

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA

Plaintiff,

v.

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

Defendants.

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01cv00072-BDB/WWD (ACE)

ZUNI RIVER BASIN

**Tri-State Generation and Transmission Association, Inc.'s
Response to United States' Report and State's Proposal
For Proceeding Once The Stay Is Lifted**

Tri-State Generation and Transmission Association, Inc. (Tri-State) responds in opposition to the United States' Report dated May 31, 2001 (United States' Report) and to the State's Proposal For Proceeding Once The Stay Is Lifted served July 9, 2001 (State Report) (together sometimes "Reports") on the following grounds:

Dismissal of Tri-State Generation and Transmission Association, Inc.

1. Tri-State should be dismissed from this adjudication at the outset. Both Reports fail to provide for a procedure for dismissal of defendants improperly named. Tri-State is one of those defendants. Tri-State is the successor by merger to Plains Electric Generation and Transmission Cooperative, Inc. (Plains), which is a named defendant in this action. Tri-State's water rights are located outside the exterior boundaries of the Zuni River Basin, New Mexico as shown on the Hydrologic Map of the Zuni River Basin dated April 2001, attached to the United States' Report and

described in the Narrative Description of the Adjudication Boundary for the Zuni River Basin, New Mexico. See, Affidavit of Frederick R. Allen attached as Exhibit A hereto and incorporated herein. Adjudications do not adjudicate groundwater uses located outside of the downwardly extended vertical boundaries of the perimeter of the particular stream system subject to the adjudication, which in this case is the Zuni River Basin, and with points of diversion outside the basin involved in the adjudication. *Id.* The points of diversion and place of use for all of Tri-State's water rights are outside the Zuni River Basin. Moreover, Tri-State's water rights are the subject of adjudication in the Rio San Jose River Basin in *State v. Kerr McGee Corporation, et al.*, Nos. CB-83-190-CV and CB-83-220-CV (Consolidated). *Id.* The State's letter of April 26, 2001 by D. L. Sanders, Special Assistant Attorney General, to Charles E. O'Connell, Jr., attached to the United States' Report, confirms that "[t]here is agreement that a majority of the defendants were named in err." (p.2) Plains/Tri-State is one of those defendants wrongly named. This same letter also stated that "[t]his adjudication cannot proceed with erroneously named defendants" essentially because these defendants own no water rights within the basin and therefore will have no standing. The State's letter also emphasizes:

"The state has adopted the procedure of identifying the proper defendants from the hydrographic survey before the filing of an adjudication and the *lis pendens*. The course chosen by the US postures this adjudication without a survey, proper defendants, or a *lis pendens*."

Id. Finally, the State's letter documents that "the United States has recognized the general inaccuracy of those named." (p.3) Accordingly, Tri-State should be

dismissed, with prejudice, from this Zuni River Basin adjudication. Both Reports should provide for a procedure for its dismissal, along with any other defendants that have been improperly joined.

United States' Report

2. Tri-State opposes the United States' proposal on several grounds. First, the United States has not shown a real need or urgency for this adjudication at this time. The United States merely claims, notably without support, that "[t]he potential conflicts among existing and new water users in the basin require the United States to resume the water rights adjudication in this Court." Unsupported "potential conflicts" are far outweighed by the drawbacks described in the State's letter of April 26, 2001 attached to the United States' Report and in the State's Report. Secondly, if this adjudication does proceed, the State Engineer – not the United States – should conduct the hydrographic survey of the Zuni River Basin. Section 72-4-13, NMSA 1978 directs the State Engineer to make hydrographic surveys by providing that:

The State Engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the state, beginning with those most used for irrigation.... He is authorized to cooperate with the agencies of the United States engaged in similar surveys...and may accept and use in connection with the operations of his office the results of the agencies of the United States. (Emphasis added).

Further, NMSA 1978, Section 72-4-16 permits reports of hydrographic surveys of waters of any stream system in New Mexico or other surveys made by the State Engineer, or under his authority, or by any engineer of the United States, or any other engineer, in the opinion of the State Engineer qualified to make such a survey, to be

filed in his office and permits these surveys to be received and considered in evidence. Nonetheless, these surveys must either be made by the State Engineer or by an engineer, who the State Engineer has found qualified. In other words, the State Engineer must maintain control of the survey.¹ There is no showing that the State Engineer has found the United States' engineer qualified to make the survey in this adjudication. Moreover, the United States' proposal that its survey will be available for joint review and comment by the State does not satisfy the statutory requirement that the State Engineer shall make the hydrographic survey. The State Engineer's decision should control the preparation of the survey and assure that his standards are followed – the State Engineer should not merely be the source of review and comment. See also, *United States v. Bluewater-Toltec Irrigation District*, 580 F.Supp. 1434 (D.N.M. 1984), *aff'd*, 806 F.2d 986 (10th Cir. 1986), noting that the State Engineer may make use of all or part of a hydrographic survey “if he saw fit” prepared by the United States, but even if he does not accept the United States' survey, it still may be offered into evidence involving the general adjudication.

¹ In particular Section 72-1-16 provides:

All reports of hydrographic surveys of the waters of any stream system, or parts thereof, and other surveys heretofore or hereafter made by the state engineer, or under his authority, or by any engineer of the United States, or any other engineer, *in the opinion of the state engineer qualified to make the same, may, when made in writing and signed by the party making the same, be filed in the office of such state engineer, and the originals or certified copies thereof, made by such state engineer, shall be received and considered in evidence in the trial of all causes involving the data shown in such survey, the same as though testified to by the person making the same, subject to rebuttal, the same as in ordinary cases.* (Emphasis added)

3. The New Mexico statutory scheme mandates that the State Engineer “shall” make hydrographic surveys. NMSA 1978, §72-4-13. These statutes make clear that while an hydrographic survey prepared by a qualified engineer of the United States may be entered in evidence and may be used by the State Engineer in conducting an hydrographic survey, the State Engineer is still charged with making or remaining in control of hydrographic surveys in New Mexico. See, NMSA 1978 Sections 72-4-13, 72-4-14, 72-4-16 and 72-4-17. If the Zuni River Basin adjudication is to proceed, the State Engineer should conduct the hydrographic survey with funding by the United States through a mutually agreeable arrangement, since the United States is the plaintiff pressing for the adjudication. The United States may cooperate and assist the State Engineer in preparing the hydrographic survey. In short, the State Engineer should make the survey but with funding by the United States.

4. At this juncture, the United States’ Report proposes that only two specific areas of the Zuni River Basin should be the subject of a hydrographic survey. (U.S. Report, pp.3-5). The United States also proposes to conduct only a partial hydrographic survey by surveying these two areas. Tri-State opposes a partial survey of two areas only. Contrary to the United States’ suggestion, the hydrographic survey should be a complete hydrographic survey – not a partial hydrographic survey consisting of two areas now and the remainder of the basin at some distant, undesignated future date, if ever. Section 72-4-17 requires that the State Engineer make “a *complete* hydrographic survey of such stream system...in order to obtain *all* data necessary to the determination of the rights involved.” If any survey is to be

prepared, it should be a complete hydrographic survey prepared at one time, so that all parties are on a level playing field and equal footing in the adjudication. Assuming *arguendo* that the United States is correct that the majority of non-governmental defendants in the Zuni River Basin are concentrated in five areas, finishing the survey should not present an obstacle before proceeding with the adjudication. Again, the only ground that the United States suggests, notably without support, for a partial survey is the “potential” – not actual – conflicts among new and existing users. Such an unsupported assertion does not permit avoiding New Mexico’s statutory mandate to prepare a complete survey.

5. During the preparation of the hydrographic survey, the United States has proposed to dismiss without prejudice individual non-governmental defendants, providing the Court approves preparation of the hydrographic survey of two specific areas. Presumably the United States suggests by this dismissal that no answers or other pleadings are required until after the hydrographic survey is completed. Tri-State supports dismissal but *not* with the proviso that the United States prepare a hydrographic survey of two areas only. Dismissal should be made until the State completes the hydrographic survey. Additionally, defendants, such as Tri-State, whose water rights are not within the exterior boundaries of the Zuni River Basin, should be dismissed with prejudice at the outset.

6. The federal and Indian interest claims should also be included in the hydrographic survey, so that the hydrographic survey is complete. The United States provides no support for its suggestion that the federal claims are in many instances

based on “time-sensitive data studies.” (United States’ Report, p.5) All claimants are indispensable parties in an adjudication. *United States v. Bluewater Toltec Irrigation District*. 580 F.Supp. at 1441. This adjudication should not proceed without all parties or without a complete hydrographic survey.

7. Since the United States suggests that individual, non-governmental claimants be dismissed without prejudice, presumably the United States takes the position that the stay should not be lifted and that no pleadings or answers need be filed at this time. Tri-State agrees.

State Report

8. Tri-State recognizes that the Special Master’s Order of March 30, 2001 ordered the United States and the State to file by May 31, 2001 a proposal for proceeding once the stay entered in this case is lifted. First, Tri-State opposes lifting the stay until a complete hydrographic survey is prepared. Concomitantly, Tri-State opposes the State’s proposed schedule for lifting the stay by July 30, 2001 (now outdated by extensions but presumably lifting the stay is still proposed by the State) and requiring it and other individual non-Indian and non-governmental defendants to proceed to file pleadings directed to the United States Complaint, including pretrial motions and answers, prior to completion of the hydrographic survey. The stay should remain in effect until a complete hydrographic survey is prepared, with the exception of dismissals or motions to be filed by defendants, such as Tri-State, for their dismissal from the adjudication at the outset. Otherwise, the non-Indian and non-governmental defendants are singled out as a special class, forced to plead and litigate issues before

they are apprised of specific claims by the intervenor Zuni Tribe or other Indian interests and of the United States' claims for its beneficiaries or any other claims. The non-Indian and non-governmental defendants would also, under the State's proposed schedule, be forced to plead before they are on notice of the State's and the United States' surveyed water rights for all claimants – including the non-Indian and non-governmental defendants.

9. If the stay is lifted prior to completion of the hydrographic survey, non-Indian and non-governmental defendants would incur pleading and motion expenses at the outset without the benefit of a full and complete hydrographic survey. In Tri-State's case, it would be forced to incur expenses even though, as pointed out above, it should be dismissed with prejudice, as its water rights lie completely outside the Zuni River Basin.

10. Once the hydrographic survey is completed, the United States should file a statement of claims to water rights on behalf of its beneficiaries and serve this statement on all water claimants that are joined upon lifting the stay. Intervenors, such as the Zuni Tribe, should likewise file and serve specific statements of claims to the extent the claims of the intervenors differ from those asserted by the United States on their behalf. The Special Master can then set a schedule for filing pleadings and briefing motions directed to the United States' Complaint and other matters requiring a schedule, such as responses to statements of claims by the United States and intervenors, including as the Zuni Tribe.

11. In sum, the stay of proceedings entered by the District Court should not be lifted until the full and complete hydrographic survey is completed. This places the burden on the plaintiff and the State to determine the nature and extent of rights before non-Indian and non-governmental defendants are placed in the position of incurring time and expense to defend their rights. The stay should not be lifted now except for the express exception to permit dismissal, with prejudice, of Tri-State and any other defendants whose rights to use groundwater are outside the Zuni River Basin boundaries as disclosed by the United States' Hydrologic Map.

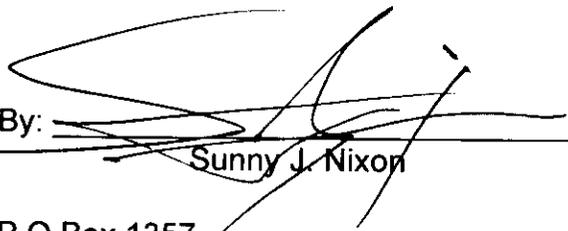
Conclusion

For the foregoing reasons, Tri-State should be dismissed with prejudice at the outset. It also opposes the United States' and State's Reports for the foregoing reasons. Tri-State submits that the stay should not be lifted now except to permit Tri-State's dismissal with prejudice and the dismissal of other defendants similarly situated whose rights to use groundwater are outside the Zuni River Basin boundaries as disclosed by the United States' Hydrologic Map. Otherwise, the stay should not be lifted until the State – with funding by the United States – completes the hydrographic survey, if the adjudication is to proceed. Tri-State further submits that the State's reasons for not proceeding set forth in its April 26, 2001 letter far outweigh the United States' assertion that the adjudication should proceed.

Respectfully submitted,

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2. I have examined the map titled "Hydrologic Map of the Zuni River Basin, NM", dated April 2001 and also the Narrative Description of the Adjudication Boundary for the Zuni River Basin, New Mexico, dated April 2001, attached to the Zuni River Basin United States' Report, and find that Tri-State owns no surface or underground water rights, the points of diversion of which or the places of use of which are within the exterior boundaries of the Zuni River Basin as shown on said map. Adjudications do not adjudicate groundwater uses located outside the downwardly extended vertical boundaries of the perimeter of the particular stream system subject to the adjudication, which in this case is the Zuni River Basin.

3. Tri-State's water rights, including their points of diversion and places of use, are located in the townships and ranges listed below:

T11N, R10W

T12N, R10W

T12N, R11W

T14N, R12W, all in NMPM.

Tri-State also has an interest in Bluewater Reservoir which is located in T12N, R12W, NMPM. These townships are located outside the exterior boundaries of the Zuni River Basin.

4. Tri-State is a party to the Bluewater water rights adjudication suit, *State ex rel. State Engineer v. Kerr McGee Corporation, et al.*, CB-83-190 & CV-83-220-CV Consolidated, Thirteenth Judicial District Court, Cibola County, New Mexico

("Bluewater Adjudication"). All of Tri-State's water rights described in paragraph 3 are included in that Bluewater Adjudication.

Frederick R. Allen

Frederick R. Allen, P.E. & P.S.

SUBSCRIBED and sworn to before me this 10 day of August, 2001.

Amanda C. Sanchez

Notary Public

My commission expires:

5-29-05

