

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

FILED
at Santa Fe, NM

JUL - 6 2001

ROBERT M. MARCH, Clerk
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA,

Plaintiff,

CIV No. 01 0072 BB/WWD-ACE

v.

ZUNI RIVER BASIN

**STATE OF NEW MEXICO, ex rel.
STATE ENGINEER, et al.,**

Defendants.

**STATE'S PROPOSAL FOR PROCEEDING
ONCE THE STAY IN THIS CASE IS LIFTED**

THE STATE OF NEW MEXICO, by and through its counsel of record, pursuant to the Court's Scheduling Order of March 30, 2001, hereby makes its Proposal for Proceeding Once the Stay in This Case is Lifted, and as such sets forth the following:

Introduction

The Court's March 30, 2001 Scheduling Order (# 31) required the counsel for the United States and counsel for the State confer in an effort to reach an agreement with regards to a procedural and scheduling order to initiate the adjudication of the Zuni River basin. The Order at paragraph 3 required that if the parties reach an agreement, they are to file their proposed order by May 31, 2001. It further provided that

If the parties are unable to reach an agreement, they shall file by May 31 a proposal for proceeding once the stay in this case is lifted.

Because the State had received neither a draft scheduling order nor proposals regarding the Zuni adjudication from the U.S. by May 25, 2001, it filed a motion for an extension

of time within which to comply with the Court's Order of March 30, 2001. That Motion was granted and an Order entered extending the deadline to July 6, 2001.

Four days after the court's original deadline, on June 4, 2001, the state received by mail a copy of a signed pleading filed by the United States Department of Justice ("U.S.D.O.J.") characterized as a "report intended to comply with the Special Masters Scheduling Order of March 31, 2001." Prior to this the state had received no written or otherwise formal offer from the U.S.D.O.J.¹ As a preliminary matter, the state would note that there are two main problems with the U.S.D.O.J.'s report: first, it is not responsive to the court's Order of March 30, 2001; second, it contains inaccurate factual allegations which the state is now compelled to address.

I. Inaccurate Statements Contained in the U.S.D.O.J. Report

Regrettably, the U.S.D.O.J. report contains some statements to the court that are not wholly accurate; accordingly, the state is obligated to correct the record. Most significant is the U.S.D.O.J. allegation that a general stream adjudication of the Zuni filed in 1984 was dismissed as the result of inaction by the state:

The state court apparently felt that the state failed to fulfill its end of the agreement [to conduct the survey and adjudication of the Zuni River basin] because, in 1990, that court took the extraordinary step of dismissing the State's suit with prejudice for the State's failure to prosecute.

U.S. Report, p. 3.

Contrary to these allegations, this was not "the state's suit," but rather was initiated by a complaint brought by the City of Gallup, New Mexico. Nothing contained

¹ Prior to May 25, 2001, the state called Mr. O'Connell at the D.O.J. about its intentions. Subsequent to those calls D.O.J. provided a letter outlining the substance of the pleading it intended to file if approved by higher powers at D.O.J.

in the 1990 Order of Dismissal could be construed to support the U.S.D.O.J. allegations that the dismissal came as a result of inaction by the state.

The pleadings leading up to the dismissal bear this out. On April 9, 1985, the parties to the 1984 Zuni adjudication suit stipulated to a stay of the matter for five years in consideration for various actions and cooperations of and between the parties in adjudicating the basin. Amended Stipulation and Requests for Injunction and Stay, attached hereto as Exhibit A. On the same day, the court entered its Order staying the matter for five years:

This action be, and it is hereby, STAYED in its entirety until a period of five years has elapsed from the date of the filing of said Stipulation and Requests for Injunction and Stay . . .

Amended Order Enjoining State Engineer and Staying Action, p. 2, attached hereto as Exhibit B. Nonetheless, in March of 1990, while the matter was still stayed, a different Judge, the Honorable Joseph L. Rich, dismissed the matter with prejudice.

The dismissal by Judge Rich was entered in March of 1990, prior to the expiration of the five year stay granted in 1985. It is apparent Judge Rich was unaware of the existence of the previous Stipulation and Order because his Order of Dismissal provided:

No written stipulation signed by the parties postponing the final action beyond three (3) years has been filed as required by Rule 1-041E of the N.M.R.C.P.

Order of Dismissal, attached hereto as Exhibit C.

Clearly the matter was not dismissed because of any failure by the state, but because Judge Rich was ignorant of the fact that the matter had been stayed. The Order of Dismissal attributes the failure to prosecute to the plaintiff. None of the pleadings filed by the City of Gallup, the United States, or Judge Rich align the State of New

Mexico *ex rel.* State Engineer as a plaintiff. Additionally, the state finds no record that notice of the dismissal was served on the state. Apparently the U.S.D.O.J. overlooked relevant pleadings in developing its version of the history of the case as set forth in its report. This is at odds with the U.S.D.O.J. allegation that the dismissal came as a result of the state's failure to prosecute.²

The U.S.D.O.J. also alleges that it complied with the terms of the five year stay and engaged in certain studies while the state did not:

In accordance with that agreement, the United States contracted for many studies, one of which was a hydrographic survey of a majority of Indian water users . . . [and] [n]otwithstanding the State's prior commitment to conduct studies necessary to adjudicate the waters of the Basin, the United States now offers to initiate that task . . .

U.S. Report, p. 3. Contrary to the implications of the U.S.D.O.J., the state undertook a hydrographic survey of the region while the matter was stayed. While the U.S.D.O.J. condemns the state for its lack of diligence to adjudicate the Zuni River basin, it ignores the fact that when the case was dismissed in 1990 it neither opposed the dismissal nor requested that it be reinstated. For at least the last eleven years the U.S.D.O.J. has been no more diligent than any other party in advancing the adjudication of the Zuni River basin.

II. The U.S.D.O.J.'s Report is Not Responsive to the Court's Order of March 30, 2001

This court's Order of March 30, 2001 required that the state and U.S.D.O.J. confer prior to May 31, 2001, and to file by that date a procedural and scheduling order to initiate the adjudication of the Zuni River basin. Shortly before the deadline, the state

² Additionally disturbing is that the U.S.D.O.J.'s attorney, Charles O'Connell had also affirmatively stated in his March 22, 2001 letter to all the Zuni Defendants that the dismissal of the matter in 1990 was because the "State failed to move the case forward." As noted above, this is not a correct statement, but might well affect perceptions of the state's attitude toward cooperating in the future survey and adjudication process.

inquired of the U.S.D.O.J. to gain insight to what it might propose to the state. Rather than "confer" with the state, it merely informed the state of the contents of the report it intended to file. Clearly, the U.S.D.O.J. did not intend to confer with the state. Suffice it to say, the U.S.D.O.J.'s "procedural and scheduling order" in the state's opinion does not comply with the court's March 30, 2001 Scheduling Order, so no agreement between the parties appears possible.

III. The State and the U.S.D.O.J. Have not Reached an Agreement Regarding the Abilities of the Parties to Plan for and Complete This Stream System Adjudication

By filing its report without conferring with the state, it appears the U.S.D.O.J. has unilaterally concluded that no agreement is possible. The state committed to the court at the hearing on March 27, 2001 that it would evaluate any proposal the U.S.D.O.J. might make with regards to an adjudication of the Zuni River basin at this time. The U.S.D.O.J.'s refusal to meaningfully "confer" with the state subsequent to the March 27, 2001 hearing, makes it clear that the U.S.D.O.J. seeks to have the court order this adjudication regardless of any commitment to its future. The state concludes that without a commitment of resources for its completion, it is irresponsible to initiate an ill-fated adjudication.

The state is presently involved in the adjudication of numerous river basins and in the litigation of multiple federal claims. These alone are straining its resources to the utmost. Many basins in addition to the Zuni remain to be adjudicated. Most significant among these is the Middle Rio Grande, which includes the Albuquerque metropolitan area, the MRGCD, the largest number of pueblos in a single adjudication, and it will present legal, factual and logistical challenges that make it a daunting task to complete once commenced. Additionally, ongoing new interstate river disputes and the ever

increasing difficulty of meeting New Mexico's Pecos river delivery obligations to Texas are already drawing state attorneys and State Engineer staff away from adjudication activities. Significant logistical problems for the state and the State Engineer are once again developing. While the state does not discount the need to adjudicate the Zuni, its remoteness, lack of a large population center, and lack of significant irrigation presents no real legal urgency; certainly, the U.S.D.O.J. has not offered any basis for urgency. Apparent, as always, is the U.S.D.O.J.'s presumption that all state concerns are merely secondary to those identified by the U.S.D.O.J.

It should be noted that the state has a detailed written Adjudication Plan.³ This plan provides a comprehensive analysis of the state's intention to and the process by which it will adjudicate all its waters, the order in which it intends to perform the adjudications, and the resources which will be necessary to accomplish the task. It underscores the limits on the existing resources of the state and the State Engineer that impact on or are impacted by existing adjudications and litigation, as well as the magnitude of the additional task of completely adjudicating all those waters of the State of New Mexico which have yet to be addressed. The Plan contemplates that it will take additional funding in excess of \$150,000,000 and staff in excess of 250 personnel years to complete the task. Completion of the plan is a direct function of budgeting and the availability of qualified personnel.

The order of magnitude of these numbers make patently clear that at this time, the state's ability to commit to undertake and complete the adjudication of the Zuni River basin - even with some degree of financial and logistical assistance from the U.S. - is

³ New budgeting, strategic planning and the requirement of numerous approvals prior to its release prevent this summary from being provided at this time. It will accompany any motion filed by the state to which this summary is germane.

unrealistic. As such, the state is unwilling to volunteer to undertake this adjudication. Because it appears equally clear that the U.S.D.O.J. is unwilling to abandon this litigation, except as it dictates, the parties are clearly unable to reach agreement unless the U.S.D.O.J. agrees at a minimum to continue to pursue additional for the adjudications completion. Therefore, and pursuant to the court's March 30, 2001 Scheduling Order, the state proposes the following proposal for proceeding once the stay in this case is lifted.

IV. The States' Proposal for Proceeding Once the Stay in This Case is Lifted

The court's March 30, 2001 Scheduling Order, and the related Order granting the State's Motion for an Extension of Time provide that the state has until July 6, 2001 to file this proposal for proceeding once the stay in the case is lifted. The U.S.D.O.J. has already filed its report. Additions, suggestions or other comments relevant to the U.S.D.O.J. report and the state's proposal shall be filed no later than July 20, 2001.

The state now proposes that a status and scheduling conference should occur immediately after that comment period ends, to followed by a briefing schedule for motions directed to the face of the U.S. Complaint, under the following terms:

1. On July 30, 2001, a status and scheduling conference shall be held.
2. On July 30, 2001, the stay in this case shall be lifted.
3. Pleadings directed to the U.S. Complaint shall be filed no later than November 30, 2001.
4. The U.S. shall file its response to such pleadings no later than March 31, 2002.
5. Replies shall be filed no later than May 31, 2002.

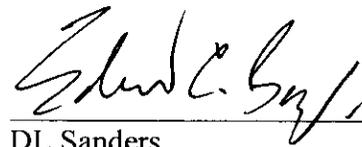
6. A hearing at which oral arguments shall be heard regarding any such motions shall be held in July, 2002, the date to be announced by the court.

7. Depending upon the court's ruling on the motions, parties already served shall answer the Complaint by September 30, 2002.

V. Conclusion

The state does not presently have the resources to undertake the adjudication of the Zuni River basin. Such resources will not be available in the foreseeable future. In any event, the urgency of other adjudications and litigation precludes contemplating the Zuni River adjudication in a time frame which the U.S. would find acceptable. Nonetheless, the State of New Mexico's Adjudication Plan does contemplate the adjudication of the Zuni River. As such, the state requests that the Court order the U.S. to fund this adjudication to its completion, or in the alternative, adopt the state's proposal for proceeding once the stay in this case is lifted.

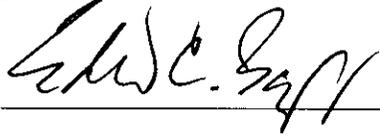
Respectfully submitted,



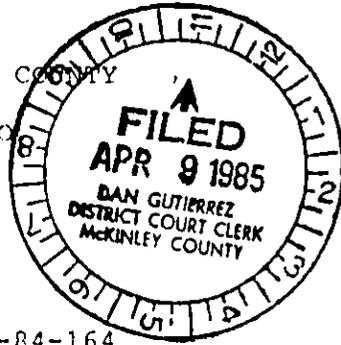
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Certificate of Service

I certify that on this 9th day of July, 2001, a true and correct copy of the foregoing pleading was mailed by first class mail to the attached list of counsel of record and pro se parties:



IN THE DISTRICT COURT OF MCKINLEY COUNTY
 FOR THE STATE OF NEW MEXICO



CITY OF GALLUP, et al.,
 Plaintiff,

 UNITED STATES, et al.,
 Defendants.

No. CV-84-164

AMENDED
 STIPULATION AND REQUESTS
 FOR INJUNCTION AND STAY

Plaintiff City of Gallup and defendants United States of America, Zuni Indian Tribe of New Mexico, and State of New Mexico ex parte S.E. Reynolds, State Engineer, agree as follows, for and in consideration of these mutual promises and the Stipulation and Consent to Dismissal of the named parties and the State of New Mexico in its proprietary capacity filed in United States of America and Zuni Tribe v. City of Gallup, U.S.D.C. Cause Civ. No. 82-111 M, a copy of which is attached hereto as Exhibit 1 and the provisions of which are incorporated herein by this reference:

All stipulating parties except the State Engineer request the Court to enter an injunction as described in paragraph below. Plaintiff City of Gallup and the State Engineer consent to the Court staying this action, after consideration of the injunction described in paragraph 7, until a period of five years has elapsed from the date this stipulation is filed, or until the date of completion of the comprehensive water resource



and use study and hydrographic survey described in paragraphs 5 and 6 below, whichever is earlier. All other stipulating parties request such a stay after the Court's imposition of the injunction described in paragraph 7 below.

2. All stipulating parties except the State Engineer agree to join in a request as detailed in the attached Exhibit 2, which is incorporated herein by this reference, that the State Engineer declare the groundwater resources of the Zuni Basin to have reasonably ascertainable boundaries, as more fully described in Exhibit 2.

3. The Zuni Tribe of New Mexico agrees to voluntarily submit to the State Engineer an annual report of any new appropriations of water or modifications of existing water rights, for five years from the date of the filing of this agreement, or until the date of the completion of the water resource and use studies described in paragraph 5 below, whichever is earlier.

4. The City of Gallup, the Zuni Tribe of New Mexico, and the United States except as noted in this paragraph, agree to forgo new appropriations of any waters for uses other than exclusively domestic ones, from the area of the Zuni River Basin as described in Exhibit 2, for a period of five years or until the date of completion of the water resource and use studies described in paragraph 5, whichever comes first. Nothing in this stipulation, either express or implied, is intended to limit, restrict, or otherwise impair the legal rights if any, of the Navajo Nation and members of the Navajo Tribe, including the

Navajo allottees, to develop, use, or otherwise appropriate water from any source within the area of the Zuni River Basin, as described in Exhibit 2. Furthermore, this stipulation does not prohibit the United States, acting through the Public Health Service - Indian Health Service, Bureau of Indian Affairs or any other federal agency, from aiding, funding, developing, or otherwise assisting in the use of water resources for the Navajo Nation or members of the Navajo Tribe, including the Navajo allottees. This Paragraph shall not be construed as a consent by the City of Gallup and the Zuni Tribe of New Mexico to appropriation of water by the Navajo Nation and members of the Navajo Tribe and shall not preclude the City of Gallup or the Zuni Tribe of New Mexico from taking action in federal or state court to attempt to prohibit such appropriation if deemed necessary.

5. The United States and the State Engineer agree to enter forthwith into a cooperative arrangement between the Bureau of Indian Affairs and the State Engineer to study the water resources and existing water uses of the area of the Zuni River Basin described in Exhibit 2, and pledge their best efforts to the completion of the same. The United States agrees that the Bureau of Indian Affairs will conduct a computer modeling study of the groundwater resources of the area.

6. The United States and State Engineer agree that both parties will cooperate in conducting a hydrographic survey of existing water uses according to established State Engineer Office standards. The United States and State Engineer agree to

dispute and verify results between themselves on a mutually agreeable basis. Recognizing that time is of the essence in this agreement both parties agree to make every reasonable effort to complete all facets of the comprehensive studies described herein within five years following the date of filing of this stipulation.

All stipulating parties except the State Engineer agree to prohibit any new appropriations of water for uses other than exclusively domestic ones from the area of the Zuni River Basin as described in Exhibit 2 until the expiration of five years from the date of the filing of this stipulation or until the date of completion of the comprehensive study and hydrographic survey described in paragraphs 5 and 6, whichever comes first. Said parties further agree to seek an order in this case enjoining the State Engineer from granting permits for new appropriations for uses other than exclusively domestic ones in the area described in Exhibit 2 until five years elapse from the date of the filing of this stipulation or until the comprehensive study and hydrographic survey described in paragraphs 5 and 6 are completed, whichever occurs first. The State Engineer agrees that he will not oppose the request for such an injunction.

8. The United States, the Zuni Tribe of New Mexico, and the State Engineer agree to cooperate in the development of evidence concerning, and to stipulate insofar as possible on the legal parameters of, the Zuni Tribe's claims for federally reserved and aboriginal water rights under federal law, in order to clarify and resolve the issues and to avoid needless litigation in the

future.

9. All stipulating parties recognize that any party to this litigation or any other entity remains free to seek relief from the court to the extent that it deems its rights under this agreement to be violated or its interests otherwise infringed. All stipulating parties agree to join in the defense of those part of the stipulation to which they have agreed against any challenge by any entity, whether party to this stipulation or not.

10. All stipulating parties agree to make all reasonable efforts individually to obtain, and to join in support for, funding to finance the provisions of paragraphs 5 and 6 of this stipulation from the New Mexico State Legislature and the United States Congress. The parties join in this agreement in recognition that the agreements herein, if effectuated, will result in substantial savings to all parties.

DATED:

3/26/85

Herbert A Becker by eb per phone
William L. Lutz *call 3/26/85*
United States Attorney

Herbert A. Becker
Assistant United States Attorney

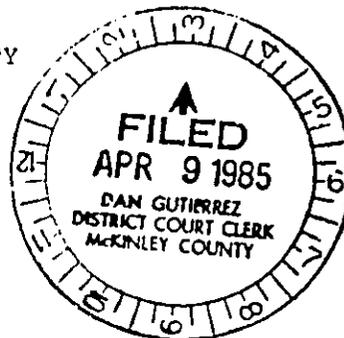
Stephen G Boyden by eb per phone call
Stephen G. Boyden *3/26/85*
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James Jay Mason by eb per phone call
James Jay Mason 3/26/85
Attorney for the City of Gallup

Eric R. Biggs
Eric R. Biggs
Special Assistant Attorney General
Counsel for the State of New
Mexico ex rel. S.E. Reynolds,
State Engineer

IN THE DISTRICT COURT OF MCKINLEY COUNTY
FOR THE STATE OF NEW MEXICO

CITY OF GALLUP, et al.,)
)
Plaintiff,)
)
vs.) No. CV-84-164
)
UNITED STATES, et al.,)
)
Defendants.)



AMENDED
ORDER ENJOINING STATE
ENGINEER AND STAYING ACTION

This matter came before the Court on certain parties' Amended Stipulation and Requests for Injunction and Stay, the terms of which are hereby incorporated in full by this reference. The Court having considered the same, and being otherwise fully advised in the premises,

IT IS FOUND that the Court has jurisdiction over the parties and the subject matter.

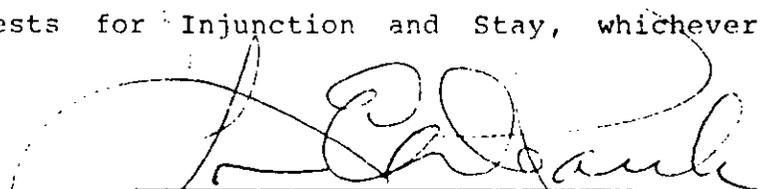
IT IS ORDERED that the State Engineer be, and he hereby is, ENJOINED from granting permits for any new appropriations for uses other than exclusively domestic ones, including livestock watering and noncommercial gardening under N.M. Stat. Ann. §72-12-1 (1978), in the area referred to as the Zuni Basin in said stipulation and described in Exhibit 2 thereto, as bounded by the Gallup, Rio Grande, and Bluewater underground water basins, the headwaters of the Little Colorado River, and the state line, until five years elapses from the date of the filing of said stipulation, or until the date of completion of the comprehensive study and hydrographic survey referred to in said

EXHIBIT

B

stipulation, whichever occurs first.

IT IS FURTHER ORDERED that this action be, and it is hereby, STAYED in its entirety until a period of five years has elapsed from the date of the filing of said Stipulation and Requests for Injunction and Stay, or until the date of completion of the comprehensive study and hydrographic survey referred to in said Stipulation and Requests for Injunction and Stay, whichever occurs first.



DISTRICT COURT

Approved as for form:

Herbert A. Becker by eb per phone call 4/1/85
William L. Lutz
United States Attorney

Herbert A. Becker
Assistant United States Attorney

Stephen G. Boyden by eb per phone call 4/5/85
Stephen G. Boyden
Attorney for the Zuni Tribe
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Eric R. Biggs
Special Assistant Attorney General
Counsel for the State of New Mexico
ex rel. S. E. Reynolds, State
Engineer

ELEVENTH JUDICIAL DISTRICT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

FILED
DISTRICT COURT
MCKINLEY COUNTY

MAR 5 9 33 AM '90

CITY OF GALLUP, et al.,

Plaintiffs

vs.

No. CV-84-164

UNITED STATES OF AMERICA,
ON ITS BEHALF AND ON BEHALF OF IT WARDS, et al.,

Defendants.

ORDER OF DISMISSAL

The Court having reviewed the file in the above entitled cause finds that the Plaintiff has failed to bring such action or proceeding to its final determination for a period of at least three (3) years after the filing of said action and that no written stipulation signed by the parties postponing final action beyond three (3) years has been filed as required by Rule 1-041E of N.M.R.C.P.

IT IS THEREFORE ORDERED that the above entitled cause be and the same is hereby dismissed with prejudice.

/s/ Joseph L. Rich

Joseph L. Rich
District Judge

Jay Mason
Herbert A. Becker

EXHIBIT

C