

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

01AUG23 PM 1:12

UNITED STATES	)	
	)	
Plaintiff,	)	
	)	
vs.	)	01cv00072BDB/WWD (ACE)
	)	
A & R PRODUCTIONS, ET AL.,	)	ZUNI RIVER BASIN
	)	UNITED STATES' REPORT
	)	
Defendants.	)	

RESPONSE OF THE DEFENDANTS JOHN A. YATES  
ET AL TO THE REPORTS OF THE UNITED STATES  
AND THE STATE OF NEW MEXICO PURSUANT  
TO THE SPECIAL MASTER'S ORDER OF MARCH 30, 2001

I. INTRODUCTION

The John A. Yates et al Defendants (hereafter "Yates Defendants") understand the Special Master's previous order of March 30, 2001, to order the United States and the State of New Mexico to confer and agree, if possible, on a proposed procedural and scheduling order for proceeding with the above adjudication once the District Judge's stay of proceedings was lifted. Those reports have now been filed.

It does not appear from their respective reports that the United States and the State of New Mexico meaningfully conferred on a process to move forward this adjudication proceeding. In fact the reports suggest the parties would

76

go in opposite directions. The United States says the case could be dismissed without prejudice as to the non-governmental defendants and the United States would undertake a partial hydrographic survey of two of the five designated areas where the United States believes the bulk of the water rights are located. After this partial hydrographic survey was completed the United States would rejoin those defendants whose water rights are found by the survey and submit offers of judgment to them. The United States report does not say when, or if, there would be a hydrographic survey undertaken by the United States for the rest of the basin.

By contrast the State of New Mexico would not commit any funds or staff to do a hydrographic survey with the United States, or do a hydrographic survey of the basin itself. However, the State of New Mexico suggests the Special Master enter a scheduling order over the next year which would lift the stay of proceedings imposed by the District Judge and require the filing of motions directed to the United States complaint, responses and replies thereto, and ultimately, if necessary, answers by the Defendants to the United States complaint.

## II. RESPONSE TO THE UNITED STATES REPORT

The United States proposal to begin the hydrographic survey of the Zuni River basin in two specific areas (Areas 1 and 2 is counsel's understanding) is a minor step in the right direction. Clearly, however, this is far short of what is required to obtain a final, comprehensive judgment inclusive of the water rights of all water rights claimants in the basin. Leaving parties and water rights out only causes problems later on after a final decree is entered.

In the view of the Yates Defendants, the United States commitment should be to undertake and complete a hydrographic survey of the entire Zuni River basin with or without the cooperation of the State of New Mexico. The United States correctly points out a hydrographic survey completed by the United States is admissible into evidence in water rights adjudication proceedings under state law. While the United States calls its complaint one for declaratory judgment and quiet title, the relief requested in the complaint is virtually identical to ordinary water rights adjudication suits filed by the State of New Mexico in state or federal court.

The United States says the majority of the non-governmental water rights are concentrated in 5 specific areas shown on the hydrologic map. If that is in fact the case, it should not be a difficult task to finish the

hydrographic survey for the entire basin; parenthetically, the Yates defendants have identified a significant number of their water rights which lie outside the 5 identified areas, particularly area 5. Whether others have rights outside those areas is presently unknown but likely.

More specifically, the Yates Defendants recommend to the Special Master that upon completion of the entire hydrographic survey, the United States would submit offers of judgment to each identified water right claimant. Presumably there may also be "no right" offers, as is often the case in these adjudication proceedings.

At the same time, or preferably prior thereto when the United States has joined, or as the case may be, rejoined the water rights claimants as defendants, the United States would serve on each defendant, including those receiving "no right" offers of judgment, a statement of claims to water rights in the basin by the United States on behalf of its beneficiaries. Also statements of claims by any intervening parties, such as the Zuni Tribe, would be served on water rights claimants, as defined above, to the extent the claims of the intervenors differ from those asserted by the United States on their behalf.

Litigation wise, the offers of judgment, including "no right" offers, and the claims of the United States for its

beneficiaries and the intervenors' water rights claims could proceed along parallel tracks as far quantification of their water rights is concerned.

The Yates defendants see it as very important that each defendant knows what the United States and the intervenors contend what their water rights are in order to evaluate their respective interests in the litigation both with respect to their own water rights and the impact the claims of the United States and the intervenors would have on their water rights. There is bound to be many de minimus water rights identified in the hydrographic survey. The United States did not directly answer the Special Master's question as to what class of water rights could be dismissed. Presumably one category could be domestic and stock wells authorized under NMSA 1978, 72.12.1 or small pre basin domestic wells and stock tanks. Such claimants would probably have little incentive from an economic standpoint to litigate the claims of the United States and the Intervenor.

The water rights claims of the Yates Defendants, while being of the stock and domestic water variety (although not exclusively so) could be sufficiently substantial and important to an integrated ranching operation that the Yates Defendants possibly would oppose the claims of the

United States and the Intervenor. While no means complete, counsel's preliminary investigation of the Yates Defendants' water rights indicates that a number of these rights are located either within or adjacent to the area #5 in the vicinity of Atarque, the largest single area shown on the hydrologic map.

Because at least some of the Yates Defendants' water rights are presently of record in the State Engineer's office, and thus probable the Yates Defendants would be defendants in this cause, the Yates Defendants would prefer to remain in the case as defendants - albeit inactive - until the hydrographic survey of their water rights is completed and offers of judgment served in order to receive notice of the proceedings during the progress of the hydrographic survey. Implicit in this semi active role is the assumption that lifting the stay of the District Court would be premature at this time.

### III. RESPONSE TO THE STATE OF NEW MEXICO REPORT

The proposal of the State of New Mexico is totally unacceptable to the Yates Defendants. The State of New Mexico proposal casts the non-governmental defendants into the endless maw of the adjudication without these defendants even knowing what specific claims the United States makes for its beneficiaries, the beneficiaries as

States and the State of New Mexico, if participating in the hydrographic survey, say the non-governmental defendants have in the way of water rights. The defendants would be put to a great expense to litigate issues in which they may not have any interest once the non-governmental defendants learn the specific claims of the United States, the claims of their beneficiaries or intervenors as well as their own Adjudication proceedings should have a certain symmetry which the State of New Mexico's proposal lacks. Otherwise the parties are litigating "in the blind" in the worst sense of the term.

#### IV. CONCLUSION

Accordingly, the Yates Defendants request the Special Master reject the proposal of the State of New Mexico and modify the United States proposal to require a full and complete hydrographic survey in order that finality be achieved. The Yates Defendants further ask the Court not to dismiss the non-governmental defendants without prejudice while a full and complete hydrographic survey is completed and all parties having or claiming water rights in the Zuni basin be joined and offers of judgment served on them.

The stay of proceedings entered by the District Court should not be lifted until the full and complete

hydrographic survey referred to above is completed and the case proceeds as recommended herein.

ERNEST CARROLL, ESQ.  
Post Office Box 1720  
Artesia, NM 88211-1720  
(505) 746-3505  
(505) 746-6316 (fax)

NEIL C. STILLINGER, ESQ.  
Post Office Box 8378  
Santa Fe, NM 87504  
(505) 984-1034  
(505) 984-1477 (fax)

Attorneys for the  
Yates Defendants

By

  
NEIL C. STILLINGER



Attorney's Certificate of Service

Neil C. Stillinger, co-counsel with Ernest Carroll, Esq. for the John A. Yates, et al defendants in the above-entitled cause, hereby certifies that on the 24<sup>TH</sup> day of August, 2001, he mailed to each of the parties listed below a copy of the Response of the defendants John A. Yates, et al to the Reports of the United States and the State of New Mexico pursuant to the Special Master's order of March 30, 2001, postage prepaid.

Edward C. Bagley, Esq.  
Office of the State Engineer  
P.O. Box 1148  
Santa Fe, New Mexico 87504

Ann Hambleton Beardsley  
HC 61, Box 747  
Ramah, New Mexico 87321

Bruce Boynton III, Esq.  
P.O. Box 1239  
Grants, New Mexico 87020

Ted Brodrick  
P.O. Box 219  
Ramah, New Mexico 87321

Steven L. Bunch, Esq.  
NM Highway & Transportation  
P.O. Box 1149  
Santa Fe, New Mexico 87504

Darcy Bushneil, Esq.  
US District Court  
District of New Mexico  
3333 Lomas Blvd. NW  
Albuquerque, NM 87102-2272

Kenneth J. Cassutt, Esq.  
Cassutt, Hays & Friedman, PA  
530-B Harkle Road  
Santa Fe, New Mexico 87505

David Candelaria  
12,000 Ice Caves Road  
Grants, New Mexico 87020

Jeffrey A. Dahl, Esq.  
Lamb, Metzgar, Lines & Dahl  
P.O. Box 987  
Albuquerque, New Mexico 87111

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

Louis E. DePauli, Sr.  
1610 Redrock Drive  
Gallup, New Mexico 87301

Tessa T. Davison, Esq.  
Swaim, Schrandt & Davidson PC  
4830 Juan Tabo, NE #F  
Albuquerque, New Mexico 87111

Peter Fahmy, Esq.  
Office of the Regional  
Solicitor  
755 Parfet St., 151  
Lakewood, Colorado 80215

Sandra S. Drullinger  
818 E. Maple St.  
Hoopeston, Illinois 60942

Vickie L. Gabin, Esq.  
US District Court  
US Courthouse  
P.O. Box 2384  
Santa Fe, New Mexico 87504

Stephen G. Hughes, Esq.  
Special Assistant Attorney  
General  
New Mexico Land Office  
310 Old Santa Fe Trail  
Santa Fe, New Mexico 87501

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

Lynn A. Johnson, Esq.  
USDJ-ENRD  
999 - 18<sup>th</sup> St., Suite 945  
Denver, Colorado 80202

David R. Lebeck  
P.O. Drawer 38  
Gallup, New Mexico 87305

Jane Marx, Esq.  
Williams, Janov & Cooney  
2501 Rio Grande Blvd. NW  
Albuquerque, New Mexico 87104

Gerald F. McBride  
2725 Aliso Dr. NE  
Albuquerque, New Mexico 87110

Stanley M. Pollack, Esq.  
Navajo Nation Dep. Of Justice  
P.O. Box 2019  
Window Rock, AZ 86515-2010

R. Bruce Frederick, Esq.  
NM Attorney General's Office  
Spec. Asst. Attorney General  
P.O. Box 1148  
Santa Fe, New Mexico 87504

Raymond Hamilton, Esq.  
US Attorney's Office  
District of New Mexico  
P.O. Box 607  
Albuquerque, New Mexico 87103

Mary Ann Joca, Esq.  
US Dept. of Agriculture  
517 Gold Ave., SW, Rm. 4017  
Albuquerque, New Mexico 87102

Albert O. Lebeck, Jr.  
P.O. Drawer 38  
Gallup, New Mexico 87305

Roger Martella, Esq.  
DOJ/ENRD-IRS  
P.O. Box 44378  
Washington, DC 20026-4379

Myrrl W. McBride  
2725 Aliso Dr. NE  
Albuquerque, New Mexico 87110

Charles E. O'Connell Jr. Esq.  
US Dept. of Justice  
Environment & Natural Res.  
601 D St. NW, Room 3507  
Washington, DC 20004

Mark Smith, Esq.  
Rodey, Dickason, Sloan  
Akin & Robb, P.A.  
P.O. Box 1888  
Albuquerque, New Mexico 87102

Sunny Nixon, Esq.  
Rodey, Dickason, Sloan  
Akin & Robb, P.A.  
P.O. Box 1357  
Santa Fe, New Mexico 87504

Rosebrough & Barnhouse, P.C.  
P.O. Box 1744  
Gallup, New Mexico 87305

John B. Welton, Esq.  
Briana Berman, Esq.  
Salmon, Lewis & Weldon  
2850 E. Camelback Rd., Ste 200  
Phoenix, Arizona 85016

Dorothy C. Sanchez, Esq.  
715 Tijeras S.W.  
Albuquerque, New Mexico 87102

Stephen P. Shadle, Esq.  
Westover Law Firm  
2260 South 4<sup>th</sup> Ave, Suite 2000  
Yuma, Arizona 85364

Mark H. Shaw, Esq.  
3733 Eubank Blvd. NE  
Albuquerque, New Mexico 87111

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

Pamela Williams, Esq.  
Division of Indian Affairs  
Office of Solicitor for Int.  
1849 C. Street, NW, Rm. 6456  
Washington, DC 20240



Neil C. Stillinger