

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

<b>UNITED STATES OF AMERICA,</b>	)	<b>07-cv-00681-BB</b>
<b>ET AL.,</b>	)	
	)	
<b>PLAINTIFFS,</b>	)	
	)	
	)	<b>ZUNI RIVER BASIN</b>
	)	<b>ADJUDICATION</b>
<b>v.</b>	)	
	)	
	)	
<b>STATE OF NEW MEXICO</b>	)	
<b>COMMISSIONER OF PUBLIC</b>	)	
<b>LANDS, ET AL.,</b>	)	
	)	<b>Subproceeding 1</b>
<b>DEFENDANTS.</b>	)	<b>Zuni Indian Claims</b>
	)	

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**VARIOUS DEFENDANTS’ RESPONSE IN OPPOSITION TO UNITED STATES MOTION TO STRIKE ANSWER FILED BY NON-PARTIES**

The various Defendants listed in the United States’ Motion to Strike Answer Filed by Non-Parties (Doc. No. 186), by and through their attorneys of record, Law & Resource Planning Associates, P.C. (“LRPA”), hereby file this Response in Opposition to the United States’ Motion.

Sadly, the filing of this Motion by the United States serves only to exacerbate the perception by many participants in this litigation that the United States employs heavy handed and unfair tactics in prosecuting this adjudication. The professed desire by the United States in filing the Motion is to prevent “great confusion on the docket and effectively allow persons and entities listed above to perform an end-run around the requirements of this Court’s orders and the Federal Rules of Civil Procedure.” United States’ motion at page 5. This seemingly laudatory intent is belied by the United States’ apparent complete rejection of several very simple ways in

which confusion, if there is any, can be rectified. Instead, this Motion is simply an attempt to punish people who did everything the Court requested.

As noted in the United States' brief, the Court ordered that persons who wished to participate in the Zuni Subproceeding should file a Notice of Intent to Participate with the Court by October 26, 2007. While the United States' Motion never acknowledges this, the Notices of Intent for the persons specified in its Motion were filed with the Court. (Doc. Nos. 124, 125, 126, and 127). In addition, the undersigned appeared on their behalves at the status conference held before the Special Master on November 27, 2007. The individuals listed in the United States' Motion did everything the Court asked them to do.

While the United States never specifies why it does not believe that the various listed defendants are not proper parties to this litigation, it is apparently because of the technical problems encountered by LRPA in getting the Notices filed. As detailed in the Affidavit of David Lerwill, he was unable to successfully file the Notices by midnight on October 26, 2007. After trying unsuccessfully for several hours, he came into the office at 5:00 a.m. the following morning, a Saturday, and was able to successfully file the Notices with the Court.<sup>1</sup>

When Mr. Lerwill encountered problems with the filing, he e-mailed the help desk regarding the technical problems. On the following Monday morning he received a response from Phyllis Rael indicating that he "may have to try again this morning" and that "the system may have been down for a short time." Thereafter, Mr. Lerwill worked with the staff of the federal court to file the Notices for a second time. Following their instructions, he amended the Subproceeding Entry of Appearance and received assurances that the filings not only were successful, but worked with the staff and developed an Entry of Appearance in the main

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<sup>1</sup> Mr. Lerwill has successfully filed numerous pleadings with the Federal District Court, including a Notice to Participate of Ramah Land and Irrigation Company earlier in the day of October 26, 2007. (Document 123). He certainly is not a neophyte when it comes to electronic filings.

proceeding that the staff considered to be the template for others also seeking to file multiple Notices.

During the following status conferences, the undersigned was never made aware either by the Court or counsel for the United States that the filing was problematic or considered to be deficient.<sup>2</sup>

The United States makes the similar claim that the Answer filed on behalf of numerous clients was untimely and should be stricken from the record. Again, as documented by David Lerwill, the filing of the Answer was complicated by technical problems. *See* Affidavit of David Lerwill, filed concurrently with this Response. After encountering the problems, Lerwill contacted the help desk for assistance in accomplishing the filing. He received three responses. Two responses indicated that the recipients of the e-mail were out of the office and would return either the following morning or on the following Monday. The third response stated that the error message was indicative of our Internet service provider having issues with the domain name service. The response suggested that the cache be cleared and that a further attempt be made. Lerwill followed the advice but to no avail. The filing was finally successfully accomplished using the computer in a local copy shop early the following morning.

Follow-up with the firm's computer consultant suggested that the Court's filing service may be inadvertently blocking our e-mails. This was communicated through a voice mail to the Court's help desk soon thereafter. In follow-up calls to the help desk, Lerwill has learned that the problem cannot be solved unless it is actively occurring. Since the botched filing on January 31, 2008 and February 1, 2008, no further problems have been encountered.

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<sup>2</sup> During the status conference held on November 27, 2007, the undersigned spoke with Ellen Heath regarding our electronic filing to determine if we had done everything that was required to successfully complete the electronic filing. She indicated that we had fixed all problems that had initially occurred.

In both instances, counsel for the United States' received copies of the filings almost immediately. In the case of the Notices to Participate, copies were served on the United States the following day, a Saturday. In the case of the Answer, Lerwill specifically e-mailed the Answer to counsel for the United States and advised of the technical difficulties in filing the pleading. The read receipt indicates the e-mail and attached answer was received and read before 5:00 on that day. It is difficult to ascertain in what way the United States has been prejudiced by the filings.

The United States claims that upon encountering technical problems that the various defendants should have sought the leave of the Court to file a late answer on behalf of these defendants. However, as pointed out to the United States in earlier correspondence, the Court's Order on electronic filing provides the method of dealing with filing errors, i.e., notice to the Help Desk of any problems. (Doc. No. 956). The Order specifies "Filing errors should be reported to the Clerk's Office via the CM/ECF Help Desk. In Albuquerque, call 348-2075. Outside of Albuquerque, call 1-866-620-6383. Personnel at the Help Desk are also available to answer questions about any aspect of the CM/ECF system." This is exactly how the technical difficulties were handled once encountered.

The only legitimate complaint raised by the United States is that counsel for the numerous defendants did not notice that all defendants were not included in the Court's Initial Scheduling and Planning Order.<sup>3</sup> The undersigned assumes complete responsibility for that oversight. However, in an attempt to rectify the situation, counsel suggested to counsel for the United States that the parties file a joint motion to amend the scheduling order to join the omitted defendants. *See* letter to United States' Counsel attached hereto as Exhibit A. Apparently a

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<sup>3</sup> After receiving the Order, the undersigned noticed a number of clients on the list and wrongfully assumed that the extensive list was complete.

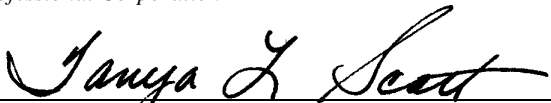
simple solution was not contemplated by the United States since it immediately filed this Motion.

It is clear that the United States' intentions in filing this Motion are not to clear up any confusion or prevent end-runs around Court orders. In both instances, the defendants through their counsel were following the Court's directives in good faith. In both instances, copies of the pleadings that were being filed were attached to the help requests to verify compliance with the Court's order. There have been no end-runs around the Court's order. When presented with a simple solution to clear up any professed confusion, counsel for the United States chose to simply ignore the suggestion and proceed to burden the Court and opposing counsel with this specious motion. This action does nothing to alleviate the pervasive distrust by numerous defendants in this litigation of the United States' true motivations.

For the foregoing reasons, the various defendants listed in the United States' Motion to Strike pray the Court deny the Motion in its entirety.

Respectfully submitted,

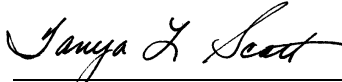
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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that, on February 14, 2008, I filed the foregoing pleading electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Filing to be served by electronic means.

  
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Tanya L. Scott