in this adjudication are available for viewing and downloading. This website shall include an brief explanation of how a claimant may contact the United States District Court for access to the Court's website.

### **B. Hard Copy Repository**

The United States will establish and maintain a repository of pleadings filed in this case at the University of New Mexico's Zollinger Library in Gallup, New Mexico. Pleadings may not be removed from the repository.

## **II. HYDROGRAPHIC SURVEY PROCESS**

### **A. Approval by State**

For each of the subsections delineated by the United States of America ("United States"), a hydrographic survey report and hydrographic survey maps shall be filed when the survey is completed. Prior to filing, the report and maps shall be submitted to the State for review, and any objections shall be submitted to the United States by the State within 30 days of receipt of the report and maps. The State and United States will have 30 days in which to discuss and resolve any objections. A joint motion explaining unresolved objections shall be filed with the Court within 10 days of the end of discussions.

B. Consent Orders

The United States' proposed Consent Order(s) shall set out the amount and location of irrigated acreage, the location of the point of diversion and the purpose of use, irrigation water requirements and priority dates, and include a map showing the individual claimant's water right claims as recognized by the United States and State.

C. Domestic Wells: Dismissal of Section 72-12-1 Claimants: Parties whose water rights claims are based solely on permits issued by the Office of the State Engineer pursuant to Section NMSA 1978, Section 72-12-1 (1931), shall so inform the United States by affidavit, attaching a copy of such permit, and be dismissed without prejudice. The United States shall then take the steps necessary to effect dismissal, if appropriate, of these parties. Upon request of the OSI, dismissal shall be conditioned on the claimant agreeing to install and maintain a flow meter on the permitted well.

~~claim forms? different consent order form?~~

D. State Trust Lands

The New Mexico State Land Office shall identify all state trust lands within the boundaries of this adjudication and provide the United States with this information within 90 days of the entry of an order defining the boundaries of this adjudication. ~~Any general claim regarding water rights on state trust lands shall be made within six months of the entry of this order.~~

### III. JOINDER OF CLAIMANTS

A. Water rights claimants identified in each report who have heretofore not been joined to the suit, shall be joined by the United States as those surveys are completed, and within 30 days of the filing. Unknown claimants shall not be joined as parties at this time.

B. Service on Claimants shall be accomplished by the United States by certified mail which includes the following: a Request for Waiver of Service, a Notice of Adjudication, an Amended Complaint, this General Procedural Order, a proposed Consent Order, a Form Answer, and Notice of Field Office. If no Request for Waiver of Service is returned to the United States within 60 days, the Claimant shall be personally served with the Summons, Complaint and other information in the packet, and may be assessed the costs of personal service pursuant to Federal Rule of Civil Procedure 4(d)5.

C. Mailing of service packets shall begin within 30 days after Claimants in each subsection have been joined.

D. Claimants already joined in this suit will receive the Amended Complaint and other information in the packet with the exception of the Request for Waiver of Service.

E. The Notice of Adjudication and the forms of Consent Order and Form Answer shall be approved by the Court. The Notice shall explain the adjudication process, the Claimants rights and obligations under this Order, and how to access the record in this case.

F. Once served, claimants may contact the United States directly to advise of errors in ownership, mapping, or other matters. However, field offices or follow-up field investigations will not be scheduled until further orders are entered.

#### **IV. DISMISSAL OF PARTIES CLAIMING NO WATER RIGHTS**

Parties who claim no water rights within the boundaries of the Zuni River Stream System adjudication may be dismissed at any time by filing a disclaimer with the United States. The United States shall then take the steps necessary to effect dismissal, if appropriate, of these parties and of parties who have previously filed answers and motions in accordance with the Federal Rules of Civil Procedure.

#### **V. RESPONSES**

##### **A. Agreement.**

1. Claimants who agree with all of the elements of the water rights claims as set out in the proposed Consent Order(s) may sign and return each order to the United States at the following address: **[need address]**

The United States shall transmit the signed order to the Court for approval and filing.

2. A signed and returned Consent Order serves as the Claimant's Answer to the Complaint. As between the State, the United States and the Claimant, the Consent Order finally adjudicates the water, rights elements contained therein. Each Consent Order is subject to challenge by other Claimants during the *inter se* proceedings, which will be scheduled following the completion of subfile activity.

##### **B. Disagreement.**

###### **1. Field Office**

Claimants who disagree with any element of the proposed Consent Order must attend a scheduled field office session for receiving further information or discussing disagreements with

the proposed Consent Order. Good faith participation in field office sessions is required to satisfy the discovery requirements of Rule 26(a)(1)(A) and (B) of the Federal Rules of Civil Procedure. Accordingly, Claimants are expected to bring to the field office their documents or other information that supports their position. To the extent possible, the United States shall have available at the field office session the data upon which the Consent Order is based. Information that cannot be maintained at the field office shall be disclosed to the Claimant and made available for examination at a location convenient to the Claimant. If the disagreement can be resolved at the field office, the Claimant shall sign either the original Consent Order or a new Consent Order that incorporates any changes agreed upon. The United States shall transmit the signed orders to the Court for approval and filing.

## 2. Rejection of Consent Order

Claimants who reject the proposed Consent Order or any other offer after attending a field office session shall file the Form Answer included in the service packet with the Court, and shall mail a copy of the Answer to the United States. The Answer rejecting the proposed Consent Order shall include a statement explaining why the Consent Order is objectionable, and a statement that the Claimant made a good faith attempt to resolve the disagreement with the United States.

## **VI. OMITTED OR ADDITIONAL CLAIMS**

Following the filing of a completed hydrographic survey report, any person or entity who claims water rights within the boundary of a completed hydrographic survey report shall as soon as possible ~~notify~~ file a water rights claim or claims with the Court.

## **VII. STATUS CONFERENCE**

Status and scheduling conferences will be scheduled periodically. The first conference

for each sub-area will be scheduled within 60 days of the filing of the hydrographic survey for that section.

#### **VIII. CHANGE OF ADDRESS OR OWNERSHIP**

All Claimants, whether or not they are represented by counsel, are responsible for informing the Court of any changes in their mailing address or changes in ownership of water rights or real property associated with the rights. The information must be filed with the Court within 30 days of any change at the following address:

Water Rights Adjudication Clerk  
United States District Court  
333 Lomas Blvd. N.W., Suite 270  
Albuquerque, NM 87102

and a copy must be sent to the United States at the address noted above.

#### **IX. *PRO SE* PRESENTATION**

Claimants who intend to appear and represent themselves shall file a notice with the Court at the address noted above, and serve copies on those listed on the Distribution List, attached. Thereafter, they will be included on the Distribution List and served with pleadings pursuant to Paragraph X, below.

#### **X. ~~LIMITS ON~~ ADDITIONAL REQUIREMENTS FOR SERVICE OF PLEADINGS**

A. This procedural Order shall be served on all counsel of record and defendants *pro se* who have made a separate entry of appearance. Subsequent procedural orders for each sub-area shall be served only on all counsel of record and defendants with water rights claims in the sub-area. Others may apply to the Court for inclusion on the specific service lists.

B. Service of pleadings and other papers required to be served concerning subfile orders between an individual Claimant and the United States shall be limited to the individual Claimant (or counsel for the Claimant) and the United States.

C. Where water rights claims are associated with state trust lands, service of proposed consent orders, pleadings, correspondence and all other papers required to be served concerning subfile orders shall be served on the New Mexico Commissioner of Public Lands and any individual claimant.

D. Service of pleadings and other papers required to be served concerning the Zuni River Basin adjudication generally shall be served on counsel of record and defendants *pro se*.

E. Unless otherwise ordered by the Court, parties filing motions of general application shall not be required to determine if their motions are opposed prior to filing the motion . When a motion involves issues or claims limited to a particular Claimant or sub file, the movant shall determine if the motion is opposed before filing.

#### **XI. SERVICE OF THIS ORDER**

The United States will serve this order on all defendants named in the Complaint.

**IT SO ORDERED.**

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SPECIAL MASTER VICKIE L. GABIN