

ORIGINAL

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

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,)
)
PLAINTIFF,)
)
)
)
v.)
)
STATE OF NEW MEXICO; NM)
STATE ENGINEER; RICHARD)
DAVIS MALLERY, ET AL.,)
)
DEFENDANTS.)
_____)

CIV NO. 01- 0072 BB/WWD -ACE
ZUNI RIVER BASIN

**DEFENDANT RICHARD DAVIS MALLERY'S
ANSWER TO UNITED STATES' COMPLAINT AND
COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF**

COMES NOW, Defendant Richard Davis Mallery, by and through his undersigned attorneys, and for his Answer to the United States' Complaint filed January 19, 2001 states as follows:

1. Defendant Richard Davis Mallery denies paragraph 2;
2. Defendant Richard Davis Mallery admits paragraph 7;
3. Defendant Richard Davis Mallery is without information to either admit or deny the truth of paragraphs 1, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, and 34 or they contain legal conclusions with which Defendant Richard Davis Mallery cannot agree, therefore, Defendant Richard Davis Mallery denies these paragraphs and demands strict proof thereof.

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AFFIRMATIVE DEFENSES

As separate and distinct affirmative defenses, Defendant Richard Davis Mallery states as follows:

FIRST AFFIRMATIVE DEFENSE

The United States' Complaint must be dismissed for lack of jurisdiction and the Court's obligation to abstain until the proper action is brought in state court.

SECOND AFFIRMATIVE DEFENSE

The United States' Complaint fails to state a claim upon which relief can be granted as to numerous defendants opting rather for an advisory opinion from this Court on the nature and extent of unrelated property rights under state law, and therefore, the Complaint must be dismissed for lack of a case or controversy under Article III of the United States Constitution.

THIRD AFFIRMATIVE DEFENSE

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.

FOURTH AFFIRMATIVE DEFENSE

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.

FIFTH AFFIRMATIVE DEFENSE

The water rights of individual Navajo allottees are limited to actual beneficial use.

SIXTH AFFIRMATIVE DEFENSE

The 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 United States' 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.

SEVENTH AFFIRMATIVE DEFENSE

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.

EIGHTH AFFIRMATIVE DEFENSE

The water rights of the Navajo Nation are restricted to those actual reservation lands demonstrably proven to be capable of economic productive agricultural use within the meaning of federal principles and guidelines for measuring cost-benefit ratios.

NINTH AFFIRMATIVE DEFENSE

The Ramah Band of the Navajo Nation has no independent water rights separate from those of the Navajo Nation.

TENTH AFFIRMATIVE DEFENSE

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).

ELEVENTH AFFIRMATIVE DEFENSE

The United States' claims to water under the BLM generic legislation are limited to beneficial use under New Mexico state water law.

TWELFTH AFFIRMATIVE DEFENSE

Numerous of the claims made against Defendant Richard Davis Mallery and similarly situated non-indian defendants are based upon *de minimus* and unmeasurable uses of water, and therefore, must be dismissed for those reasons.

THIRTEENTH AFFIRMATIVE DEFENSE

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.

WHEREFORE, Defendant Richard Davis Mallery respectfully requests that the Court dismiss the United States' Complaint with prejudice, award Defendant attorney fees and costs as provided by law, and for such other and further relief as the Court deems just and proper.

**COUNTERCLAIM FOR
DECLARATORY AND INJUNCTIVE RELIEF**

As a separate and distinct Counterclaim against Plaintiff United States, Defendant Richard Davis Mallery states as follows:

JURISDICTION

1. Defendant Richard Davis Mallery denies this Court has jurisdiction, but if the Court finds it has jurisdiction, it also has jurisdiction over this Counterclaim.

FACTUAL ALLEGATIONS

2. Defendant – Counterclaimant Richard Davis Mallery owns 230 acres of land as Trustee of the Richard Davis Mallery Revocable Trust.

3. Defendant – Counterclaimant Richard Davis Mallery uses surface water rights as obtained through ongoing beneficial use off a tributary of the Zuni River;

4. Defendant – Counterclaimant Richard Davis Mallery also uses a well for domestic and other related purposes.

COUNT I

5. Defendant – Counterplaintiff Richard Davis Mallery incorporates by reference the allegations in paragraphs 1 though 4 of this Counterclaim as though fully set forth herein;

6. Defendant – Counterplaintiff Richard Davis Mallery incorporates by reference the allegations in paragraphs 1 though 6 of this Counterclaim as though fully set forth herein;

7. Upon information and belief, Plaintiff – Counterdefendant United States has joined landowners and water rights holders, including Defendant – Counterplaintiff Richard Davis Mallery, who are unaffected by this litigation. The erroneous joinder has caused and is continuing to cause substantial damage, loss in property values and corollary economic dislocation.

WHEREFORE, Defendant – Counterclaimant Richard Davis Mallery, as the owners of his water rights under New Mexico state water law, requests that the Court determine and declare such water rights as being unaffected by Plaintiff – Counterdefendant United States, as trustee for the Navajo Nation, Ramah Band and Zuni Pueblo’s allegations of ownership of a Pueblo water right.

COUNT II

8. Defendant – Counterplaintiff Richard Davis Mallery incorporates by reference the allegations in paragraphs 1 through 7 of this Counterclaim as though fully set forth herein;

9. In accordance with its equitable powers and its obligation to balance the interests of the parties, Defendant – Counterplaintiff Richard Davis Mallery is entitled to an immediate hearing with respect to the methodology used for determining who would be served with a summons in this action and an order immediately dismissing all those who have been served and made a defendant to this action in error.

10. As to those remaining parties, this Court has an equitable duty to order Plaintiff to take action in the printed and other media to assure the public at large that this action will not destroy the property values of the real parties in interest to this action.

WHEREFORE, Defendant – Counterplaintiff Richard Davis Mallery respectfully requests that the Court:

A. Declare off-reservation domestic and related sanitary water uses are unaffected by on-reservation water uses;

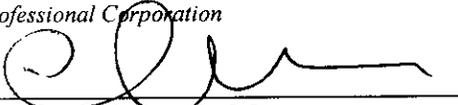
B. Compel Plaintiff – Counterdefendant United States to provide and disseminate immediate public information that indicates the filing of the United States’ Complaint on January 19, 2001 does not constitute proof that property values of persons living in the area have been or will be necessarily diminished;

C. Compel Plaintiff – Counterdefendant United States to provide for immediate dismissal of those erroneously named defendants and provide attorneys fees and costs as appropriate in those cases where such individuals have been made a party defendant in this action through Plaintiff – Counterdefendant’s errors.

D. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer was served upon counsel of record via first class mail on this 29th day of August, 2001 as follows:

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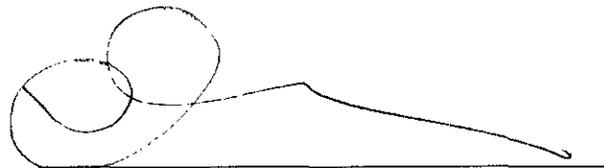
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