

**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 ET AL.’S MOTION TO
EXPUNGE THE NOTICE OF LIS PENDENS FILED BY THE UNITED STATES
AND MEMORANDUM BRIEF IN SUPPORT THEREOF**

COMES 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 submit this Motion to Expunge the Notice of *Lis Pendens* filed by the United States with the county clerks of McKinley, Catron, and Cibola Counties. As grounds for this motion, the WNMWPA states as follows:

1. That the Notice of *Lis Pendens* filed by the United States is inappropriate for the issues involved in this adjudication, is overly broad, and does not account for any differences in the type of claims pending in the adjudication.

2. Due to the nature of this Motion and the recent pleadings filed by Plaintiffs in this matter, concurrence has not been sought.

WHEREFORE, for the foregoing reasons, the WNMWPA respectfully requests that the Notice of *Lis Pendens* recorded by the United States in McKinley, Cibola, and Catron Counties be expunged.

MEMORANDUM IN SUPPORT

The United States has filed a Notice of *Lis Pendens* with the County Clerks of McKinley, Cibola and Catron Counties, giving notice of the pendency of the lawsuit and its potential impact on all the properties located within the Zuni River Basin. *See* Exhibit “A,” attached hereto. The Notice of *Lis Pendens* filed by the United States amounts to the wholesale clouding of the titles of all property owners located within the described boundaries of the Zuni River Basin, without regard to any claims of water rights ownership or usage. “Once a *lis pendens* is filed, it clouds the title and effectively prevents the property’s transfer until the litigation is resolved or the *lis pendens* is expunged.” *Key v. Superior Court*, 2003 WL 22534225, 2 (Cal.App. 2 Dist. 2003). The practical effect resulting from recording a notice of *lis pendens* is to render the property unmarketable and destroy its utility as security for obtaining a loan. *Ex parte State Dept. of Revenue*, 2003 WL 21949724, 5 (Ala.Civ.App.2003). Because the potential for abuse is so apparent, the device is used very narrowly to put third parties on notice of the pendency of an action, not as an offensive tool of the plaintiff to exact a premature settlement. *Id.*

Recognizing the negative impacts arising from the improper filing of a *lis pendens* and the potential for abuse, some courts have limited the recording of a *lis pendens* to actions where the claimant is seeking title to or possession of real property. *See e.g., Knauer v. Foote*, 101 Hawai’i 81, 89, 63 P.3d 389, 397 (Hawai’i 2003); *Alexander v. Daimler Chrysler Services North America, L.L.C.*, 2003 WL 22183564, 3 (Minn.App. 2003). This limitation is consistent with the statutory requirements of New Mexico’s own *lis pendens* act, NMSA 1978, §38-1-14 (1965),

which allows the filing of a notice of *lis pendens* in actions “affecting the title to real estate.” See also *Hill v. Department of Air Force*, 884 F.2d 1321, 1322 (10th Cir. 1989) (holding that, in New Mexico, the recording of a notice of *lis pendens* is improper in an action seeking only monetary damages). In a federal court proceeding, the propriety of filing a notice of *lis pendens* is governed by state law. *Hamilton v. Smith*, 808 F.2d 36, 37 (10th Cir. 1986).

In general stream adjudications, the object of the process is to determine all claims to the use of the water in a given stream system, whether or not those claims are appurtenant to real property. *State, ex rel. Reynolds v. Pecos Valley Artesian Conservancy Dist.*, 99 N.M. 699, 700, 663 P.2d 358, 359 (1983), citing *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044 (1914). Water rights are property interests that exist separate and apart from real property unless they are appurtenant to irrigated lands by virtue of statute. *KRM, Inc. v. Caviness*, 1996-NMCA-103, ¶8, 122 N.M. 389, 391, 925 P.2d 9, 11; NMSA 1978, §72-1-2 and §72-5-22. A general stream adjudication determines rights to the use of water, the points of diversion, quantities, and priority dates. It does not clarify title to real property.

The United States has recorded a blanket Notice of *Lis Pendens*, covering all real property located within the boundaries of the Zuni River Basin. To record a *lis pendens* on all real property within the boundaries of the Zuni River Basin is particularly harmful to those persons who claim no water rights or whose water rights are not appurtenant to any real property. In any event, the determination of claims to the use of water in a given stream system does not affect “title” to the real property, so as to come within the purview of the *lis pendens* statute.

The *lis pendens* notice filed by the United States further makes no distinction between water rights that are or are not appurtenant to real property. The United States also makes no attempt to file a notice of *lis pendens* only against the real property that is actually involved in

this adjudication. They simply filed a blanket notice against all real property in the entire Zuni River Basin adjudication boundary, using broad strokes to implicate entire sections of land in the litigation.

A *lis pendens* notice continues until the completion of a lawsuit, including any periods during which the matter is on appeal. *Salas v. Bolagh*, 106 N.M. 613, 615, 747 P.2d 259, 261 (Ct.App.1987). Thus, the consequences to the property owners within the Zuni River Basin are apparent. A stream adjudication that conceivably will languish far into the future only compounds the negative impacts on the real property owners in the Basin. Even if the United States complies with the scheduling orders entered by the Court for completion of this adjudication, the process will be ongoing for years. After the plaintiffs conclude the adjudication with individual water rights holders, the *inter se* proceedings will necessarily follow, a period of time during which the various claimants will litigate against each other to define their respective entitlements to water. Allowing the Notice of *Lis Pendens* as filed by the United States will be a tremendous injustice to the landowners in the Zuni River Basin.

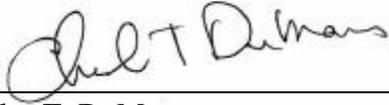
WHEREFORE, the pendency of this action with its attendant clouding of the titles of the real estate of a number of property owners is a hardship on the people involved. Recent pronouncements of the United States indicate that the process may be even lengthier than previously anticipated. For the foregoing reasons, the WNMWPA respectfully requests that the Notice of *Lis Pendens* recorded by the United States in McKinley, Cibola, and Catron Counties be expunged.

Dated: December 9, 2003

Respectfully submitted,

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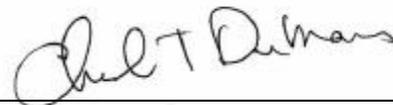
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