

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

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

NO. CIV-01-00072-BB/WWD ACE

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

ZUNI RIVER ADJUDICATION

Defendants.

**RESPONSE OF THE SALT RIVER PROJECT AGRICULTURAL  
IMPROVEMENT AND POWER DISTRICT TO THE REPORTS  
OF THE UNITED STATES AND THE STATE OF NEW MEXICO**

The Salt River Project Agricultural Improvement and Power District ("SRP"), through its undersigned attorneys, submits this Response to the Reports filed pursuant to the Special Master's order dated March 30, 2001 by the United States and the State of New Mexico. The Special Master's Order directs the United States and the State of New Mexico to confer on a proposed procedural and scheduling order for proceeding with this Adjudication. Instead of presenting an agreement, these reports present the opposing viewpoints of the State of New Mexico and the United States as to how this case should move forward. Unfortunately, neither Report has presented a viable option that addresses the majority of the Defendants' concerns. In fairness to all named and potential parties, the following steps should be taken:

1. Define adjudication boundaries;
2. Define Plaintiff's and Intervenor's claims;
3. Adjudicate Federal claims first;
4. Produce any hydrographic survey report ("HSR") with the full cooperation of the State Engineer; and
5. Proceed in accordance with the State of New Mexico's resource constraints.

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**A. The Boundaries of the Adjudication must be Defined.**

The Zuni River Adjudication cannot move forward until the boundaries of the basin and this Adjudication have been officially resolved. Until that time, the named and potential defendants have no way to determine if they are a proper party.

The Complaint of the United States seeks a declaratory judgment to establish the priority and extent of the United States' rights and the Defendants' rights in "the surface water and groundwater in the Zuni River basin in New Mexico." Complaint at 15. In its Complaint, the United States broadly describes the Zuni River basin by geographical boundaries, stating: "The Zuni River is bounded on the north by the Puerco River watershed, on the east by the Continental Divide, and on the south by the headwaters of the Little Colorado River." *Id.* at 18. In addition, the United States declares that the groundwater supplies from which it depends are derived primarily from the San Andres-Glorieta aquifer. *Id.* The boundaries of the aquifer, however, are not defined. Similarly, the Complaint does not explain if the reference to that aquifer is meant to bring the entire San Andres-Glorieta aquifer within the jurisdiction of this Adjudication or just that portion covered by the surface water basin.

In submitting its Report, the United States also submitted a map of the Zuni River basin. The Report and its map fail to delineate, however, the extent to which they encompass groundwater basins. Presumably, the map boundaries continue vertically downward into the earth. In that case, only those water users with surface water diversions or groundwater withdrawal points within the boundaries of the map are proper parties. For these reasons, before the adjudication can continue, the United States should

make a clear statement adopting its map as the official boundaries of the adjudication for surface water and groundwater.

**B. The United States and the Intervenors Should Submit Statements of Claim Before the Adjudication Continues.**

The United States is the Plaintiff in this action; its job is to present its claims, it has the burden of proof and the burden of going forward. If the United States is not ready to present its claims, it should not have filed this litigation. Any Intervenors, likewise, have the burden of presenting their claims. Nevertheless, without presenting any claims for water, the United States argues that the named Defendants “are all persons or entities claiming rights or interests in the use of the surface and groundwaters waters of the Zuni River basin in New Mexico... adverse to and in violation of the rights of the Plaintiff. The Defendants’ use of surface and groundwater in the Zuni River basin in New Mexico constitutes an unlawful interference with the Plaintiff’s right to the use of that water.” Complaint at 17. The Defendants cannot be expected to litigate in a vacuum; to defend themselves against claims that have not, as yet, been made known and which, for all the Defendants or the Court knows, do not even exist. To do so would impermissibly shift the burden of proof to the Defendants.

The United States has argued that it should not have to proceed by submitting its water rights claims because the data is “time-sensitive.”<sup>1</sup> No reason is given as to why this data is time-sensitive. According to the United States Report, it contracted to perform in the 1980s a HSR of Indian water claims in the basin. Presumably, that

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<sup>1</sup> The United States has apparently argued, however, that the Adjudication itself must proceed without delay because this same unidentified data is time-sensitive. Letter from D.L. Sanders to Charles E. O’Connell, Jr., dated April 26, 2001 at 3 (attached to United States Report).

information still exists, and could be updated at this time. The Defendants cannot determine, in any logical manner, the extent to which their rights may be adverse to or interfere with Federal claims until those claims are known. Until these Federal claims are identified, all defendants are forced to expend time and resources in this litigation to protect their state water rights against the unpredictable, unquantified threat of a Federal interference claim. This is true even though the extent and nature of the Federal claims may be such that, if known to the Defendants, would not require the Defendants to do anything to protect their rights. Once the Federal claims are identified, however, the Defendants can evaluate their stake in this Adjudication with real facts, and determine the resources necessary to defend their claims.

**C. The Adjudication of Federal Claims Should Proceed First.**

Instead of adjudicating its own claims, and that of its beneficiaries, the United States proposes that this Adjudication proceed by quantifying and litigating the majority of the non-Federal water rights. U.S. Report at 3-5. The claims of the United States, the Plaintiff in this action, would not be adjudicated for many years, through a process and with funding that is yet to be determined. To move the adjudication of non-Federal claims forward, the United States is willing to fund and conduct HSRs for two unidentified areas of the five areas noted on its map. *Id.* These funds should be used, instead, to quantify and adjudicate the Federal claims to water.

The United States has hypothesized that all Defendants are adverse to or interfering with Federal water rights. Complaint at 15. The United States also claims that its water rights “in most instances are prior and paramount to other water rights in the Zuni River basin in New Mexico.” *Id.* at 16. Of course, none of these claims can be

proven until the Federal claims to water are adjudicated. The United States is apparently forging ahead with this litigation because the “potential conflicts among existing and new water users in the basin require the United States to resume the water rights adjudication in this Court.” U.S. Report at 3. Yet, these potential conflicts cannot be identified, much less resolved, until the Federal claims are quantified in this Adjudication.

If the United States truly stands ready, with funds and determination, to move this adjudication forward, then it should use its resources to address its stated goals. By identifying and litigating Federal water rights, this Court will establish the quantity and priority date for each Federal claim. Only then can the United States and the other parties determine which state water claims pose the greatest threat to Federal water rights. Without that information, the United States will be forced to litigate all state-law claims with equal zeal. Moreover, if the Defendants’ state water rights are adjudicated before the Federal claims, their expectation of receiving a specific amount of water will remain at risk, subject to the United States’ undefined priority claim. For these reasons, the most efficient way to proceed with this litigation is with the adjudication of all Federal water claims.

**D. Any HSR Should be Conducted in Cooperation with the State Engineer.**

The United States has proposed that it fund and conduct two HSRs that address non-Federal water rights. U.S. Report at 3. The United States proposes that the court adopt its HSRs to litigate the majority of the state-law based water rights. New Mexico law, however, does not authorize such a scheme. Under New Mexico law, the “state engineer shall make hydrographic surveys and investigations of each stream system and source of water supply in the state... for the determination, development and adjudication

of water supply of the state.” N.M. Stat. Ann. §72-4-13 (emphasis added). The State Engineer may cooperate with the United States in performing the HSR or even “accept and use in connection with the operations of [its] office the results of the agencies of the United States.” Id. But any cooperation with the United States or acceptance of its HSR results is discretionary. See id. In this way, the State Engineer can fulfill his duty to provide a fair representation of water rights while reducing the expense and personnel hours usually necessary to produce an HSR. The United States, for its part, may use its resources to move an adjudication forward.

The United States proposal to conduct two HSRs in the Zuni River Adjudication does not provide for cooperation by the State Engineer, or require his acceptance of the results. The United States merely gives the State Engineer the power to comment on the HSRs, but makes no prediction as to how or if it would incorporate those comments. As authority for its ability to side-step any meaningful review by the State, the United States cites N.M. § 72-4-16 for the proposition that its HSRs may be received into evidence. It is true that the United States may offer an HSR as evidence in an adjudication, even without the State Engineer’s cooperation or acceptance. United States v. Bluewater-Toltec Irrigation Dist., 580 F. Supp. 1434, 1445 (D.N.M. 1984), aff’d 806 F.2d 986 (10<sup>th</sup> Cir. 1986). But this offering of evidence by the United States does not negate the duty of the State Engineer to provide the court with an HSR to adjudicate water rights in the basin. Nor does it mean that this Court should use any United States HSR as a basis for litigating claims. If the United States intends to proceed, it must cooperate with the State Engineer.

**E. Response to the State of New Mexico Report.**

The State of New Mexico proposes that the stay be lifted so that motions directed towards the United States' Complaint may be filed. Under this proposal, the Defendants would be forced to litigate all issues in the abstract—without knowledge of their own stake in the litigation. SRP opposes litigating issues surrounding the Complaint before the United States and the Intervenors have submitted their statements of claim, with one exception. That exception would allow a process, once the boundaries of the Zuni River basin Adjudication have been determined, for improperly named Defendants to be dismissed from this Adjudication.

The State of New Mexico also reports that this adjudication is ill-timed, and not a priority for the State. N.M. Report at 5-7. The State claims that it lacks the resources to properly continue a Zuni River Adjudication at this time. As evidenced by its numerous commitments to other water adjudications and its Adjudication Plan, the State of New Mexico is diligently adjudicating the waters of this State. The State should be allowed, within reason, to name priorities and dedicate its resources in accordance with those priorities. The schedule for this Adjudication should be sensitive to the State's prior commitments.

**CONCLUSION**

This Adjudication should proceed in accordance with the State of New Mexico's resource constraints. The first step should be to define the boundaries of the adjudication so that only proper parties remain in the litigation. Next, the United States and the Intervenors should submit statements of claim for their water rights and those of their beneficiaries. This action would allow the Defendants to evaluate their own water claims

and determine their stake in this litigation. Third, in preparing for litigation, any HSR should be conducted with the full cooperation of the State Engineer. Finally, the Federal water rights of the United States and the Intervenor should be adjudicated. The Defendants cannot defend their own water claims in any meaningful way if they do not know how the Federal water rights have been quantified.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: 

Mark A. Smith

Tom Outler

Post Office Box 1888

Albuquerque, New Mexico 87103

Telephone: (505) 765-5900

Facsimile: (505) 768-7395

-and-

SALMON, LEWIS & WELDON, P.L.C.

John B. Weldon, Jr.

M. Byron Lewis

Mark A. McGinnis

2850 E. Camelback Rd., Suite 200

Phoenix, Arizona 85016

Telephone: (602) 801-9060

Facsimile: (602) 801-9070

CERTIFICATE OF SERVICE

I hereby certify that I have caused to be mailed a true and correct copy of the foregoing pleading to the following counsel of record on August 24, 2001:

Raymond Hamilton, Esq.  
U.S. Attorney's Office  
District of New Mexico  
P. O. Box 607  
Albuquerque, NM 87103

Charles E. O'Connell, Jr., Esq.  
Environment & Natural Resources  
Division  
United States Department of Justice  
601 D Street, N.W., Rm. 3507  
Washington, DC 20004

Mary Ann Joca, Esq.  
U.S. Department of Agriculture  
517 Gold Ave., SW, #4017  
Albuquerque, NM 87102

Steven L. Bunch, Esq.  
N.M. Highway & Transportation Dept.  
P. O. Box 1149  
Santa Fe, NM 87504-1149

Edward C. Bagley, Esq.  
N.M. Attorney General's Office  
Special Assistant  
P. O. Box 1148  
Santa Fe, NM 87504-1148

D. L. Sanders, Esq.  
State of New Mexico  
Engineer's Office  
P. O. Box 25102  
Santa Fe, NM 87504-5012

Mr. Albert O. Lebeck, Jr.  
P. O. Drawer 38  
Gallup, NM 87305

Mr. David R. Lebeck  
P. O. Drawer 38  
Gallup, NM 87305

Kenneth J. Cassutt, Esq.  
Cassutt, Hays & Friedman, P.A.  
530-B Harkle Road  
Santa Fe, NM 87505

Ms. Sandra S. Drullinger  
818 E. Maple Street  
Hoopeston, IL 60942

David R. Gardner, Esq.  
P. O. Box 62  
Bernalillo, NM 87004

Jeffrey A. Dahl, Esq.  
Lamb, Metzgar, Lines & Dahl, P.A.  
P. O. Box 987  
Albuquerque, NM 87103-987

Ms. Kimberly J. Gugliotta  
158 W. William Casey Street  
Corona, AZ 85641

Mr. Gerald F. McBride  
Ms. Myrrl W. McBride  
2725 Aliso Drive, N.E.  
Albuquerque, NM 87110

Mr. Ted Brodrick  
P. O. Box 219  
Ramah, NM 87321

Tessa T. Davidson, Esq.  
Swaim, Schrandt & Davidson, P.C.  
4830 Juan Tabo, N.E., #F  
Albuquerque, NM 87111

Bruce Boynton, III, Esq.  
P. O. Box 1239  
Grants, NM 87020

William G. Stripp, Esq.  
P. O. Box 159  
Ramah, NM 87321

Robert W. Ionta, Esq.  
McKim, Head & Ionta  
P. O. Box 1059  
Gallup, NM 87305

R. Bruce Frederick, Esq.  
N.M. Attorney General's Office  
Special Assistant  
P. O. Box 1148  
Santa Fe, NM 87504-1148

Stephen G. Hughes, Esq.  
N.M. State Lane Office  
310 Old Santa Fe Trail  
Santa Fe, NM 87501

Mr. Louis E. DePauli, Sr.  
1610 Redrock Drive  
Gallup, NM 87301

Ernest L. Carroll, Esq.  
Losee, Carson, Haas & Carroll  
P. O. Box 1720  
Artesia, NM 88211-1720

Neil C. Stillinger, Esq.  
P. O. Box 8378  
Santa Fe, NM 87504

Ms. Ann Hambleton Beardsley  
HC 61 Box 747  
Ramah, NM 87321

Sunny J. Nixon, Esq.  
Rodey, Dickason, Sloan, Akin & Robb,  
P.A.  
P. O. Box 1357  
Santa Fe, NM 87504-1357

Dorothy C. Sanchez, Esq.  
715 Tijeras, N.W.  
Albuquerque, NM 87102

Stephen P. Shadle, Esq.  
Westover, Shadle, Carter & Walsma,  
PLC  
2260 S. Fourth Ave., #2000  
Yuma, AZ 85364

Randolph Barnhouse, Esq.  
Rosebrough & Barnhouse, P.C.  
P. O. Box 1744  
Gallup, NM 87305-1744

Vickie L. Gabin, Esq.  
Special Master  
United States District Court for the  
District of New Mexico  
P. O. Box 2384  
Santa Fe, NM 87504-2384

Mark H. Shaw, Esq.  
3733 Eubank, NE  
Albuquerque, NM 87111

Deborah S. Gille, Esq.  
Stephen R. Nelson, Esq.  
Eastham Johnson Monnheimer & Jontz,  
PC  
P.O. Box 1276  
Albuquerque, NM 87103-1276

Stephen R. Nelson, Esq.  
Eastham Johnson Monnheimer & Jontz,  
PC  
PO Box 1276 Albuquerque, NM  
87103-1276

Larry D. Beall, Esq.  
Beall & Biehler  
6715 Academy Road NE  
Albuquerque, NM 87109

David Candelaria  
12000 Ice Caves Rd.  
Grants, NM 87020

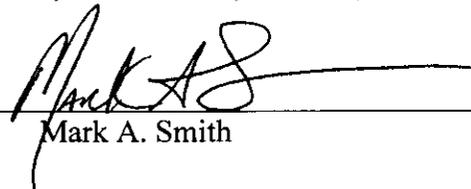
Jane Marx, Esq.  
Williams, Janov & Cooney, PC  
2501 Rio Grande Blvd, NW  
Albuquerque, NM 87104-3223

Susan M. Williams, Esq.  
Williams, Janov & Cooney, PC  
2501 Rio Grande Blvd, NW  
Albuquerque, NM 87104-3223

Darcy S. Bushnell, Esq.  
US District Court  
District of New Mexico  
333 Lomas Blvd, NW  
Albuquerque, NM 87102-2272

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By: \_\_\_\_\_



Mark A. Smith