

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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UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW MEXICO, *ex rel.*
STATE ENGINEER, et al.,

Defendants.

Robert M. ...
CIV No. 01 0072 BB/WWD-ACE

ZUNI RIVER BASIN

STATE OF NEW MEXICO'S ALTERNATIVE PROPOSALS FOR AN
ADJUDICATION SCHEDULING ORDER

THE STATE OF NEW MEXICO *ex rel.* State Engineer, by and through its counsel of record, pursuant to the Court's Order Entered to Further Adjudication Planning by the U.S. and the State of New Mexico (No. 92), hereby submits herewith its proposed alternative adjudication scheduling order, and further states as follows:

1. On September 7, 2001, Special Master held a status conference at which time she continued the stay of this matter to allow the State of New Mexico *ex rel.* State Engineer ("State") and the United States ("U.S.") to confer as to how and under what circumstances the United States lawsuit for an adjudication of the Zuni River stream system could be advanced.
2. Subsequent to that status conference the State and the U.S. did repeatedly so confer, meeting by way of telephone conferences and exchange draft proposed scheduling orders.

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3. On December 20, 2002, the Court entered its order to further the adjudication planning by the United States of America and the State of New Mexico. (No. 92). It required the United States and the State:

[T]o file and serve on counsel of record a proposed adjudication scheduling order no later than December 28, 2001.

4. By December 28, 2001, the State and the U.S. agreed that their progress encouraged them to believe they would agree upon a joint proposed scheduling order, yet there were significant conceptual differences as to how best to allow the United States' lawsuit to proceed. As such, on that date, each filed their own version of a proposed adjudication scheduling order. State's Notice of Filing (No. 95); U.S.' Draft Statement of the Issues and Nature of the Suit (No. 96).

5. The Court's December 20, 2001 Order (No. 92) further required that:

The United States and the State may revise the proposed order during January 2002 and shall file and serve it no later than January 31, 2002.

6. The United States and the State continued to confer throughout most of January, 2002.

7. On January 29, 2002, the United States terminated its consultations with the State and informed the State that on January 31, 2002 it would file its own proposed order. Edward Bagley letter to Charles O'Connell dated January 29, 2002, attached hereto as Exhibit A.

8. On that same date the State informed the U.S. that it correspondingly would be forced to file its own proposed order. See Exhibit A.

9. On January 15, 2002, the Court entered its Notice of Adjudication Meeting (No. 101), which allows that:

Counsel may file comments on the proposed scheduling order(s) submitted by the United States of America and the State of New Mexico, ex rel. State Engineer no later than February 8, 2002.

II. Discussion

The State is aware that the Court's procedure for developing a scheduling order invites competing comments and proposals from all parties as to how to proceed in this matter. As such, and for the Court's consideration, the State here sets out the basis for its proposal.

The State of New Mexico is presently involved in the adjudication of the water right claims of numerous stream systems across New Mexico involving the litigation of multiple federal claims, and thousands of defendants and individual claims. These adjudications already are straining the State's resources to the utmost. The only source of resources accessible to the State to deal with the U.S.' Zuni River lawsuit is to reallocate resources away from the Taos adjudication (pending since 1969¹), from the Rio Pojoaque adjudication, (pending since 1966²), from the Rio Chama adjudication (pending since 1969³), or from the Santa Cruz/Truchas adjudication (pending since 1968⁴). Additionally, the water rights in many of the other stream systems in New Mexico have been told to wait their turn to be adjudicated. While the State does not discount the need to adjudicate the Zuni stream system, its remoteness, lack of a large population center, and lack of significant irrigation ranks its priority among the basins to be adjudicated well down the list.

¹ *New Mexico v. Abeyta, et al.*, 69cv07896 JEC-ACE and 69cv7939 JEC-ACE, Consolidated.

² *New Mexico, et al. v. Aamodi, et al.*, 66cv06639 M-ACE.

³ *New Mexico v. Aragon, et al.*, 69cv07941 JEC-ACE.

⁴ *New Mexico v. Abbott, et al.*, CIV 68-7488 JC and CIV 70-8650 JC, Consolidated.

The presence of significant irrigation is the primary factor statutorily required to determine which stream systems are to be adjudicated. The New Mexico legislature has directed the State Engineer to survey all the waters of the state, “**beginning with those most used for irrigation.**” NMSA 1978, § 72-4-13 (1982) (emphasis added). It is difficult to dispute that the waters of the Zuni River are among those least used for irrigation. Conversely, pursuant to section 72-4-13, the irrigation (and population) of the Middle Rio Grande is significantly greater, and its water rights have yet to be surveyed.

The State, however, does have some discretion under this section with regards to hydrographic surveys undertaken by third parties:

[The State Engineer] is authorized to cooperate with the agencies of the United States engaged in similar surveys and investigations . . . and may accept and use in connection with the operations of his office the results of the agencies of the United States.

Id. In other words, if the United States makes a hydrographic survey of the Zuni River stream system, the State may consider it and accept the result for use in the United States’ lawsuit.

Even if the State Engineer does cooperate in the conduct of a Zuni hydrographic survey, State participation in the lawsuit is not required:

[I]f suit for the adjudication of such rights shall have been begun by private parties, **the attorney general shall not be required to bring suit .**

..

NMSA 1978, § 72-4-15 (1907). And it is within the discretion of the State Engineer as to whether to participate:

[T]he attorney general shall intervene in any suit for the adjudication of rights to the use of water, on behalf of the state, **if notified by the state engineer that in his opinion the public interest requires such action.**

Id. These statutory constraints demonstrate that the legislature was well aware that at no time would the State ever have the resources to simultaneously adjudicate all the waters of New Mexico, and they clearly contemplate prioritization of adjudications at the discretion of the State Engineer. The State and the State Engineer have been and continue to be involved in this ongoing prioritization process, not only because it is provided for by statute, but because the legislature and executive mandate prioritization of the adjudications. One of the most visible examples of this prioritization process is the State Engineer's triaging of the agency's limited resources by focusing them on the Pecos and Lower Rio Grande adjudications. Similarly, the legislature has provided special project appropriations to increase progress on the two adjudications having priority: the lower Pecos River and the Lower Rio Grande. The United States' Complaint for the adjudication of the Zuni River stream system falls far from the priorities set by the New Mexico legislature and implemented by the State Engineer, and it is not likely to be given priority status.

The State has significant limitations on its ability to commit the State to the completion of what the U.S. initiated when it filed its Complaint. The State has endeavored to work within these constraints to accommodate the Plaintiff and in deference to the Court.

Besides concern about its own resources, the State is also concerned with the level of the United States' commitment to this litigation. The three proposals made by the United States and filed with the Court only provide details with regards to two of the five areas identified by the Map of the Zuni River stream system which was submitted by the United States in conjunction with its original proposal of May 31, 2001. Significant is

the United States' vagueness about which two of the five areas it will survey. All subsequent adjudication activities are left for the Court (and the United States and the State) to address another day:

Following the completion of the survey of the two specific areas proposed, the United States and the State Engineer will bring before this Court for resolution the issue of responsibility for the future conduct of the remaining portions of the hydrographic survey and the allocation of its costs.

United States proposal of May 31, 2001 (No. 60). The State is of the opinion that the United States filed this adjudication with no plan for its completion. Rather, it appears the U.S.' strategy was to file this adjudication and attempt to place responsibility for the cost of its completion upon the shoulders of New Mexico.

Both the State and this Court have ample experience with the problems that result when an adjudication is initiated when there is commitment to its completion. This case is an example of there being no commitment to its completion, especially by the parties filing it. The State's proposal seeks to avoid this problem by making it clear up front New Mexico's limited ability to undertake and complete this adjudication and the commitment the United States must make to bring their adjudication to a close.

This is the United States' lawsuit. To avoid the past experiences of this Court and the State with water rights adjudications initiated without sufficient thought concerning how such cases would be concluded, and given how thinly the State's limited resources already are stretched among the adjudications currently pending before the Court, the United States, as Plaintiff, is required to prosecute the action, and it is the State, as a Defendant, that can elect to voluntarily participate in it.

III. State's Proposal to Complete the Adjudication of the Zuni River Basin

Attached as Exhibit B is the State's Proposed Procedural Order, which has been drafted to best provide a process for this adjudication to progress within the limits of the State's resources.

First, it recognizes the limitation of the State's resources and although it lacks a substantive commitment by the State until one of four federal court adjudications is complete, it does not discount future participation and realignment of the State as a Plaintiff.

Accordingly, the U.S. should, as Plaintiff, commit to and pay for the completion of the entire hydrographic survey of the Zuni River stream system. As the United States filed this lawsuit this is a cost it should have contemplated having to bear to prosecute the case as it is obligated to as Plaintiff.

The State will participate by providing staff to consult with the U.S. and review its hydrographic survey to insure that Hydrographic Survey Bureau practices and procedures are met. This is permitted pursuant to the statutory authorization allowing the State Engineer to "cooperate with the agencies of the United States engaged in similar surveys." NMSA 1978, § 72-4-13.

Finally, and perhaps most significant, the State's proposed order contemplates the complete adjudication of the Zuni River stream system. The State's proposal provides the process for procedural motions, the hydrographic survey, dismissal and joinder of parties, and the service of offers of judgment.

IV. State's Alternative Proposal for a Briefing Schedule for Motions to Dismiss

If the Court decides not to adopt the State's Proposal to Complete the Adjudication of the Zuni River stream system, attached hereto as Exhibit B, the State alternatively proposes that the Court lift the stay in this case for the limited purpose of allowing the filing and briefing of motions directed to the face of the U.S. Complaint, including Rule 12 motions, under the following terms:

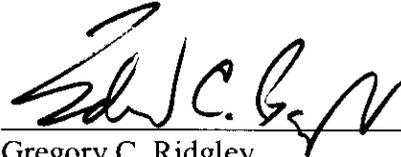
1. The stay in this case shall be immediately lifted.
2. Responsive pleadings, including Rule 12 motions, directed to the U.S. Complaint shall be filed no later than April 30, 2002.
3. The U.S. shall file its response to such pleadings no later than June 30, 2002.
4. Replies shall be filed no later than August 31, 2002.
5. A hearing at which oral arguments may be heard, as determined by the Court, regarding any such motions shall be held in October, 2002, the date to be announced by the court.
6. Subject to the court's ruling on the motions, parties already served shall answer the Complaint by December 31, 2002.

V. Conclusion

The State does not presently have the resources to commit to the adjudication of the Zuni River stream system. Such resources will not be available in the foreseeable future, certainly not within a time frame which the U.S. would find acceptable. Nonetheless, the State of New Mexico's Proposed Adjudication Scheduling Order does contemplate the complete adjudication of the Zuni River stream system. As such, the

State requests that the Court order the U.S. to fund this adjudication to its completion, or in the alternative, adopt the State's proposal for briefing motions to dismiss.

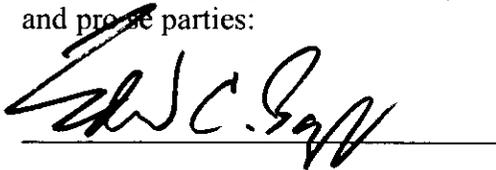
Respectfully submitted,



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Certificate of Service

I certify that on this 31st day of January, 2002, a true and correct copy of the foregoing pleading was mailed by first class mail to the attached list of counsel of record and pro se parties:



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OFFICE OF THE STATE ENGINEER

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January 29, 2001

VIA FACSIMILE AND REGULAR MAIL

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Re: United States v. State of New Mexico Engineer, et al.
United States District Court Case No. 01-0072

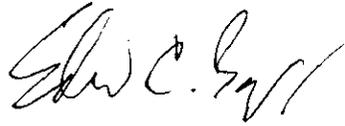
Dear Mr. O'Connell;

I am writing both to memorialize and to express my disappointment with your summary and unilateral termination of our court ordered consultation regarding the Zuni adjudication this afternoon. Our discussions heretofore had been both cordial and productive and I am very sorry they did not result in a resolution of the issues which divide us in this matter. Pursuant to your assertion that the United States would no longer be interested in filing a joint proposal, the State of New Mexico will file its own proposal with the Court on January 31, 2002 pursuant to Special Master's Order.

EXHIBIT

A

Best regards.

A handwritten signature in black ink, appearing to read "Edward C. Bagley". The signature is fluid and cursive, with the first name "Edward" being the most prominent.

Edward C. Bagley
Special Assistant Attorney General

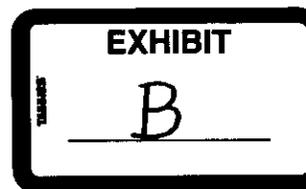
cc: The Honorable Bruce D. Black
The Honorable Vickie L. Gabin
Darcy Bushnell, Esq.
DL Sanders, General Counsel
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Jane Marx, Esq.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

United States,)
) 01cv00072 BDB/WWD(ACE)
Plaintiff,)
)
v.)
)
A & R Productions, et al.,)
)
Defendants.)
_____)

PROPOSED ADJUDICATION SCHEDULING ORDER

This proceeding is a comprehensive general stream system adjudication pursuant to NMSA 1978, §§ 72-4-13 to 72-4-20 of all claims to the right to the use of the waters of the Zuni River stream system in New Mexico, including the claims of all persons, whether known or unknown, to the right to the use of the waters of the stream system. Accordingly, the United States' complaint seeks the Court's application of appropriate laws of the State of New Mexico, including but not limited to NMSA 1978, §§ 72-4-13 to 72-4-20, as well as appropriate laws of the United States necessary for the adjudication of all rights to the use of surface water or groundwater within the stream system involved.



As used in this order, “stream system” refers to the surface waters of the Zuni River including all its tributaries within the State of New Mexico and all hydrologically connected groundwater. The extent of the hydrologically connected groundwaters will be defined within six months after entry of the adjudication scheduling order by the Court by consultation and agreement between hydrologists for the United States, the State of New Mexico *ex rel.* State Engineer, and the Zuni Pueblo following the appropriate and necessary hydrological research. New Mexico’s involvement in such consultation and research is contingent upon the availability of resources to the Hydrology Bureau of the Office of the State Engineer in light of its current commitments to perform hydrological work on the Pecos, Lower Rio Grande, Middle Rio Grande, and San Juan River basins.

CASE MANAGEMENT

I. The Court will immediately suspend its Order to stay all further proceedings, dated March 1, 2001, as to all named defendants for the limited purpose of allowing named defendants who disclaim any interest in a water right to move for dismissal from this suit on that basis, and to allow parties not presently joined to the suit to move to intervene.

II. A public meeting will be scheduled shortly after the extent of the hydrologically connected groundwaters, and the corresponding scope of this adjudication, has been determined. Attorneys for the United States and the State of New Mexico *ex rel.* State Engineer (“State”) will attend and provide information on the nature, purpose, and scope of this adjudication.

III. The United States shall fund and conduct a complete hydrographic survey of the Zuni River stream system. To assure that the hydrographic survey complies with the appropriate standards of the State of New Mexico, the New Mexico Office of the State Engineer agrees to

provide the United States' survey team with appropriate personnel to review the survey work and insure that the conduct and completion of the survey is consistent with the Office of the State Engineer Hydrographic Survey Bureau manual of policies and procedures. The hydrographic survey shall commence after the hydrologically connected groundwaters have been identified, but in no instance later than April 30, 2003.

The agreement of the State to fund personnel to assist in the hydrographic survey shall be contingent upon the United States' obtaining funding for the hydrographic survey. It shall additionally be subject to the availability of appropriated funds legally available for such purpose, and shall not be interpreted to require obligation or payment of such funds.

IV. Upon the completion of the hydrographic survey, and upon the completion of one or more of four ongoing water right adjudications currently pending in the United States District Court for the District of New Mexico (*New Mexico v. Abbott, et al.*, CIV 68-7488 JC and CIV 70-8650 JC, Consolidated (Santa Cruz-Truchas); *New Mexico, et al. v. Aamodt, et al.*, 66cv06639 M-ACE (Pojoaque); *New Mexico v. Abeyta, et al.*, 69cv07896 JEC-ACE and 69cv7939 JEC-ACE, Consolidated (Taos); and *New Mexico v. Aragon, et al.*, 69cv07941 JEC-ACE (Chama)), the Court shall suspend its Order to stay all further proceedings.¹

The State shall then move for an order of the Court realigning the State as plaintiff.

The United States shall then move to:

A. Dismiss with prejudice all those named as defendants in error;

¹ The Court recognizes the possibility that the Plaintiff's hydrographic survey might be completed before the conclusion of any of the four adjudications now pending in United States District Court, at which time the State would not have available resources to pursue the adjudication further. The hydrographic survey could become stale before such resources do become available.

B. Join as defendants all claimants not a party to the suit.

V. When the conditions in paragraph IV are met, Defendants shall then be afforded an opportunity to file responsive pleadings or any Rule 12 motions which have not yet been presented to the Court pursuant to paragraph I.

VI. When the conditions in paragraphs IV above are satisfied, and subject to the Court's rulings on motions filed pursuant to paragraph V, above, the United States with the assistance of the State shall serve appropriate offers of judgment upon claimants within the stream system.

The agreement of the State of New Mexico *ex rel.* Office of the State Engineer to fund personnel to provide such appropriate offers of judgment shall be entirely contingent upon the United States' obtaining its own funding for that purpose. It shall additionally be subject to the availability of appropriated funds legally available for such purpose, and shall not be interpreted to require obligation or payment of such funds.