

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

UNITED STATES,

Plaintiff,

vs.

NO. CIV-01-0072 BB/WWD

STATE OF NEW MEXICO ENGINEER, et al.,

Defendants.

**RESPONSE BY DEFENDANT PAUL PETRANTO
TO THE REPORTS OF THE UNITED STATES AND THE STATE OF NEW MEXICO**

NOW ENTERING COURT is Defendant Paul Petranto, by and through his attorney at law, William G. Stripp, who comments as follows

INTRODUCTION

This matter has been pending for over 20 years, yet neither the United States nor the State of New Mexico know who the indispensable parties are. While both governmental entities have far greater resources than any of the other parties, and both governmental entities make claims to water rights in the Zuni River Basin, neither has acted with any diligence whatsoever to pursue those claimed rights. Furthermore, neither governmental entity has cooperated with the other, and neither has developed any realistic plan on how to proceed.

Summary of other proposals

1. United States Comments and Proposal

1. A state district court dismissed a predecessor water adjudication lawsuit due to New Mexico's failure to prosecute.

2. The US will conduct a limited hydrographic survey of two specific areas in the Zuni River Basin (neither of which is federally controlled land).

3. Following completion of the limited survey, the US and New Mexico will jointly fund and complete the remainder of the hydrographic survey.

4. The US should not have to identify its water rights claims at this time.

5. If the limited hydrographic survey is approved by the Court, the US will move to dismiss without prejudice the individual non-governmental defendants.

2. New Mexico Comments and Proposal

1. The US did not confer with New Mexico as required, and made inaccurate statements in its report.

2. New Mexico is committed to other water rights adjudications that are more urgent than the Zuni River Basin.

3. New Mexico does not have the funds or the staff to go forward with an adjudication of the water rights in the Zuni River Basin.

4. The Court should lift the stay and enter a scheduling order.

3. Ionta Comments and Proposal

1. The individual defendants should not be dismissed, unless the case itself is dismissed.

2. The US must identify and serve all Defendants within 4 months or the lawsuit shall be dismissed with prejudice.

3. No defendant shall be required to respond until 6 months after the deadline for service of all defendants.

4. The US shall provide a pro forma answer and disclosure to all defendants.

5. The US shall provide specified disclosure within 4 months.

6. The Court shall establish a central registry for filing and service of pleadings.

4. Yates Comments and Proposal

1. The United States and New Mexico did not meaningfully confer.

2. The proposal of New Mexico is totally unacceptable to Yates, and the United States proposal should be modified.

3. The US should commit to undertake and complete a hydrographic survey of the entire Zuni River Basin.

4. Upon completion of the hydrographic survey the US should serve a statement of claims to water rights on behalf of the US and its beneficiaries.

5. Upon completion of the hydrographic survey, the US should submit offers of judgment to each identified water rights claimant.

6. Yates defendants would prefer to remain in the case as inactive defendants until the hydrographic survey is completed and offers of judgment served.

7. Lifting the stay would be premature at this time.

5. Tri-State Generation Comments and Proposal

1. Tri-State's water rights are located outside the exterior boundaries of the Zuni River Basin, and therefore any complaint against Tri-State should be dismissed with prejudice.

2. Tri-State opposes the United States proposal, because (1) there is no real need or urgency for adjudication at this time; (2) as a matter of law, the State Engineer, and not the US, must either conduct or maintain control of the hydrographic survey; (3) the US should fund the survey which the State Engineer conducts; (4) a full hydrographic survey should be conducted, rather than a partial survey as proposed by the US; (5) the dismissal of non-governmental defendants is acceptable, but not if conditioned on a partial hydrographic survey; (6) federal and Indian interest claims should be included in the hydrographic survey. However, Tri-State agrees that the stay should not be lifted.

3. Tri-State opposes New Mexico's proposal primarily because, if the stay is lifted before a complete hydrographic survey is prepared, the non-governmental defendants would be forced to plead prematurely.

4. Tr-State believes that once the hydrographic survey is completed, the US should file a statement of claims to water rights on behalf of its beneficiaries and serve this statement on all water claimants.

5. Once this is accomplished, the Special Master can set a schedule for filing pleadings.

6. New Mexico Commissioner of Public Land Comments and Proposal

1. The US and New Mexico should be ordered to meet and confer to propose a scheduling Order that meets the Special Master's Order.

2. The US should be required to pay for any hydrographic survey.

3. Motions to dismiss must be briefed and decided before any hydrographic survey is prepared.

4. If the matter is not dismissed, a scheduling framework is proposed.

5. Non-governmental defendants should be allowed to withdraw if they so choose, rather than being dismissed.

6. The Commissioner of Public Lands should also be allowed to withdraw.

Petranto's Comments and Proposal

1. The Federal Rules of Civil Procedure apply to this proceeding, and cannot be waived or overridden by either the District Court or the Special Master.¹ See United States v. Real Property Located at Incline Village, 47 F.3d 1511 (9th Cir. 1995):

“Federal Rule of Civil Procedure 83 permits the district courts to promulgate local rules governing practice and procedure, so long as the rules do not conflict with the Federal Rules.”

2. In New Mexico, claimants of water rights are necessary and indispensable parties to a water rights adjudication. State ex rel. Reynolds v. W.S. Ranch Co. 69 N.M. 169, 364 P.2d 1036 (1961).

3. A motion to dismiss before answering may be made on the ground of failure to join a party under Rule 19. FRCP 12(b)(7).

4. In Zuni Tribe and United States of America v. City of Gallup, State of New Mexico, et al., CIV-82-1135M, the United States District Court for the District of New Mexico ruled, on December 21, 1982, that the matter could not proceed as a class action, and, if the Plaintiffs desired to proceed, then they needed to adjudicate the rights of all water claimants.

¹It is clear to Petranto's counsel at this point that one of the reasons why water rights adjudications drag on for so long is that the participants apparently believe that they do not have to follow the Federal Rules of Civil Procedure. However, there is no authority that allows participants in water rights adjudications to “opt out” of the Federal Rules.

5. Despite being aware for almost 20 years that they cannot proceed with a water rights adjudication unless they identify and bring in all claimants of water rights in the Zuni River Basin (indispensable parties), the United States is not even close to determining who the indispensable parties are.

6. On offers of proof, the map attached to the United States' Report shows that it has not done its research prior to filing its lawsuit. Footnote 1 on page 3 of the report states: "The United States is of the understanding that a majority of the non-government defendants in the Zuni River basin are concentrated in five specific areas." The United States understanding is "dead" wrong. Area 2 on the map, which includes the "Muerto" and is comprised of 16 sections, is very sparsely populated. Similarly, Areas 1, 4 and 5 are also sparsely populated. Area 3, which includes the unincorporated town of Ramah, is the only one of the five areas that has what might be called a "population".

7. The United States wants to proceed, but is unable to proceed under the Federal Rules, because it is unprepared and has not identified the indispensable parties. New Mexico admits that it is unprepared to proceed.

8. The United States' proposal to perform a limited hydrographic survey of two areas of the basin will not work. Unless all of the indispensable parties are joined and ordered by this Court to participate in a hydrographic survey, the United States is going

to get minimal cooperation and a great deal of resistance and open hostility from the local landowners to any attempt to conduct such a survey. The United States has “poisoned the well” regarding any cooperation that it might have hoped to obtain by stating in its complaint: “The Defendants’ use of surface and groundwater in the Zuni River basin in New Mexico constitutes an unlawful interference with the Plaintiffs’ right to use of that water.”

9. Rather than conducting a limited hydrographic survey of non-governmental areas, the United States should conduct a hydrographic survey of the land that the United States claims water rights to, including the national monuments, the national forest, the Indian reservations, and any other federally controlled land. First of all, the United States should have conducted such a survey prior to filing its lawsuit. Since the United States is claiming that it has water rights that are superior to all other water rights in the area, it was required by Rule 11², under penalty of sanctions, to properly investigate its claims before filing and serving its complaint. In conducting such a survey, the United States would be prepared to immediately disclose and identify what water rights it is claiming, which it is required to do under Rule 26(a)(1)-(4).

²Rule 11(b)(3) states in relevant part: “By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading...an attorney...is certifying that to the best of the person’s knowledge, information and belief, **formed after an inquiry reasonable under the circumstances**...the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery...”

10. After conducting a hydrographic survey of federally controlled land, the United States might learn that there is no urgent need for a water rights adjudication in the Zuni River Basin. However, if the United States should conclude that there is such a need, then it must make diligent efforts to properly identify all indispensable parties prior to filing a complaint. Taking any action until all indispensable parties are joined is a waste of everyone's time and resources. For example, while Petranto moved to revoke the reference to the Special Master, and had his motion denied, each and every indispensable party who is joined in this matter will also have a right to file such a motion. Until all indispensable parties are joined and this case is at issue, it is absurd to file a scheduling order and to have to rule on motions on a piecemeal basis.

11. The Manual of Complex Litigation provides guidance on how to proceed after the United States conducts a hydrographic survey on the land under federal control, identifies the indispensable parties, and files and serves a proper complaint.

CONCLUSION

This matter should be dismissed by order stating that the United States cannot file another complaint until it has conducted a hydrographic survey of the land under its control, identified the indispensable parties to the proceeding, and is prepared to file a proper complaint and proceed in accordance with the Federal Rules of Civil Procedure, including the provisions in Rule 26 regarding Initial Disclosure.

Date: August 24, 2001

Respectfully submitted,
----signed electronically-----

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CERTIFICATE OF MAILING

This is to certify that this pleading was served by mail on counsel of record or parties pro per.

----signed electronically-----

WILLIAM G. STRIPP
ATTORNEY FOR DEFENDANT PAUL PETRANTO