

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

UNITED STATES OF AMERICA,)	
)	
PLAINTIFF,)	
)	
)	CIV NO. 01- 0072 BB/WWD -ACE
)	
v.)	ZUNI RIVER BASIN
)	
STATE OF NEW MEXICO; NM)	
STATE ENGINEER; RICHARD)	
DAVIS MALLERY, ET AL.,)	
)	
DEFENDANTS.)	
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**DEFENDANT RICHARD DAVIS MALLERY’S
COMMENTS ON THE PROPOSED SCHEDULING ORDERS
SUBMITTED BY THE UNITED STATES AND THE STATE OF NEW MEXICO**

COMES NOW, Defendant Richard Davis Mallery, by and through his undersigned attorneys, and hereby provides the following comments and submits his proposed alternative adjudication scheduling order. *See* Exhibit A.

1. This is a highly complex and significant legal case with the apparent misjoinder of many defendants. Accordingly, there should be an immediate determination of a method of joinder with consequent dismissal of improper defendants and an award of costs to those defendants. In addition, parties claiming an interest in a water right that are not presently joined should be allowed to move to intervene.

2. Second, the boundary of the Basin has not been adequately determined, especially the relationship between surface water and ground water. The Court should

appoint a committee to address hydrologic issues in the basin. Such a committee would be comprised of scientists, engineers and lawyers selected by the parties.

3. Third, the United States has proposed performing the hydrographic survey on a piecemeal basis but has not proposed a schedule for completing the hydrographic survey. Such an indefinite approach raises the question of how to determine the various parties' claims to water without due process violations or undue delay. A comprehensive hydrographic survey, rather than a piecemeal approach, should be performed to avoid those problems. Regardless of whether the hydrographic survey is comprehensive or piecemeal, there must be supervision by the State with participation by all parties in the process. The Court should appoint a committee to address hydrographic survey issues in the basin. Like the hydrology committee, the hydrographic survey committee would be comprised of scientists, engineers and lawyers selected by the parties. In addition, a website should be used to describe the process and disseminate information to encourage cooperation by the individual, non-Indian parties to a greater degree than if the survey was performed exclusively by the federal government.

4. Fourth, the filing of this lawsuit has put a cloud on the title of Defendants' properties thereby reducing the value of those properties. And, any prolonged stay of the proceedings compounds the adverse effect on property values. Therefore, the State, in conjunction with the United States, should prepare a statement outlining the nature of the adjudication and its effect so that the real estate community and lending institutions are informed of the facts and effects of the United States' action to quiet title.

5. Finally, there are substantive threshold legal issues that should be decided first. For example, if the issues regarding the Zuni Pueblo's water rights are first decided

by the Court or settled through mediation, then those findings and conclusions would inform the balance of the hydrologic factual issues. One solution would be for the Court to certify the legal issues for briefing and then allow the parties time to try to negotiate a settlement in a mediation session paid for by the United States.

Defendant Mallery agrees in general with the proposed adjudication scheduling order submitted by the State of New Mexico on February 1, 2002. Defendant Mallery's proposed adjudication scheduling order, submitted as Exhibit A to these comments, is essentially the State's proposals with his revisions indicated by the redlined text.

Respectfully submitted,

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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 8th day of February, 2002 as follows:

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