

**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**

**ZUNI RIVER BASIN ADJUDICATION**

**COMMENTS OF DEFENDANTS RICHARD DAVIS MALLERY *ET AL.*  
TO THE ORDER TO SHOW CAUSE**

In accordance with the Special Master’s request in the Order to Show Cause filed with the Court on July 26, 2005, Defendant Richard Davis Mallery, Western New Mexico Water Preservation Association (“WNMWPA”), appreciates the opportunity to comment on the Special Master’s Order relating to the treatment of domestic wells as a potential global or system-wide issue.

**COMMENTS**

The Zuni basin is unique in that domestic wells are miles apart, have no hydraulic connection to one another, and serve multiple purposes for the rural residents who use them. These purposes can include stock watering, growing of garden and landscaping, and related rural uses.

New Mexico statutes authorize all domestic well users a right to receive a domestic well permit sufficient to irrigate not more than one acre of non-commercial trees or garden. N.M.S.A. 1978, §72-12-1 *et seq.* In general in New Mexico, this has resulted in a diversionary right of three acre feet per annum (afa).

The State Engineer's attempt to offer an across the board permit of .7 afa for domestic wells is an attempt to utilize this Court to do what the New Mexico legislature has refused to authorize them to do—deny permits for an amount sufficient to irrigate one acre of non-commercial trees or garden.

The cost of requiring every single domestic well user to litigate the scope of his or her individual permit and prove beneficial use through the testimony of expert witnesses would be prohibitive to them and would delay the adjudication for no valid policy reason. There would be, at a minimum, over 250 hearings for the members of the association alone. In the Zuni Basin, there is no demonstrable scarcity, these wells are distant from one another, there are no well interference issues, and the wells are essential to the livelihood of the individual well users. Furthermore, the OSE had no problem selecting an across the board number they viewed as sufficient to obtain their policy goals of administrative limitation of diversions from domestic wells. For this reason, there is no reason that the specific number could not be litigated as a global issue before the Court to determine whether the OSE has the legal right to impose such a limitation.

## **CONCLUSION**

Defendant Richard Davis Mallery, on behalf of all members of the Western New Mexico Water Preservation Association, appreciates the opportunity to comment on the questions posed in the Special Master's Order to Show Cause.

Dated: August 19, 2005

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,  
*A Professional Corporation*



By: \_\_\_\_\_

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**CERTIFICATE OF MAILING**

In accordance with the instructions of the Special Master, the foregoing Comments on the Proposed Scheduling Order are being served on the Special Master at Post Office Box 2384, Santa Fe, NM 87504-2384. These Comments are also being filed of record, but not served upon any other party.



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Charles T. DuMars