

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FILED
U.S. 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'S RESPONSE TO THE UNITED STATES' PROPOSED ADJUDICATION SCHEDULING ORDER

THE STATE OF NEW MEXICO, by and through its counsel of record, and pursuant to the Court's Notice of Adjudication Meeting, hereby responds to Plaintiff the United States' ("U.S.") Proposed Adjudication Scheduling Order, and states as follows:

On January 31, 2002 the United States filed its Proposed Adjudication Scheduling Order. The United States' Proposal refers in several instances to points of agreement with the State of New Mexico which do not exist. Its proposal fails to contemplate the complete adjudication of the basin. Additionally, it limits the United States' involvement in prosecuting its own complaint to the minimal commitment of conducting a hydrographic survey of two discrete areas within the basin, and the joinder and dismissal of parties in those two areas. As such, the State objects to it.

1. **There is no Agreement Between the State of New Mexico and the United States**

The U.S.' proposal alleges certain "agreements" between the State of New Mexico and the United States. More specifically, the U.S.' Proposal states that the State "agreed to make available appropriate technical personnel to identify the extent of

hydrological connection between the surface and groundwater,” that it “further agreed that this task is to begin within two (2) months after the entry of the adjudication scheduling order,” and that it “agrees to provide the United States’ survey team with appropriate personnel to assist in the conduct and completion of the survey.” U.S. January 31, 2002 Proposal, pp. 2, 3. This is incorrect. No agreements have been made by the State of New Mexico with the United States with regards to the adjudication of the Zuni River stream system.¹

The State of New Mexico’s involvement by the State of New Mexico in certain hydrological studies and a hydrographic survey in the course of settlement negotiations engaged in by those two parties pursuant to the Court’s Order dated December 20, 2001 (No. 92). However, the State of New Mexico has been clear from the start that any positions taken by it pursuant to settlement negotiations with the United States were taken only in the context of those negotiations. The State of New Mexico’s position has always been that it contemplated no agreement with the United States except one being taken in the context of a fully realized adjudication plan expressed in a joint proposed scheduling order executed by both the State of New Mexico and the United States. On January 29, 2002 the U.S. terminated negotiations before that point was reached.

At the present time, the State of New Mexico and the United States have filed competing proposed scheduling orders with the Court. They may be similar in some respects, but they differ greatly in others. Although the State of New Mexico’s proposal provides for the State’s involvement in certain hydrological studies and a hydrographic

¹ Notwithstanding any “agreement” with the U.S., or lack thereof, there are statutory and resource limitations on the State’s involvement with this adjudication. The State described those limitations in the State of New Mexico’s Alternative Proposals for an Adjudication Scheduling Order (No.), and reasserts them here by reference.

survey, this is offered only as part of the State's entire proposal. The State of New Mexico's Proposal cannot be severed so as to allow the United States to cherry pick those provisions which it finds favorable, and leave those which it does not.

As such, there is no reasonable basis for the U.S. to assert agreement by the State to participate in hydrological studies and a hydrographic survey. The State herewith repudiates the U.S.' allegations that such agreements exist, and objects to the U.S. Proposal on that basis.

2. The United States' Unwillingness to Commit its Resources to the Complete Adjudication of the Zuni River Stream System Appears Consistent with Its Complaint; That is, File the Suit, and Get the Court to Order the State to Complete It

The U.S.' Proposal characterizes its Complaint as being one which seeks a "comprehensive general stream system adjudication." U.S.' January 31, 2002 Proposal, p. 1. However, the U.S. Proposal falls far short of providing for the completion of such an adjudication. Once the hydrological extent of the basin has been determined, the U.S.' Proposal provides only for 1) the "hydrographic survey of areas one and two as identified by the map of the Zuni River surface water basin submitted by the United States in connection with its proposal of May 31, 2001²; 2) joinder and dismissal of parties in areas

² The U.S. Proposal alleges that these are two of five areas which contain the majority of non-government defendant/landowners in the Zuni River stream system. U.S. January 31, 2002 Proposal, p. 4, FN. 2. The U.S. provides no evidentiary basis for this factual allegation. At least one litigant disputes it:

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 very sparsely populated. Area 3, which includes the town of Ramah, is the only one of the five areas that has what might be called a population.

Response by Defendant Paul Petrano to the Reports of the United States and the State of New Mexico, p. 7 (No.81). As such, the significance of the five areas identified by the U.S. map remains unclear. The only thing that is known for certain is that the U.S. wants to adjudicate two of them.

one and two; and 3) providing offers of judgment to claimants in areas one and two³. U.S.' January 31, 2002 Proposal, pp. 4, 6. No material proposal is made for the adjudication of any portion of the basin beyond areas one and two.

Clearly, the U.S. Proposal requires only the adjudication of the discrete areas the United States wants adjudicated, rather than provide a comprehensive plan, or any plan for completing the adjudication. The U.S. has filed what it alleges to be a Complaint for such a comprehensive adjudication; it appears to be only a Complaint for the adjudication of only two of the five sections it identifies. With regard to the remainder, which constitutes the vast majority of the basin, the U.S.' Proposal provides only that:

The United States and the State of New Mexico ex rel., Office of the State Engineer [sic] 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. At the conclusion of the survey or at appropriate intervals, offers of judgment will be offered to appropriate claimants.

U.S.' January 31, 2002 Proposal, pp. 6. This action is nothing more than an attempt to dump responsibility for this adjudication on the State. This is expressly stated by the State in its own Proposal:

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.

³ Even with regard to "providing" offers of judgment to claimants in areas one and two – the two areas the U.S. actually seems interested in having adjudicated - the U.S.' Proposal makes no commitment of resources. Its provision for this is entirely passive:

[O]ffers of judgment *will be provided* to all claimants within the two areas after appropriate guidance is provided by the Court.

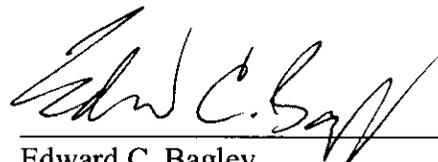
U.S.' January 31, 2002 Proposal, p. 6 (emphasis added). It is unclear from this who will "provide" the offers of judgment, whether the U.S. even intends to be involved in "providing" offers of judgment, or if ultimately this too will be left to the Court, the State and another day.

State's January 31, 2002 Proposal, p. 5. The State and this Court have experience with the problems which result when adjudications have been commenced without a cogent plan for their completion. The U.S. failure to commit to the completion of the adjudication that it filed destines this adjudication to founder. The State objects to the U.S. Proposal for its failure to provide its plan for its completion of its adjudication of the Zuni River stream system.

Conclusion

The United States' Proposal alleges agreements with the State of New Mexico which do not exist, fails to contemplate the complete adjudication of the Zuni River stream system, and fails to commit the United States to any involvement or participation in the adjudication beyond conducting a hydrographic survey of two discrete areas within the basin and joinder and dismissal of parties in those two areas. The State objects to the U.S. Proposal on those basis.

Respectfully submitted,



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