

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

UNITED STATES OF AMERICA)	
and)	07cv00681-BB
ZUNI INDIAN TRIBE)	
Plaintiffs,)	ZUNI RIVER BASIN
)	ADJUDICATION
-v-)	
)	
STATE OF NEW MEXICO, ex rel. State)	Subproceeding 1
ENGINEER, et al.)	Zuni Indian Claims
Defendants)	
_____)	

STATE OF NEW MEXICO’S ANSWER TO UNITED STATES’ SUBPROCEEDING COMPLAINT ON BEHALF OF THE ZUNI INDIAN TRIBE AND ITS ALLOTTEES

The State of New Mexico *ex rel.* State Engineer (“State”) answers the United States of America’s May 11, 2007 Subproceeding Complaint (No. 1125), (“Complaint”) as follows:

1. The State admits that the Zuni Indian Tribe is a federally recognized Indian tribe. The State is without knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations set forth in paragraph 1 of the Complaint.
2. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph 2 of the Complaint.
3. The allegations of paragraph 3 of the Complaint appear to be solely assertions of the state of the law rather than factual assertions and as such require no response; however, the State asserts that aboriginal title to lands owned by the Zuni Tribe has been extinguished. Insofar as the allegations of paragraph 3 may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth.

4. The allegations of paragraph 4 of the Complaint contain assertions of the state of the law rather than factual assertions and these require no response; however, the State specifically denies that the Tribe enjoys any “prior and paramount” water right under federal or state law. As to those assertions of fact about the rights of the Tribe under Spanish and Mexico law, the State denies each and every element of the same.

5. The allegations of paragraph 5 of the Complaint appear to be solely assertions of the state of the law rather than factual assertions and as such require no response; however, the State specifically denies that any water rights the Tribe may have under federal or state law automatically, or “necessarily” include a right to divert groundwater. See Affirmative Defenses, below.

6. The State is without knowledge or information sufficient to form a belief as to the truth of the factual allegations contained in paragraph 6 of the Complaint. The allegations of the third sentence of the paragraph appear to contain assertions of the state of the law rather than factual assertions and as such require no response. Insofar as these allegations may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth.

7. The allegations of paragraph 7 of the Complaint appear to be solely assertions of the state of the law and proffered legal authority rather than factual assertions and as such require no response. Insofar as the allegations may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth.

8. The statements of paragraph 8 of the Complaint appear generally to be statements of the nature of the United States' claims and as such require no response. Insofar as the allegations may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth. Other allegations of paragraph 8 of the Complaint appear to be solely assertions of the state of the law and proffered legal authority rather than factual assertions and as such require no response; however, the State specifically asserts: 1) that the priority of any of the Tribe's water rights, except for federal reserved water rights, cannot be earlier than the date of first beneficial use; and 2) that for federal reserved water rights, the priority is the date of reservation. See Affirmative Defenses, below.

9. The allegations of paragraph 9 of the Complaint appear to be solely explanations of the form of presentation of the United States' claims and legal argument, and those require no response; however, the State specifically denies the United States' assertion that after the Tribe's water rights have been quantified, they "may be used for any purpose," as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others, and the post-adjudication administrative scheme. Insofar as any allegations in this paragraph may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth.

10. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 10 of the Complaint ("Religious and Ceremonial Uses of Water."). The second sentence of the paragraph appears to be solely an explanation of the United States' claims and as such requires no response. The third

sentence appears to be exclusively a statement of the legal nature of the United States' claim and as such requires no response; however, as in paragraph 9 above, the State specifically denies the United States' assertion that the Tribe may use “all sources and quantities of water for religious and ceremonial purposes,” as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others and the post-adjudication administrative scheme.

11. The allegations of paragraphs 11, 12, and 13 of the Complaint (under header “Definitions and Explanation of References”) appear to be solely explanations of the form of presentation of the United States' claims and require no response.

12. The State is without knowledge or information sufficient to form a belief as to the truth of the allegations of the first sentence of paragraph 14 of the Complaint (under header “Impoundments (Other Than Reservoirs”). The second and third sentences of the paragraph appear to be solely statements of the legal nature of the United States' claims and as such require no response. The State specifically asserts, however, that: 1) the elements of the Tribe's water rights, if any, associated with these impoundments will depend on the nature of the right adjudicated; and 2) a federal reserved right does not include the unqualified right to increase uses or create new uses as alleged.

13. The State is without knowledge or information sufficient to form a belief as to the allegations of the first sentence of paragraph 15 of the Complaint (under header “Reservoirs”). The allegations of the second and third sentences of the paragraph appear to be solely statements of the legal nature of the United States' claims and as such require no response. The State specifically asserts, however, that: 1) the elements of the Tribe's water rights, if any,

associated with these reservoirs will depend on the nature of the right adjudicated; and 2) a federal reserved right does not include the unqualified right to expand reservoirs or create new reservoirs as alleged.

14. The State is without knowledge or information sufficient to form a belief as to the allegations of the first two sentences of paragraph 16 of the Complaint (under header “Wells and Springs”). The third sentence of the paragraph appears to be solely a statement of the legal nature of the United States' claims and as such require no response; the State specifically denies, however, that a federal reserved right includes the unqualified right to establish new points of diversion as alleged, as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others and the post-adjudication administrative scheme.

15. The State is without knowledge or information sufficient to form a belief as to any factual allegations in paragraph 17 of the Complaint. The other allegations appear to be solely explanations of the presentation of the United States' claims and as such require no response.

16. The allegations of paragraph 18 of the Complaint appear to be solely summary quantifications and statements of the legal nature of the United States' claims and as such require no response; see, however, Affirmative Defenses, below. Insofar as the allegations of this paragraph may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth.

17. The allegations of the first sentence of paragraph 19 of the Complaint appear

to be solely summary quantifications and statements of the legal nature of the United States' claims and as such require no response. Insofar as they may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth. The third sentence of the paragraph appears to be solely a statement of the legal nature of the United States' claims and as such require no response; the State specifically denies, however, that a federal reserved right includes the unqualified right to manipulate usages as alleged, as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others and the post-adjudication administrative scheme.

18. The State is without knowledge or information sufficient to form a belief as to the allegations of the first sentence of paragraph 20 of the Complaint (under header "Wells"). The second and third sentences of the paragraph appear to be solely statements of the legal nature of the United States' claims and as such require no response; the State specifically denies, however, that any water right that may be associated with these wells includes the right to change the purpose of use in the "sole discretion" of the Tribe, as alleged, as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others and the post-adjudication administrative scheme. In addition, the State specifically denies that a federal reserved right includes the unqualified right to create new points of diversion as alleged, as this will also depend on the nature of the right adjudicated, the type of use proposed, possible harm to others and the post-adjudication administrative scheme.

19. The State is without knowledge or information sufficient to form a belief as to the factual allegations of paragraph 21 of the Complaint (under header "Past and Present

Supplemental Irrigation Wells”). The remaining allegations of the paragraph appear to be solely statements of the nature of the United States' claims and as such require no response.

20. The State is without knowledge or information sufficient to form a belief as to the factual allegations of the first sentence of paragraph 22 of the Complaint (under header “Springs”). The remaining allegations of the paragraph appear to be solely statements of the legal nature of the United States' claims and as such require no response; the State specifically denies, however, that any water right that may be associated with these springs includes the right to change the purpose of use in the “sole discretion” of the Tribe, as alleged, as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others and the post-adjudication administrative scheme.

21. The State is without knowledge or information sufficient to form a belief as to the factual allegations of the first and second sentences of paragraph 23 of the Complaint (under headers “Irrigation by Means of Permanent Works” and “Past and Present Surface Diversions”). The remaining allegations of the paragraph appear to be solely explanations of the United States' claims and as such require no response, but insofar as they may be interpreted as assertions of fact material to any claim, the State denies each and every element of the same.

22. The allegations of paragraph 24 of the Complaint (under header “Practically Irrigable Acreage”) appear to be solely summary quantifications and explanations of the nature of the United States' claims and as such require no response; see, however, Affirmative Defenses, below. In addition, the State specifically denies that the claimed acreage can be practicably irrigated. Insofar as any of the allegations of his paragraph may be interpreted as

assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth.

23. The State is without knowledge or information sufficient to form a belief as to the factual allegations of the second sentence of paragraph 25 of the Complaint (under header “Irrigation by Means of Seasonal or Temporary Works”). The third, fourth and fifth sentences of the paragraph appear to be solely explanations of the United States' claims and as such require no response. The allegations of the first sentence of the paragraph appear to be solely statements as to the legal nature of the United States' claims and require no response; the State denies, however, that any federal or state water right can be recognized for such uses.

24. The allegations of paragraph 26 of the Complaint (under header “Special Claims for Zuni Allotments Outside the Exterior Boundaries of the Zuni Reservation”) appear to be solely summary quantifications and statements of the legal nature of the United States' claims and as such require no response. Insofar as they may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth. See, however, Affirmative Defenses, below.

25. The allegations of paragraph 27 of the Complaint appear to be solely summary quantifications and statements of the legal nature of the United States' claims and as such require no response. Insofar as they may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth. See, however, Affirmative Defenses, below.

26. The allegations of paragraph 28 of the Complaint appear to be solely

summary quantifications and statements of the legal nature of the United States' claims and as such require no response. Insofar as they may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth. See, however, Affirmative Defenses, below.

27. The allegations of paragraph 29 of the Complaint appear to be solely summary quantifications and statements of the legal nature of the United States' claims and as such require no response. Insofar as they may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth. See, however, Affirmative Defenses, below.

28. The allegations of paragraph 30 of the Complaint appear to be solely summary quantifications and statements of the legal nature of the United States' claims and as such require no response. Insofar as they may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth. See, however, Affirmative Defenses, below.

29. The allegations of paragraph 31 of the Complaint appear to be solely summary quantifications and statements of the legal nature of the United States' claims and as such require no response. Insofar as they may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth. See, however, Affirmative Defenses, below.

First Affirmative Defense

Pursuant to the Treaty of Guadalupe Hidalgo, the rights of the Zuni Indian Tribe, under federal law, to divert and use the waters of the Zuni River Basin on lands owned by the Tribe on the date of accession of American sovereignty, are limited to those rights that were vested under Mexican Law as of May 13, 1846.

Second Affirmative Defense

The rights of the Zuni Indian Tribe, under federal law, to divert and use the waters of the Zuni River Basin on lands owned by the Tribe on the date of accession of American sovereignty, do not include the right to increase its diversion and use of water from the Zuni River Basin in excess of the maximum annual quantity of water lawfully diverted and used by the Tribe prior to May 13, 1846.

Third Affirmative Defense

The rights of the Zuni Indian Tribe, under federal law, to divert and use the waters of the Zuni River Basin for irrigation purposes on lands owned by the Tribe on the date of accession of American sovereignty, cannot exceed the maximum annual quantity of water lawfully diverted and used by the Tribe to irrigate those tribal lands actually irrigated between May 13, 1846, and June 7, 1924.

Fourth Affirmative Defense

The rights of the Zuni Indian Tribe, under federal law, to divert and use the waters of the

Zuni River Basin for domestic, livestock watering, or any other non-irrigation purpose on lands owned by the Tribe on the date of accession of American sovereignty, cannot exceed the maximum annual quantity of water lawfully diverted and used by the Pueblo for such purposes between May 13, 1846, and June 7, 1924.

Fifth Affirmative Defense

The rights of the Zuni Indian Tribe to divert and use the waters of the Zuni River Basin do not include the right to divert and use groundwater, except to the extent that the Pueblo has established such a right by the lawful diversion and use of groundwater under the laws of Mexico or the Territory or State of New Mexico.

Sixth Affirmative Defense

Any diversion and use of water by the Zuni Indian Tribe initiated after May 13, 1846, in order to be lawful, must have been pursuant to the laws of the Territory or State of New Mexico, including specifically requirements under Territorial or State law to obtain a permit from the Territorial or State Engineer for the diversion and use of surface water after March 19, 1907, and requirements under State law to obtain a permit from the State Engineer for the diversion and use of groundwater within the Gallup Underground Water Basin after March 14, 1994.

Seventh Affirmative Defense

Zuni Indian Tribe claims to rights to divert and use the waters of the Zuni River Basin may be barred or limited by the Pueblo Lands Act of 1924 and the 1933 Act, and by the decisions of the Indian Claims Commission and Court of Claims.

Eighth Affirmative Defense

Any rights, other than federal reserved rights, the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin are limited by the requirement of prior actual beneficial use.

Ninth Affirmative Defense

Any federal reserved rights the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin are limited to uses in such manners and quantities as are necessary to accomplish the primary purpose of the reservation.

Tenth Affirmative Defense

Any federal reserved rights the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin are limited to waters unappropriated on the date of the reservation, and carry a priority which is the date of the act of reservation.

Eleventh Affirmative Defense

Any federal reserved rights the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin are limited to quantities determined by the needs of the Tribe, which quantities may be less than those determined by a Practicably Irrigable Acreage analysis.

Twelfth Affirmative Defense

No federal reserved right the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin includes the right to use water off reserved lands, or to lease, market, or otherwise authorize use by others off reservation lands.

Thirteenth Affirmative Defense

No right the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin includes the right to use water off Pueblo lands, or to lease, market, or otherwise authorize use by others off Pueblo lands.

Fourteenth Affirmative Defense

No right the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin can have a priority earlier than: 1) the date water was first put to be beneficial use; or 2) for a federal reserved right, the date of reservation.

Fifteenth Affirmative Defense

There are no federal reserved water rights on lands owned by the Tribe on the date of accession of American sovereignty (grant lands).

WHEREFORE, the State of New Mexico, having answered, respectfully requests that the Court require the United States of America to prove all elements of its claims to rights to divert and use water filed on behalf of the Zuni Indian Tribe.

Electronically Filed

/s/ Edward C. Bagley

Arianne Singer
Edward C. Bagley
Special Assistant Attorneys General
Attorneys for State of New Mexico
P.O. Box 25102
Santa Fe, NM 87504-5102
Telephone: (505) 827-6150

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 30, 2008, I filed the foregoing State of New Mexico's Answer to United State's Subproceeding Complaint on Behalf of the Zuni Tribe and Its Allottees electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.