

ORIGINAL

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

FILED
U.S. DISTRICT COURT
DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,)
)
PLAINTIFF,)
)
)
)
v.)
)
STATE OF NEW MEXICO; NM)
STATE ENGINEER; RICHARD)
DAVIS MALLERY, ET AL.,)
)
DEFENDANTS.)
_____)

Richard Davis Mallery
CIV NO. 01-0072 BB/WWD-(ACE)
ZUNI RIVER BASIN

**DEFENDANT RICHARD DAVIS MALLERY'S COMMENTS
ON THE PROPOSED "INTERIM PROCEDURAL ORDER FOR THE
ADJUDICATION OF WATER RIGHTS CLAIMS IN THE ZUNI RIVER
BASIN" PROVIDED BY THE SPECIAL MASTER AT THE
JANUARY 16, 2003 SCHEDULING AND STATUS CONFERENCE**

COMES NOW, Defendant Richard Davis Mallery, by and through his undersigned attorneys, and hereby provides the following comments on the proposed "Interim Procedural Order for the Adjudication of Water Rights Claims in the Zuni River Basin" ("Proposed Order") provided by the Special Master at the January 16, 2003, Scheduling and Status Conference.

1. The Proposed Order states "[f]or each of the subsections delineated by the United States of America . . . a hydrographic survey report shall be filed when the survey is completed. Once the hydrographic survey is completed, Defendants will have the burden of undoing any errors in the survey. "[C]laimants who disagree with any element of the proposed Consent Order may choose to file the Answer Form, describing the extent of the disagreement with the Consent Order, or alert the United States as to any errors." (Proposed Order ¶II.B.).

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2. In order to expedite the process, Defendants should, prior to the commencement of the hydrographic survey, have the opportunity to provide written comments on the initial criteria used in the hydrographic survey that will have the effect of determining priority dates, purposes and amounts of water used, periods and places of use, whether land has been irrigated and whether a use is beneficial.

3. Defendant Mallery proposes that the Court insert the following language at the end of paragraph II.B. Disagreement: "Prior to the commencement of the hydrographic survey, Claimants shall have the opportunity to provide written comments on the initial criteria used in the hydrographic survey that will have the effect of determining priority dates, purposes and amounts of water used, periods and places of use, whether land has been irrigated and whether a use is beneficial."

4. The stated purpose of the draft order is "to guide the course of the adjudication of the *non-federal* rights claims in the Zuni River Basin." (emphasis added). The Court will consider Federal, Tribal and State agency claims on a separate schedule. (*See*, Order, entered on July 15, 2002, by District Judge Bruce D. Black setting the schedule for and directing the Special Master and parties regarding the conduct of this case). There is no interim procedural order to guide the course of the adjudication of the Federal, Tribal and State agency claims.

5. During the January 16, 2003, Scheduling and Status Conference, various counsel indicated that Indian and non-Indian federal claims might not be filed for another two to three years. One of Defendant Mallery's affirmative defenses asserts that Zuni Pueblo and its water rights are constrained by the Pueblo Indian water rights doctrine and are measured by historical beneficial use and demand as well as the obligation to balance its uses against the needs of others within the Basin. Another asserts that the water rights of individual Navajo allottees are limited to actual beneficial use.

6. In the interest of fairness, Defendant Mallery requests that the Proposed Order be revised to reflect that the same hydrographic survey criteria applied to the non-federal, non-Indian rights claims will also be used during the hydrographic survey for the Indian rights claims.

7. Defendant Mallery proposes that the Court insert the following language at the end of paragraph II.B. Disagreement and after the language inserted according to Comment 1 above relating to the opportunity to provide input on the hydrographic survey criteria: "The same hydrographic survey criteria applied to the non-federal, non-Indian rights claims will also be used during the hydrographic survey for the Indian rights claims."

8. The draft order states in paragraph I.F., that the United States shall publish and post notices of public meetings at least one week prior to the meetings. One week may not be sufficient to ensure all interested claimants receive notice prior to the meetings.

9. Defendant Mallery requests that the last sentence of paragraph I.F. of the draft order be revised to provide for a two-week notice period.

10. In July 2002, the Court ordered Plaintiffs to amend the Complaint to reflect the status of this case as a water adjudication once the Court has accepted the definition of the scope of the adjudication. An amended complaint has not yet been filed.

11. Depending on the nature and extent of the amendments, it may be premature at this time to enter a procedural order. Defendant Mallery requests an opportunity to submit additional comments regarding the Proposed Order after the amended Complaint has been filed.

For the foregoing reasons, Defendant Mallery respectfully requests the Special Master revise the Proposed Order as set forth above.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

By: 

Charles T. DuMars
Jeffrie D. Minier
Attorneys at Law
Albuquerque Plaza, 201 3rd Street NW, Ste. 1370
Albuquerque, NM 87102
(505) 346-0998 / FAX: (505) 346-0997

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 31st day of January, 2003 as follows:

Raymond Hamilton
Asst. U.S. Attorney
Office of the U.S. Attorney
District of New Mexico
P.O. Box 607
Albuquerque, NM 87130

Albert O. Lebeck, Jr.
P.O. Box Drawer 38
Gallup, NM 87305

Kenneth J. Cassutt, Esq.
Cassutt, Hays & Friedman, P.A.
530 – B Harkle Road
Santa Fe, NM 87505

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

Bruce Boynton
Boynton & Sims – West
P.O. Box 1239
Grants, NM 87020

Patricia A. Madrid
NM Attorney General
P.O. Box 1508
Santa Fe, NM 87504 – 1508

Thomas C. Turney
State Engineer
P.O. Box 25102
Santa Fe, NM 87504 – 5102

William G. Stripp
Attorney for Paul Petranto
P.O. Box 159
Ramah, New Mexico 87321

Charles E. O'Connell Jr., Esq.
U.S. Department of Justice
Environment & Natural Resources
601 D Street, NW – Room 3507
Washington, DC 20004

David R. Lebeck
P.O. Box Drawer 38
Gallup, NM 87305

Sandra S. Drullinger
818 E. Maple Street
Hoopeston, IL 60942

Jeffrey A. Dahl, Esq.
Lamb, Metzgar, Lines & Dahl, P.A.
P.O. Box 987
Albuquerque, NM 87103 – 0987

Ray Powell, Jr.
Commissioner of Public Lands
P.O. Box 1148
Santa Fe, NM 87504 – 1148

R. Bruce Frederick
Stephen G. Hughes
Commissioner of Public Lands
P.O. Box 1148
Santa Fe, NM 87504 – 1148

Tessa T. Davidson, Esq.
4830 Juan Tabo NE, Suite F
Albuquerque, NM 87111

David Candelaria, Pro Se
12000 Ice Caves Road
Grants, NM 87020

Jane Marx, Esq.
Williams, Janov & Cooney
2501 Rio Grande Blvd., N.W.
Albuquerque, NM 87104 – 3223

Peter Fahmy, Esq.
Office of the Regional Solicitor
United States Department of Interior
755 Pafet Street, # 151
Lakewood, CO 80125

Louis E. Depauli, Sr.
Attorney Pro Se
1610 Redrock Drive
Gallup, NM 87301

Mark A. Smith, Esq.
Rodey Law Firm
P.O. Box 1888
Albuquerque, NM 87103

Vickie L. Gabin, Special Master
United States District Court
District of New Mexico
P.O. Box 2384
Santa Fe, NM 87504 – 2384

Kimberly J. Gugliotta
158 W. William Casey Street
Corona, AZ 85641

Roger Martella, Esq.
DoJ / ENRD – IRA
P.O. Box 44378
Washington, DC 20026 – 4378

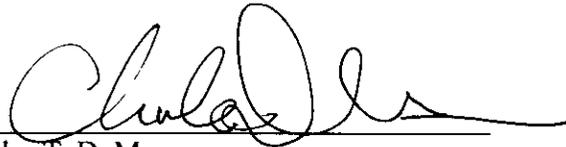
Lynn A. Johnson, Esq.
USDJ – ENRD
999 – 18th Street, Suite 945
Denver, CO 80202

D. L. Sanders
Edward C. Bagley
Special Assistant Attorneys General
Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504 – 5102

Larry D. Beall, Esq.
Beall & Biehler, P.A.
6715 Academy Road NE
Albuquerque, NM 87109

John B. Weldon, Esq.
M. Bryon Lewis, Esq.
Mark A. McGinnis, Esq.
Salmon, Lewis & Weldon
2850 East Camelback Rd. – Suite 200
Phoenix, AZ 85016

Darcy S. Bushnell, Esq.,
Judicial Clerk
United States District Court
District of New Mexico
333 Lomas Blvd., NW
Albuquerque, NM 87102 – 2272

A handwritten signature in black ink, appearing to read "Charles T. DuMars", written over a horizontal line.

Charles T. DuMars