

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.	)	
_____	)	

**MOTION TO JOIN ADDITIONAL PARTY DEFENDANT NUNC PRO TUNC**

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 retroactively effective as of August 29, 2001. 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-1-0058 & ZRB-5-0050 <sup>1</sup>	RICHARD DAVIS MALLERY REVOCABLE TRUST P.O. BOX 520 RAMAH, NM 87321

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 number listed, or may otherwise be using or diverting surface or underground waters within the Zuni River stream system.

3. Richard Davis Mallery was joined as a party defendant in this action by the United States' original Complaint (Doc. No. 1). Subsequently, on August 29, 2001, "Defendant Richard Davis Mallery, individually and as Trustee of the Richard Davis Mallery Revocable Trust" voluntarily appeared via an entry of appearance filed by attorneys with Law and Resource Planning Associates, P.C. (Doc. No. 84; see also Doc. No. 87). Thereafter, Richard Davis Mallery filed numerous pleadings in this action, including an Answer (Doc. No. 248).

4. The July 14, 2004 *Zuni River Basin Hydrographic Survey Report for Sub-Areas 4 and 8*, filed of record on July 16, 2004 (Doc. No. 340), identified "R.D. Mallery" as the owner of the surveyed water uses included in Subfile ZRB-1-0058. Subsequently, an ownership

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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.

update resulted in the proposed consent order for the subfile being put in the name of the Richard Davis Mallery Revocable Trust. However, this change was not propagated through all of the data sets then used by the United States and, due to confusion concerning the earlier joinder and representation of Richard Davis Mallery, the United States erroneously failed to include the Richard Davis Mallery Revocable Trust on the November 4, 2005 Motion to Join Additional Parties Defendant (Doc. No. 397), which was based on the Hydrographic Survey. The Court granted that motion on November 22, 2005 (Doc. No. 403).

5. Pursuant to 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* (Doc. No. 387), the United States served counsel of record for Mr. Mallery with a service packet including a proposed Consent Order. However, while the proposed Consent Order in that packet was in the name of the Richard Davis Mallery Revocable Trust, the included Request for Consultation form bore the printed name: "R.D. Mallery." Nonetheless, Mr. Mallery returned the Request for Consultation for Subfile ZRB-1-0058 and, on May 15, 2006, met with representatives of the United States, and the State of New Mexico ex rel. State Engineer ("State") concerning the subfile. The consultation did not result in an agreement. However, at no time have Mr. Mallery or his counsel raised the name discrepancy as an issue.

6. The January 2007 *Zuni River Basin Adjudication Hydrographic Survey Report: Sub-area Ramah*, filed of record on January 23, 2007 (see Doc. No. 961), identified the Richard Davis Mallery Revocable Trust as the owner of the surveyed water uses in Subfile ZRB-5-0050. Subsequently, pursuant to the Special Master's January 1, 2007 Ramah Sub-Area *Procedural and Scheduling Order for the Adjudication of Water Rights Claims* (Doc. No. 954),

the United States served counsel for Mr. Mallery with a service packet including a proposed Consent Order and a Request for Consultation form, both in the name of the Richard Davis Mallery Revocable Trust. The United States received no Request for Consultation or other response from Mr. Mallery or his counsel concerning this subfile.

7. On November 6, 2007, counsel for Richard Davis Mallery filed a motion to withdraw as counsel of record for Mr. Mallery, and also for Susan Mallery. Unlike the 2001 entries of appearance (Doc. Nos. 84 & 87), the motion to withdraw made no reference to Mr. Mallery “as Trustee of the Richard Davis Mallery Revocable Trust.” The United States did not oppose the motion but, while it was pending, by a letter dated November 28, 2007, informed counsel for Mr. Mallery that an update of ownership information indicated that one well previously included in Subfile ZRB-5-0050 was no longer owned by the Richard Davis Mallery Revocable Trust. Accordingly, the letter indicated that the consent order offer previously made for that subfile was withdrawn, and transmitted a revised consent order offer. The United States has received no response to the November 28, 2007 letter. On January 4, 2008, the Court granted the motion to withdraw (Doc. No. 1432).

8. On January 31, 2008, counsel for the United States sent a letter to Charles T. DuMars, Christina Bruff DuMars, and Tanya Scott, former counsel for Richard Davis Mallery which, *inter alia*, sought clarification as to whether they continued to represent the Richard Davis Mallery Trust. The United States has received an acknowledgement of receipt of the letter, but no response to the inquiry concerning the Mallery Trust. The United States has no preference with regard to whether these attorneys currently represent the Trust but, in light of

New Mexico Rule of Professional Conduct 16-402, believes they are obliged to clearly state their view concerning the matter.

9. Fed.R.Civ.P. 21 provides, in pertinent part, that “the court may at any time, on just terms, add or drop a party.” Richard Davis Mallery has actively participated in this adjudication since shortly after its initiation and has never distinguished between such participation in his capacity as an individual and participation in his capacity as Trustee for the Richard Davis Mallery Revocable Trust. Nunc pro tunc joinder of the Richard Davis Mallery Trust, effective as of August 29, 2001 -- the date “Defendant Richard Davis Mallery, individually and as Trustee of the Richard Davis Mallery Revocable Trust” first voluntarily appeared in this action, 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-1-0058 and ZRB-5-0050.

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.

11. The United States provided a draft of the present motion to Edward Bagley, counsel for Co-Plaintiff State of New Mexico ex rel. State Engineer, who concurs in this motion for joinder.

DATED: March 6, 2008

Electronically Filed

/s/Bradley S. Bridgewater

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BRADLEY S. BRIDGEWATER

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Denver, CO 80294  
(303) 844-1359

COUNSEL FOR THE UNITED STATES

**CERTIFICATE OF SERVICE**

I hereby certify that, on March 6, 2008, I filed the foregoing *Motion To Join Additional Party Defendant Nunc Pro Tunc* 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:

RICHARD DAVIS MALLERY REVOCABLE TRUST  
c/o Richard Davis Mallery  
P.O. Box 3519  
Truth or Consequences, NM 87901

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