

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

UNITED STATES OF AMERICA,)
ET AL.,)
)
 PLAINTIFFS,)
)
)
)
 v.)
)
 STATE OF NEW MEXICO)
 COMMISSIONER OF PUBLIC)
 LANDS, ET AL.,)
)
 DEFENDANTS.)

CIV NO. 01- 00072 BDB/WDS (ACE)

ZUNI RIVER BASIN ADJUDICATION

DEFENDANTS RICHARD DAVIS MALLERY, WOODSON ALLEN, CHARLIE ALLEN, GERALD ALLEN, WARNER AND RUTH ANDERSON, CAROL ANSLEY, J. PARLEY AND MARY ANSLEY, BILL AND KAREN ARMSTRONG, NANCY AUSTER, DAVID BACA, LILITH BAKER, WILLIAM AND INA JEAN BARNES, JOHN AND BETTY BAUMGARDNER, RONALD BLOCK, ROSS AND SIMMIE BOEHM, H. DARRELL BOGART, DEWARD AND GLORIA BOND, ELWIN AND ELLEN BOND, LAVERL BOND, MAUREEN BOND, GRACE BOND, CHARLES BRADY, JOHN BRAULT, WENDELL AND MARTHA BRIGGS, TED BRODERICK, ROBERT AND JANE BRUKER, TOMMY AND SANDY BURT, KENNETH AND GINGER CARLOCK, CLINT CARLSON, LARRY AND SALLY CARVER, DON CATOR, CROSSFIRE CATTLE CO., RON CAVIGGIA, LOIS CHEDSEY, HELEN CLAWSON, GRANT AND BLANCHE CLAWSON, KEITH AND LINDA CLAWSON, KIRK AND FLORA CLAWSON, JERRY COSPER, MRS. R.D. COUSINS, GLENNA COX, KATHLEEN DALLY, DUKE AND LYNNA DAVIS, RONNY AND CLAIR DEMARAY, ARDEN AND IRENE DENBLEYKER, CHRIS AND BARBARA DENTZEL, TOM DUCKETT, BILLY AND MARY DURHAM, A. R. AND DELPHA ENNISS, ROSS AND VERONICA FEAGIN, AFTON FISHER, JERRY AND EMILY FRAZIER, REX AND ROMONA FULLER, LEROY GABALDON, MICHAEL GARCIA, MAX GARCIA, LUCIANO AND ALICE GARCIA, RUSS GARNAAT, SANDRA GOMEZ, LAWRENCE GREEN, DENNIS GREEN, HENRY AND REBECCA GRIZZLE, RICHARD GRUDA, LES AND JACKIE HADDEN, JUNE GEORGE MITCHELL AND SANDRA HAIGHT, VIRGINIA HANSEN, WILLIAM HANSHAW, KENNETH HARRINGTON, BILL HARVEY, ELSIE BOYD HATCH, MILTON AND JONNIE HEAD, MELVIN AND JACKIE HEATH, ROBERT HEINE, ANN HENDERSON, GALE HENKE, FRANCES AND JAMES HERMAN, AMOS M. HINSHAW, JAMES W. HURLBUT / HURLBUT REALTY, NATALOU HYDER, LINDA AND ROBERT IONTA, WALLACE JACKSON, JR.,

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FAILURE TO PROSECUTE OR IN THE ALTERNATIVE
TO STAY FILING OF *LIS PENDENS*

COME NOW, Defendants Richard Davis Mallery et al., members of the Western New Mexico Water Preservation Association (“WNMWPA”), by and through their undersigned attorneys, and respectfully move the Court to dismiss this case without prejudice, or in the alternative to stay the filing of *Lis Pendens*, and as grounds therefore state:

1. This action was filed on January 19, 2001, as a quiet title suit against a large number of property owners in Cibola and McKinley Counties, irrespective of whether they claimed any water rights, needlessly causing irreparable harm to possibly hundreds of individuals;

2. The Court ordered the Plaintiffs to amend their Complaint to reflect the status of this case as a water adjudication, rather than a quiet title suit, and to file the Amended Complaint by January 6, 2003. (Docket No. 147, July 15, 2002);

3. The United States did not file its amended complaint on January 6, 2003, due in part to its inability to agree with the New Mexico Office of the State Engineer on the geographic boundaries of the adjudication. The United States' inability to agree with the State of New Mexico on the geographic scope of the adjudication was due in part to the financial ability of the United States to fund the hydrographic survey and reflects the United States' inadequate preparation prior to filing suit. *See* Administrative Order (Doc. No. 233, Sept. 11, 2003), wherein the Court found that "the United States filed the adjudication without engaging in sufficient consultation with the State of New Mexico, the party which has an equal or greater responsibility and financial burden in such a case." The Court found that fairness requires that, at least initially, the United States bear full responsibility for the Special Master's costs and expenses;

4. The Court then ordered the United States to file and serve its amended complaint no later than August 1, 2003. (Order on Special Master's Report re Geographic Scope of Adjudication, Doc. No. 200, May 21, 2003). The United States filed its Amended Complaint on August 4, 2003;

5. The United States' contractor has begun the hydrographic survey in which the water use of the non-Indian, non-federal water rights claimants will be determined, ultimately leading to a quantification of their rights. At the April 12, 2003, status conference in Gallup, New Mexico, the Special Master assured the non-Indian, non-federal water rights claimants that the Indian and federal claims would proceed on a schedule parallel to the non-Indian, non-federal claims;

6. At the September 9, 2003, status conference, the United States informed the court that it would not proceed on a parallel track in determining the Indian claims. The United States indicated that it would not file claims for the Zuni Pueblo surface water or the Navajo Nation surface water and groundwater until 2007 or 2008, the lengthy delay a result of insufficient funding to prosecute this case.¹ The United States intends to file a *lis pendens* on the title of all non-Indian landowners within the basin;

7. Such a *lis pendens* in effect for this lengthy time period will destroy the economic viability of property within the basin, while having no effect on the Indian interests, because the Indian parties are political sovereigns that are unaffected by such filings;

8. The refusal by the United States to proceed expeditiously with all claims of all parties on an efficient basis and without prejudice to the non-Indian claimants causes irreparable injury to the non-Indian claimants with no corresponding benefits to the Indian claimants;

9. Consequently, Defendants Mallery et al. seek the safeguard against delay provided by Rule 41(b) of the Federal Rules of Civil Procedure, i.e. dismissal of the case without prejudice;

¹ Counsel for the United States and the Zuni Tribe indicated that they would file the Zuni Tribe's groundwater claims within one year. On September 30, 2003, counsel for the Zuni Tribe stated that the United States and the Zuni Tribe had submitted a proposed scheduling order to the Special Master, but did not circulate a copy to counsel.

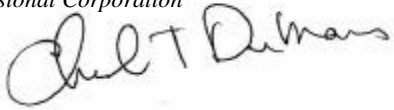
10. On September 29, 2003, a draft of this Motion was transmitted via facsimile to counsel for Plaintiffs United States of America, State of New Mexico, *ex rel.* State Engineer, Zuni Indian Tribe and Navajo Nation. An attempt to contact Plaintiffs' counsel was made by telephone on September 30, 2003. Counsel for the Zuni Indian Tribe objects to this Motion. At the time of the filing of this Motion, a response has not been received from counsel for Plaintiffs United States of America, State of New Mexico, *ex rel.* State Engineer and Navajo Nation. Due to the nature of this Motion, concurrence of Co-Defendants was not sought.

WHEREFORE, Defendants Richard Davis Mallery *et al.*, members of the Western New Mexico Water Preservation Association, respectfully request the following relief:

- a) That the action be dismissed without prejudice, or placed on an inactive calendar, and that no *lis pendens* be filed in the case until the action is ready to proceed as to all parties;
- b) If the action is not dismissed, that the United States be ordered to file all of its claims on behalf of the Indian claimants by May 1, 2004;
- c) If the United States is not able to file its claims, it should be ordered to file briefs outlining the legal basis for all its claims on behalf of the Indian claimants by May 1, 2004, to which the State and the non-Indian, non-federal claimants could respond, thus providing legal clarity to all concerned as to the legal theories by which the Indian claims will be determined, whatever their size and scope;
- d) That the Court grant such other and further relief as the Court deems appropriate.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

By:  _____

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon counsel of record via first class mail on this 30th day of September, 2003 as follows:

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A handwritten signature in cursive script that reads "Charles T. DuMars". The signature is written in dark ink and is positioned above a horizontal line.

Charles T. DuMars