

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

UNITED STATES OF AMERICA)	
and)	07cv00681-BB
ZUNI INDIAN TRIBE)	
Plaintiffs,)	ZUNI RIVER BASIN
)	ADJUDICATION
-v-)	
)	
STATE OF NEW MEXICO, ex rel. State)	Subproceeding 1
ENGINEER, et al.)	Zuni Indian Claims
Defendants)	
_____)	

**STATE OF NEW MEXICO’S ANSWER TO ZUNI INDIAN TRIBE'S
SUPPLEMENTAL SUBPROCEEDING COMPLAINT**

The State of New Mexico *ex rel.* State Engineer (“State”) answers the Zuni Indian Tribe’s July 27, 2007 Supplemental Subproceeding Complaint (No. 1187), (“Supplemental Complaint”) as follows:

1. The State denies that the Tribe's attempted reference of the entire United States' Subproceeding Complaint in paragraph 1 of its Supplemental Complaint is of any substantive or operative effect, and cannot substitute for specific reference to the statements that the Tribe wishes to adopt. The State asserts that, as a result, paragraph 1 of the Supplemental Complaint fails to state a claim. In the event that the paragraph is deemed to state a claim, the State answers the same by adopting in its entirety the State's answer to the United States' Subproceeding Complaint, filed January 30, 2007 (No. 166) (“NM Answer to US Subproceeding Complaint”).

2. The allegations of paragraph 2 of the Supplemental Complaint appear to be solely explications of the nature of the Tribe's claims and as such require no response; however, the State specifically asserts that: 1) that the priority of any of the Tribe's water rights, except for

federal reserved water rights, cannot be earlier than the date of first beneficial use; and 2) that for federal reserved water rights, the priority is the date of reservation. See Affirmative Defenses, below. Insofar as the allegations of this paragraph may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth.

3. The State is without knowledge or information sufficient to form a belief as to the allegations of the first sentence of paragraph 3 of the Supplemental Complaint (under header “Supplemental Claims Relating to Impoundments and Natural Ponds” and sub-header “Impoundments”). The second and third sentences of the paragraph appear to be solely statements of the legal nature of the Tribe's claims and as such require no response. The State specifically asserts, however, that: 1) the elements of the Tribe's water rights, if any, associated with these impoundments will depend on the nature of the right adjudicated; and 2) a federal reserved right does not include the unqualified right to increase uses or create new uses as alleged.

4. The State is without knowledge or information sufficient to form a belief as to the allegations of the first sentence of paragraph 4 of the Supplemental Complaint (under header “Natural Ponds”). The second sentence of the paragraph appears to be solely an explication of the nature of the Tribe's claims and as such requires no response. The State specifically asserts, however, that: 1) the elements of the Tribe's water rights, if any, associated with these ponds will depend on the nature of the right adjudicated; and 2) a federal reserved right does not include the unqualified right to establish new uses as alleged, as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others and the post-adjudication

administrative scheme.

5. The allegations of paragraph 5 of the Supplemental Complaint (under header “Supplemental Claims Relating to Wells and Springs”) appear to be solely summary quantifications and explications of the nature of the Tribe's claims and as such require no response, but insofar as the statement may be interpreted as an assertion of fact material to any claim, the State denies each and every element of the same. The State also incorporates by reference, as if fully rewritten here, its answers to the allegations of paragraphs 16 through 22 of the United States' Subproceeding Complaint, found at paragraphs 14 through 20 of its Answer to US Subproceeding Complaint.

6. The State specifically denies the allegation of paragraph 6 of the Supplemental Complaint - that a federal reserved right includes the unqualified right to establish new points of diversion as alleged - as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others and the post-adjudication administrative scheme. The State also incorporates by reference, as if fully rewritten here, its answers to the allegations of paragraphs 16 through 22 of the United States' Subproceeding Complaint, found at paragraphs 14 through 20 of its Answer to US Subproceeding Complaint.

7. The State is without knowledge or information sufficient to form a belief as to the allegations of the first and third sentences of paragraph 7 of the Supplemental Complaint (under header “Supplemental Claims for Irrigation by Means of Permanent Works” and sub-header “Past and Present Surface Water Diversions”). The State also incorporates by reference, as if fully rewritten here, its answers to the allegations of paragraph 23 of the United States' Subproceeding Complaint, found at paragraph 21 of its Answer to US Subproceeding Complaint.

8. The allegations of paragraph 8 of the Supplemental Complaint (under header “Practicably Irrigable Acreage”) appear to be solely summary quantifications and explications of the nature of the Tribe's claims and as such require no response; see, however, Affirmative Defenses, below. In addition, the State specifically denies that the claimed acreage can be practicably irrigated. Insofar as any of the other allegations of this paragraph may be interpreted as assertions of fact material to any claim, the State is without knowledge or information sufficient to form a belief as to their truth.

9. The allegations of paragraph 9 of the Supplemental Complaint (under header “Supplemental Claims for Maintenance of Surface Flows for Cultural, Religious, Recreational, and Wildlife Habitat Use”) appear to be solely explications of the nature of the Tribe's claims and as such require no response; however, the State specifically denies any assertion that after the Tribe's water rights have been quantified, they may be used for the purposes stated, as this will depend on the nature of the right adjudicated, the type of use proposed, possible harm to others, and the post-adjudication administrative scheme. See also Affirmative Defenses, below.

First Affirmative Defense

Pursuant to the Treaty of Guadalupe Hidalgo, the rights of the Zuni Indian Tribe, under federal law, to divert and use the waters of the Zuni River Basin on lands owned by the Tribe on the date of accession of American sovereignty, are limited to those rights that were vested under Mexican Law as of May 13, 1846.

Second Affirmative Defense

The rights of the Zuni Indian Tribe, under federal law, to divert and use the waters of the Zuni River Basin on lands owned by the Tribe on the date of accession of American sovereignty,

do not include the right to increase its diversion and use of water from the Zuni River Basin in excess of the maximum annual quantity of water lawfully diverted and used by the Tribe prior to May 13, 1846.

Third Affirmative Defense

The rights of the Zuni Indian Tribe, under federal law, to divert and use the waters of the Zuni River Basin for irrigation purposes on lands owned by the Tribe on the date of accession of American sovereignty, cannot exceed the maximum annual quantity of water lawfully diverted and used by the Tribe to irrigate those tribal lands actually irrigated between May 13, 1846, and June 7, 1924.

Fourth Affirmative Defense

The rights of the Zuni Indian Tribe, under federal law, to divert and use the waters of the Zuni River Basin for domestic, livestock watering, or any other non-irrigation purpose on lands owned by the Tribe on the date of accession of American sovereignty, cannot exceed the maximum annual quantity of water lawfully diverted and used by the Pueblo for such purposes between May 13, 1846, and June 7, 1924.

Fifth Affirmative Defense

The rights of the Zuni Indian Tribe to divert and use the waters of the Zuni River Basin do not include the right to divert and use groundwater, except to the extent that the Pueblo has established such a right by the lawful diversion and use of groundwater under the laws of Mexico or the Territory or State of New Mexico.

Sixth Affirmative Defense

Any diversion and use of water by the Zuni Indian Tribe initiated after May 13, 1846, in

order to be lawful, must have been pursuant to the laws of the Territory or State of New Mexico, including specifically requirements under Territorial or State law to obtain a permit from the Territorial or State Engineer for the diversion and use of surface water after March 19, 1907, and requirements under State law to obtain a permit from the State Engineer for the diversion and use of groundwater within the Gallup Underground Water Basin after March 14, 1994.

Seventh Affirmative Defense

Zuni Indian Tribe claims to rights to divert and use the waters of the Zuni River Basin may be barred or limited by the Pueblo Lands Act of 1924 and the 1933 Act, and by the decisions of the Indian Claims Commission and Court of Claims.

Eighth Affirmative Defense

Any rights, other than federal reserved rights, the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin are limited by the requirement of prior actual beneficial use.

Ninth Affirmative Defense

Any federal reserved rights the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin are limited to uses in such manners and quantities as are necessary to accomplish the primary purpose of the reservation.

Tenth Affirmative Defense

Any federal reserved rights the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin are limited to waters unappropriated on the date of the reservation, and carry a priority which is the date of the act of reservation.

Eleventh Affirmative Defense

Any federal reserved rights the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin are limited to quantities determined by the needs of the Tribe, which quantities may be less than those determined by a Practicably Irrigable Acreage analysis.

Twelfth Affirmative Defense

No federal reserved right the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin includes the right to use water off reserved lands, or to lease, market, or otherwise authorize use by others off reservation lands.

Thirteenth Affirmative Defense

No right the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin includes the right to use water off Pueblo lands, or to lease, market, or otherwise authorize use by others off Pueblo lands.

Fourteenth Affirmative Defense

No right the Zuni Indian Tribe may have to divert and use the waters of the Zuni River Basin can have a priority earlier than: 1) the date water was first put to be beneficial use; or 2) for a federal reserved right, the date of reservation.

Fifteenth Affirmative Defense

There are no federal reserved water rights on lands owned by the Tribe on the date of accession of American sovereignty (grant lands).

WHEREFORE, the State of New Mexico, having answered, respectfully requests that the Court require the Zuni Indian Tribe to prove all elements of its claims to rights to divert and use water from the Zuni River Basin.

Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 31, 2008, I filed the foregoing State of New Mexico's Answer to the Zuni Indian Tribe's Supplemental Subproceeding Complaint electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.