

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

UNITED STATES OF AMERICA,)	
)	
and)	
)	
STATE OF NEW MEXICO ex rel. STATE)	
ENGINEER,)	No. 01cv00072-MV/WPL
)	
Plaintiffs,)	ZUNI RIVER BASIN
)	ADJUDICATION
v.)	
)	
A & R PRODUCTIONS, <i>et. al.</i> ,)	Subfile No. ZRB-4-0169
)	
Defendants.)	
)	

JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN

Pursuant to the Court’s December 30, 2015 *Order Setting Pretrial Conference* (Doc. 3164) and Fed. R. Civ. P. 26(f), counsel for the United States of America and State of New Mexico and Subfile Defendants Henry R. and Rebecca J. Grizzle conferred by telephone on January 27, 2016, and present to the Court the Joint Status Report and Provisional Discovery Plan they jointly have prepared.

NATURE OF THE CASE

A determination in this general stream system water rights adjudication of the Grizzles’ water rights associated with the real property they own in the Zuni River Basin.

AMENDMENTS TO PLEADINGS AND JOINDER OF PARTIES

Neither Plaintiffs nor the Grizzles intend to file any additional pleadings or join additional parties.

STIPULATIONS

The parties stipulate and agree that the United States District Court for the District of New Mexico has jurisdiction of the parties and the subject matter and that venue is properly laid in this District.

The parties further stipulate to the following facts: (1) the Plaintiffs recognize that the Grizzles own the real property on which the water features listed in Attachment A are found; (2) the corresponding water rights attributes for the historic water uses (the priority, amount, beneficial use, periods of use, and place of use) are agreed upon to the extent that Plaintiffs recognize a water right (denominated “US/NM Recognized Water Right” in Attachment A); and (3) the Grizzles are not required to prove the basis for and extent of the water rights described in Attachment A that the Plaintiffs are willing to recognize; provided, however, that to the extent the Grizzles assert water rights in addition to or different from those listed in Attachment A (*see* Subfile Defendants’ Contentions below), those claims will affect, change, and/or reduce the rights to which Plaintiffs might otherwise stipulate.

PLAINTIFFS’ CONTENTIONS

The Plaintiffs contend that the Grizzles are entitled to water rights for lands owned in the Zuni River Basin of New Mexico only to the extent of the US/NM Recognized Water Right (Attachment A). The Subfile Answer (Doc. 1653) and Amendment to Subfile Answer (Doc. 2709) reflect that the Grizzles do not agree with any aspect of the water rights described in Attachment A and that they claim water rights in excess of those described in Attachment A. To the extent that the Grizzles claim water rights in excess of those Plaintiffs are willing to

recognize, the Grizzles are required to establish all elements of each disputed water right, namely the priority, amount, beneficial use, periods of use, and place of use.

SUBFILE DEFENDANTS' CONTENTIONS

The Grizzles contend that the quantity and other characteristics of the water rights associated with their property are governed by the railroad act signed into law by President Lincoln on July 1, 1862—the Pacific Railroad Act of 1862, 12 Stat. 489. The Grizzles contend that the title to their real property traces directly to the railroad company originally granted the land under the aforementioned act. New Mexico law therefore does not govern the determination of the Grizzles' water rights. Based on the provisions of the Pacific Railroad Act, the Grizzles assert a right to use water in excess of the US/NM Recognized Water Right (Attachment A).

DISCOVERY PLAN

Limited discovery may be necessary and should be centered on that material which is relevant to establish or dispel the Grizzles' contentions. Discovery should begin once the Court issues a scheduling order adopting the provisions of this Joint Status Report and Provisional Discovery Plan. The parties propose the discovery plan outlined in the paragraphs below.

1. The Grizzles have the burden to establish all elements of any water right that are different from or in addition to those described in Attachment A (the priority, amount, beneficial use, periods of use, and place of use). In any proceeding or trial before the Court, the Grizzles will first call witness(es) to support their claims for the water rights asserted in their Subfile Answer (Doc. 1653) and the Amendment to Subfile Answer (Doc. 2709).

2. Defendants have identified the following witnesses to support the contentions made in their Subfile Answer and Amendment to Subfile Answer:

a. Henry R. Grizzle, P. O. Box 154, Vanderwagon, New Mexico 87326,
(505) 713-6717.

Defendants shall disclose to Plaintiffs within 30 days from the issuance of the Court's scheduling order the names, addresses, and telephone numbers of every witness that they intend to call and shall disclose whether the person identified will be a lay or expert witness.

3. After the Grizzles have presented their testimony and evidence, Plaintiffs may call the following person as a rebuttal witness:

a. Scott Turnbull, P.E., Associate Engineer, Natural Resources Consulting Engineers, Inc., 131 Lincoln Ave., Ste. 300, Fort Collins, Colorado 80524, (970) 224-1851; and

b. Rebuttal witness(es) to any additional expert(s) identified by the Grizzles.

4. Either party may also call witnesses yet to be named to identify or authenticate documents, if necessary.

5. Within thirty (30) days from the issuance of the Court's scheduling order, the parties shall exchange Initial Disclosure material as described in Fed. R. Civ. P. 26(a)(1). Included in Initial Disclosures, the Grizzles shall provide Plaintiffs copies of all documentary evidence in their possession that they intend to present to the Court to support their claimed water right. Although Plaintiffs have no initial burden of proof, Plaintiffs shall have an ongoing obligation to disclose during discovery any documentary evidence that they intend to introduce to rebut the Grizzles' evidence and such evidence shall be disclosed 30 days before the close of discovery.

6. The parties anticipate that discovery will be focused on the water right attributes (the priority, amount, beneficial use, periods of use, and place of use) of the water rights claimed by

the Grizzles and described in their Subfile Answer and Amendment to Subfile Answer. The following procedures shall govern discovery associated with this subfile action. Discovery shall be limited to those factual matters associated with establishing the elements for the Grizzles' claimed, contested water rights based on the doctrine of prior beneficial use.

- a. Maximum of twenty-five (25) interrogatories (including any subparts) (responses due thirty (30) days after service).
- b. Maximum of twenty-five (25) requests for production of documents (responses due thirty (30) days after service). Copies of documents may be produced in either paper or electronic PDF format at the discretion of the disclosing party.
- c. Maximum of twenty-five (25) requests for admission (responses due thirty (30) days after service).
- d. Once discovery begins, each party shall be permitted to depose the other parties (or party representatives) and the identified witness(es) of the other party. Each deposition shall be arranged through the consent of all parties to this proceeding. Each deposition is limited to a maximum of four (4) hours unless extended by agreement of the parties and shall occur at the location of the witness's principle place of work unless otherwise agreed to by all parties. Costs associated with the deposition shall be borne by the party taking the deposition except that costs associated with witness's appearance (fees, travel expenses, etc.) shall be borne by the party on whose behalf the witness is to be called.
- e. As contemplated under Fed. R. Civ. P. 26(a)(2), if the Grizzles intend to call an expert witness of any kind, that expert shall be identified no later than thirty (30) days

from the issuance of the Court's scheduling order. Every expert witness must prepare and produce a complete, final written expert report to Plaintiffs no later than sixty (60) days from the issuance of the Court's scheduling order. The expert report of any expert witness identified by the Grizzles shall include every expert opinion (and the complete basis thereof) held by the expert to which he/she may give testimony.

f. As contemplated under Fed. R. Civ. P. 26(a)(2), Plaintiffs will prepare and produce a written report from Mr. Turnbull (or another appropriate expert identified by Plaintiffs) to rebut the opinion of any expert witness retained by the Grizzles. If the Grizzles do not produce a written expert report, Plaintiffs will nevertheless prepare a written expert report from Mr. Turnbull to establish the factual basis for the water rights described in the US/NM Recognized Water Right (Attachment A). Plaintiffs shall have forty-five (45) days from the day the Grizzles provide their expert report(s) to produce Plaintiffs' expert report(s).

g. Supplementation under Fed. R. Civ. P. 26(e) shall be due twenty (20) days after either party has acquired new information.

h. All discovery commenced in this proceeding shall be completed within one hundred twenty (120) days after the issuance of the Court's scheduling order. Therefore, any interrogatories, requests for admission, and requests for production must be submitted no later than thirty (30) days before the discovery completion date described here. No deposition may be held beyond the 120-day discovery period without the consent of either the opposing parties or the Court.

DISPOSITIVE MOTIONS

Plaintiffs anticipate that the parties may file motions for summary judgment under Fed. R. Civ. P. 56 in an attempt to resolve any legal issues that do not involve a factual dispute. The parties should submit motions for summary judgment under the following schedule:

1. Within thirty (30) days after the close of discovery, the Grizzles shall submit any motion for summary judgment they deem appropriate to establish some or all of the water rights they claim in excess of those rights recognized by Plaintiffs in Attachment A.

2. Within sixty (60) days from the close of discovery, Plaintiffs shall submit a combined brief that contains (1) any response they might have to the Grizzles' motion for summary judgment and (2) any cross-motion for summary judgment on those water rights attributes the Grizzles claim in excess of those Plaintiffs are willing to recognize. Plaintiffs shall be permitted to submit a single combined brief not to exceed fifty-four (54) double-spaced pages (not inclusive of necessary appendices or attachments).

3. Within seventy-five (75) days from the close of discovery, the Grizzles shall submit a combined brief that contains (1) any reply they might have to Plaintiffs' response to their motion for summary judgment and (2) any response to Plaintiffs' cross-motion for summary judgment. The Grizzles shall be permitted to submit a single combined brief not to exceed forty-eight (48) double-spaced pages (not inclusive of necessary appendices or attachments).

4. Plaintiffs shall file a final reply to the Grizzles' response to the Plaintiffs' cross-motion for summary judgment within ninety (90) days from the close of discovery. Plaintiffs shall be permitted to submit a single combined brief not to exceed twenty (20) double-spaced pages (not inclusive of necessary appendices or attachments).

5. No oral argument will be permitted on any motion for summary judgment without a party requesting permission for oral argument from the Court and establishing good cause for the need for such oral argument.

TRIAL

To the extent that an issue of material fact remains that requires the Court to conduct an evidentiary trial after dispositive motions have been resolved, Plaintiffs estimate that any trial would require one (1) day. This is a non-jury case and should be scheduled only after dispositive motions have been addressed and resolved. The Court shall schedule a final pretrial conference as contemplated by Fed. R. Civ. P. 16(e) and shall subsequently issue a final trial plan for the parties to follow.

SETTLEMENT

The possibility of settlement in this case is considered unlikely. The parties do not request a settlement conference.

Respectfully submitted,

/s/
Samuel D. Gollis
U.S. Department of Justice
South Terrace, Suite 370
999 18th St.
Denver, CO 80202
(303) 844-1351

Approval granted by e-mail on 2/4/16
Henry R. Grizzle
Rebecca J. Grizzle
P. O. Box 154
Vanderwagen, NM 87326

ATTORNEY FOR THE UNITED STATES

_____/s/
Edward C. Bagley
Office of the New Mexico State Engineer
Special Assistant Attorney General
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150

ATTORNEY FOR THE STATE OF NEW MEXICO

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of February, 2016, I filed the foregoing JOINT STATUS REPORT AND PROVISIONAL DISCOVERY PLAN electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing. I further certify that this date I served the foregoing on the following non-CM/ECF Participants via U.S. first class mail, postage prepaid:

Henry R. & Rebecca J. Grizzle
P.O. Box 154
Vanderwagen, NM 87326

/s/
Samuel D. Gollis