

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

UNITED STATE OF AMERICA, for Itself)	
and as Trustee for the Zuni Indian Tribe,)	
Navajo Nation and Ramah Band of Navahos)	
)	
and)	
)	
STATE OF NEW MEXICO ex rel. STATE)	
ENGINEER,)	No. 01cv00072-MV/WPL
)	
Plaintiffs,)	ZUNI RIVER BASIN
)	ADJUDICATION
and)	
)	
ZUNI INDIAN TRIBE, NAVAJO NATION)	
)	
Plaintiffs in Intervention)	
-v-)	
)	
A & R PRODUCTIONS, <i>et. al.</i> ,)	Subfile No. ZRB-2-0098
)	
Defendants.)	
)	

JOINT STATUS REPORT AND PROPOSED PARTIAL DISCOVERY PLAN

The Parties request that the Court adopt the provisions and deadlines agreed to by the Parties as outlined in the paragraphs below. Further, the Parties request that the Court address the two procedural disputes identified by the Parties below. The Plaintiffs will prepare a proposed scheduling order based upon any decisions of the Court concerning these identified disputes.

MEETING OF PARTY REPRESENTATIVES

Pursuant to Fed. R. Civ. P. 26(f), a telephonic meeting was held on April 8, 2014 and was attended by:

Guss Guarino for Plaintiff United States of America;

Edward Bagley for Plaintiff State of New Mexico; and

Peter Shoenfeld for Defendants Yates Ranch Property, LLP and Jay Land, LTD.

NATURE OF THE CASE

This subfile action concerns the determination of Defendants' water rights in the Zuni River Basin.

AMENDMENTS TO PLEADINGS AND JOINDER OF PARTIES

Plaintiffs do not intend to file any additional pleadings or join additional parties.

Defendants do not intend to file any additional pleadings or join additional parties.

STIPULATIONS

The Parties stipulate and agree that venue is properly laid in this District; that the United States District Court for the District of New Mexico has jurisdiction of the parties and the subject matter.

The Parties further stipulate to the following facts: 1) Plaintiffs recognize that Defendants are entitled to the recognition of water rights to the extent identified in the last-proposed Consent Order presented to Defendants; 2) the Parties have identified numerous water features over which they have differences concerning the associated water rights, for those water features identified in Attachment A for which dispute exists, the water rights attributes for the historic water uses (priority, quantity, and beneficial use) are agreed upon to the extent that Plaintiffs are willing to recognize a water right as identified in Attachment A; 3) Defendants are not required to prove the basis for and extent of the contested water rights described in Attachment A to the extent that Plaintiffs are willing to recognize those water rights; and 4) the law governing this case is the law of the State of New Mexico.

PLAINTIFFS' CONTENTIONS

The Plaintiffs contend that the Defendants are entitled to water rights for lands owned in the Zuni River Basin of New Mexico only to the extent that they are recognized by Plaintiffs in the last-proposed Consent Order and Attachment A. Attachment A characterizes those water features (wells, impoundments, etc.) over which dispute remains with Defendants.

DEFENDANTS' CONTENTIONS

For each of the “Denied” water rights set forth in the Defendants’ Subfile Answer the statutory elements set forth in NMSA § 72-4-19 are the issues before the Court, except where some of those elements are agreed by the Parties. The elements are the “priority, amount, purpose, periods and place of use, and as to water used for irrigation . . . the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.”

For the most part (in 84 out of the 123 water sources identified by the Plaintiffs) the Defendants’ water rights are, as set forth in the Answer, larger than as contended by Plaintiffs because greater amounts of water have been diverted from the wells or springs or greater amounts of surface water have been impounded and used in stock ponds which are larger than as asserted by Plaintiffs; in some instances, the priority is earlier than as claimed by Plaintiffs. In several instances, the purpose of use is different or broader than as claimed by Plaintiffs.

The Defendants have pleaded that they have 24 additional water rights which the Plaintiffs failed to include in any manner in their proposed Consent Order. In addition, Defendants have in the last month found four additional stock tanks which should be adjudicated. They were not revealed by the Plaintiffs’ hydrographic survey, nor were they pleaded by either Plaintiffs or Defendants. As necessary, leave to include those water rights in the adjudication of their rights will be sought by Defendants.

The amount of water claimed by the Defendants is the amount of water applied to beneficial use in any one year, and includes all water required to provide or deliver the water at or to the Defendants' places and purposes of use. Each source of water and each place of use gives rise to a discrete water right. The water right from each well is measured by the amount of beneficial use made of the water from that well in the year of greatest beneficial use. The water right from each surface source of water is measured by the amount of beneficial use made of the water from that well in the year of greatest beneficial use.

Plaintiffs will contend (although they have not now so plead) that Defendants' water rights in Atarque Lake have been abandoned, and Defendants assert the contrary.

Plaintiffs have declined to recognize the Defendants' water rights from the points of diversion which are located on lands owned by the State of New Mexico and leased for grazing by these Defendants. Defendants are known claimants of those water rights and are entitled to have them adjudicated in original proceedings in which they are parties, namely, in this subfile (as opposed to *inter se* proceedings).

DISPUTE BETWEEN THE PARTIES

The Parties have identified two basic procedural disputes; these procedural disputes prevent the Parties from crafting a complete, joint, proposed discovery plan and scheduling order.

The first procedural dispute concerns the respective burdens of the Parties. Plaintiffs believe that given Plaintiffs' recognition that Defendants have certain water rights as recognized in the last-proposed Consent Order and Attachment A, it is the Defendants' burden to present evidence of a water right in excess of that which Plaintiffs are willing to recognize. As such, Plaintiffs would have the responsibility to rebut Defendants' contentions for additional water

rights. On the other hand, Defendants' believe that to the extent any water right is disputed, Plaintiffs have the burden to prove, in the first instance, the water right in dispute and Defendants may rebut Plaintiffs evidence showing a water right in excess of that which Plaintiffs prove.

The second procedural dispute concerns the scope of his subfile action. Defendants allege to contest the ownership of water rights adjudicated to the State of New Mexico in Subfile ZRB-1-0075 (concerning lands held in trust by the New Mexico Commissioner of Public Lands). Plaintiffs believe that the scope of this subfile action centers exclusively on water rights associated with land owned by Defendants. Defendants believe that this subfile action includes consideration water rights claimed by Defendants but previously adjudicated in Subfile ZRB-1-0075.

To arrive at a discovery plan and pre-trial order that will efficiently govern the discovery and pre-trial activities of the Parties moving forward, the Parties believe the Court should give guidance as to the resolution of these procedural disputes.

PARTIAL DISCOVERY PLAN

To the extent that the Parties can agree, the Parties jointly propose to the Court the discovery plan outlined in the paragraphs below. This discovery plan is not complete and is agreed to by the Parties though they maintain the procedural differences described above.

1. Defendants may call as witness(es) the following individual(s):

Donald Alam (contact will be arranged through counsel)

2. Plaintiffs may call as witness(es) the following individual(s):

Scott Turnbull, P.E., Associate Engineer, Natural Resources Consulting Engineers, Inc., 131 Lincoln Ave., Ste. 300, Fort Collins, Colorado 80524
(970) 224-1851 (contact will be arranged through counsel)

3. The Parties may also call witnesses yet to be named to identify or authenticate documents, if necessary.
4. Within 30 days from the issuance of the Court's scheduling order, the Parties shall exchange Initial Disclosure material as described in Fed. R. Civ. P. 26(a)(1). Included in Initial Disclosures, the Parties will provide the opposing Parties all documentary evidence in their possession that they intend to present to the Court. The Parties shall have an ongoing obligation to disclose during discovery any documentary evidence that they intend to introduce to respond to or rebut evidence and such response/rebuttal evidence shall be disclosed no later than 30 days before the close of discovery.
5. Discovery will be needed on the following subjects: the water right attributes of Defendants' water right (priority, quantity, source, and purpose of use). The following procedures shall govern discovery associated with this subfile action.
 - a. Maximum of 30 interrogatories (including any subparts) for Plaintiffs and Defendants (responses due 30 days after service).
 - b. Maximum of 25 requests for production of documents for Plaintiffs and Defendants (responses due 30 days after service). Copies of documents may be produced in either paper or electronic PDF format at the discretion of the disclosing party.
 - c. Maximum of 25 requests for admission by Plaintiffs and Defendants (responses due 30 days after service).
 - d. Once discovery begins, each party is permitted to depose the other parties (or party representative(s) with knowledge), the identified witness(es) of another

party, and persons identified as having relevant information concerning the contested water rights claimed by Defendants and described in Attachment A. Each deposition shall be arranged through the consent of all Parties to the subfile proceeding. Each deposition is limited to a maximum of 8 hours unless extended by agreement of the parties and shall occur at the location of the witness' principle place of work unless otherwise agreed to by all parties. Costs associated with the deposition (*e.g.*, reporter fees, room reservation, *etc.*) shall be borne by the party taking the deposition except that costs associated with the deposed witnesses (*e.g.*, expert fees, travel expenses, *etc.*) shall be borne by the party on whose behalf the witness is to be called.

- e. Given the nature of the existing procedural disputes (described above), it is not possible to establish the sequence of events for the disclosure of expert and rebuttal expert reports. Nonetheless, both parties recognize that as contemplated under Fed. R. Civ. P. 26(a)(2), written reports shall be prepared and presented by any testifying expert witness.
- f. Supplementation under Fed. R. Civ. P. 26(e) is due 20 days after the new information has been acquired.
- g. All discovery commenced must be completed by 180 days after the issuance of the Court's scheduling order. Therefore, any interrogatories, requests for admission, and requests for production must be submitted no later than 30 days before the discovery completion date described here.

DISPOSITIVE MOTIONS

Plaintiffs and Defendants anticipate that they will each file a motion for summary judgment under Fed. R. Civ. P. 56 in an attempt to resolve those issues that do not have a material issue of fact in dispute. Given the nature of the existing procedural dispute (described above), it is not possible to establish the sequence of events for filing dispositive motions.

TRIAL

To the extent that an issue of material fact remains after dispositive motions that require the Court to conduct an evidentiary trial, Plaintiffs estimate that any trial would require 1 day; Defendants believe that an evidentiary trial will require more than 1 day. This is a non-jury case and should be scheduled only after dispositive motions have been addressed and resolved. The Court shall schedule a final pretrial conference as contemplated by Fed. R. Civ. P. 16(e) and shall subsequently issue a final trial plan for the parties to follow.

SETTLEMENT

The possibility of settlement in this case is not considered likely. The Parties do not request a settlement conference.

Respectfully submitted this 10th day of April 2014.

Electronically Filed

/s/ Andrew "Guss" Guarino

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/s/ Peter Shoenfeld

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COUNSEL FOR DEFENDANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on April 10, 2014, I filed the foregoing JOINT STATUS REPORT AND PROPOSED PARTIAL DISCOVERY PLAN 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/ Andrew "Guss" Guarino