**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEW MEXICO**

**UNITED STATES OF AMERICA,**
**and**
**STATE OF NEW MEXICO, *ex rel.***
**STATE ENGINEER,**

**Plaintiffs,**

**and**

**No. 01cv00072 BB/WWD-ACE**

**ZUNI INDIAN TRIBE AND NAVAJO NATION,**

**ZUNI RIVER BASIN**

**Plaintiffs-in-Intervention,**

**v.**

**A & R Productions, *et al.*,**

**Defendants.**

---

**UNITED STATES' RESPONSE TO "MOTION FOR THE FLORA AND FAUNA"**

---

The United States of America ("United States") hereby responds to the *Motion for the Flora and Fauna of the Land Located within the S1/2 of the SE1/4 of the SE1/4 of T12N R16W Section 13 to Join in the Adjudication for Subareas 4 and 8* filed September 8, 2005 [Doc. No. 386] ("Motion for the Flora and Fauna") by Joan and Richard Bowser ("Movants"). The United States urges that the Motion for the Flora and Fauna be denied for the following reasons:

1. Movants failed to comply with Rule 7.4(b) and (c) established by this Court's March 27, 2003 *Administrative Order Establishing Motion Practice and*

*Procedure* in that they failed to "determine whether there is concurrence or opposition by contacting each attorney of record (as limited [by Rule 7.3]) and the plaintiff(s)" and their motion fails to include the statement required by Rule 7.4(c). For the same reasons, the Motion for the Flora and Fauna would fail to meet the requirements of D.N.M.LR-Civ 7.3, if it applied. Movants also failed to provide their mailing address or telephone number on either the Motion for the Flora and Fauna or on their subsequently-filed certificate of service [Doc. No. 388], in violation of Fed.R.Civ.P. 11(a) which mandates that "[e]ach paper shall state the signer's address and telephone number, if any."

2. The Motion for the Flora and Fauna is unaccompanied by any brief and, in itself, fails to provide any legal authority in support of the Movants' legal position.

3. As far as the United States can determine, Movants are not currently parties to this action, although their names have been included on mailing lists for this case for several years. On March 13, 2001, the United States received a *Waiver of Service of Summons*, dated March 9, 2001, signed by "Joan Bowser for Cheryl H. Duty." Joan Bowser has never entered an appearance as an attorney in this action. The waiver itself bears no indication that Joan Bowser is an attorney licensed to practice law in New Mexico, or otherwise authorized to represent Cheryl H. Duty in this adjudication, and the United States accordingly has not filed the document with the Court.[1] On April 19, 2001, the clerk accepted for filing a document entitled "Answer to United States' Complaint" [Doc. No. 43] which was signed by Joan Bowser and purported to be submitted by Joan and Richard Bowser on behalf of Cheryl Duty, who was identified as

[1] The United States separately received a waiver filed by Cheryl H. Duty in her own behalf, which has been filed with the Court. The United States has no record of a waiver signed by Joan or Richard Bowser on their own behalf.

the owner of the South ½ of the SE ¼ of the SE ¼ of Township 12 North, Range 16 West, Section 13 ("Movants' tract"). The answer was not signed by Cheryl Duty, or by Richard Bowser, and does not identify Joan Bowser as being an attorney for Cheryl Duty. Accordingly, the answer on its face violates Fed.R.Civ.P. 11(a)'s requirement that "[e]very pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party," and appears to constitute the unauthorized practice of law by Joan Bowser. Chisholm v. Ruekhaus, 124 N.M. 255, 258, 948 P.2d 707, 710 (1997) ("Representing one's self in a legal proceeding does not constitute the 'practice of law.' Representing another, however, does." (Citations omitted.)).[2] In any event, the document does not purport to be a filing by the Bowsers on their own behalf.

4. Accordingly, Movants' motion may be intended to be in the nature of a motion to intervene, which would be governed by Fed.R.Civ.P. 24. However, the Motion for the Flora and Fauna fails to comply with Rule 24(c) in that it is not "accompanied by a pleading setting forth the claim or defense for which intervention is sought."

5. Movants request that they be allowed to join in the adjudication for Subareas 4 and 8 and assert that "certain waters in sub areas [sic] 4 and 8 are upstream or downstream" of Movants' tract. Notwithstanding the entirely equivocal character of Movants' assertion, it is easily determined from a map that their tract is not located

[2] The United States mentions this matter not for the purpose of seeking sanctions, but only to clarify the record in this case concerning whether the Movants are currently parties. Indeed, the United States' best information from Mckinley County records is that the Movants are currently the legitimate owners of record of Movants' tract. Once the Hydrographic Survey Report for Subarea 3 is completed, the United States intends to properly serve and join the Movants as defendants and to offer them a consent order for any water rights identified on their property.

within either Subarea 4 or Subarea 8, as defined by paragraphs I.A. and I. B. of the Special Master's September 8, 2005 *Amended Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 4 and 8 of the Zuni River Stream System* (Docket No. 387). Indeed, the Movants' tract is within Subarea 3, is over 6 miles from any part of Subarea 4, is twice that distance from any part of Subarea 8, and lies entirely within the Rio Nutria tributary system which neither contributes surface water to nor receives surface water from any tributary within Subareas 4 and 8. Accordingly, the Movants' tract is neither upstream nor downstream of any land or water in Subareas 4 or 8.

6. The Motion for the Flora and Fauna can be construed to state that Movants desire to litigate *inter se* challenges to water rights in Subareas 4 and 8. To that extent their motion is premature and should be deferred until the *inter se* phase of this adjudication. Alternatively, the motion may state a desire to adjudicate Movants' own water rights on Movants' tract, which is also premature and should be deferred until the Special Master enters a procedural and scheduling order for Subarea 3, where the Movants' tract is located.

7. The Motion for the Flora and Fauna can be read to assert claims on behalf of all the plants and animals on the Movants' tract and to request that such plants and animals be joined as parties to this adjudication. Quite apart from a number of obvious practical problems (e.g., the fact that some of the Movants' proposed parties may be migratory and others may be extremely short-lived making identification of the real parties in interest pursuant to Fed.R.Civ.P. 17(a) impossible), the Movants have wholly failed to cite any authority establishing that the plants and animals on Movants' tract have

capacity to sue or be sued, Fed.R.Civ.P. 17(b), are "persons" able to be joined to this adjudication pursuant to Fed.R.Civ.P. 19 or 20, have standing,[3] or are able to be the owners of water rights or any other property interest.

8. Again, the named Movants have never entered appearances as counsel or otherwise identified themselves as attorneys licensed to practice law in the State of New Mexico. They appear *pro se* and are without authority to represent any other parties. Chisholm v. Ruekhaus. As is to be expected, the Motion for the Flora and Fauna is not signed by any of the flora and fauna. Accordingly, to the extent the motion is intended as a motion by or on behalf of certain flora and fauna, it both violates Rule 11 and constitutes the unauthorized practice of law by Movants.

Submitted this 20th day of September, 2005.

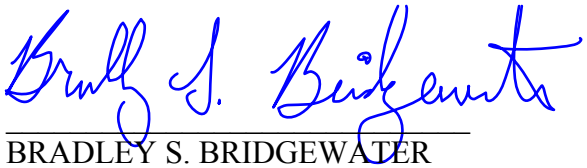
COUNSEL FOR THE UNITED STATES:

BRADLEY S. BRIDGEWATER
U.S. Department of Justice
999 18th Street, Suite 945N
Denver, CO 80202
(303) 312-7318

[3] In order to satisfy the "case or controversy" requirement of U.S. Const. art. III, §2, a party "must show (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Environmental Services, 528 U.S. 167, 180-81 (2000). The Movants' assertion that the allocation of waters in Subareas 4 and 8 "may have an adverse effect on the Flora and Fauna" is facially conjectural, and therefore an insufficient basis for Article III standing.

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing *United States' Response to "Motion for the Flora and Fauna"* were mailed to all persons on the attached distribution list on September 20, 2005.



BRADLEY S. BRIDGEWATER

Charnas, Stephen, Esq.
Sutin, Thayer & Browne PC
P.O. Box 1945
Albuquerque, NM 87103-1945

Stripp, William G., Esq.
P.O. Box 159
Ramah, NM 87321

Gardner, David R., Esq.
P.O. Box 62
Bernalillo, NM 87004

Stanley Pollack/Bidtah Becker
Navajo Nation Dept. of Justice
P.O. Box 2010
Window Rock, AZ 86515-2010

Drullinger, Paul & Sandra, Pro Se
319 E. Elm Street
Hoopeston, IL 60942-1822

McBride, Gerlad F., Pro Se
McBride, Myrrl W., Pro Se
2725 Aliso Dr., N.E.
Albuquerque, NM 87110

Shoenfeld, Peter B., Esq.
P.O. Box 2421
Sante Fe, NM 87504-2421

Sunny J.Nixon, Mark Adams
Rodey Dickason Sloan Akin & Robb
P.O. Box 1357
Santa Fe NM 87504-1357

Boynton, Bruce, Esq.
Boynton, Simms-West Law Office
P.O. Box 1239
Grants, NM 87020

Beardsley, Ann Hambleton, Pro Se
127 Orchard Drive
Central, UT 84722

Ionta, Robert W., Esq.
McKim, Head & Ionta
P.O. Box 1059
Gallup, NM 87305

Haas, James E., Esq.
Losee, Carson & Haas P.A.
Box 1720
Artesia, NM 88211

Joca, Mary Ann, Esq.
U.S. DOA, Off. of Gen. Counsel
P.O. Box 586
Albuquerque, NM 87103

Greg Mehojah
DOI, Office of the Solicitor
505 Marquette Ave NW Ste 1800
Albuquerque, NM 87102

Gugliotta, Kimberly J., Pro Se
158 W. William Casey St.
Corona, AZ 85641

Bunch, Steven L., Esq.
N. M. Highway & Trans. Dept.
P.O. Box 1149
Santa Fe, NM 87504- 1149

Stephen Hughes/Michael Thomas
N.M. State Land Office
P.O. Box 1148
Sante Fe, NM 87504-1148

Sanchez, Dorothy C., Esq.
1011 4th Street, N.W.
Albuquerque, NM 87102-2132

Fahmy, Peter, Esq.
Office of Regional Solicitor
755 Parfet St., Suite 151
Lakewood, CO 80215

Brodrick. Ted, Pro Se
P.O. Box 219
Ramah, NM 87321

Shadle, Stephen P., Esq.
Westover, Shadle, Carter & Walsma
2260 S. Fourth Ave., #2000
Yuma, AZ 85364

Dahl, Jeffrey A., Esq.
Lamb, Metzgar, Lines & Dahl, PA
P.O. Box 987
Albuquerque, NM 87103

Marx, Jane, Esq.
2825 Candelaria Road NW
Albuquerque, NM 87107

Williams, Pamela, Esq.
Division of Indian Affairs
1849 C St., N.W., Rm 6456
Washington, DC 20240

Lebeck, David R., Pro Se
Lebeck, Albert O., Pro Se
P.O. Drawer 38
Gallup, NM 87305

Cassutt, Kenneth J., Esq.
530-B Harkle Road
Santa Fe, NM 87505

Gehlert, David W., Esq.
USDOJ-ENRD
999 18TH St., Suite 945
Denver, Colorado 80202

Gabin, Special Master Vickie L.
U.S. District Court - DCNM
P.O. Box 2384
Sante Fe, NM 87504-2384

DePauli, Louis E., Pro Se
1610 Redrock Drive
Gallup, NM 87031

Clara M. Mercer
1017 S. 10th Avenue
Yuma, AZ 85364

Edward Bagley, Gregory Ridgley,
Off. of State Eng, Legal Services
P.O. Box 25102
Sante Fe, NM 87504-5102

David Candelaria, Pro Se
12,000 Ice Caves Rd.
Grants, NM 87020

Jay F. Stein, James C. Brockmann
Stein & Brockmann, P.A.
P.O. Box 5250
Santa Fe, NM 87502-5250

Cheryl Duty, Pro Se
HC61 Box 788
Ramah, NM 87321

Shaw, Mark H., Esq.
9700 Entrada Pl. NW
Albuquerque, NM 87114-3776

Christina Bruff DuMars, Charles
T. DuMars, Tanya L. Scott
201 Third St. NW, Suite 1370
Albuquerque, NM 87102

Cullen Hallmark, Esq.
Garber & Hallmark
P.O. Box 850
Santa Fe, NM 87504

William J. Cooksey
Dubois, Cooksey & Bischoff, P.A.
2020 Fourth Street, N.W.
Albuquerque, NM 87102

Nelson, Stephen R., Esq.
Johnson & Nelson, P.C.
P.O. Box 25547
Albuquerque, NM 87125-5547

Susan C. Kery, Esq.
Sheehan, Sheehan & Stelzner
P.O. Box 271
Albuquerque, NM 87103

Richard W. Bowser, Pro Se
Joan D. Bowser, Pro Se
#5, Hawk Ridge Road
Moriarty, NM 87035

John W. Utton
Sheehan, Sheehan & Stelzner, PA
P.O. Box 271
Albuquerque, NM 87103

Updated 9/20/05