

**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,**

Plaintiffs,

and

No. 01cv00072 BB/WWD-ACE

**ZUNI INDIAN TRIBE AND
NAVAJO NATION,**

ZUNI RIVER BASIN

Plaintiffs-in-Intervention,

v.

A & R Productions, *et al.*,

Defendants.

UNITED STATES' ADDITIONAL COMMENTS RE: ORDER TO SHOW CAUSE

Pursuant to the Special Master's instructions during the hearing in this matter on August 23, 2005, the United States of America ("United States") submits the following additional comments concerning the Special Master's July 26, 2005, *Order to Show Cause and Notice of Hearing Re: Stream System-Wide Issue* [Doc. No. 370] ("Show Cause Order"), matters discussed at the August 23, 2005 hearing, and documents filed by other parties following the hearing. In addition, the United States submits herewith a revised proposed *Amended Procedural And Scheduling Order For The*

Adjudication Of Water Rights Claims In Sub-Areas 4 And 8 Of The Zuni River Stream System.

Draft Stream Adjudication Rules circulated for comment by the Judicial Subcommittee of the New Mexico State Supreme Court Ad Hoc Adjudication Rules Committee.

The United States objects to any application of the referenced draft stream adjudication rules to this federal civil action for the following reasons:

1. The referenced stream adjudication rules circulated by the Judicial Subcommittee clearly indicate on their face that they are drafts. They are not final and continue to undergo significant change in each version.
2. The draft rules do not have the force of law in any jurisdiction.
3. Even if adopted by the New Mexico Supreme Court as rules binding in the courts of the State, the referenced water adjudication rules would provide no binding authority with respect to Federal Court proceedings and could not be applied in this proceeding in derogation of the Federal Rules of Civil Procedure or the Federal Rules of Evidence. U.S. Const. art. VI, Paragraph 2.

Post-Hearing Comments Filed by Defendants Richard Davis Mallery *et al.* and Paul Davis *et al.*

The comments filed on August 30, 2005 by counsel for Richard Davis Mallery *et al.* and counsel for Paul Davis *et al.* identify, for the first time, legal questions and authorities that may be relevant to the question of whether the adjudication of some aspects of the water rights for some of the domestic wells in the Zuni stream system, specifically those domestic wells permitted pursuant to NMSA 1978 § 72-12-1, may be conducted on a basin-wide basis. The United States requests 10 days, or until September 9, 2005, in which to submit a detailed response to these post-hearing filings.

Delay and Consequent Expense Caused by Deviation From the Procedure and Schedule Previously Ordered in this Case

The post-hearing submissions mentioned above have now identified seven potential legal issues. The United States' position is that defendants are free, at any time, to file a motion for summary judgment concerning such issues, but that there is no need to disrupt the schedule previously ordered by the Special Master in consequence of, much less in mere anticipation of, such motions. However, if the subarea by subarea procedure previously ordered by the Special Master is to be further stayed, or discarded, the consequences will inevitably be the interjection of profound delay into this action.

There will be delay while the parties brief, and the Special Master, and possibly the District Court, decide, what the relevant stream system issue or issues are, who must be joined before the substance of those issues can be briefed, and how such joinder is to be accomplished. There will be delay while such joinder is completed. There will be delay while the parties brief, and the Special Master, and possibly the District Court, decide, whether discovery is necessary to fairly resolve the selected issues and, if so, there will be further delay while such discovery is conducted. There will be delay while the parties finally brief the identified issues and while the Special Master prepares her report and recommendations. There will be delay while the parties brief their objections to the Special Master's report and until the District Court decides the matter. There may be much more delay if any party succeeds in taking an appeal of the issue to the Court of Appeals. A realistic estimate of the time that will be consumed by these actions will acknowledge that it will require months, at a minimum, and more likely years, based on experience with similar proceedings in this Court.

While this delay continues, the hydrographic survey data already compiled by the United States at a cost of over \$1 million, in reliance on this Court's previous procedural orders, will be growing stale. As Mr. Stripp pointed out at the August 23, 2005 hearing, property ownership in the Zuni Basin is constantly changing. In addition, new domestic wells are being permitted by the State on a continual basis. The cumulative effect of these and other changes to water uses in the Zuni stream system while a basin-wide issue is resolved, will be to render obsolete and unreliable the hydrographic survey already nearly completed. The United States cannot afford to spend federal taxpayer money on hydrographic surveys rendered useless simply because this Court decides to abruptly change its procedural course in the middle of the adjudication.

The United States again urges the Special Master to maintain the schedule sequence mandated by her previous scheduling orders. Submitted herewith is a revised *Amended Procedural and Scheduling Order For The Adjudication Of Water Rights Claims In Sub-Areas 4 And 8 Of The Zuni River Stream System* which incorporates changes made necessary by the passage of time. No party objected to a previous version of the amended order circulated to counsel on July 22, 2005. Counsel for the United States has discussed the schedule incorporated in the proposed amended order with Counsel for the State and believes that schedule is feasible, provided the amended order is entered by the Special Master no later than September 12, 2005.

Respectfully submitted this 31st day of August 2005.

COUNSEL FOR THE UNITED STATES:

A handwritten signature in black ink, appearing to read "Bradley S. Bridgewater". The signature is written in a cursive style with a horizontal line extending from the end.

BRADLEY S. BRIDGEWATER

U.S. Department of Justice

999 18th Street, Suite 945N

Denver, CO 80202

(303) 312-7318

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *United States' Additional Comments Re: Order To Show Cause* were mailed to all persons on the attached distribution list on August 31, 2005.


BRADLEY S. BRIDGEWATER

Charnas, Stephen, Esq.
Sutin, Thayer & Browne PC
P.O. Box 1945
Albuquerque, NM 87103-1945

Stripp, William G., Esq.
P.O. Box 159
Ramah, NM 87321

Gardner, David R., Esq.
P.O. Box 62
Bernalillo, NM 87004

Stanley Pollack/Bidtah Becker
Navajo Nation Dept. of Justice
P.O. Box 2010
Window Rock, AZ 86515-2010

Drullinger, Sandra S., Pro Se
818 E. Maple St.
Hoopeston, IL 60942

McBride, Gerlad F., Pro Se
McBride, Myrrl W., Pro Se
2725 Aliso Dr., N.E.
Albuquerque, NM 87110

Shoenfeld, Peter B., Esq.
P.O. Box 2421
Sante Fe, NM 87504-2421

Sunny J.Nixon, Mark Adams
Rodey Dickason Sloan Akin & Robb
P.O. Box 1357
Santa Fe NM 87504-1357

Boynton, Bruce, Esq.
Boynton, Simms-West Law Office
P.O. Box 1239
Grants, NM 87020

Beardsley, Ann Hambleton, Pro Se
127 Orchard Drive
Central, UT 84722

Ionta, Robert W., Esq.
McKim, Head & Ionta
P.O. Box 1059
Gallup, NM 87305

Haas, James E., Esq.
Losee, Carson & Haas P.A.
Box 1720
Artesia, NM 88211

Joca, Mary Ann, Esq.
U.S. DOA, Off. of Gen. Counsel
P.O. Box 586
Albuquerque, NM 87103

Greg Mehojah
DOI, Office of the Solicitor
505 Marquette Ave NW Ste 1800
Albuquerque, NM 87102

Gugliotta, Kimberly J., Pro Se
158 W. William Casey St.
Corona, AZ 85641

Bunch, Steven L., Esq.
N. M. Highway & Trans. Dept.
P.O. Box 1149
Santa Fe, NM 87504-1149

Stephen Hughes/Michael Thomas
N.M. State Land Office
P.O. Box 1148
Sante Fe, NM 87504-1148

Sanchez, Dorothy C., Esq.
1011 4th Street, N.W.
Albuquerque, NM 87102-2132

Fahmy, Peter, Esq.
Office of Regional Solicitor
755 Parfet St., Suite 151
Lakewood, CO 80215

Brodrick, Ted, Pro Se
P.O. Box 219
Ramah, NM 87321

Shadle, Stephen P., Esq.
Westover, Shadle, Carter & Walsma
2260 S. Fourth Ave., #2000
Yuma, AZ 85364

Dahl, Jeffrey A., Esq.
Lamb, Metzgar, Lines & Dahl, PA
P.O. Box 987
Albuquerque, NM 87103

Marx, Jane, Esq.
2825 Candelaria Road NW
Albuquerque, NM 87107

Williams, Pamela, Esq.
Division of Indian Affairs
1849 C St., N.W., Rm 6456
Washington, DC 20240

Lebeck, David R., Pro Se
Lebeck, Albert O., Pro Se
P.O. Drawer 38
Gallup, NM 87305

Cassutt, Kenneth J., Esq.
530-B Harkle Road
Santa Fe, NM 87505

Gehlert, David W., Esq.
USDOJ-ENRD
999 18TH St., Suite 945
Denver, Colorado 80202

Gabin, Special Master Vickie L.
U.S. District Court - DCNM
P.O. Box 2384
Sante Fe, NM 87504-2384

DePauli, Louis E., Pro Se
1610 Redrock Drive
Gallup, NM 87031

Clara M. Mercer
1017 S. 10th Avenue
Yuma, AZ 85364

Edward Bagley, Gregory Ridgley,
Off. of State Eng, Legal Services
P.O. Box 25102
Sante Fe, NM 87504-5102

Shaw, Mark H., Esq.
9700 Entrada Pl. NW
Albuquerque, NM 87114-3776

Nelson, Stephen R., Esq.
Johnson & Nelson, P.C.
P.O. Box 25547
Albuquerque, NM 87125-5547

David Candelaria, Pro Se
12,000 Ice Caves Rd.
Grants, NM 87020

Christina Bruff DuMars, Charles
T. DuMars, Tanya L. Scott
201 Third St. NW, Suite 1370
Albuquerque, NM 87102

Susan C. Kery, Esq.
Sheehan, Sheehan & Stelzner
P.O. Box 271
Albuquerque, NM 87103

Jay F. Stein, James C. Brockmann
Stein & Brockmann, P.A.
P.O. Box 5250
Santa Fe, NM 87502-5250

Cullen Hallmark, Esq.
Garber & Hallmark
P.O. Box 850
Santa Fe, NM 87504

Richard W. Bowser, Pro Se
Joan D. Bowser, Pro Se
#5, Hawk Ridge Road
Moriarty, NM 87035

Cheryl Duty, Pro Se
HC61 Box 788
Ramah, NM 87321

William J. Cooksey
Dubois, Cooksey & Bischoff, P.A.
2020 Fourth Street, N.W.
Albuquerque, NM 87102

John W. Utton
Sheehan, Sheehan & Stelzner, PA
P.O. Box 271
Albuquerque, NM 87103

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