

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED *bp*  
2009 JUL 14 AM 11 36

ELEVENTH JUDICIAL DISTRICT COURT  
COUNTY OF SAN JUAN  
STATE OF NEW MEXICO

STATE OF NEW MEXICO on the )  
relation of the State Engineer, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
UNITED STATES OF AMERICA et al., )  
 )  
Defendants, )  
 )  
and )  
 )  
 )  
JICARILLA APACHE TRIBE and )  
NAVAJO NATION, )  
 )  
Defendant-Intervenors. )  
 )  
\_\_\_\_\_ )

No. 75-184  
SAN JUAN RIVER GENERAL  
STREAM ADJUDICATION  
  
Ute Mountain Ute Subproceeding

**[PROPOSED] PRELIMINARY SCHEDULING ORDER FOR THE  
ADJUDICATION OF THE WATER RIGHTS OF THE UTE MOUNTAIN UTE  
TRIBE**

---

This Order is entered by the Court pursuant to Rule 1-016(B) NMRA to further guide the course of the adjudication of the water rights claims asserted in this action by the Ute Mountain Ute Tribe and by the United States of America, acting as Trustee for the benefit of the Ute Mountain Ute Tribe (“United States”).<sup>1</sup> In entering this Order, the Court has taken into consideration the schedule and discovery plan proposed by the parties and the comments of counsel and parties *pro se* at the scheduling conference. This Order (1) establishes certain initial procedures necessary to guarantee the rights of all water rights claimants to notice and an opportunity to participate in a subproceeding to adjudicate the Ute Claims, and (2) establishes an interim discovery plan

<sup>1</sup> This Order will hereafter refer to these claims as, collectively, the “Ute Claims.”

*Dkted*

which shall be subject to review and amendment after all those eligible to participate in the subproceeding have been given an opportunity to comment.

## **I. Date of Conference and Appearances**

### **A. Date of Conference**

The scheduling and management conference was held at \_\_\_\_\_ a.m. on \_\_\_\_\_, 2009, before the Honorable Rozier Sanchez.

### **B. Appearances**

#### **For the United States:**

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

#### **For the Ute Mountain Ute Tribe:**

Daniel H. Israel  
1315 Bear Mountain Drive  
Boulder, CO 80305  
(303) 246-9027

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

Tracy Hofmann  
Arianne Singer  
Special Assistant Attorneys General  
P.O. Box 25102  
Santa Fe, NM 87504-5102  
(505) 827-6150

John Utton  
Special Assistant Attorney General  
PO Box 271  
Albuquerque, NM 87501  
(505) 247-0411

## II. Description of the Subproceeding

The Court enters this scheduling order to guide the adjudication of the Ute Claims independently of the procedures and schedules established for the five geographic sections and six categories of water rights identified in Section I of the September 22, 2008 Fifth Amended Case Management Plan. Pursuant to Rule 1-071.2(B) NMRA, provisionally adopted by New Mexico Supreme Court Order No. 07-8300-13 (June 13, 2007), the Court hereby designates resolution of the Ute Claims as an expedited *inter se* proceeding that shall be conducted as a unified subproceeding within Case No. 75-184 both as between the plaintiff State and defendants United States and Ute Mountain Ute Tribe and as among these defendants and other water rights claimants. (Said subproceeding hereafter referred to as the "Ute Mountain Ute Subproceeding.") The Court amended the Fifth Amended Case Management Plan by removing the Ute Mountain Ute Tribe from the list of priorities in Section I: Prioritization of Adjudication. The purpose was to give the Ute Mountain Ute Claim its own expedited *inter se* proceeding so as not to delay the remainder of claims in the priority listing. The Court finds that designation of the Ute Mountain Ute Subproceeding will promote judicial efficiency and expeditious completion of the adjudication and will not injure either the parties asserting the Ute Claims or any party opposing the Ute Claims. As set forth in Section III(C) of this Order, notice of the Ute Mountain Ute Subproceeding shall be given as required by Provisional Rule 1-071.2(C). Following a hearing, notice shall be given using the water rights and land records set forth in Rule 1-071.2(C), and other appropriate records and methods. All water rights claimants within the San Juan River Stream System in New Mexico shall be given an opportunity to participate in the Ute Mountain Ute Subproceeding. Pursuant to Provisional Rule 1-071.2(D), the

Subproceeding will result in a partial final decree adjudicating the water rights of the Ute Mountain Ute Tribe that binds all water rights claimants regardless of whether they were served and joined as defendants, participated in, or received actual notice of the proceeding. However, the Ute Mountain Ute Subproceeding shall not involve the adjudication of any other parties' water rights claims.

## **A. *Statement of Claims and Defenses***

### **1. The United States**

The United States, acting as sovereign and trustee for the Ute Mountain Ute Tribe, claims federal reserved rights to divert and/or impound and deplete water with a priority of March 2, 1868 within the New Mexico portion of the San Juan River Stream System based on federal law and asserted evidence of (a) specified past or present uses of 135 constructed impoundments for livestock and wildlife watering purposes; (b) specified past or present uses of 27 wells and 11 springs for livestock and wildlife watering purposes; and (c) projected additional domestic, commercial, and industrial uses totaling 10,950 acre-feet per year of diversion and 10,441 acre-feet per year of depletion necessary to provide the Ute Mountain Ute Tribe with a permanent homeland. The United States asserts that the Animas-La Plata Project has no relevance to the claims asserted on behalf of the Ute Mountain Ute Tribe in this case.

### **2. The Ute Mountain Ute Tribe**

The Ute Mountain Ute Tribe claims a federal reserved water right off the flows of the mainstem of the San Juan River as those flows cross a diversion location used by the San Juan Generating Plant. The priority date is 1868 and the amount of the water right is 7300-9300 acre feet, measured on the basis of a power claim comparable

to the water requirements of other power generators now utilizing water in the San Juan Basin. Once quantified the water can be used for a variety of purposes as necessary to provide the Tribe and its members with a permanent home and abiding place so as to permit the Tribe to develop its reservation based on the surroundings they inhabit. The Ute Mountain Ute Tribe asserts that the Animas-La Plata Project has no relevance to the claims the Tribe has asserted in this adjudication.

### **3. The State**

On February 28, 2008, the State filed Answers and Affirmative defenses to the Restatement of the Claim of the Ute Mountain Ute Tribe and to the United States' Claims on behalf of the Ute Mountain Ute Tribe. Without waiving any of the answers or defenses provided therein, the State asserts the following defenses in this matter:

(1) The rights recognizable in this matter are limited to the quantity of the Tribe's historic and existing beneficial uses on its lands in New Mexico.

(2) The additional and future uses claimed by the Tribe and the United States on behalf of the Tribe are not feasible or justifiable under either federal or state law, are not required to fulfill the purposes of the reservation, are not necessary for the establishment of a permanent homeland for the Tribe, are not tailored to the reservation's minimal need, are not limited to the primary purpose of the reservation and are not justified by the Tribe's history, culture, geography and natural resources, economic base, past water use and present and projected population in New Mexico.

(3) Together with the quantity of water available to the Tribe within the State of Colorado (including water supplied by the Animas-La Plata Project), the Tribe's historic and existing beneficial uses in New Mexico constitute an amount of

water sufficient to fulfill the purposes of the reservation and to establish a permanent homeland within the reservation situated in both states. The Tribe and the United States are barred and estopped from making claims for additional and future uses for the Ute Mountain Ute reservation that were settled and compromised, including by, but not limited to, the December 10, 1986, Colorado Ute Indian Water Rights Settlement Agreement, the Colorado Ute Indian Water Rights Settlement Act of 1988 (Public Law 100-585) and the Colorado Ute Settlement Act Amendments of 2000 (Public Law 106-554, Appendix D).

(4) No right the Tribe may have to divert and use waters of the State of New Mexico may have a priority earlier than: 1) the date the water was first put to beneficial use; or 2) establishment of the reservation in New Mexico by Act of Congress dated February 20, 1895, 28 Stat. 677.

(5) No federal reserved right the Tribe may have to divert and use the waters of the State of New Mexico includes the right to use, lease, market or otherwise authorize use by others of the water off the Tribe's reservation in New Mexico.

### **III. Case Plan and Schedule**

#### ***A. Document Depository***

The State shall hold copies of documents specified herein and make them available for inspection and copying during ordinary business hours. The State shall provide electronic copies, in Portable Document Format ("PDF"), to the Clerk of Court for posting on the Court's website. Other copies shall be made at the expense of the party requesting the copies.

## ***B. Interim Disclosures***

The Court finds that early disclosure by the United States, the Ute Mountain Ute Tribe, and the State of evidence these parties may use to support the Ute Claims or defenses to the Ute Claims will facilitate a more efficient discovery process and will serve to better inform potential Participants in the Ute Claims Subproceeding about the nature of the Ute Claims and associated issues. Accordingly, the Court orders that, on or before 60 days following the entry of this order, the United States, the Ute Mountain Ute Tribe, and the State shall make available to counsel of record in this civil action:

- a) the name, and, if known, the address and telephone number of each individual, including experts, likely to have discoverable information concerning the Ute Claims that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information; and
- b) a copy of, or a description by category and location of, all discoverable documents, data compilations, reports of experts, and tangible things regarding the Ute Claims that are in the possession, custody, or control of the disclosing party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.

The disclosures required herein may, and shall be, supplemented or amended in a timely manner if the disclosing party learns that in some material respect the disclosure is incomplete or incorrect, whether due to the passage of time or otherwise, and if the

additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Disclosures by other Participants in the Ute Claims Subproceeding shall be scheduled following the Initial Pre-Trial Scheduling Conference.

***C. Notice Pursuant to Provisional Rule 1-071.2(C)***

No later than March 30, 2020, the State, the United States, and the Ute Mountain Ute Tribe shall jointly submit to the Court, and serve on counsel of record, a motion seeking Court approval of procedures to be followed concerning the Ute Mountain Ute Subproceeding, including specified procedures for giving notice consistent with Provisional Rule 1-071.2(C), and a proposed form of notice,. The proposed form of notice shall be attached to the joint motion and include, at a minimum:

- (1) a description of the procedures to be followed with respect to the Ute Mountain Ute Subproceeding;
- (2) a form Notice of Intent to Participate by which claimants of water rights in the San Juan River Stream System Adjudication may elect to participate in the Ute Mountain Ute Subproceeding;
- (3) a specified deadline, not earlier than 60 days following Court approval of the form of notice, by which any Notice of Intent to Participate must be filed with the Clerk of Court and served on counsel for the State;
- (4) a specified date certain and location, to be provided by the Court, for the Initial Pre-Trial Scheduling Conference; and
- (5) a warning that a water rights claimant's failure to file a timely Notice of Intent to Participate and appear at the Initial Pre-Trial Scheduling Conference will be



grounds for precluding that water rights claimant's subsequent participation in the Ute Mountain Ute Subproceeding, but that the water rights claimant will be bound by said proceedings whether they were served and joined as defendants, participated in, or received actual notice of the Ute Mountain Ute Subproceeding. After hearing any comments or objections to the proposed notice procedures and form of notice, the Court will issue an order approving procedures to be followed with respect to the Ute Mountain Ute Subproceeding and a form of notice to be provided to all claimants.

***D. Initial Pre-Trial Scheduling Conference and Pre-Trial Scheduling Order***

Not later than 15 days prior to the Initial Pre-Trial Scheduling Conference, the State will distribute to each party that has filed a timely Notice of Intent to Participate a proposed scheduling order and plan of discovery. The Court will hear comments and objections concerning the State's proposal at the Initial Pre-Trial Scheduling Conference and will allow Participants to submit written comments not later than 15 days following the conference. Thereafter the Court will issue its Pre-Trial Scheduling Order to govern subsequent proceedings on the Ute Claims. Subject to revision by that Pre-Trial Scheduling Order, the following shall guide the course of the Ute Claims Subproceeding:

***E. Discovery will be needed on the following subjects***

One or more parties intend to make discovery requests relevant to the factual basis of the asserted claims and defenses. Other parties may dispute whether such information is properly discoverable in this proceeding under the New Mexico Rules of Civil Procedure or, even if such information is discoverable, whether it is admissible under the New Mexico 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.

## ***F. Expert Witness Disclosure***

### **1. Anticipated fields of expert testimony:**

The parties anticipate calling expert witnesses in the fields of hydrology, history, engineering, economics, and hydrographic survey. Additional fields of expert testimony may be identified by other participants.

#### **a) Expert Reports:**

Because expert testimony concerning the Ute Claims may be time sensitive, no expert disclosures shall be made before the Initial Pre-Trial Scheduling Conference. Reports from retained experts, shall thereafter be due:

- From the United States by 360 days after the Initial Pre-Trial Scheduling Conference;
- From the Ute Mountain Ute Tribe by 180 days after the United States' expert witness disclosures;
- From the State by 180 days after the Ute Mountain Ute Tribe's expert witness disclosures;
- From all other parties by 180 days after the State's expert witness disclosures.

### **2. Discovery Completion Date**

All discovery concerning Ute Claims, or defenses to Ute Claims, will be commenced in time to be completed no later than 120 days prior to the date set for trial.

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 90 days prior to trial.

### **3. Pretrial Motions**

#### **a) Anticipated Questions of Law or Mixed Questions of Law and Fact**

One or more parties may seek to file dispositive motions concerning relevant issues, which could include the following. Nothing in this preliminary list of issues shall prevent any party from raising other issues before trial. At this point in time, the parties reserve their rights to assert that such matters must be resolved upon a factual record established at an evidentiary hearing. Such pre-trial motions shall not be filed before the Initial Pre-Trial Scheduling Conference.

- (1) whether applicable law limits the Tribe's use of water to the amount of historic and existing beneficial use on its lands in New Mexico.
- (2) whether the amounts claimed for the Tribe are necessary to fulfill the purposes of the reservation or establish a permanent homeland for the Tribe and whether the claimed amounts may lawfully be made from asserted points of diversion and sources of supply.
- (3) whether water supply available to the Tribe from sources in Colorado must be accounted as reducing or even satisfying the Tribe's right to sufficient water to fulfill the purposes of the reservation or to establish a permanent homeland.
- (4) whether the earliest priority date of the Tribe to divert and use water in New Mexico is (a) the date the water was first put to beneficial use; (b) establishment of the reservation in New Mexico by Act of Congress dated February 20, 1895, 28 Stat. 677; or (c) March 2, 1868.

(5) whether any of the State's defenses are barred by collateral estoppel or res judicata.

(6) Other issues related to the asserted claims or defenses or that may arise in the course of the proceedings.

### **b) Deadline for Pre-trial Motions**

Pretrial motions concerning Ute Claims or defenses, other than discovery motions, shall be filed with the Court and served on opposing parties no later than 60 days prior to the date established for trial. Any pretrial motions concerning Ute Claims or defenses, other than discovery motions, filed after this date shall be considered untimely in the discretion of the Court. The Court, in its discretion, may designate any ruling on a pretrial motion as an interlocutory order subject to appeal.

### **4. Witness and Exhibit Lists**

Final lists of witnesses and exhibits shall be due from all parties 30 days prior to trial.

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

The parties agree that it is impossible to make a realistic projection concerning the length of trial at this point in time and that a trial date should not be set until all participants have an opportunity to be heard at the Initial scheduling conference.

### **6. Court Review**

The Court may periodically schedule hearings to review the terms of this Order and determine whether they continue to serve the purposes of just, speedy and inexpensive determination of all the claims in this adjudication.

SO ORDERED, this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
ROZIER E. SANCHEZ  
DISTRICT JUDGE *PRO TEMPORE*