

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

|   |   |                  |
|---|---|------------------|
| UNITED STATES OF AMERICA,                 | ) |                  |
| and                                       | ) |                  |
| STATE OF NEW MEXICO, <i>ex rel.</i> STATE | ) |                  |
| ENGINEER,                                 | ) |                  |
|   | ) |                  |
| Plaintiffs,                               | ) |                  |
|   | ) | No. 01cv00072 BB |
| and                                       | ) |                  |
|   | ) | ZUNI RIVER BASIN |
| ZUNI INDIAN TRIBE, NAVAJO NATION,         | ) | ADJUDICATION     |
|   | ) |                  |
| Plaintiffs in Intervention,               | ) |                  |
|   | ) |                  |
| v.  | ) |                  |
|   | ) |                  |
| A&R PRODUCTIONS, et al.                   | ) |                  |
|   | ) |                  |
| Defendants.                               | ) |                  |
| _____                                     | ) |                  |

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**MOTION TO JOIN ADDITIONAL PARTY DEFENDANT NUNC PRO TUNC AND TO  
DISMISS ERRONEOUSLY JOINED DEFENDANT**

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The United States of America (“United States”) hereby respectfully requests the Court to join as an additional party defendant the entity named below and order the party to answer the United States’ Complaint in this action as required in any civil action in the United States District Court or suffer default judgment against the party. The United States further moves the Court to make such joinder retroactive to May 31, 2006, and to dismiss the party erroneously joined as “K & D ENTERPRISE; C.R.O.” In support of this motion, the United States asserts:

1. The entity listed below is diverting and using or may claim a right to divert and use surface or underground waters within the Zuni River stream system in New Mexico:

| Subfile No.                             | Defendant   |
|---|---|
| ZRB-2-0052<br>& ZRB-3-0079 <sup>1</sup> | HOFFMAN LIVING TRUST DATED SEPTEMBER 25, 2002<br>P.O. BOX 707<br>FENCE LAKE, NM 87315 |

The water uses, or claims to the right to use water, of this entity are subject to the laws of the State of New Mexico and the United States. This Court has exclusive jurisdiction to adjudicate all claims to the right to divert, store, or use public waters of the Zuni River stream system in New Mexico.

2. The entity listed above may be diverting and using water associated with the subfile numbers listed, or may otherwise be using or diverting surface or underground waters within the Zuni River stream system.

3. Based on ownership data obtained from county records for the Hydrographic Survey of Sub-Areas 9 & 10, the United States, on January 24, 2006, moved to join, *inter alia*, “K & D ENTERPRISEA; C.R.O.” [sic] as a party defendant in this case (Doc. No. 468). The Court granted the United States’ motion on January 26, 2006 (Doc. No. 470). Subsequently, pursuant to the Special Master’s *Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 9 and 10 of the Zuni River Stream System* (Doc. No. 436), the United States mailed a proposed Consent Order and other required documents to K & D ENTERPRISEA; C.R.O.

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<sup>1</sup> The United States provides Subfile Numbers in motions to join only for tracking purposes, and not to limit in any way the scope of the joinder sought.

4. On February 22, 2006, Tanya Scott, of Law & Resource Planning Associates, wrote to counsel for the United States on behalf of, *inter alia* Karl and DeAnn Hoffman. Ms. Scott indicated, and provided deed copies demonstrating, that the property which was the subject of Subfile ZRB-2-0052 was formerly owned by K & D Enterprises: C.B.O., but had since been conveyed to the trustees of the Hoffman Living Trust dated September 25, 2002 (“Trust”).

5. The United States subsequently determined that the change of ownership documented in the deeds provided by Ms. Scott also affected the property involved in Subfile ZRB-3-0079, in Sub-Area 7. However, due to a data processing error, (1) the Trust was omitted from the United States’ March 31, 2006 *Motion to Join Additional Parties Defendant* (Doc. No. 615), which was based on the Sub-Area 7 Hydrographic Survey; but (2) Counsel for the United States thereafter erroneously assumed the Trust had been joined.

6. Pursuant to the Special Master’s *Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Area 7 of the Zuni River Stream System* (Doc. No. 561), the United States served the Trust with a proposed Consent Order for Subfile ZRB-3-0079, and with other required service items. On May 31, 2006, DeAnn L. Hoffman, as Trustee, signed a Waiver of Service of Summons on behalf of the Trust. (Filed June 7, 2006, Doc. No. 719.) The Trust also, via its attorney, returned a timely Request for Consultation concerning Subfile ZRB-3-0079. The United States also served the Trust with a revised proposed Consent Order for Subfile ZRB-2-0052. On July 17, 2007, the United States, Co-Plaintiff State of New Mexico ex rel. State Engineer (“State”), and the Trustees and Counsel for the Trust consulted concerning

both Subfile ZRB-2-0052 and Subfile ZRB-3-0079. The consultation process concerning those subfiles is not yet concluded.

7. Fed.R.Civ.P. 21 provides, in pertinent part, that “the court may at any time, on just terms, add or drop a party.” *Nunc pro tunc* joinder of the Hoffman Living Trust dated September 25, 2002, effective as of May 31, 2006 -- the date the Trust waived service of process, will not prejudice any party, will preclude the need for the affected parties to file duplicative documents with the Court, and will cause the Court’s records to more completely reflect the actual relationship of the parties and the status of Subfiles ZRB-2-0052 and ZRB-3-0079.

8. Inasmuch as K & D ENTERPRISE; C.R.O. appears to have been erroneously joined and has neither waived service nor filed any pleading in this action, a Motion to Substitute Parties pursuant to Fed.R.Civ.P. 25(c) appears inappropriate. Instead, that party should simply be dismissed. Other than as recounted herein, the Hydrographic Survey for the Zuni River Basin has not identified that entity as a potential claimant of water rights.

9. Counsel for the United States provided a draft of this motion to counsel for the Trust and for the State, both of whom have indicated that they do not oppose this motion.

10. For the benefit of other parties, and by way of explanation, the United States asserts that motions to add additional defendants, dismiss defendants, correct defendants’ names, and take other corrective action, are parts of an on-going process made necessary by the hydrographic survey, defendants’ responses, and other kinds of new information received during the course of this adjudication. The United States advances such motions primarily for the

purpose of ensuring that the Court's records indicate as accurately as possible the persons or entities that are parties to this case.

In conclusion, the United States respectfully moves the Court to enter an Order that (1) joins the HOFFMAN LIVING TRUST DATED SEPTEMBER 25, 2002 as a party defendant in this case; (2) makes said joinder retroactively effective as of May 31, 2006; and (3) dismisses "K & D ENTERPRISEA; C.R.O." from this case.

DATED: December 13, 2007

Electronically Filed

/s/Bradley S. Bridgewater

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BRADLEY S. BRIDGEWATER  
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(303) 844-1359

COUNSEL FOR THE UNITED STATES

**CERTIFICATE OF SERVICE**

I hereby certify that, on December 13, 2007, I filed the foregoing *Motion To Join Additional Party Defendant Nunc Pro Tunc And To Dismiss Erroneously Joined Defendant* electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

I further certify that I served the foregoing motion on the following non-CM/ECF Participant by the means indicated:

Via U.S. mail, postage prepaid:

HOFFMAN LIVING TRUST DATED SEPTEMBER 25, 2002  
P.O. BOX 707  
FENCE LAKE, NM 87315

\_\_\_\_\_/s/\_\_\_\_\_  
Bradley S. Bridgewater