

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

**UNITED STATES OF AMERICA,** )  
**ET AL.,** )  
 )  
          **PLAINTIFFS,** )  
 )  
 )  
**v.** )  
 )  
**STATE OF NEW MEXICO** )  
**COMMISSIONER OF PUBLIC** )  
**LANDS, ET AL.,** )  
 )  
          **DEFENDANTS.** )  
\_\_\_\_\_ )

**CIV NO. 01- 00072 BDB/WDS (ACE)**  
**ZUNI RIVER BASIN ADJUDICATION**

**DEFENDANTS RICHARD DAVIS MALLERY, WOODSON ALLEN, CHARLIE ALLEN, GERALD ALLEN, WARNER AND RUTH ANDERSON, CAROL ANSLEY, J. PARLEY AND MARY ANSLEY, BILL AND KAREN ARMSTRONG, NANCY AUSTER, DAVID BACA, LILITH BAKER, WILLIAM AND INA JEAN BARNES, JOHN AND BETTY BAUMGARDNER, RONALD BLOCK, ROSS AND SIMMIE BOEHM, H. DARRELL BOGART, DEWARD AND GLORIA BOND, ELWIN AND ELLEN BOND, LAVERL BOND, MAUREEN BOND, GRACE BOND, CHARLES BRADY, JOHN BRAULT, WENDELL AND MARTHA BRIGGS, TED BRODERICK, ROBERT AND JANE BRUKER, TOMMY AND SANDY BURT, KENNETH AND GINGER CARLOCK, CLINT CARLSON, LARRY AND SALLY CARVER, DON CATOR, CROSSFIRE CATTLE CO., RON CAVIGGIA, LOIS CHEDSEY, HELEN CLAWSON, GRANT AND BLANCHE CLAWSON, KEITH AND LINDA CLAWSON, KIRK AND FLORA CLAWSON, JERRY COSPER, MRS. R.D. COUSINS, GLENNA COX, KATHLEEN DALLY, DUKE AND LYNNA DAVIS, RONNY AND CLAIR DEMARAY, ARDEN AND IRENE DENBLEYKER, CHRIS AND BARBARA DENTZEL, TOM DUCKETT, BILLY AND MARY DURHAM, A. R. AND DELPHA ENNISS, ROSS AND VERONICA FEAGIN, AFTON FISHER, JERRY AND EMILY FRAZIER, REX AND ROMONA FULLER, LEROY GABALDON, MICHAEL GARCIA, MAX GARCIA, LUCIANO AND ALICE GARCIA, RUSS GARNAAT, SANDRA GOMEZ, LAWRENCE GREEN, DENNIS GREEN, HENRY AND REBECCA GRIZZLE, RICHARD GRUDA, LES AND JACKIE HADDEN, JUNE GEORGE MITCHELL AND SANDRA HAIGHT, VIRGINIA HANSEN, WILLIAM HANSHAW, KENNETH HARRINGTON, BILL HARVEY, ELSIE BOYD HATCH, MILTON AND JONNIE HEAD, MELVIN AND JACKIE HEATH, ROBERT HEINE, ANN HENDERSON, GALE HENKE, FRANCES AND JAMES HERMAN, AMOS M. HINSHAW, JAMES W. HURLBUT / HURLBUT REALTY, NATALOU HYDER, LINDA AND ROBERT IONTA, WALLACE JACKSON, JR.,**

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COME NOW, Defendants Richard Davis Mallery *et al.*, members of the Western New Mexico Water Preservation Association (“WNMWPA”), by and through their undersigned attorneys, and for their Answer to the United States’ Amended Complaint filed August 4, 2003 state as follows:

1. Defendants Richard Davis Mallery *et al.* admit paragraphs 1, 2, 4, 5;

2. Defendants Richard Davis Mallery *et al.* are without information to either admit or deny the truth of paragraphs 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25 or they contain legal conclusions with which Defendants Richard Davis Mallery *et al.* cannot agree, therefore, Defendants Richard Davis Mallery *et al.* deny these paragraphs and demand strict proof thereof.

### **AFFIRMATIVE DEFENSES**

As separate and distinct affirmative defenses, Defendants Richard Davis Mallery *et al.* state as follows:

#### **FIRST AFFIRMATIVE DEFENSE**

The 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.

#### **SECOND AFFIRMATIVE DEFENSE**

The water rights for any lands created by executive order are restricted to those demonstrably proven to be capable of economic productive agricultural use within the meaning of federal principles and guidelines for measuring cost-benefit ratios.

#### **THIRD AFFIRMATIVE DEFENSE**

The water rights of individual Navajo allottees are limited to actual beneficial use.

#### **FOURTH AFFIRMATIVE DEFENSE**

The Complaint must be dismissed because the United States' action fails to join indispensable parties within the State of Arizona who are directly affected by the United States' allegations and the outcome of this action. And, it is not an adjudication of a complete stream system as contemplated by the New Mexico adjudication statute.

#### **FIFTH AFFIRMATIVE DEFENSE**

The Complaint must be dismissed because the United States' action fails to join the State of Arizona whose rights are affected by what will become a *pro tanto* equitable apportionment of an interstate stream system, modifying existing interstate entitlements to water.

#### **SIXTH AFFIRMATIVE DEFENSE**

The water rights of the Navajo Nation are restricted to those actual reservation lands demonstrably proven to be capable of economic productive agricultural use within the meaning of federal principles and guidelines for measuring cost-benefit ratios.

#### **SEVENTH AFFIRMATIVE DEFENSE**

The Ramah Band of the Navajo Nation has no independent water rights separate from those of the Navajo Nation.

#### **EIGHTH AFFIRMATIVE DEFENSE**

The primary purpose of use of water pursuant to executive order, treaty, and/or federal legislation was solely for agricultural purposes. All other water uses are secondary and must be acquired pursuant to applicable state law. *See United States v. New Mexico*, 438 U.S. 696 (1978).

#### **NINTH AFFIRMATIVE DEFENSE**

The United States' claims to water under the BLM generic legislation are limited to beneficial use under New Mexico state water law.

### **TENTH AFFIRMATIVE DEFENSE**

Numerous of the claims made against Defendant Richard Davis Mallery and similarly situated non-indian defendants are based upon *de minimus* and unmeasurable uses of water, and therefore, must be dismissed for those reasons.

### **ELEVENTH AFFIRMATIVE DEFENSE**

Neither under Spanish nor Mexican law or under federal executive order, treaty, or federal legislation was it contemplated or intended that on-reservation water use could be the basis for an injunction against off-reservation water use for domestic and other related purposes.

**WHEREFORE**, Defendants Richard Davis Mallery *et al.*, members of the Western New Mexico Water Preservation Association, respectfully request that the Court dismiss the United States' Complaint with prejudice, award Defendants attorney fees and costs as provided by law, and for such other and further relief as the Court deems just and proper.

### **COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF**

As a separate and distinct Counterclaim against Plaintiff United States, Defendants Richard Davis Mallery *et al.* state as follows:

#### **FACTUAL ALLEGATIONS**

3. Defendants – Counterclaimants Richard Davis Mallery *et al.* use surface water rights as obtained through ongoing beneficial use off a tributary of the Zuni River system;

4. Defendants – Counterclaimants Richard Davis Mallery *et al.* also use wells for domestic and other related purposes.

## COUNT I

5. Defendants – Counterplaintiffs Richard Davis Mallery *et al.* incorporate by reference the allegations in paragraphs 1 through 4 of this Counterclaim as though fully set forth herein;

6. Defendants – Counterplaintiffs Richard Davis Mallery *et al.* incorporate by reference the allegations in paragraphs 1 through 6 of this Counterclaim as though fully set forth herein;

7. Upon information and belief, Plaintiff – Counterdefendant United States has joined landowners and water rights holders, including Defendant – Counterplaintiff Richard Davis Mallery, who are unaffected by this litigation. The erroneous joinder has caused and is continuing to cause substantial damage, loss in property values and corollary economic dislocation.

**WHEREFORE**, Defendants – Counterclaimants Richard Davis Mallery *et al.*, as the owners of his water rights under New Mexico state water law, requests that the Court determine and declare such water rights as being unaffected by Plaintiff – Counterdefendant United States, as trustee for the Navajo Nation, Ramah Band and Zuni Pueblo’s allegations of ownership of a Pueblo water right.

## COUNT II

8. Defendants – Counterplaintiffs Richard Davis Mallery *et al.* incorporate by reference the allegations in paragraphs 1 through 7 of this Counterclaim as though fully set forth herein;

9. In accordance with its equitable powers and its obligation to balance the interests of the parties, Defendants – Counterplaintiffs Richard Davis Mallery *et al.* are entitled to an

immediate hearing with respect to the methodology used for determining who would be served with a summons in this action and an order immediately dismissing all those who have been served and made a defendant to this action in error;

10. As to those remaining parties, this Court has an equitable duty to order Plaintiff to take action in the printed and other media to assure the public at large that this action will not destroy the property values of the real parties in interest to this action.

**WHEREFORE,** Defendants – Counterplaintiffs Richard Davis Mallery *et al.* respectfully request that the Court:

A. Declare off-reservation domestic and related sanitary water uses are unaffected by on-reservation water uses;

B. Compel Plaintiff – Counterdefendant United States to provide and disseminate immediate public information that indicates the filing of the United States’ Complaint on January 19, 2001 does not constitute proof that property values of persons living in the area have been or will be necessarily diminished;

C. Compel Plaintiff – Counterdefendant United States to provide for immediate dismissal of those erroneously named defendants and provide attorneys fees and costs as appropriate in those cases where such individuals have been made a party defendant in this action through Plaintiff – Counterdefendant’s errors;

D. Such other and further relief as the Court deems just and proper.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,  
*A Professional Corporation*

By: \_\_\_\_\_



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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing was served upon counsel of record via first class mail on this 30th day of September, 2003 as follows:

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