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.

COMMENTS BY PAUL PETRANTO TO PROPOSED SCHEDULING ORDERS OF THE UNITED STATES AND THE STATE OF NEW MEXICO

A. HISTORY OF THIS LITIGATION

1. This case addresses the same issues as presented in Zuni Tribe v. City of Gallup et al., United States District Court for the District of New Mexico case number CIV-82-1135-M, which was filed on October 5, 1982 as a "quiet title" action. Plaintiff Zuni Tribe tried to pursue the case as a "class action" naming only a few defendants. Several of those defendants, including the State of New Mexico, the City of Gallup, Ramah Land and Irrigation Company, Ramah Valley Acequia Community Ditch Association, Ramah Domestic Utilities Association, Plains Electric Generation and Transmission, Inc., Continental Divide Electric Cooperative, Inc., filed motions to dismiss under FRCP Rules 12(b)(7) and 19 for failure to join indispensable parties.

On December 21, 1982, Senior United States District Judge Mechem issued the following Memorandum Opinion and Order:

> "There is no question that the Zuni Tribe can maintain an action under 28 U.S.C. § 1362 as arising under the Constitution, laws or treaties of the United States. To assert otherwise is of no assistance here whatever.

> "This suit cannot be maintained as a class action. By its own language, it is a suit to quiet title. From the pleadings it appears to be a suit to adjudicate water rights as to some claimants in the Zuni River System and not others. The quiet title or adjudication puts into issue the title of each and every claimant of interest in the system and against one another and against the world. It is not in the nature of a class action where relief is sought from one for the benefit of others and where relief against that one may inure to the benefit of the class. There are in all probability questions of law and fact common to all claimants but there are questions of law and fact as to each claimant against every other claimant.
>
> "The absence from this suit of any claimant to a right to the use of the water of the Zuni River System would expose each defendant here to a substantial risk of incurring litigation from other sources.
>
> "There is no reason to proceed on a piece-meal basis. The better approach would be to have an adjudication of all users rights.
>
> "It appears that there might be two causes of action here. The delineation of the Gallup Sag is not clear from the pleadings. If it is a separate source of water independent of the Zuni River System not taking from it and not contributing to it and the claims affecting it can be handled by injunction or other remedy, then it may be pursued in that fashion.
>
> The plaintiff will have 45 days to amend its complaint or to proceed to an adjudication of the Zuni River System and its ground water resources.
>
> IT IS SO ORDERED.

On February 4, 1983, Plaintiff Zuni Tribe filed an amended complaint and a motion to compel joinder of the United States as an involuntary Plaintiff. On March 11, 1983, Plaintiff Zuni Tribe filed its Second Amended Complaint. Defendants again filed motions to dismiss under FRCP Rules 12(b)(7) and 19 for failure to join indispensable parties.

On March 28, 1983, Defendant State of New Mexico filed its motion for a more definite statement under FRCP Rule 12(e), because of the failure of Plaintiff Zuni Tribe to adequately define the groundwater aquifers referred to in the complaint.

In partial response to Defendants' motions to dismiss, filed on April 6, 1983, Plaintiff Zuni Tribe stated in relevant part, at lines 19 - 27, page 4, as follows:

> Defendants' objections to plaintiff's manner of proceeding appear to be mere delay tactics to undermine plaintiff's adjudication erfforts (sic). Defendants also disregard the nature of this general stream adjudication and seem impatient to have all parties named and served in an unreasonably short time. This action involves as yet untold thousands of claimants. It will take many months, perhaps years, to determine the names of all claimants, including heirs of deceased persons, with an interest in the subject waters. Plaintiff simply does not know the names of all parties defendant at this time but will designate such persons as it obtains the necessary information.

On June 28, 1983, it was ordered that the United States be realigned as a plaintiff in the lawsuit.

On October 4, 1984, Defendant City of Gallup filed its motion to dismiss based upon its filing of City of Gallup v. United States et al., McKinley County District Court case number CV-84-164, on September 5, 1984.

On October 5, 1984, the United States filed its complaint: (1) to have a general adjudication of the rights of all claimants to the use of the surface waters and ground waters of the Zuni River Basin in New Mexico; (2) to obtain a declaratory judgment of the priority and extent of the water rights of the United States and its wards in the Zuni River Basin; and (3) to obtain an injunction permanently enjoining the City of Gallup, and any other defendant, from interfering with the rights of the United States and its ward to the use of the above-named waters."

On November 30, 1984, the State of New Mexico filed a second motion for a more definite statement.

On April 1, 1985, by stipulation of the parties, the federal action was dismissed without prejudice.

2. The case then proceeded as City of Gallup v. United States et al., McKinley County District Court case number CV-84-164, which was filed on September 5, 1984 as a “general stream adjudication”.

On April 9, 1985, based upon a stipulation of the parties, the state district court granted an injunction prohibiting the State Engineer from granting permits for any new appropriations for uses of water in the Zuni Basin other than exclusively domestic ones, including livestock watering and noncommercial gardening, for a period of five years or until the date of completion of “the comprehensive study and hydrographic survey...”

After waiting five years with no activity occurring in the case, on March 8, 1990, the state district court dismissed the action with prejudice for failure to bring the action to its final determination.

3. In the meantime, in response to actions filed by the Zuni Tribe against the United States in docket numbers 327-81L and 224-84L of the United States Claims Court, Congress passed the Zuni Land Conservation Act of 1990 (P.L. 101-486), which was originally introduced as the Zuni Claims Settlement Act of 1990. The Act settled certain claims of the Zuni Tribe, including claims for the “loss of the use of water”. Under the Act, a $25 million resource development trust fund was set up for the Zuni Tribe.

4. The Zuni Land Conservation Act of 1990 did not settle the claims of the Zuni Tribe which were presented in Zuni Indian Tribe v. United States, United States Claims Court docket number 161-79L. In that action the Zuni Tribe claimed damages for the

taking of land and interests in lands formerly held by the Zuni Tribe, including water rights. The Zuni Tribal Council, through Resolution No. M70-91-L026, agreed to settle its claims for $25 million. On January 22, 1991, the United States Claims Court entered judgment on behalf of the Zuni Tribe in the amount of $25 million.

5. Congress then considered a bill to formulate a plan for the management of natural and cultural resources on the Zuni Indian reservation, on the lands of the Ramah Band of the Navajo Tribe of Indians, and the Navajo Nation, and in other areas within the Zuni River watershed and upstream from the Zuni Indian Reservation. The Zuni River Watershed Act of 1992 (P.L. 102-338) directs the Secretary of Agriculture, acting through the Chief of the Soil Conservation Service and the Chief of the Forest Service, the Secretary of the Interior, acting through the Assistant Secretary for Indian Affairs, and the Tribes (Zuni Tribe, Navajo Nation, and the Ramah Band of the Navajo Tribe) to conduct a study and prepare a plan for watershed protection and rehabilitation on both public and private lands within a specified portion of the Zuni River Watershed. In its findings, Congress stated that “over the past century, extensive damage has occurred in the Zuni River watershed, including”...”loss of water”...and “(4) with the passage of the Zuni Land Conservation Act of 1990 (Public Law 101-486), the Zuni Indian Tribe has the ability to take these corrective measures within the Zuni Indian Reservation; (5) the implementation of a watershed management plan within the Zuni Indian Reservation will be ineffective without the implementation of a corresponding plan for the management of the portion of the Zuni River watershed that it upstream from the Zuni Indian Reservation...” Based upon this Act, conservation measures were put into place, including conservation measures on private land.

6. On January 19, 2001, which is 18 years 106 days after Zuni Tribe v. City of Gallup et al., was originally filed, the United States once again filed a “quiet title” action regarding the Zuni River Basin.

B. PROBLEMS WITH THIS LITIGATION

7. The original defendants in Zuni Tribe v. City of Gallup et al. brought up problems which have never gone away and which the United States has done nothing to cure, namely:

7.1. The United States must properly define what type of action it is bringing, e.g. “Quiet title”; “Declaratory Judgment”; “General stream adjudication”.

7.2. The United States must clearly identify the object of the litigation, i.e. “What are the boundaries of the “Zuni River Basin”?”

7.3. The United States must clearly state what it is claiming, i.e. exactly “What water rights does the United States claim that it owns that the prospective defendants are interfering with?”

7.4. The United States must identify and join all indispensable parties, i.e. “Who does the United States claim is interfering with its unquantified rights to the unidentified waters?”

8. Despite the passage of over 19 years, the United States apparently still does not know what type of action it wants to bring, still doesn’t know what the object of the litigation is, and still doesn’t know what it wants. The United States position is essentially this: “We don’t know how much water there is, or where the water is, or how much water we need, or who else claims the water, but we want all of the water.”

9. The terrible part of this litigation is that, despite protestations to the contrary, private landowners, such as Paul Petranto, are adversely impacted by an ill-conceived, poorly drafted complaint, which was apparently rushed through on the last day of the previous administration of President William Jefferson Clinton, because of fears that the complaint would not be approved by the incoming administration of President George W. Bush. This is also apparently the reason why the United States is unwilling to amend its poorly written complaint, i.e. a fear that the current administration will not approve the amendment and the case will be dismissed.

10. While it is easy for lawyers in Washington, D.C. to discount the effect that such litigation has on the local economy and landowners, the Court can take judicial notice of the local economy. For example, New Mexico's 2000 per capita income of $22,203 was approximately 75 percent of the national figure of $29,679 and ranked 49th out of the 50 states and the District of Columbia. (Only West Virginia and Mississippi were lower.) The 1999 per capita income in McKinley County, which includes Gallup, Zuni and Ramah, was $14,643 or 30th out of New Mexico's 33 counties. The 1999 per capita income in Cibola County, which includes another significant portion of the Zuni River Basin, was $13,501, or 32nd out of New Mexico's 33 counties. In effect, this litigation concerns water rights in the 2nd and 4th poorest counties in the 3rd poorest state in the United States of America. With such a marginal economy, one does not have to be a member of Mensa to figure out that litigation such as this can be devastating to everyone who lives in the area, including the Native American population.

11. Employment is not easy to come by in McKinley County and Cibola County, and it is difficult to attract new businesses to the area. The prospect that a potential business will not have the right to water can be a key factor in the decision-making process of whether or not to locate in the Zuni River Basin area. For example, if a businessperson wanted to purchase land on Highway 53 east of Ramah and build a pizza parlor, that businessperson would need to drill a well for the business water supply. Without a water supply, the entrepreneur could not run his pizza parlor, so there is no reason to purchase the land or erect the building. This effects local landowners, who would like to sell land to the entrepreneur, local construction workers, who would like jobs erecting the pizza parlor, and local residents who would like jobs making, serving, and delivering pizzas.

12. The fear that a prospective business might be denied a well permit is not so far-fetched. On April 9, 1985, in City of Gallup v. United States et al., McKinley County District Court case number CV-84-164, the parties stipulated that, for a period of 5 years or until the date of completion of a “comprehensive study and hydrographic survey”, the New Mexico State Engineer would not grant permits for any new appropriations for uses of water in the Zuni Basin other than exclusively domestic ones, including livestock watering and noncommercial gardening. A well permit for a pizza parlor is not “exclusively domestic” or “livestock watering” or “noncommercial gardening”. Therefore, under such an order, the granting of a well permit for the prospective pizza parlor entrepreneur would be prohibited. The end result of such an order is that the economy of an already economically impoverished area is pushed further into the hole.

13. The United States has never arranged for a “comprehensive study and hydrographic survey” of the basin, even though it said it saw a need for such a survey over 19 years ago. As a result, the United States does not know how much water is available for current or future users. As far as anyone, including the United States, knows, there may be plenty of water available in the Zuni River Basin for all current users and all individuals or businesses that want to move into the basin. It is the height of irresponsibility for the United States to take the position that everyone is interfering with its right to water in the Zuni River Basin, when the United States has not defined the basin or the amount of water available in it, has not quantified how much water it needs, and has not identified the current users of the water in the basin or quantified the amount of water that they are using.

14. Prior to filing its complaint, the United States did not adequately research the issues and facts involved, as required by FRCP Rule 11. The United States has known for over 18 years that it did not know who was claiming water rights in the basin. Back in 1983, Plaintiff Zuni Tribe complained:

> Defendants also disregard the nature of this general stream adjudication and seem impatient to have all parties named and served in an unreasonably short time. This action involves as yet untold thousands of claimants. It will take many months, perhaps years, to determine the names of all claimants, including heirs of deceased persons, with an interest in the subject waters. Plaintiff simply does not know the names of all parties defendant at this time but will designate such persons as it obtains the necessary information.

From the progress of this litigation to date, it seems clear that, since 1983, the United States has done almost nothing to identify the “untold thousands of claimants” “with an interest in the subject waters” or to determine what the “subject waters” are.

15. On information and belief, the United States has failed to include a great many individuals who claim an interest in water in the Zuni River Basin, and has improperly named others who claim no such interest. Furthermore, on information and belief, of those individuals who have been named by the United States as defendants in this matter, less than 20% have waived service of the summons and complaint.

C. PROPOSED SCHEDULING ORDER

16. The way to resolve this matter is simple. The United States, and all other parties, should be required to follow the Federal Rules of Civil Procedure, which "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." See Rule 1.

17. Rule 19(a) states:

> "A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party."

The United States should have identified indispensable parties prior to filing its complaint. Since it has not done so, the Court should order the United States to identify all indispensable parties, i.e. everyone who claims an interest in water in the Zuni River Basin, within 30 days, or the complaint shall be dismissed.[1]

[1]As the indispensable parties have not been identified, there is no way of knowing whether either the assigned District Judge or the appointed Special Master has a conflict of interest that would require the recusal of either or both of them.

18. Rule 4(m) states:

> "If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time..."

Once the United States has identified all of the indispensable parties, pursuant to Rule 4(m), it should be ordered to serve all such parties within 120 days.

19. Under this proposal, within 150 days of the date of entry of the scheduling order, all indispensable parties will have been identified and served.

20. Under FRCP Rule 12(a)(1)(A), a party must file a responsive pleading within 20 days of service of the summons and complaint. All parties who are properly served should be required to meet this requirement, or be subject to an entry of default.

21. Under this proposal, all answers and responsive pleadings, including motions under Rule 12(b) and 12(e) and most counterclaims and cross-claims under Rule 13[2], would be filed within 170 days of the entry of the scheduling order.

22. A pretrial conference under Rule 16 should be set for 210 days after the date of entry of the scheduling order to discuss, among other issues, Rule 26 discovery requirements. Prior to the pretrial conference, parties should refer to the checklists in the Manual for Complex Litigation, Third (Federal Judicial Center 1995), pp. 411-432, to develop recommendations for a case management plan and additional scheduling orders which will enable the case to proceed in a "just, speedy, and inexpensive" manner.

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[2]Subject to the outcome of motions to dismiss and motions for a more definite statement, additional answers, counterclaims, and cross-claims would be filed at a later date.

D. CONCLUSION

23. As a plaintiff in a federal civil action, the United States is entitled to no better or worse treatment then any other party. The Federal Rules of Civil Procedure "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action." The Rules provide protection for all parties and should be followed. It will be neither "speedy" nor "inexpensive" for the other parties, if the United States is allowed to proceed without first identifying the indispensable parties, and then promptly serving those parties with a summons and complaint, so their answers can be filed, and the case can become at issue. If the United States cannot identify the indispensable parties within 30 days and serve them all within 150 days from the date of the scheduling order, then this matter should be dismissed.

Date: February 8, 2002

Respectfully submitted,

----signed electronically-------

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CERTIFICATE OF MAILING

This is to certify that this pleading was served by U.S. Mail on opposing parties of record.

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William G. Stripp, Esq.