

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

UNITED STATES OF AMERICA)
)
 Plaintiff,)
) 01cv00072-BB-ACE
 -v-)
) ZUNI RIVER BASIN
 STATE OF NEW MEXICO, ex rel. STATE)
 Engineer, A & R Productions, et al.,)
)
 Defendants.)
 _____)

SPECIAL MASTER’S REPORT AND RECOMMENDATIONS
FOR FEDERAL AND INDIAN WATER RIGHTS CLAIMS PROCEEDINGS

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

From: Vickie L. Gabin
Special Master

This Report sets out the Special Master’s recommendation for proceeding with the development of federal and Indian water rights claims simultaneously with the investigation of non-federal claims.

THIS MATTER is before the Special Master pursuant to the Court’s July 15, 2002, Scheduling Order (Docket No. 147), which instructed her to produce general guidelines and scheduling orders for the conduct of the case, and the May 21, 2003, Order on Special Master’s Report re Geographic Scope of Adjudication (No. 200), which provides in part “(t)he Special Master shall direct and control all scheduling for litigation activity...as governed by case management considerations.”

Scheduling orders typically are entered without too much dispute by the parties, and without resort to the Court. Because my course for proceeding with federal and Indian claims departs radically from the position advocated by Plaintiff United States of America, however, I present my

recommendation in this Report to allow the parties an opportunity for objections. In short, the United States' approach is that its resources will not permit the concurrent investigation of both non-federal and federal/Indian water rights claims; I believe defining all rights at the same time is the only way this adjudication may be completed in a reasonable period of time.

I. CASE MANAGEMENT

From the outset, my case management strategy for this adjudication contemplated the simultaneous preparation of the hydrographic survey of non-federal claims, and claims brought by the federal and Tribal interests. In the April 26, 2002, Special Master's Report and Recommendations on Zuni River Basin and Adjudication Procedure (No. 123), I noted that one reason water rights adjudications were so long lived was that federal and Indian water rights claims were prepared and litigated years after the non-federal rights were adjudicated, and recommended that the hydrographic survey of non-federal rights and the preparation of federal and Indian claims proceed simultaneously. (pp. 7-8, 11).

With regard to this matter, the Court's July 15 Order on the April 26 recommendations at p. 3, Paragraph 6, may be ambiguous. First, it provides that the Court will consider the water rights claims "in two sequential phases," or one set of claims following another. It then states that each set of claims would proceed on different schedules, and concludes with the statement "[i]f necessary, parties may move to proceed on parallel or divergent tracts [sic]." While no party has formally moved this Court to consider proceeding along either parallel or divergent tracks, non-federal water rights claimants have from the very beginning stages of this suit urged that fundamental fairness requires that all water right claims be defined simultaneously. Additionally, the United States' proposed procedural order submitted January 9, 2003, while general and lacking in deadlines,

proposed that Indian, non-Indian federal and state agency water right claims would be developed concurrently with the hydrographic survey (No. 152).

II. CURRENT CASE STATUS

Following an April 11 field trip and April 12, 2003 status conference, I entered two orders for the first phase of the adjudication of non-federal rights (Nos. 208, 215). Among other provisions, the orders required water rights claimants to file what are essentially statements of their water rights claims, announced the first field offices, and set up the general procedures and schedules for the hydrographic survey process.

The September 9 status conference was to discuss schedules and procedures for filing and adjudicating the water rights claims of the United States, both in its proprietary capacity and as trustee for the Navajo Nation, the Ramah Band of Navajos and Zuni Indian Tribe, and potential additional claims by the Tribal interests (No. 224). Counsel for those parties were instructed to circulate a proposed scheduling and procedural order (or orders) to counsel of record and defendants *pro se* prior to the conference. No orders were prepared or circulated. By way of explanation, at the conference Mr. Charles O'Connell for the United States reported that under current circumstances - this Court's order requiring the United States to bear the costs of the hydrographic survey, coupled with resource constraints - the earliest that these claims could be investigated and filed would be 2007 or 2008. (After conferring with Ms. Marx, counsel for the Zuni Indian Tribe, he agreed that Zuni's groundwater claims could be ready for filing next year. Following my instruction from the bench, Mr. O'Connell and Ms. Marx submitted a draft order to me by letter, but did not circulate it to counsel of record; consequently, I do not consider it at this time.)

III. RECOMMENDATION

I am sympathetic to the United States' budgetary problems. At the same time I believe that this Court now has an opportunity to approach a water rights adjudication with the expectation that it will be prosecuted, and completed, within a reasonable period of time. This adjudication has already departed from the usual way of doing business. For example, the order requiring that water rights claimants must step forward and declare their interests in advance of the hydrographic survey was designed in part to expedite the non-federal subfile phase.

In practical terms, assuming that the residents of the Zuni Basin are facing the same pressures on their water resources that are experienced in the rest of New Mexico (and there is no reason not to so assume), the sooner all rights are adjudicated and capable of administration, the sooner water rights claimants will enjoy a measure of certainty regarding their rights.

In February, 2002, Mr. O'Connell estimated that the hydrographic survey of the non-federal claims would take as long as three or four years. Preparation of the federal and Indian claims might take between two and three years. While it would be unreasonable to hold the United States to precisely this timetable, it seems to me that four years for non-federal claims processing and development of federal and Indian claims is a realistic, albeit optimistic, goal to begin with.¹ Four years of work means completion of the non-federal subfile phase, and the presentation of the federal and Indian claims by the end of fall, 2006. Even with the usual delays caused by unforeseen circumstances and difficulties, there is every reason to think that this adjudication can result in a final decree within 10 years of its filing, or 2011.

¹ Optimism is still legal in the State of New Mexico.

