

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

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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UNITED STATES,

Plaintiff,

vs.

CIV-No. 01-0072-BB/WW
CLERK OF COURT

STATE OF NEW MEXICO ENGINEER, et al.,

Defendants.

**COMMENTS OF THE NEW MEXICO COMMISSIONER
OF PUBLIC LANDS ON THE SEPARATE REPORTS SUBMITTED BY
THE UNITED STATES AND THE STATE OF NEW MEXICO**

Pursuant to the Special Master's Scheduling Order filed on March 30, 2001, the New Mexico Commissioner of Public Lands ("Commissioner") submits the following comments on the separate reports submitted by the United States and the State of New Mexico ("New Mexico").

I. Proposed Schedule:

The Special Master's Order required the United States and New Mexico to "file a proposed procedural and scheduling order covering, at a minimum, the next two years[.]" Although New Mexico's proposal at least takes the case through September 2002, neither report sets out a realistic scheduling proposal through 2003. The United States and New Mexico should, therefore, be ordered to meet and confer and to propose a scheduling order that complies with the Special Master's Order. The Commissioner submits the following additional comments for consideration by the Special Master:

1. New Mexico's current proposal appropriately provides for an initial period for the filing of "[p]leadings directed to the U.S. Complaint," such as Rule 12(b)(6) motions to dismiss. Such motions must be briefed and decided before any hydrographic survey is prepared. However, the parties remaining in this lawsuit (see below **Section II Other Matters**) should be allowed to file these pleadings up to March 31, 2002, with responses and replies due on July 31st and September 30th, 2002, respectively.

The remaining comments assume that the court denies any motions to dismiss.

2. Since it is overwhelmingly clear that New Mexico cannot fund a hydrographic survey of the Zuni River Basin at this time, the United States alone must pay for the survey. However, if it is the United States' position that it can, through federal court order, force New Mexico to appropriate funds for a hydrographic survey of the Zuni River Basin ("Basin"), then the Scheduling Order should require the United States to submit a brief on this undoubtedly disputed matter no later than December 31, 2002. Responses and replies should be due on February 28th and March 31st, 2003, respectively.

3. By May 31, 2003, the United States should "identify with specificity" all of its claimed water rights in the Basin, as required by paragraph 2(d) of the Scheduling Order.

4. By July 31, 2003, the Scheduling Order should require the parties to identify and propose to the Special Master any other "Threshold Matters" that require immediate resolution, or that are susceptible to immediate resolution as a matter of law on summary judgment. Such matters may, for example, relate to whether the Court as a matter of law can strike any of the United States' claims for federal reserved water rights. The Court could thereafter identify which "Threshold Matters", if any, it desires to resolve and set out an appropriate briefing schedule in its order.

5. The Scheduling Order should require the United States to submit a draft hydrographic survey of the entire Zuni River Basin to the Office of the State Engineer ("OSE") by August 1, 2004. The Order should require the United States to fund the OSE's review of the draft and, following such review, require the OSE to submit its comments and identify deficiencies in the survey by March 31, 2005. The United States would thereafter prepare its final hydrographic survey, addressing all OSE comments. Neither OSE nor any other party would be estopped later from questioning the validity of the United States' hydrographic survey.

II. Other Matters:

1. In paragraph 2(b) of her Scheduling Order, the Special Master requested a discussion of whether non-governmental defendants should be dismissed. Since there is no way of determining who should be in this lawsuit prior to completion of the hydrographic survey, the non-governmental defendants should be allowed to withdraw

from this lawsuit if they so choose, subject to being brought in later by the United States based on its completed hydrographic survey of the entire Basin. These defendants should be allowed to *withdraw*, as opposed to being outright dismissed, because some may desire to remain in the lawsuit. (See Comments and Proposal of Robert W. and Linda A. Ionta.) However, the Order allowing dismissal should provide that those who choose to withdraw would not be prejudiced in any way. They would not be estopped or precluded in any way from filing motions to dismiss or for summary judgment on any legal or factual grounds, from challenging the accuracy and validity of the hydrographic survey, or from asserting any right or defense they may have against the United States. This may result in a certain amount of duplication, but that is difficult to avoid in a lawsuit of this nature.

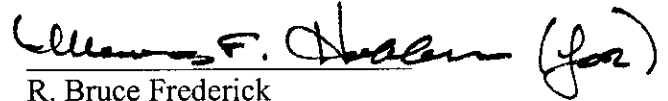
2. Also related to paragraph 2(a) of the Scheduling Order, the Commissioner should be allowed to withdraw from this lawsuit along with the non-governmental defendants. Like the non-governmental defendants, the Commissioner has no general regulatory jurisdiction over the waters of the State. The Commissioner is like a landowner in the Basin insofar as he has jurisdiction over State surface and mineral lands in the Basin (*See* N.M. Const. Article XIII) and may have a claim to water rights associated with such state lands. Like other landowners in the Basin, the Commissioner should not be served until the State lands, and their associated water rights, are identified by the hydrographic survey.

3. The Order allowing the non-governmental defendants and the Commissioner to withdraw should provide that they may later seek to intervene in the lawsuit at any time to protect their claimed rights, even if the United States fails to identify them on its hydrographic survey as having an interest in water.

4. As to paragraph 2(c) of the Scheduling Order, those claiming only statutory rights to use water pursuant to NMSA 1978, § 72-12-1 (1931) should not be joined as defendants, as their consumptive use is likely insignificant compared to the very large administrative burden of serving them all with every pleading and fairly adjudicating each of their individual rights. If the United States desires to join these water users to its lawsuit, then it should bear the cost of assuring that they are properly

copied on every pleading and notice and that their rights to due process are otherwise protected.

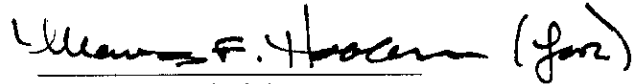
Respectfully submitted,



R. Bruce Frederick
Stephen G. Hughes
New Mexico State Land Office
P.O. Box 1148
Santa Fe, New Mexico 87504-1148
(505) 827-5758

Certificate of Service

I certify that a true and correct copy of the foregoing pleading was mailed by first class mail to the persons listed below on August 24, 2001.



R. Bruce Frederick

D.L. Sanders, Esq.
Edward C. Bagley, Esq.
Office of the State
Engineer
P.O. Box 25102
Santa Fe, NM 87502-
5102

Ann Hambleton
Bearsley
HC 61 Box 747
Ramah, NM 87321

Bruce Boynton III, Esq.
P.O. Box 1239
Grants, NM 87020-
1239

Ted Brodrick
P.O. Box 219
Ramah, NM 87321-
0219

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

David Candelaria
12,000 Ice Caves Road
Grants, NM 87020

Ernest Carroll, Esq.
P.O. Box 1720
Artesia, NM 88211-
1720

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

Stephen Charnas, Esq.
P.O. Box 1945
Albuquerque, NM
87103

Jeffery A. Dahl, Esq.
P.O. Box 987
Albuquerque, NM
87103

Tessa T. Davidson, Esq.
4830 Juan Tabo, NE # F
Albuquerque, NM
87111

Louis E. DePauli, Esq.
1610 Redrock Drive
Gallup, NM 87301

Sandra S. Drullinger
818 East Maple Street
Hoopston, IL 60942

Peter Fahmy, Esq.
Office of the Reg. Sol.
755 Parfet St. 151
Lakewood, CO 80215

Raymond Hamilton,
Esq.
US Atty. Office, District
of NM
P.O. Box 607
Albuquerque, NM
87103

Mary Ann Joca, Esq.
US Dept. of Agric.
517 Gold Av. SW, Rm.
4017
Albuquerque, NM
87102

Lynn A. Johnson, Esq.
USDJ-ENRD
999 – 18th Street, Suite
945
Denver, CO 80202

Albert R. Lebeck, Jr.
Esq.
P.O. Drawer 38
Gallup, NM 87305

David R. Lebeck, Esq.
P.O. Drawer 38
Gallup, NM 87305

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

Jane Marx, Esq.
2501 Rio Grande Blvd.,
NW
Albuquerque, NM
87104

Myrrl W. McBride
2725 Aliso Dr. NE
Albuquerque, NM
87110

Gerald McBride
2725 Aliso Dr. NE
Albuquerque, NM
87110

Charles E. O'Connell Jr.
US Dept. of Justice
601 D Street, NW, Rm.
3507
Washington, DC 2004

Stanley M. Pollack, Esq.
Navajo Nat. Dept. of
Justice
P.O. Box 2019
Window Rock, AZ
86515

Mark A. Smith, Esq.
Jocelyn Drennan, Esq.
Sunny J. Nixon, Esq.
Rodey Dickason Sloan
Akin & Robb PA
P.O. Box 1888
Albuquerque, NM
87103

Randolph H. Barnhouse,
Esq.
Rosebrough &
Barnhouse
P.O. Box 1744
Gallup, NM 87305

Salmon Lewis &
Weldon
2850 East Camelback
Road, Suite 200
Phoenix, AZ 85016

Dorothy C. Sanchez,
Esq.
715 Tijeras SW
Albuquerque, NM
87102

Stephen P. Shadle, Esq.
Westover Law Firm
2260 S. 4th Ave, Suite
2000
Yuma, AZ 85364

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

Neil C. Stillinger, Esq.
P.O. Box 8378
Santa Fe, NM 87504-
8378

Stephen R. Nelson, Esq.
P.O. Box 1276
Albuquerque, NM
87103-1276

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

Larry D. Beall, Esq.
6715 Academy Road,
NE
Albuquerque, NM
87109

Pamela Williams, esq.
Div. of Indian Affairs
1849 C. Street, NW,
Rm. 6456
Washington, DC 20240

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

Kimberly J. Gugliotta,
158 W. William Casey
Street
Corona, AZ 85641

Darcy S. Bushnell, Esq.
U.S. District Court
333 Lomas Blvd. NW
Albuquerque, NM
87102-2272

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

John B. Weldon, Esq.
M. Byron Lewis, Esq.
Mark A. McGinnis, Esq.
4444 North 32nd Street,
#200
Phoenix, AZ 85032