

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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DEPT. CLERK

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

CIV No. 01 0072 BB/WWD-ACE

ZUNI RIVER BASIN

**STATE OF NEW MEXICO'S OBJECTION TO AND CLARIFICATION OF
UNITED STATES' JANUARY 6, 2003 PLEADING PROPOSING
GEOGRAPHICAL BOUNDARIES FOR THIS ADJUDICATION**

THE STATE OF NEW MEXICO, by and through its counsel of record, pursuant to the Court's Scheduling Orders of July 15, 2002 (No. 147) and December 5, 2002 (No. 152), hereby objects to the United States' pleading characterized as "Identification of Zuni River Stream System Boundary," ("pleading") filed on January 6, 2003 (No. 156), and in support thereof, sets forth the following:

I. The State Has Not Reached an Agreement with the United States

In its pleading, the United States implies that it has reached an agreement with the State with regard to the geographical scope of the adjudication as required by the Court's Scheduling Orders of July 15, 2002 and December 5, 2002. It has not.¹ No

¹ It is worthy of note that this is not the first time the State has had to correct the record that there was no agreement reached with the United States as the United States had represented to the Court. In its January 31, 2002 Proposed Adjudication Scheduling Order, the United States stated that the State had agreed to the scheduling of certain adjudication tasks when in fact the State was not in agreement. The State was forced to respond:

[T]here 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 agreement exists and objects to the U.S. Proposal on that basis.

agreement has been reached between the United States and the State of New Mexico with regard to the scope of the adjudication, much less a map or township/range/section description of same.

The United States implies that an agreement has been reached by stating that the map accompanying the pleading was “prepared jointly by the State . . . and a contractor of the Department of the Interior.” U.S.’ Identification of Zuni River Stream System Boundary, p. 1. It was not. It would be more accurate to say that mapping information has been exchanged between the parties, as we have worked to the final preparation of a joint product. Affidavit of James McNeese, (attached hereto as Exhibit A). It is important to the State that the Court should not interpret the tone and content of the pleading to conclude that the State is in agreement with the United States at this time. The United States’ implication was recognized by the Court’s own docket clerk as the pleading is characterized in the electronic docket as:

NOTICE (IDENTIFICATION) by the USA and the State of New Mexico’s Engineer’s Office of the Zuni River Stream System Boundary.

Docket Report for United States v. A & R Productions, et al., No. 156, Description Col. (emphasis added) (attached hereto as Exhibit B). This is perfectly understandable, but the State of New Mexico must make it very clear that it does not concur in the United State’s pleading.

The State knows of no basis upon which the United States might rely to represent that an agreement exists. Quite the opposite. Immediately prior to the United States’ filing of its pleading, the State made very clear that agreement had not been reached,

expressly stating on December 24, 2002 to its counsel, Charles O'Connell that "... your assumption ... that the State and the United States agree ... is not correct." December 24, 2002 letter from State to Charlie O'Connell, (attached hereto as Exhibit C). Three days later, on December 27, 2002 the State informed the United States that it had "not yet received the United States most recent draft map," and obviously therefore had not had a chance to review it, or agree to it. December 27, 2002 letter from State to Charlie O'Connell, (attached hereto as Exhibit D). Consequently, the State offered that it "would not oppose a motion by the United States for an extension of time to identify the geographic boundaries of this adjudication." *Id.* The United States never responded to the State's proposal for an extension of time to come to an agreement, opting instead to file a pleading which incorrectly states that the two parties are in agreement.

II. Although the United States and the State are Close to Agreeing on the Geographical Boundaries of the Zuni River Surface Drainage, We Have not Agreed That the Zuni Surface Drainage Properly Defines the Geographical Scope of This Adjudication

Despite the existence of some remaining technical questions, the State does acknowledge that it is very close to coming to an agreement with the United States as to a definition of the geographical boundaries of the Zuni River surface drainage. Affidavit of James McNees, attached hereto as Exhibit A. The State communicated as much to counsel for the United States on December 24, 2002, when it noted that, although they were not yet in agreement, "our technical people and yours do seem to be making significant progress in that direction." December 24, 2002 letter from State to Charlie O'Connell, (attached hereto as Exhibit B). If agreement on the definition of the Zuni River surface drainage were the only issue presented in defining the geographical scope

of this adjudication, then in the interest of advancing this matter, the State would not have objected to the United States' pleading, notwithstanding its inaccurate implications.

The technical issue of the definition of the boundary of the surface drainage of the Zuni, however, is not the main issue facing the Court and the parties in defining the geographical scope of this adjudication. Rather, the key question that remains is what surface drainages should be included within the geographical scope of the adjudication.

Undisputed hydrological conditions, together with Zuni involvement in administrative proceedings regarding groundwater pumping in the Puerco River area to the north, and newspaper reports of Zuni concerns regarding ground water pumping Carrizo Wash region to the south, both of which are outside the geographical boundaries of the Zuni River surface drainage, all suggest that these two drainage basins should be included in this adjudication as well. Together, the geographical boundaries of the Puerco River, the Zuni River, and the Carrizo Wash surface drainages are consistent with the geographical boundaries of the State Engineer's Gallup Groundwater Administrative Basin. Because the Puerco River, the Zuni River, and the Carrizo Wash are hydrologically interrelated, and because a final decree which includes all three would better facilitate coherent water rights administration in the region, the State respectfully suggests that given the very real concerns that have been raised by the Zuni, the parties and the Court should consider whether the geographical scope of this adjudication should be defined to be consistent with the entire Gallup Groundwater Administrative Basin.

The State recognizes that the United States want to limit its expenditure of funds to pay for this adjudication by restricting its boundaries to the Zuni River surface drainage, and exclude the Puerco River and Carrizo Wash areas. However, the State is of

the belief that this will simply create problems in the future. There is every reason to expect that, because of their hydrological interrelationships with the Zuni surface drainage, and because the Zuni have already expressed concern about proposed groundwater pumping from both areas, at some later date the Court will be asked to add both the Puerco River and the Carrizo Wash to this adjudication. Nonetheless, in the interest of moving this adjudication forward, the State has offered the United States its proposals for language that would limit the scope of this adjudication to the Zuni River surface drainage, now and in the future. The State's proposals have sought to geographically limit the adjudication while at the same time address the State's resource concerns by protecting it from having to assume the cost of the adjudication of the Puerco River and the Carrizo Wash, were the Zuni or some other party to attempt to add them to this proceeding in the future.

The United States has either flatly rejected or failed to respond to the State's proposals. In the absence of agreed language which explains to future litigants why these two regions were excluded, and protecting the State from having to ultimately shoulder the financial burden of paying for their adjudication, the State urges that the Court order the boundaries of this adjudication be those of the Gallup Groundwater Basin.

III. The Gallup Groundwater Basin Should be Considered as the Adjudication's Geographical Boundary

Geographically, the Zuni River surface drainage comprises only the middle third of the Gallup Groundwater Basin. The Gallup Groundwater basin was declared in 1980² by the State Engineer to be a single and contiguous region for purposes of groundwater administration. Gallup Groundwater Basin Map (Attached hereto as Exhibit E). It is

² The boundaries of the Gallup Groundwater Basin were expanded fourteen years later, in 1994, by the State Engineer to add a discrete region to the northwest of Gallup.

bounded to the east by the Arizona border, to the north by the boundary of the San Juan stream system adjudication, to the east by the Rio San Jose stream system adjudication, and to the south by the Gila River stream system adjudication. Except for the present proceeding, no portion of the Gallup Groundwater Basin is presently the subject of an adjudication.

From north to south, the Gallup Groundwater Basin consists of three lobes. The northern lobe is the Puerco River surface drainage, which includes the City of Gallup. The middle lobe, as noted above, is the Zuni River surface drainage. The southern lobe is the Carrizo Wash surface drainage, which includes the Zuni Indian Tribe's sacred Zuni Salt Lake, and the Salt River Project's Fence Lake Mine. The Zuni Indian Tribe, the beneficiary of the United States in this matter, has indicated significant interest in all three basins. The water rights of all three areas are interrelated, and all three should be included in this adjudication for purposes of developing a final decree which will facilitate the effective administration of water rights.

A. The Carrizo Wash

The Dakota Aquifer underlies the Carrizo Wash basin, to the south of the Zuni River basin. The Zuni have publicly stated that groundwater diversions from the Dakota Aquifer will adversely impact their water rights. The Zuni Indian Tribe has also expressly stated that because of this it may sue to force an adjudication of the Carrizo Wash. As the Carrizo Wash is part of the same administrative area as the Zuni River, namely the Gallup Groundwater Basin, and the Zuni Indian Tribe has water rights which are impacted by groundwater withdrawals taking place in both the Carrizo Wash and the Zuni River basins, the Carrizo Wash should be included in this adjudication.

The Zuni Indian Tribe's interest in the Carrizo Wash was reported as recently as two weeks ago, on Saturday, December 21, 2002, in the Santa Fe New Mexican. December 21, 2002, the Santa Fe New Mexican (Attached Hereto as Exhibit F). The New Mexican's article of that date stated the Zuni were acutely concerned that pumping by the Salt River Project at its proposed Fence Lake mine site will impair the flow of water to the Zuni Salt Lake, which they consider sacred. The location of the Salt River Project's pumping was reported as being "on the border of Catron and Cibola Counties," and that the Zuni Salt Lake was to the south of that. Id. Both are outside the geographical boundaries of the Zuni River surface drainage basin, but within the geographical boundaries of the Carrizo Wash basin.

Even more pointedly, the article stated that the Zuni were prepared to force an adjudication of the area impacted by the pumping proposed by Salt River Project:

Zuni Governor Malcolm Bowekaty says the Pueblo will consider suing to force a full adjudication of its water rights in the area if the state ultimately proposes to allow pumping for the mine project.

Id. That area, of course, is the Carrizo Wash. It follows from the Zuni Indian Tribe's public statements that an adjudication of the Carrizo Wash in the near future is not only possible, but likely. As the Carrizo Wash is part of the Gallup Groundwater Basin, the same administrative area as the Zuni River, and as the Zuni Indian Tribe has related water right interests in both, it follows that a final decree which includes both would be desirable. As such, the Carrizo Wash should be included in the instant adjudication.

B. The Puerco River

Groundwater within the Puerco River surface drainage basin is also hydrologically connected to the Zuni River. The San Andres Glorieta Aquifer underlies

both the Zuni River and Puerco River surface drainages. The United States recognizes that, as a result, groundwater withdrawals from within the geographical boundaries of the Puerco River surface drainage will adversely impact the exercise of water rights within the geographical boundaries of the Zuni River surface drainage. The United States expressly acknowledged this in an earlier proposed draft pleading, faxed to the State on November 5, 2002:

The United States and the State of New Mexico's Engineer's Office [sic] recognize that the San Andres-Glorieta Aquifer underlies and is in hydraulic continuity with the surface waters of the Zuni River Basin, the Upper Puerco River Basin and the Rio San Jose River Basin. As such, the United States and the State of New Mexico's Engineer's Office [sic] further recognize that withdrawals [sic] from the San Andres-Glorieta Aquifer could impact adversely the ability to exercise valid right(s) to the use of surface flows in the Zuni, Upper Puerco, and Rio San Jose River Basins.

Charles O'Connell November 5, 2002 Fax, p. 5 (Attached Hereto as Exhibit G). The State reaffirmed this proposition in its November 19, 2002 letter to the United States, wherein it noted that, although the United States' proposed draft pleading recognized the hydrologic connection between the Zuni River and the Puerco River, it failed to explain why the Puerco River was not included in this adjudication:

On November 5, 2002, you transmitted to me a pleading purporting to identify the geographical boundaries of the Zuni River stream system for purposes of this adjudication. As you know, the State is concerned that your pleading fails to include the hydrologically connected Puerco River surface basin in the adjudication. As the United States' own hydrologist pointed out, groundwater which is diverted in the River Puerco surface basin will impact water rights in the Zuni River surface basin, as the San Andres-Glorietta aquifer underlies both.

November 19, 2002 letter from Edward Bagley to Charlie O'Connell, (attached hereto as Exhibit H). The United States has never offered any explanation for why it does not

propose to include the Puerco River in this adjudication, when these hydrological and administrative realities would seem to benefit the Pueblo.

With regard to groundwater pumping in the Puerco River area, the Zuni Indian Tribe has shown significant interest in the City of Gallup's pending application filed with the State Engineer to pump groundwater. Gallup sits squarely within the surface drainage of the Puerco River, to the north of the Zuni River surface drainage. Although the Zuni have not intervened in that administrative action, they have participated in technical discussions, and have maintained regular contact with this office with regard to it. They clearly have some interest in the City of Gallup's diversion of groundwater within the geographical boundaries of the River Puerco.

C. The Zuni River

Groundwater pumping which takes place within the geographical boundaries of the Carrizo Wash and the Puerco River surface drainages will impact the exercise of both surface water and groundwater rights within the geographical boundaries of the Zuni River surface drainage. It seems that it will only be a matter of time before parties whose water rights are so impacted will seek enforcement of their rights as against those diverting ground water in the Carrizo Wash in Puerco River areas. As noted above, the Zuni Indian Tribe has already stated that it will "sue to force an adjudication of the Carrizo Wash."

The State Engineer recognized this interrelationship when it made the River Puerco, the Zuni River, and the Carrizo Wash part of a single administrative geographical unit called the Gallup Groundwater Basin. They are administered together and they should be adjudicated together as well. The Gallup Groundwater Basin also presents the

additional advantage of already being legally fully defined, with a definition which is entirely consistent with that of the adjacent adjudications and the borders of the State of Arizona. (Attached hereto as Exhibit I).

IV. If the Adjudication is Limited to the Zuni River, Then The Exclusion of the Puerco River and Carrizo Wash Should be Addressed in the Record

The United States' pleading makes clear that it would prefer to exclude the Puerco River and Carrizo Wash areas, and limit this adjudication to the geographical boundary of the Zuni River surface drainage. On October 25, 2002, the United States and the State consulted on this issue and tentatively agreed that the scope of this adjudication could be so limited if certain issues raised by excluding the Puerco River and the Carrizo Wash could be addressed in the record. The State summarized that position in its letter to Charlie O'Connell of November 19, 2002:

We met and discussed this issue on October 25, 2002. It was the State's understanding from that meeting that the State could agree to the exclusion of the Puerco River from this adjudication if we could also agree to language explaining: 1) why the Puerco River is not included within the geographic boundaries of the Zuni River stream system for purposes of this adjudication; 2) how the Zuni River stream system can be administered without a final decree which includes the hydrologically connected Puerco River; and 3) who will be responsible for the adjudication of the Puerco River if that becomes necessary to administer water rights adjudicated pursuant to the instant matter.

(attached hereto as Exhibit H). The United States ultimately failed to propose language which did this, a fact which the State also memorialized in its letter of November 19, 2002:

On November 5, 2002, you forwarded me a draft pleading which purports to identify the geographical scope of the Zuni River stream system for purposes of the instant adjudication . . . [h]owever, it does not include language answering the three questions presented . . . which arise from that recognition.

Id. (emphasis added). The State then proposed language to the United States which attempted to address, at least in part, the exclusion of the Puerco River and the Carrizo Wash. The United States rejected it, indicating that it did not want to limit itself with regard to later initiating the adjudication of the two areas:

As to the last paragraph, I cannot bind a future administration to take action or not take action. Therefore, I cannot agree to language that would agree that the "United States shall not file any action requiring or otherwise seeking the expenditure of State funds for the cost of [the adjudication]."

Charlie O'Connell's November 27, 2002 e-mail transmittal (attached hereto as Exhibit J). Subsequent to the United States' rejection of its proposed language, the State has suggested alternative language which tried to accommodate the United States' concerns while at the same time addressing and explaining the exclusion of the Puerco River and the Carrizo Wash from this adjudication. To date, the United States has not responded to the State's proposed language. Certainly, it cannot be said that agreement has been reached between the United States and the State with regard to the status of the Puerco River and the Carrizo Wash in this adjudication.

If the Court ultimately adopts the position of the United States, and orders that the geographical scope of this adjudication shall be limited to the Zuni River surface drainage, then the record should reflect why the Puerco River and the Carrizo Wash were excluded, particularly given the Zuni Indian Tribe's acute concern with the City of Gallup to the north and the Salt River Project to the south. The State respectfully suggests that in the record some attention be given to the following questions:

- 1) Why the surface drainages of the Puerco River and the Carrizo Wash are not being included within the geographic boundaries of the Zuni River stream system for purposes of this adjudication;

- 2) How the Zuni River stream system can be administered without a final decree which includes the hydrologically connected Puerco River and the Carrizo Wash; and
- 3) Who will be responsible for the adjudication of the Puerco River and the Carrizo Wash if that becomes necessary to administer water rights adjudicated pursuant to the instant matter.

V. The State's Resource Limitations

The State's position that the Puerco River and the Carrizo Wash either be included in this adjudication, or excluded with explanation in the record as to how they will be dealt with in the future, is driven as much by its own resource limitations as by hydrological realities. These very reasons are shared by the United States. The State has raised the issue of its limited resources and the press of other ongoing adjudications and water related litigation (e.g. silvery minnow) with this Court, and this Court's Orders have taken the State's resource limitations into account. See e.g. State of New Mexico's February 1, 2002 Alternative Proposal for Adjudication Scheduling Order (No. 102).

However, the prospect of the Puerco River and the Carrizo Wash being later added to this adjudication, possibly after the United States has ceased to be meaningfully involved in it, threatens to place a greater potential resource burden on the State than the original prospect of just adjudicating the Zuni River surface drainage. The State knows of no reason for not constructively addressing this issue at the outset of this adjudication when it has received so much attention. The United States is already showing itself to be a "reluctant contractor." In its resistance to addressing meaningfully the State's concerns regarding the geographic scope of this adjudication, the United States is again showing reluctance to address the financial and other consequences of this suit which it filed. This is as true today as it was a year ago, when the State wrote:

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.

State's of New Mexico's January 31, 2002 Alternative Proposal For an Adjudication Scheduling Order, p. 6 (No. 102). In that same pleading, the State went on to note that "[b]oth 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 [United States]." Id.

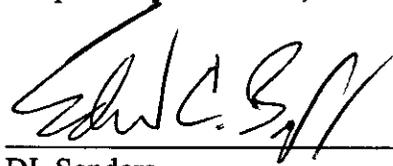
The state of affairs with regard to the United States has not changed. Its most recent pleading again alleges agreements with the State which do not exist. It again fails to deal with fundamental adjudication issues which are not to its liking, this time by refusing to explain, or even acknowledge the hydrologically connected regions of the Carrizo Wash and River Puerco. The State respectfully requests the Court address this, so that the United States or other parties cannot later significantly expand the scope of this adjudication and then shift "the cost of its completion upon the shoulders of New Mexico."

VI. Conclusion

In sum, the United States' pleading falsely alleges an agreement with the State which does not exist. The State objects to it on that basis. The State further respectfully requests that the Court include the entire Gallup Groundwater Basin within the geographical scope of this adjudication. However, if the Court ultimately determines to exclude the River Puerco and the Carrizo Wash areas, and limit this adjudication to the

Zuni River surface drainage basin, the State asks that the Court include language in the record which addresses the exclusion.

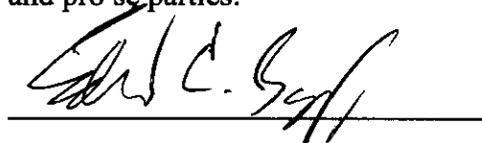
Respectfully submitted,



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Certificate of Service

I certify that on this 14th day of January, 2003, 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:



THE EXHIBITS ATTACHED TO THIS
PLEADING ARE TOO VOLUMINOUS TO
SCAN. SAID EXHIBITS ARE ATTACHED
TO THE ORIGINAL PLEADING IN THE
CASE FILE WHICH IS LOCATED IN THE
RECORDS DEPARTMENT, U.S.
DISTRICT COURT CLERK'S OFFICE.