

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,)	
Plaintiffs,)	
)	
and)	01cv00072-BB-ACE
ZUNI INDIAN TRIBE, and NAVAJO NATION,)	
Plaintiffs-in-Intervention,)	ZUNI RIVER BASIN
)	ADJUDICATION
-v-)	
)	
A & R PRODUCTIONS, <i>et al.</i>)	Sub-areas 4 and 8
)	
Defendants.)	
)	

ORDER DENYING MOTION FOR THE FLORA AND FAUNA
AND REQUIRING JOINDER OF PROPER WATER RIGHTS CLAIMANT

THIS MATTER is before the Special Master on the Motion for the Flora and Fauna of the Land Located Within the S1/2 of the SE1/4 of the SE1/4 of T12N R16W Section 13 to Join in the Adjudication for Sub-areas 4 and 8, filed September 8, 2005 (Docket No. 386), and on reference to the Special Master by Order entered November 22, 2005 (No. 402). Plaintiff United States of America (“United States”) filed its Response September 20, 2005 (No. 389).

Joan and Richard Bowser filed the Motion on their own behalf, and on behalf of the flora and fauna which occupy the lands which are identified in the Motion. The Bowsers assert that the waters associated with Sub-areas 4 and 8 “are upstream or downstream of the land located within the S1/2 of the SE 1/4 of the SE 1/4 of T12N R16W Section 13 and allocation of these waters may have an adverse effect on the Flora and Fauna.” The Bowsers request “to be allowed to join in the adjudication for subareas 4 & 8.”

This Order denies the Motion to join, requires that the current title holder of the water rights associated with the reference tract of land be joined, and provides for the submission of a statement of claim.

Sub-area 3

The United States asserts that the tract referenced by the Bowsers is within Sub-area 3, and not within either Sub-area 4 or Sub-area 8, as defined by the September 8, 2005, Amended Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 4 and 8 of the Zuni River Stream System (No. 387). The fact that the tract is within Sub-area 3 is undisputed by the Bowsers, and, at this time, is dispositive of the Bowsers' Motion for inclusion in the adjudication.¹ The July 20, 2003, Procedural and Scheduling Order (No. 215) sets out the framework for this adjudication and provides on p. 1 that "Procedural and scheduling orders for each sub-area will issue following the filing of the hydrographic survey report for the sub-area." Paragraph IV addresses the hydrographic survey process, which proceeds sub-area by sub-area. The hydrographic survey for Sub-area 3 has not yet been filed; thus, the adjudication of this sub-area has not been initiated.

I construe the Bowsers' request to join in the adjudication of sub-areas 4 and 8 to mean that they intend to lodge *inter se* challenges to other individuals' water rights claims in sub-areas 4 and 8. Their request is denied because the *inter se* phase of the adjudication will occur once the adjudication of rights in all sub-areas is completed. At that time, every water rights claimant will be

¹As the United States points out, the Motion as filed raises several significant legal issues. Response at 1-3. Violations of F. R. Civ. P. 11 and allegations of unauthorized practice of law are always to be taken seriously; however, I do not believe that under the present circumstances, the Court need address these issues.

afforded the opportunity to challenge other rights. State ex rel. Reynolds v. Lewis, 99 N.M. 699, 663 P.2d 358 (1983).

Ownership of Water Rights

The following facts are not disputed. The United States asserts that a Waiver of Service of Summons dated March 9, 2001, was signed by “Joan Bowser for Cheryl H. Duty.” Because the waiver does not indicate whether Ms. Bowser is authorized to represent Ms. Duty in any capacity, the United States did not file the Waiver. Response at 3 - 4. On April 19, 2001, an “Answer to United States’ Complaint (No. 43) was signed and filed by Ms. Bowser. Ms. Bowser states “the property is under land contract to Joan and Richard Bowser from Cheryl Duty. Cheryl Duty was the named defendant on the complaint and Joan and Richard Bowser are making this answer on her behalf for this property.” The Answer is signed “Joan Bowser for Cheryl Duty.” The Court record includes a letter from the Bowsers, dated May 4, 2003, attached to which is a copy of the 1998 real estate contract between the Bowsers and Ms. Duty. The real estate contract provides for a down payment as well as monthly payments which continue until the purchase price is paid in full; the contract is the standard form contract which provides, *inter alia*, for the land to revert to the seller in the event of purchasers’ default. There is no reservation of water rights by the seller.

Generally, the purchaser’s interest in the property under a real estate contract is an equitable title; the seller has legal title. See, Ch. 81, Powell on Real Property (Michael Allen Wolf, ed., Matthew Bender). Under New Mexico law, the seller holds the legal title until full payment of the purchase price; the purchaser acquires an equitable interest in the land . Marks v. City of Tucumcari, 93 N.M. 4, 595 P.2d 1199 (1979); Anthony v. Alsup, 114 N.M. 95, 835 P.2d 811 (1992). Water rights are generally considered to be appurtenant to the land upon which the water is used, unless

those rights have been severed from the land, see, § 72-5-23 NMSA 1978, or otherwise reserved by the seller, Turner v. Bassett, 137 N.M. 381, 111 P.3d 701 (2005). New Mexico law requires that all claimants to the waters of this adjudication be made parties, § 72-4-17 NMSA 1978.

For purposes of this Order, I will assume that the United States' hydrographic survey process identifies the individual or entity which has legal title to the lands associated with water rights claims. I assume further that legal title still resides with Ms. Duty because there is no indication that the real estate contract has been paid in full, nor that she has severed the water rights from the land.

The expeditious and fair conduct of this adjudication depends on having adequate water rights information upon which to base an accurate hydrographic survey and the subsequent final decree; it is equally important that ownership records be current. Accordingly, Ms. Duty should be (again) served with process and joined as a defendant in this suit. Once that is accomplished, she should immediately either file a proper statement of water rights claim or move to substitute the Bowsers properly, pursuant to F. R. Civ. P. 25(c). If the Bowsers are substituted in this action, they should file a statement of water rights claim within 30 days of the entry of the order granting substitution. No further pleadings may be signed by the Bowsers on behalf of Ms. Duty.

IT IS ORDERED, THEREFORE, that the Motion for the Flora and the Fauna is hereby DENIED.

IT IS FURTHER ORDERED that within 45 days of the entry of this order, if it has not already done so, the United States shall re-serve Ms. Duty with the Amended Complaint and waiver of service of summons, and include a copy of this Order, the Interim Procedural Order entered June 24, 2003 (No. 208), and the July, 20, 2003, Procedural and Scheduling Order (No. 215).

IT IS SO ORDERED.

/electronic signature/
SPECIAL MASTER VICKIE L. GABIN