

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	)	<b>Subproceeding 1</b>
ENGINEER, et al.	)	<b>Zuni Indian Claims</b>
Defendants	)	
_____	)	

SCHEDULING ORDER

This Order is entered by the Special Master pursuant to Fed.R.Civ.P. 16(b) to further guide the course of the adjudication of the water rights claims asserted in this Subproceeding by the Plaintiffs United States of America (“United States”) and Zuni Indian Tribe. In entering this Order, the Special Master has taken into consideration the discovery plan proposed by the parties and the comments of counsel and parties *pro se* at the scheduling conference.

**I. Date of Conference and Appearances**

**A. Date of Conference**

The scheduling and management conference was held at 10:00 a.m. on August 27, 2008, before Special Master Vickie L. Gabin.

**B. Appearances**

**1. For the United States:**

Bradley S. Bridgewater  
U.S. Department of Justice  
1961 Stout St., 8<sup>th</sup> Floor  
Denver, CO 80294  
(303) 844-1359

**2. For the Zuni Indian Tribe:**

Jane Marx  
2825 Candelaria Road NW  
Albuquerque, NM 87107  
(505) 344-1176

**3. For the Navajo Nation:**

Bidtah N. Becker  
Navajo Nation Department of Justice  
P.O. Box Drawer 2010  
Window Rock, AZ 86515  
(928) 871-7543

**4. For the State of New Mexico ex rel. State Engineer  
("State"):**

Arianne Singer  
Edward Bagley  
John Stroud  
Special Assistant Attorneys General  
P.O. Box 25102  
Santa Fe, NM 87504-5102  
(505) 827-6150

**5. For John A. Yates, Yates Petroleum Corporation, and  
Trust Q Under the Last Will and Testament of Peggy A.  
Yates, Deceased:**

Peter B. Shoenfeld  
P.O. Box 2421  
Santa Fe, NM 87504-2421  
(505) 982-3566

**6. For Paul Davis; the Paul Davis Survivor's Trust dated July 28, 2003; the JoAnn V. Davis Residual Trust dated July 28, 2003; Pamela Davis; William G. Stripp; Sage Merrill; Anita Davis Schafer; Robert John Schafer; Kristeen Davis; Lucy Kluckhohn Jones; Priscilla Schulte; Michael Zinn; Joanne C. Snowdon; and Paul Petranto:**

William G. Stripp  
Attorney at Law  
P.O. Box 159  
Ramah, New Mexico 87321  
(505) 783-4138

**7. For ORC, LLC, Jaralosa Cattle Company, LLC, and Tampico Springs 3000, LLC:**

James M. Noble  
Ryley Carlock & Applewhite  
1999 Broadway, Suite 1800  
Denver, CO 80202  
(303) 813-6713

Jenny J. Pelton  
Ryley Carlock & Applewhite  
One North Central Ave., Suite 1200  
Phoenix, Arizona 85004  
(602) 258-7701

**8. For numerous parties:**

Tanya L. Scott  
Law & Resource Planning Associates, P.C.  
Albuquerque Plaza  
201 Third Street NW, Suite 1750  
Albuquerque, New Mexico 87102  
(505) 346-0998

**II. Statement of Claims and Defenses**

***A. The United States***

The United States, acting as sovereign and trustee for the Zuni Indian Tribe, claims federal reserved rights to divert and/or impound and deplete water with an aboriginal priority within the Zuni River Stream System based on federal law and asserted evidence of (a) specified past or present uses of 12 reservoirs and 333 other

constructed impoundments for irrigation, recreation, livestock, construction, sewage treatment, or public water supply purposes; (b) specified past or present uses of 206 wells and 76 springs for irrigation, livestock, domestic, commercial, municipal, industrial, and other identified purposes; (c) predicted additional domestic (including public water supply), municipal, commercial, and industrial uses necessary to provide the Zuni Indian Tribe with a permanent homeland; (d) past and present irrigation of 138 specified tracts by means of permanent works; (e) past and present irrigation of an additional 100 specified tracts by means of seasonal or temporary works; (f) 1,200 acres of practicably irrigable, but previously unirrigated, land; and (g) the livestock carrying capacity of the lands held in trust for the Zuni Indian Tribe. In addition, the United States, acting as trustee on behalf of the beneficiaries of six identified Zuni allotments outside the exterior boundaries of the Zuni Indian Reservation claims (a) for the beneficiaries of Allotment Number 247321 a federal reserved right to divert from groundwater .78 acre foot per year for livestock and domestic purposes with an October 5, 1925 priority; (b) for the beneficiaries of Allotment Number 246364 a federal reserved right to divert from groundwater .78 acre foot per year for livestock and domestic purposes and to impound surface runoff in the impoundment labeled 6A-S-SP008, all with a priority of December 28, 1923; (c) for the beneficiaries of Allotment Number 246365 a federal reserved right to divert from groundwater .78 acre foot per year for livestock and domestic purposes with an October 12, 1923 priority; (d) for the beneficiaries of Allotment Number 246362 a federal reserved right to divert from groundwater .78 acre foot per year for livestock and domestic purposes with an October 12, 1923 priority; (e) for the beneficiaries of Allotment Number 246363 a federal reserved right to divert from groundwater .78 acre

foot per year for livestock and domestic purposes with a December 28, 1923 priority; and (f) for the beneficiaries of Allotment Number 211719 a federal reserved right to divert from groundwater .76 acre foot per year for livestock and domestic purposes with an April 6, 1920 priority.

### ***B. The Zuni Indian Tribe***

The Zuni Indian Tribe concurs with and adopts all of the claims made by the United States on behalf of the Tribe. In addition, the Zuni Indian Tribe claims federal rights to divert and/or impound and deplete water with an aboriginal priority within the Zuni River basin without interference for a) three additional impoundments for livestock or other purposes; b) 77 natural-occurring ponds, whenever the source of supply is available, for livestock or other purposes; c) in addition to the past, present, and future uses of wells and springs claimed by the United States for domestic, municipal, commercial and industrial needs, 1,916 acre-feet of water for additional present and future uses necessary to provide the Zuni Indian Tribe with a permanent homeland; d) past and present irrigation of one additional specified tract of land by means of permanent works; and e) 723 additional acres of practicably irrigable, but previously unirrigated, land. The Zuni Indian Tribe also claims the right to maintain non-diversionary surface water flows for cultural, religious, recreational, and wildlife habitat uses to the extent of the water rights recognized on Zuni lands.

### ***C. The State***

The State asserts as to the United States and Zuni Tribe claims that: (a) aboriginal title to lands owned by the Zuni Tribe has been extinguished; (b) the Tribe enjoys no “prior and paramount” water right under federal or state law; (c) rights the

Tribe may have under federal or state law do not automatically, or “necessarily” include a right to divert groundwater; (c) 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; (d) for federal reserved water rights, the priority is the date of reservation; (e) adjudicated water rights may not be changed in point of diversion or purpose of use in the "sole discretion" of the Tribe; (f) 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 and do not include the right to increase 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; (g) any 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; (h) 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, are limited to waters unappropriated on the date of the reservation, and are limited to quantities determined by the needs of the Tribe.

#### ***D. The Navajo Nation***

This statement is the current description of the Navajo Nation’s claims and defenses based on the Nation’s current understanding of the United States’s water rights claims on behalf of the Zuni Indian Tribe and the Zuni Indian Tribe’s water rights claims

(collectively referred to as “Zuni Indian Tribe’s water rights claims”) and the ongoing investigation concerning the Navajo Nation’s rights.

The Navajo Nation, acting as sovereign for itself and its members, claims all water rights to which the Navajo Nation is entitled under federal and state law including those past, present, and future uses of surface and ground water required to provide the Navajo Nation with a permanent homeland. These water rights claims include domestic, municipal, commercial, industrial, agricultural, and livestock uses under federal and state law. The Navajo Nation’s water rights claims are not being adjudicated in Subproceeding 1, Zuni Indian Claims.

The Navajo Nation’s defenses to the Zuni Indian Tribe’s water rights claims are to ensure that the Zuni Indian Tribe’s water rights claims are supported by the law and the evidence. The Navajo Nation will, recognizing that its water rights claims have not been completed and filed nor are scheduled to be completed and filed until July 1, 2010, defend against any and all characteristics of the Zuni Indian Tribe’s water rights claims that would impair or otherwise interfere with the Navajo Nation’s water rights. Because the Navajo Nation and the Zuni Indian Tribe both need adequate water rights to ensure a permanent homeland, the Navajo Nation’s defenses may include assessing the available water supply in the basin and assessing the interconnection of surface and groundwater in the basin and the impact of surface water uses on potential Navajo Nation groundwater uses.

***E. Parties Represented by James M. Noble and Jenny J. Pelton***

The claims and defenses of Defendants ORC, LLC; Jaralosa Cattle Company, LLC; and Tampico Springs 3000, LLC (“Defendants”) are generally contained

in the “Joint Answer of ORC, LLC, Jaralosa Cattle Company, LLC, and Tampico Springs 3000, LLC to United States’ Subproceeding Complaint and Statement of Claims for Water Rights on Behalf of, and for the Benefit of, the Zuni Indian Tribe and Zuni Allottees,” and in the “Joint Answer of ORC, LLC, Jaralosa Cattle Company, LLC, and Tampico Springs 3000, LLC to Zuni Indian Tribe’s Supplemental Subproceeding Complaint,” both of which were filed with this Court on January 31, 2008.

All of Defendants’ claims and defenses are reserved for trial. Without limitation on the foregoing, Defendants intend to require the Plaintiffs to satisfy their burdens of proof with respect to all aspects of the claims contained in the complaints, including the amount, priority, and other attributes of the water rights claimed in the complaints. To the extent Plaintiffs do not satisfy their burdens of proof, Plaintiffs’ claims should be denied.

***F. Parties represented by Law and Resource Planning Associates, P.C.***

These Defendants deny the allegations of the Plaintiffs. In addition, these Defendants assert the following affirmative defenses:

1. The Complaint fails to state a claim for which relief may be granted.
2. The Subproceeding Complaint must be dismissed for lack of jurisdiction and the Court’s obligation to abstain until the proper action is brought in state courts.
3. The Zuni Pueblo and its water rights are constrained by the pueblo Indian water rights doctrine and are measured by historical beneficial use and demand as well as the obligation to balance its uses against the needs of others within the Basin.



4. Any lands created by executive order are restricted to those demonstrably proven to be capable of economic productive agricultural use within the meaning of federal principles and guidelines for measuring cost-benefit ratios.
5. The water rights of individual Zuni allottees are limited to actual beneficial use.
6. The Subproceeding Complaint must be dismissed because the United States' action fails to join indispensable parties within the State of Arizona who are directly affected by the allegations and the outcome of this action. And, it is not an adjudication of a complete stream system as contemplated by the New Mexico adjudication statute.
7. The Complaint must be dismissed because the United States' action fails to join the State of Arizona whose rights are affected by what will become a *pro tanto* equitable apportionment of an interstate stream system, modifying existing interstate entitlements to water.
8. The primary purpose of use of water pursuant to executive order, treaty, and/or federal legislation was solely for agricultural purposes. All other water uses are secondary and must be acquired pursuant to applicable state law. *See United States v. New Mexico*, 438 U.S. 696 (1978).
9. Neither under Spanish nor Mexican law or under federal executive order, treaty, or federal legislation was it contemplated or intended that on-reservation water use could be the basis for an injunction against off-reservation water use for domestic and other related purposes.

***G. Parties Represented by James E. Haas and Peter B. Shoenfeld***

If Zuni Tribe has reserved rights, they do not have aboriginal priority, but priorities as of the effective dates of effective reservations; the predicted additional domestic (including public water supply), municipal, commercial, and industrial uses necessary to provide the Zuni Tribe with a permanent homeland can only arise within whatever effective reservations were made for Zuni; there was no effective reservation within the boundaries of the prior grants from the King of Spain, Spain, or Mexico. Practicably irrigible acreage (“PIA”) is a concept applicable only to effective reservations, and so even if acreage is practicably irrigable acreage but lies outside the effective boundaries of land reserved for Zuni (as opposed to granted to Zuni by a prior sovereign) it gives rise to no PIA water rights. Aboriginal priorities are applicable only to aboriginal water uses, and then only with respect to the amount of water used at any given time. [Place holder for position with respect to the validity and extent of non-reservation PPPW and DCMI water rights; these defendants’ position with respect to the assertions which are made by Zuni Tribe in this report.]

***H. Parties Represented by William G. Stripp***

Paul Davis; the Paul Davis Survivor’s Trust dated July 28, 2003; the JoAnn V. Davis Residual Trust dated July 28, 2003; Pamela Davis; William G. Stripp; Sage Merrill; Anita Davis Schafer; Robert John Schafer; Kristeen Davis; Lucy Kluckhohn Jones; Priscilla Schulte; Michael Zinn; Joanne C. Snowdon; and Paul Petranto claim the right to divert and/or impound and deplete water based upon their ownership interests in land in the Zuni River Basin, their historical beneficial use of water in the Zuni River Basin, and their planned future uses of water in the Zuni River Basin. These

parties assert that the most important issue, which should be the priority before all other discovery, is what admissible evidence exists that the water rights claimed by the Zuni Tribe have any kind of interrelationship with the water rights claimed by these parties. If there is no interrelationship then these parties do not need to be parties to this subproceeding.

### **III. Report of Pre-Conference Discovery Meeting Pursuant to Fed.R.Civ.P. 26(f)**

#### ***A. Date of Rule 26(f) meeting***

The parties met on August 26, 2008 at the Office of the State Engineer, Water Resources Allocation Program, Water Rights Division District 1, Springer Square Building, 121 Tijeras NE, Suite 2000, Albuquerque, New Mexico, and via teleconference.

#### ***B. Names of Conference Participants and Parties Represented***

Tyr Loranger for Peter B. Shoenfeld, representing John A. Yates, Yates Petroleum Corporation, and Trust Q Under the Last Will and Testament of Peggy A. Yates, Deceased.

James Noble, representing ORC, LLC, Jaralosa Cattle Company, LLC, and Tampico Springs 3000, LLC.

Edward Bagley, representing the State.

Jane Marx, representing the Zuni Indian Tribe.

William G. Stripp, representing Paul Davis; the Paul Davis Survivor's Trust dated July 28, 2003; the JoAnn V. Davis Residual Trust dated July 28, 2003; Pamela Davis; William G. Stripp; Sage Merrill; Anita Davis Schafer; Robert John Schafer; Kristeen Davis; Lucy Kluckhohn Jones; Priscilla Schulte; Michael Zinn; Joanne C. Snowdon; and Paul Petranto.

Bidtah Becker, representing the Navajo Nation.

Bradley S. Bridgewater, representing the United States.

Katherine Robinson for Tanya L. Scott, representing numerous defendants.

***C. Statement as to when Rule 26(a)(1) disclosures were made.***

The parties exchanged Rule 26(a)(1) disclosures on July 30, 2008.

**IV. Case Plan and Schedule**

***A. Claims Based on Evidence of Past or Present Irrigation by Means of Permanent Works (“PPPW”).***

**1. Discovery will be needed on the following subjects:**

One or more parties intend to make discovery requests concerning the following types of information. Other parties may dispute whether such information is properly discoverable in this proceeding under the Federal Rules of Civil Procedure or, even if such information is discoverable, whether it is admissible under the Federal Rules of Evidence. Until specific discovery requests, or attempts to introduce evidence, are made, it is not possible to further specify the nature of such potential disputes.

**a) Facts concerning specific PPPW claims asserted by the United States or the Zuni Indian Tribe.**

- For each tract of land identified as PPPW by the United States or the Zuni Indian Tribe, the date the irrigation commenced, the point of diversion, the amounts of water applied to each tract, the method of irrigation, and the duration of irrigation.
- For each diversion from a surface watercourse alleged by the United States or the Zuni Indian Tribe to serve PPPW, the date the diversion commenced, the annual diversion amounts, and the duration of the diversion.
- For each diversion from a well alleged by the United States or the Zuni Indian Tribe to serve PPPW, the depth, capacity, lithologic (and if available, geophysical) boring

logs, and construction including casing diameter and screened intervals depth of said well, and the date of the well's construction and use including available metering/diversion amount data of estimates.

**b) General facts asserted to be relevant to the PPPW claims asserted by the United States or the Zuni Indian Tribe**

- Facts concerning the hydrology and climatology in the adjudication area, including water supply and interconnection of surface water and groundwater (if any).
- All facts asserted as a basis for all aspects of the claims asserted by the United States or the Zuni Indian Tribe, or as a basis for contesting said claims.

**2. Expert Witness Disclosure:**

**a) Anticipated fields of expert testimony:**

The parties anticipate calling expert witnesses in the fields of hydrology, archeology, anthropology, history, agricultural science, engineering, agricultural economics, soil science, and hydrographic survey, and to the extent they are properly the subject of expert testimony, the law of prior sovereigns.

**b) Expert Reports:**

Reports from retained experts under Rule 26(a)(2), concerning PPPW claims or defenses to PPPW claims, shall be due:

From the United States by November 5, 2008;

From the Zuni Indian Tribe by March 3, 2009;

From the State by November 3, 2009;

From all other parties by January 27, 2010.

### **3. Discovery Completion Date**

All discovery concerning PPPW claims, or defenses to PPPW claims, will be commenced in time to be completed by May 4, 2010. Motions relating to discovery (including, but not limited to, motions to compel and motions for protective order) shall be filed with the Court and served on opposing parties by July 2, 2010. This deadline shall not be construed to extend the twenty-day time limit in D.N.M.LR-Civ. 26.6.

### **4. Pretrial Motions**

Pretrial motions concerning PPPW claims or defenses, other than discovery motions, shall be filed with the Court and served on opposing parties by July 30, 2010, or thirty (30) days after relevant documents are provided pursuant to a motion to compel, whichever is later. Any pretrial motions concerning PPPW claims or defenses, other than discovery motions, filed after this date shall be considered untimely in the discretion of the Court.

### **5. Witness and Exhibit Lists**

Final lists of witnesses and exhibits under Fed.R.Civ.P. 26(a)(3) shall be due from all parties on October 1, 2010.

### **6. Date and Anticipated Length of Trial**

PPPW claims and defenses in this Subproceeding should be ready for trial by November 9, 2010. The parties agree that it is impossible to make a realistic projection concerning the length of trial at this point in time.

***B. Claims for Rights to Use Water for Domestic, Commercial, Municipal, or Industrial (“DCMI”) Purposes***

**1. Discovery will be needed on the following subjects:**

One or more parties intend to make discovery requests concerning the following types of information. Other parties may dispute whether such information is properly discoverable in this proceeding under the Federal Rules of Civil Procedure or, even if such information is discoverable, whether it is admissible under the Federal Rules of Evidence. Until specific discovery requests, or attempts to introduce evidence, are made, it is not possible to further specify the nature of such potential disputes.

**a) Facts concerning specific DCMI claims asserted by the United States or the Zuni Indian Tribe.**

- For each past or present DCMI use claimed by the United States or the Zuni Indian Tribe, the date the use commenced, the point of diversion, the amounts of water used, the type of any conveyance, the specific purpose and the duration of the use.
- For each diversion from a well alleged by the United States or the Zuni Indian Tribe to serve DCMI, the depth, capacity, lithologic (and if available, geophysical) boring logs, and construction including casing diameter and screened intervals depth of said well, and the date of the well's construction and use including available metering/diversion amount data or estimates.
- For each future DCMI use claimed by the United States or the Zuni Indian Tribe, all facts asserted to provide a basis for the quantification of the claim.

**b) General facts asserted to be relevant to the DCMCI claims asserted by the United States or the Zuni Indian Tribe**

- Facts concerning the hydrology and climatology in the adjudication area, including water supply and interconnection of surface water and groundwater (if any).
- All facts asserted as a basis for all aspects of the claims asserted by the United States or the Zuni Indian Tribe, or as a basis for contesting said claims.
- All facts asserted as a basis for the claimed entitlement to past, present or future DCMCI uses or as a basis for contesting said claim.

**2. Expert Witness Disclosure:**

**a) Anticipated fields of expert testimony:**

The parties anticipate calling expert witnesses in the fields of history, hydrology, archeology, demography, economics, anthropology, agricultural economics, engineering, and hydrographic survey, and to the extent it is properly the subject of expert testimony, the law of prior sovereigns.

**b) Expert Reports:**

Reports from retained experts under Rule 26(a)(2), concerning DCMCI claims or defenses, shall be due:

From the United States by July 6, 2011;

From the Zuni Indian Tribe by November 2, 2011;

From the State by July 6, 2012;

From all other parties by October 5, 2012.

**3. Discovery Completion Date**

All discovery concerning DCMCI claims, or defenses to DCMCI claims, will be commenced in time to be completed by February 26, 2013. Motions relating to



discovery (including, but not limited to, motions to compel and motions for protective order) shall be filed with the Court and served on opposing parties by April 29, 2013. This deadline shall not be construed to extend the twenty-day time limit in D.N.M.LR-Civ. 26.6.

#### **4. Pretrial Motions**

Pretrial motions concerning DCMI claims or defenses, other than discovery motions, shall be filed with the Court and served on opposing parties by April 30, 2013, or thirty (30) days after relevant documents are provided pursuant to a motion to compel, whichever is later. Any pretrial motions concerning DCMI claims or defenses, other than discovery motions, filed after this date shall be considered untimely in the discretion of the Court.

#### **5. Witness and Exhibit Lists**

Final lists of witnesses and exhibits under Fed.R.Civ.P. 26(a)(3) shall be due from all parties on July 2, 2013.

#### **6. Date and Anticipated Length of Trial**

DCMI claims and defenses in this Subproceeding should be ready for trial by August 6, 2013. In the interests of conservation of the resources of the Court and the parties, it is the intention of the parties that the DCMI trial in this Subproceeding follow closely the trial of Navajo Indian DCMI claims in Subproceeding 2. However, the parties agree that it is impossible to make a realistic projection concerning the length of either trial at this point in time.

### **C. All Other Claims**

The scheduling of discovery and trial of all other claims in this Subproceeding shall be determined at a Scheduling and Management Conference to be set following the conclusion of the DCMI trial.

### **V. Settlement**

The parties have had no substantive discussions concerning settlement of this Subproceeding. Some of the parties assert that mediation of the issues should begin earlier rather than later, and thus anticipate requesting the early institution of mediation. The parties shall make a joint report concerning the prospects for settlement on or before the 15<sup>th</sup> of each January and July. In the event the parties are unable to reach agreement on a joint status report, they may file separate reports.

### **VI. Amendments to Scheduling Order**

This Scheduling Order will be altered or amended by the Special Master only upon a showing of good cause.

IT IS SO ORDERED

*Vickie L. Gasin*

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SPECIAL MASTER