

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

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

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CLERK OF COURT

UNITED STATES OF AMERICA, )  
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 Plaintiff, )  
 )  
 v. )  
 )  
 STATE OF NEW MEXICO, *ex rel.*, STATE )  
 ENGINEER, A & R Productions, *et al.*, )  
 )  
 Defendants. )  
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01-CV-00072-BDB/ACE

ZUNI RIVER BASIN

**ZUNI INDIAN TRIBE'S RESPONSE TO PROPOSED SCHEDULES AND PROCEDURES**

Pursuant to the Special Master's Scheduling Order of March 31, 2001, Proposed Plaintiff-Intervenor Zuni Indian Tribe submits this response to the scheduling proposals of the United States and the State of New Mexico. As discussed below, the Tribe agrees that the stay in this case should be lifted. Zuni suggests that a hybrid of the proposals presented by the State and the United States may provide the most timely and efficient resolution of this case. The Tribe endorses the proposal of the United States that it begin work on portions of the hydrographic survey. The Tribe also does not oppose the setting of a briefing schedule on motions directed to the Complaint as requested by the State, although such a schedule should be pursued simultaneously with technical work on the hydrographic survey. Zuni does not agree that the individual defendants should be dismissed. The Tribe also requests that the court rule on its Motion for Leave to Intervene once the stay in this case is lifted.

The Zuni Indian Tribe supports the United States' proposal to begin the hydrographic survey necessary to timely adjudicate the relative rights of the water users in the Zuni River basin. The only way to move this case forward is to develop the data necessary to litigate or settle the water rights claims of

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the users in the basin. The United States' proposal to complete the survey work in two of the key areas of the basin provides the State additional time to address its funding and staffing concerns that apparently limit its present ability to commit to participating in the process.<sup>1</sup> The State, however, should not be permitted to continue to shield itself indefinitely from any obligation to diligently pursue this matter. The Zuni Tribe notes that the State raises now one of the same reasons it cited to the state court nearly fifteen years ago for its inability to complete its commitment to develop the data needed in this case, *i.e.*, New Mexico's Pecos River obligations to Texas. *See* Letter to Judge DePauli from State Assistant Attorney General, January 19, 1988 (attached as Exhibit 1).<sup>2</sup> At some point, despite its ongoing budgetary demands and constraints, the State must pursue this case, and the court should so order. The United States' proposal to begin the hydrographic survey and perform the work according to the state engineer's standards is a reasonable first step.<sup>3</sup>

However, proposed Plaintiff-Intervenor Zuni opposes the proposal to dismiss the individual defendants, particularly in the absence of a plan agreed upon by both the United States and State of New Mexico to participate in and complete the hydrographic survey. Such a dismissal is inefficient, prejudicial to the interests of the Tribe, and will lead inexorably to the same kind of delay that has plagued this matter

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<sup>1</sup>According to the State's Proposal For Proceeding Once The Stay In This Case Is Lifted, at page 4, the State indicates that it undertook a hydrographic survey of the region while the matter was stayed in the earlier proceedings in state court. Although conducted more than ten years ago, it is possible that these efforts could streamline the work left to be done in this case. The State and United States should determine what work has been completed and what still needs to be done.

<sup>2</sup>Although the order dismissing the earlier state court litigation does not state with specificity the basis for concluding that the plaintiff had failed to prosecute the case, the Tribe suspects that a significant reason might be the letter from the State conceding it was not prepared to do the work it had previously committed to do.

<sup>3</sup>The Tribe suggests that if the United States and the State were to cooperate in the development and review of data in this case, such a cooperative effort may help to streamline the adjudication, with a corresponding reduction in related costs.

for more than twenty years.<sup>4</sup> The parties who have been served in this case are subject to the court's jurisdiction. Although some parties not claiming a right to water inevitably will be dropped from this suit while other water rights claimants will be added, the United States used the best available information to develop its list of defendants.<sup>5</sup> Adjustment of the list of defendants, up to the date of a final judgment, occurs in every large water rights case. The court's jurisdiction over the individuals will facilitate timely completion of the hydrographic survey, because the parties will have a forum available to address any issues or conflicts that may arise while the hydrographic survey is being developed.

Moreover, dismissal of the individual defendants may well result in duplicitous litigation, to the detriment of the Tribe (and the individuals). If the individual defendants are dismissed from the case, they will not have the ability to participate in any technical or legal issues that arise or motions that are filed during the time period in which they are not parties to the litigation.<sup>6</sup> As such, once they are brought back into the case, they cannot be bound by any rulings made without their participation. This may well result in certain issues, either technical or legal, being raised again and litigated twice, effectively providing defendants "two bites at the apple" and requiring the Tribe to litigate and relitigate on a piecemeal basis. Indeed, there are motions and requests for judicial notice already pending, and the State apparently intends

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<sup>4</sup>Dismissal of the individual defendants will have a significant substantive impact on the direction of this case. In light of its pending motion to intervene in this case and join the United States as plaintiffs, the Tribe asks the court to tread carefully in this area. Where co-plaintiffs have different positions regarding dismissal of certain defendants from an action, both views should be considered. The Tribe therefore requests that the court resolve the Tribe's status as a party-plaintiff in this case prior to making any determination about dismissal of the individual defendants.

<sup>5</sup>Although the State previously argued to the court that a hydrographic survey should be conducted prior to initiation of a general adjudication, in fact, these cases have not historically been started in that manner. The United States previously told the court that it compiled the best available land ownership and water information to develop its list of defendants in this case. This is the approach that has been used to initiate nearly all litigation to determine the relative water rights of users within a basin.

<sup>6</sup>The State clearly anticipates the filing of motions in the near future. *See* State's Proposal For Proceeding Once The Stay In This Case Is Lifted, at 7-8.

to file additional motions with the court. At a minimum, certainly, dismissal of the individuals only to bring the vast majority of them back into the case in the near future, is inefficient.

The better approach is to keep these parties in the case and pursue with diligence the hydrographic survey that will identify with certainty the water users that should remain in this case. After that work is completed, the United States will be better equipped to refine the list of defendants. In the interim, while this technical work is proceeding, the parties and the court can address any motions directed toward the Complaint that are filed, and the Tribe certainly has no objection to the State's proposal to a briefing schedule.

However, if the court is inclined to dismiss the individual defendants for a period of time, the Tribe respectfully requests that the court do so only after entering an order requiring the State and the United States to develop and complete the hydrographic survey within a specific, reasonable amount of time. The Tribe believes that dismissal of the individual defendants in the absence of a specific plan and procedure to complete the hydrographic survey will be the death knell to this litigation once again. Without an order from the court requiring the parties to move forward in the necessary data development within certain time frames, the likelihood is great that this case will once again languish. For nearly twenty years, the Tribe has attempted to protect the water resources for its homeland; it cannot afford to wait another twenty years or more until the State (or the United States) decide to move forward to have the relative rights of water users in the basin determined.

Finally, the Tribe requests that the stay in this case be lifted and that the court rule on its Motion for Leave to Intervene. As mentioned previously, the Tribe requests that such a ruling be made prior to taking any action with regard to dismissal of the individual defendants.

Respectfully submitted,

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**-Certificate of Service-**

I hereby certify that a true and correct copy of the foregoing was sent by United States mail, first class, postage pre-paid, to the following opposing counsel of record this 24<sup>th</sup> day of August, 2001:

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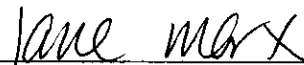
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STATE OF NEW MEXICO

STATE ENGINEER OFFICE

SANTA FE

S. E. REYNOLDS  
STATE ENGINEER

January 19, 1988

BATAAN MEMORIAL BUILDING  
STATE CAPITOL  
SANTA FE, NEW MEXICO 87503

Honorable Louis E. DePauli  
McKinley County District Court  
P.O. Box 460  
Gallup, New Mexico 87301

Re: City of Gallup v. United States, McKinley County  
No. CV-84-164

Dear Judge DePauli:

The referenced case, a general water rights adjudication of the Zuni River basin, was stayed until 1990 by your order of April 9, 1985, upon the Amended Stipulation of the parties filed the same day. In paragraph 6 of the Amended Stipulation referred to above, the United States and New Mexico agreed to make every reasonable effort to complete hydrologic studies of the resources of the area and a joint hydrographic survey of existing water uses in the area prior to April 8, 1990.

Because of the practical realities affecting statewide litigation and associated hydrographic survey work, neither the United States nor New Mexico gave an absolute commitment to meeting the above target date. Because a commitment was made to attempt to meet it, however, I have been asked to advise the Court and counsel of record of the following facts. Recent developments in Texas v. New Mexico, U.S. Supreme Court No. 65 Original, notably including the Court's decision of June 8, 1987, have required a reallocation of staff responsibilities in order to complete State Engineer Office hydrographic work in the Pecos River stream system as soon as possible. This reallocation, in conjunction with especially stringent state budgetary demands and the necessities of other current litigation, has caused most of the Zuni River hydrographic survey staff to be temporarily re-assigned to other functions. This will delay completion of the hydrographic survey of the Zuni River basin until about 1992.

This delay is not likely to significantly delay the overall litigation schedule, if the case resumes in 1990 as envisioned by your April 9, 1985 order. These cases are by their very nature

EXHIBIT

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Honorable Louis E. DePauli

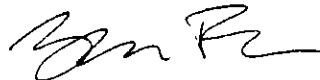
January 19, 1988

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rather lengthy. Preliminary proceedings which are not necessarily related to the hydrographic survey may take up part or all of the interim. The state remains committed to finishing Zuni River work as soon as reasonably practical consistent with other responsibilities.

Thank you for your attention.

Respectfully,



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