

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

UNITED STATES OF AMERICA,)	
and)	
STATE OF NEW MEXICO, <i>ex rel.</i> STATE)	
ENGINEER,)	
)	01cv00072-BB-ACE
Plaintiffs,)	
)	ZUNI RIVER BASIN
and)	ADJUDICATION
)	
ZUNI INDIAN TRIBE, and NAVAJO NATION,)	
Plaintiffs-in-Intervention,)	
)	
v.)	
)	
A & R PRODUCTIONS, <i>et al.</i>)	
)	
Defendants.)	
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**NAVAJO NATION’S COMMENTS
REGARDING ORDER TO SHOW CAUSE RE: STREAM SYSTEM WIDE ISSUE**

The Navajo Nation submits the following comments in response to the Order to Show Cause (No. 370) issued by the Special Master on July 26, 2005. Specifically, the Special Master has inquired why the quantification of domestic well rights is an issue which should not be heard in a stream system-wide proceeding, rather than on a subfile-by-subfile basis. In particular, the Court is interested in (1) whether, under the present circumstances, the United States and the State of New Mexico can identify and join potential water rights claimants using accessible data sources, and (2) the approximate costs to do so.

The United States is currently completing and filing the hydrographic survey report (HSR) by Sub-areas. The process for adjudicating individual water claims for the first two Sub-

areas for which an HSR has been filed is outlined in the January 5, 2005, Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-areas 4 and 8 of the Zuni River Stream System (No. 355) (Order No. 355).

Pursuant to Order No. 355, water rights claims will be adjudicated on a subfile basis. Order No. 355 also requires that water rights claimants who have not been previously joined to the adjudication be joined pursuant to their identification by the hydrographic survey reports generated for Sub-Areas 4 and 8 by the United States serving notice on these previously unjoined claimants. For those claimants whose whereabouts are unknown and those claimants who are unidentified and unknown, service will be made by publication by the United States for all such claimants for all Sub-areas after the last HSR for the Zuni River stream system has been completed and filed with the Court.

The Special Master now suggests that the adjudication should follow a process different than that outlined in Order No. 355. The suggestion appears to be that the quantification of water rights for all domestic wells should be adjudicated en masse through a stream system-wide proceeding. Ostensibly, this suggestion arises from the State's announcement at the July 18, 2005, status conference that it and the United States "have agreed that the amount of water to be offered for each domestic well should 0.7 acre-feet per annum, or an amount equivalent to claimant's actual beneficial use, whichever is higher."¹ Order to Show Cause at 2. The Special Master suggests that adjudicating domestic well rights en masse rather than on a subfile-by-

¹ The State's announcement differs from the United State's explanation that the domestic rights will be quantified as the amount of "historic beneficial use, not to exceed .7 acre feet per year." *United States' Response to Order to Show Cause* at 4.

subfile basis will beneficially guide the course of the adjudication of water rights in a manner that will prevent delay.

The suggestion of a system-wide proceeding for domestic well rights raises two concerns for the Navajo Nation. First, whatever adjudication process is adopted, the process for offering consent orders should be based on the beneficial use measure. *See* N.M. Const. Art. 16, § 3; NMSA § 72-12-2 (“Beneficial use is the basis, the measure and the limit to the right to the use of the waters described in this act [Underground Waters].”) It is unclear if adjudicating all domestic well users rights en masse will create one standard offer of quantification. As suggested by the United States and State, they intend to make offers based on the beneficial use measure. If a system-wide proceeding would lead to the offer of one quantification standard for all domestic well users, then such process will deviate from the beneficial use measure. Whatever procedure is followed to make offers, the beneficial use measure should be utilized to guide the process.

Second, whether domestic wells are adjudicated en masse in a system-wide proceeding, or on a subfile-by-subfile basis, a constitutionally based notice should guide whatever procedure is adopted. While *Mullane v. Central Hanover B. & T. Co.*, 339 U.S. 306, 318 (1950), might allow for a constitutional form of adequate notice other than personal service, Order No. 355 has already laid out a process to provide service. Order No. 355 requires personal service to all known water rights claimants and service by publication of claimants whose whereabouts are unknown and claimants who are unidentified and unknown after the all HSR Sub-areas have been filed with the Court. The Court has already started a process of providing notice to

potential claimants and at this point, there is more reason to stay with the process already developed than to deviate.

It seems that the subfile-by-subfile procedure has, for all intents and purposes, begun, and the adjudication should follow the procedure outlined in Order No. 355 until it becomes apparent that the subfile-by-subfile procedure is not expeditious or efficient.

Finally, the Navajo Nation has had an opportunity to review the comments of the United States in its *Response to Order to Show Cause* and generally concurs with and supports those comments.

NAVAJO NATION DEPARTMENT OF JUSTICE
Louis Denetsosie, Attorney General

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing pleading **NAVAJO NATION'S COMMENTS REGARDING ORDER TO SHOW CAUSE RE: STREAM SYSTEM WIDE ISSUE** was mailed first class to the parties of record on the attached Service List this 17th day of August, 2005.

SMP/fpj/147

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