

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

UNITED STATES OF AMERICA,)	01CV00072BDB/WWD (ACE)
)	
Plaintiff,)	
)	
vs.)	<u>ZUNI RIVER ADJUDICATION</u>
)	
STATE OF NEW MEXICO, <i>ex rel.</i>)	
State Engineer, A & R Productions, <i>et al.</i> ,)	
)	
Defendants.)	
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SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT'S OBJECTIONS TO SPECIAL MASTER'S REPORT AND TO RESPONSES THERETO

Pursuant to the Court's Order dated October 30, 2003 (Docket No. 276), the Salt River Project Agricultural Improvement and Power District ("SRP") submits its objections to the Special Master's report of October 2, 2003. See Special Master's Report and Recommendations for Federal and Indian Water Rights Claims Proceedings (October 2, 2003) (Docket No. 255) ("Special Master's Report"). SRP also objects to certain proposals which, although not included in the Special Master's Report, are set forth in responses to that report filed by the United States and the Zuni Tribe. See United States' Response and Motion for Action (October 10, 2003) (Docket No. 265) ("U.S. Response"); Zuni Indian Tribe's Response to Special Master's Report and Recommendations for Federal and Indian Water Rights Claims Proceedings (October 14, 2003) (Docket No. 262) ("Zuni Response").

I. Procedural Background

The Special Master held a status conference on September 9, 2003, to discuss, among other things, schedules and procedures for adjudicating federal and Indian water rights claims in this proceeding. See Special Master's Report, at 3. The United States and the Zuni Tribe thereafter responded to that report. See U.S. Response; Zuni Response. Various Defendants filed a request for the Court to extend the time to respond to the report. See, e.g., Docket No. 265; see also Docket No. 270. The Court granted Defendants' requests on October 30, and extended the deadline to file objections to the report until December 8, 2003. See Docket No. 276.

II. SRP's Objections to Report and Responses

SRP agrees with and supports the recommendations set forth in the text of the Special Master's Report. The federal and Indian water rights claims in this matter should proceed on a parallel, roughly simultaneous track with the adjudication of the non-federal claims. SRP also agrees with the Special Master that the federal and Indian claims should be ready for adjudication by no later than the end of fall, 2006. See Special Master's Report, at 4-5.

Despite its general agreement with the Special Master's recommendations, however, SRP is concerned about one particular issue that briefly was raised at the September 9 status conference and was addressed in more detail in the responses to the Special Master's Report submitted by the United States and the Zuni Tribes. That issue is the proposed bifurcation of proceedings regarding the claims of the Zuni Tribe.

Although the Special Master did not address this bifurcation in her October 2 report, both the United States and the Zuni Tribe discussed this issue in their responses. See U.S. Response, at 4-6; Zuni Response, at 1-2. SRP appreciates the desire to adjudicate the federal and Indian claims as expeditiously as possible, but believes that a “phased” approach that adjudicates the Tribes’ groundwater and surface water claims separately is fraught with potential difficulties.

SRP was not a party to the adjudication of Pueblo water right claims to the Rio Santa Cruz and Rio de Truchas Stream Systems in New Mexico ex rel. State Engineer v. Abbott, Civ. Nos. 7488 & 8650 JC, referenced in the U. S. Response at p. 5, and is not intimately familiar with the procedures used in that action. The general idea of splitting the adjudication of the Zuni Tribe’s claims by water source, however, is an important issue that merits more consideration than would come with being first formally raised in responses to a recommendation of the Special Master. For example, because the Tribe’s claims are likely to be quantified based upon a standard relating to actual or potential water uses (e.g., the “practicable irrigable acreage” test), it is difficult to ascertain how such claims can be segregated according to their source of supply. Indeed, separately adjudicating the Tribe’s “groundwater” claims would not serve the interests of judicial efficiency because the adjudication of rights for various uses would need to be repeated in the subsequent phase for “surface water” claims.

Furthermore, the the segregation of claims by source of supply could affect the other parties’ ability to present various legal arguments with respect to the Tribe’s claims.

For example, in one of the most recent decisions by any court relating to the quantification of federal reserved water rights, the Arizona Supreme Court held that such a right extends to groundwater only if surface supplies are inadequate to satisfy the purposes for which a reservation was created. In re the General Adjudication of All Rights to Use Water in the Gila River System and Source, 195 Ariz. 411, 420, 989 P.2d 739, 748 (1999), cert. denied, 530 U.S. 1250 (2000) (“A reserved right to groundwater may only be found where other waters are inadequate to accomplish the purpose of a reservation.”); see also In re All Rights to Use Water in the Big Horn River System, 753 P.2d 76, 99 (Wyo. 1988) (federal reserved rights do not extend to groundwater).

Although the Arizona decision does not directly control the adjudication of the Tribe’s claims in this proceeding, the Court should consider the effect of segregation on such legal arguments before moving forward with adjudicating only a portion of the Tribe’s claims. If a reserved right to groundwater exists only if surface supplies are not sufficient to carry out the purposes of the reservation, it would be essentially impossible to fully adjudicate the Zuni Tribe’s claims to groundwater prior to addressing its available surface supplies and all of its claims. Additionally, because New Mexico is a conjunctive management state, in some instances management of surface water rights and management of groundwater rights should be coordinated. See generally City of Albuquerque v. S.E. Reynolds, 379 P.2d 73, 71 N.M. 428 (1962); see also A. Dan Tarlock, Law of Water Rights and Resources § 6.06[2] (1994) (“New Mexico has a long and strong tradition of the coordination of ground and surface water rights.”).

III. Summary and Requested Action

In the conclusion of her report, the Special Master recommended that the Court approve the general concept of the federal and Indian claims proceeding on “parallel, roughly simultaneous tracks” with the non-federal claims and suggested that, upon the Court’s direction, she would “re-convene the scheduling and planning process for the filing of federal and Indian water rights claims.” Special Master’s Report, at 5.¹ SRP requests that the Court not act at this time upon the proposal made by the United States and the Zuni Tribe that the Tribe’s groundwater claims be segregated from its surface water claims for adjudication, but asks instead that the Court adopt the Special Master’s general suggestion of simultaneous federal and non-federal tracks and direct the Special Master to convene a status conference for the purposes of discussing more detailed scheduling issues.

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¹ The Special Master correctly noted that, despite her order to do so, the United States and the Tribes failed to circulate a proposed scheduling and procedural order to the parties ten days prior to the September 9 status conference. See Special Master’s Report, at 3; see also Order Setting Status Conference, at 1-2 (August 6, 2003) (Docket No. 224) (“Counsel representing those parties [i.e., the United States, the Ramah Band of Navajos, and the Zuni Indian Tribe] shall be prepared to circulate a proposed scheduling and procedural order (or orders, if there are disagreements) to counsel of record and defendants who have entered appearances *pro se*, at least 10 days prior to the [September 9] conference.”). Thus, the other parties had no meaningful opportunity to comment on the details of the proposed order at the September 9 conference.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

A handwritten signature in black ink, appearing to read "Mark AS", followed by a long horizontal line extending to the right.

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CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed a true and correct copy of the foregoing pleading to the following counsel of record on December 8, 2003:

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