

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

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JW
Robert M. Murch
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UNITED STATES OF AMERICA,)
 for itself and as Trustee for the)
 Zuni Indian Tribe, Navajo Nation and)
 Ramah Band of Navajos,)
 and)
 STATE OF NEW MEXICO, *ex rel.*)
 STATE ENGINEER,)
 Plaintiffs,)
)
 and)
 ZUNI INDIAN TRIBE and)
 NAVAJO NATION,)
 Plaintiffs-in-Intervention,)
)
 v.)
)
 STATE OF NEW MEXICO,)
 COMMISSIONER OF PUBLIC LANDS)
 and A & R PRODUCTIONS, *et al.*,)
 Defendants.)

01-CV-00072-BDB/WDS (ACE)

ZUNI RIVER BASIN
 ADJUDICATION

**ZUNI INDIAN TRIBE'S RESPONSE IN OPPOSITION
 TO DEFENDANTS MALLERY ET AL.'S MOTION TO DISMISS
 WITHOUT PREJUDICE PURSUANT TO FED. R. CIV. P. 41(B)
 FOR FAILURE TO PROSECUTE OR IN THE ALTERNATIVE
 TO STAY FILING OF LIS PENDENS**

The Zuni Indian Tribe, through undersigned counsel, hereby submits its Response in Opposition to Defendant Mallery et al.'s Motion to Dismiss Without Prejudice for Failure to Prosecute or in the Alternative to Stay Filing of Lis Pendens. In their Motion and Memorandum in Support thereof, the members of the Western New Mexico Water Preservation Association ("Defendants") assert that the Court should penalize Plaintiff United States for the "dilatatory nature of the prosecution of this case," Defs.' Mallery et al.'s Mem. at 4 (Docket No. 247), by taking the unusual step of dismissing the case without prejudice "until the hydrographic survey is complete."

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Id. at 6. At that time, say Defendants, “[t]he United States can bring this action again when it is prepared to diligently prosecute the case and obtain a decision on the merits.” *Id.* Ignoring both the history and present realities of this case in a variety of ways, Defendants’ Motion is built upon a faulty premise and, for that reason, is not well taken and should be denied in its entirety.

As the Defendants should be well aware and has been briefed previously to this Court, litigation to determine water rights in the Zuni River basin was originally initiated in this Court two decades ago, in 1982, by the Zuni Tribe because of threatened encroachment to the Zuni Basin’s ground water supply by the City of Gallup. In 1984, the City of Gallup filed a general stream adjudication in state court against all water users in the Basin, including the United States, and the State voluntarily joined the case as a plaintiff. The Tribe agreed to dismiss its federal court suit and the State agreed to hold the state court case in abeyance while necessary technical studies were conducted jointly by the State and the United States. The State of New Mexico and the United States entered into an agreement at that time to cooperate jointly in preparation of a hydrographic survey of water uses in the Zuni River basin to facilitate determination of relative water rights. Pursuant to that understanding, the United States contracted for a number of studies, including analysis of ground water resources in the area and a hydrographic survey of Indian water uses. The State, similarly, committed to work on the hydrographic survey of water uses in the Zuni basin but, in 1988, notified the state court that it was delayed in fulfilling its obligation to develop the survey. That work, apparently, was never undertaken by the State of New Mexico. For reasons now unclear, in 1990, the state court took the extraordinary step of dismissing the case before it with prejudice for failure to prosecute. Over the past decade, while demand on the Zuni Basin’s limited water resources continued to increase, Zuni persisted in its request for litigation to be filed to determine the relative priorities of water rights in the basin. Litigation finally was filed again in early 2001.

Although Defendants do not appear to contest the fact that water rights in the basin should be adjudicated, they contend that the hydrographic survey should have been completed before the case was filed, and seek dismissal of the case without prejudice to allow time for the survey's completion. This contention overlooks the fact that preparation of a hydrographic survey report may be part of a general stream adjudication under New Mexico law; but it is not a prerequisite to the filing of such a case. N.M. Stat. Ann. § 72-4-17 (1978). Indeed, the overwhelming majority of adjudications in this state have not been initiated by the filing of a hydrographic survey. In short, Defendants offer no compelling reason to justify their request that the Court dismiss the case without prejudice at this time. To the extent that the case may have suffered some delays at its inception, those delays clearly have been overcome.

The Zuni Tribe and the United States have proposed to the Special Master and the Court that the ground water claims for the Tribe be filed by the fall of 2004, and the Tribe's surface water *claims be timely filed thereafter. The Special Master has recommended that the tribal and non-tribal federal claims be presented by the end of fall, 2006. See Special Master's Report and Recommendations For Federal and Indian Water Rights Claims Proceedings, October 2, 2003 (Docket No. 255). She has further confirmed that preparation of the hydrographic survey will continue to proceed on a simultaneous track and be completed by fall, 2006. Id.* Upon the Court's ruling on the recommended procedures and schedule for resolution of the tribal and non-tribal federal claims, this case is now prepared to move forward expeditiously.

Indeed, by divesting the Court of jurisdiction over the non-Indian landowners in the basin now in the case, the relief the Defendants seek would likely threaten to delay, rather than encourage, completion of the hydrographic survey. The only way to move this case forward expeditiously is to develop the data necessary to litigate or settle the water rights claims of all the water users in the

basin as quickly as possible. The Court's continuing jurisdiction over the non-Indian landowners will help ensure timely completion of the hydrographic survey because the parties will have a forum available to address any issues or conflicts that may arise during the survey's development. In addition, the Court would retain the authority to issue orders in the event a party withholds its cooperation with respect to the preparation of the hydrographic survey.

Finally, it is the Zuni Tribe's understanding that the United States already has recorded a notice of *lis pendens* with the county clerks of Catron, Cibola and McKinley Counties for the purpose of satisfying the requirement of Section V of the Procedural and Scheduling Order dated July 20, 2003 (Docket No. 215). Consequently, the alternative relief sought by Defendants in their Motion is incapable of being granted.

For all the foregoing reasons, the Tribe requests that the Court deny Defendant Mallery et al.'s Motion to Dismiss Without Prejudice for Failure to Prosecute or in the Alternative to Stay Filing of Lis Pendens.

Respectfully submitted,

JANE MARX, ATTORNEY AT LAW, P.C.

By: Jane Marx
Jane Marx
3800 Rio Grande Blvd. NW, PMB 167
Albuquerque, New Mexico 87107
Telephone: (505) 344-1176
Facsimile: (505) 344-8694

Attorney for Zuni Indian Tribe

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed to the following counsel and parties of record on this 25th day of November, 2003:

Vickie L. Gabin, Special Master
United States District Court
P.O. Box 2384
Santa Fe, NM 87504-2384

Raymond Hamilton, Esq.
United States Attorney's Office
District of New Mexico
P.O. Box 607
Albuquerque, NM 87103

Charles E. O'Connell, Jr., Esq.
United States Department of Justice
Environment & Natural Resources Division
P.O. Box 44378
L'Enfant Plaza Station
Washington, DC 22026-4378

Stanley M. Pollack, Esq.
Navajo Nation Dept. of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

David W. Gehlert, Esq.
United States Department of Justice
Environment & Natural Resources Division
999 18th Street, Suite 945
Denver, CO 80202

Pamela Williams, Esq.
Division of Indian Affairs
Office of the Solicitor
1849 C Street, N.W. Room 6456
Washington, D.C. 20240

Greg Mehojah, Esq.
Department of the Interior,
Office of the Solicitor
Southwest Regional Office
505 Marquette Avenue N.W., Suite 1800
Albuquerque, NM 87102

Mary Ann Joca, Esq.
Assistant Regional Attorney
United States Department of Agriculture -
Office of the General Counsel
P.O. Box 586
Albuquerque, NM 87103-0586

D.L. Sanders, Esq.
Edward C. Bagley, Esq.
Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102

Stephen G. Hughes, Esq.
NM State Land Office
P.O. Box 1148
Santa Fe, NM 87504-1148

Steven L. Bunch, Esq.
NM Highway & Trans. Dept.
P.O. Box 1149
Santa Fe, NM 87504-1149

Jordan & Rosebrough, P.C.
P.O. Box 1744
Gallup, NM 87305

Bruce Boynton, Esq.
Boynton, Sims-West Law Office
P.O. Box 1239
Grants, NM 87020

James E. Haas, Esq.
Losée, Carson, & Haas, P.A.
Box 1720
Artesia, NM 88211

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

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

Tessa T. Davidson, Esq.
Swaim, Schrandt & Davidson, P.C.
4830 Juan Tabo NE, Suite F
Albuquerque, NM 87111

Charles T. DuMars, Esq.
Christina Bruff DuMars, Esq.
Law & Resource Planning Associates, P.C.
201 3 rd Street NW, Suite 1370
Albuquerque, NM 87102

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

Robert W. Ionta, Esq.
McKim, Head & Ionta
P.O. Box 1059
Gallup, NM 87305

Susan C. Kery, Esq.
Sheehan, Sheehan & Stelzner
P.O. Box 271
Albuquerque, NM 87103

Stephen R. Nelson, Esq.
Robert A. Johnson, Esq.
Johnson & Nelson, P.C.
P.O. Box 25547
Albuquerque, NM 87125-5547

Cullen Hallmark, Esq.
Garber & Hallmark, P.C.
P.O. Box 850
Santa Fe, NM 87504

William G. Stripp, Esq.
P.O. Box 159
Ramah, NM 87321

Sunny J. Nixon, Esq.
Mark K. Adams, Esq.
Rodey, Dickason, Sloan,
Akin & Robb, P.A.
P.O. Box 1357
Santa Fe, NM 87504-1357

Dorothy C. Sanchez, Esq.
715 Tijeras NW
Albuquerque, NM 87102

Mark H. Shaw, Esq.
3733 Eubank Blvd. NE
Albuquerque, NM 87111

Peter B. Shoenfeld, Esq.
P.O. Box 2421
Santa Fe, NM 87504-2421

Mark A. Smith, Esq.
Tom Outler, Esq.
Rodey, Dickason, Sloan, Akin
& Robb
P.O. Box 1888
Albuquerque, NM 87103

Jay F. Stein, Esq.
James C. Brockmann, Esq.
P.O. Box 5250
Santa Fe, NM 87502-5250

John B. Weldon, Jr., Esq.
M. Byron Lewis, Esq.
Mark A. McGinnis, Esq.
Salmon, Lewis & Weldon, P.L.C.
2850 E. Camelback Rd, Ste 200
Phoenix, AZ 85016

Albert O. Lebeck, Jr., *Pro Se*
David R. Lebeck, *Pro Se*
P.O. Drawer 38
Gallup, NM 87305

Gerald F. McBride, *Pro Se*
Myrrl W. McBride, *Pro Se*
2725 Aliso Drive NE
Albuquerque, NM 87110

Louis E. DePauli, Sr., *Pro Se*
1610 Redrock Drive
Gallup, NM 87301

Sandra S. Drullinger, *Pro Se*
818 E. Maple Street
Hoopston, IL 60942

Louis E. DePauli, Sr., *Pro Se*
1610 Redrock Drive
Gallup, NM 87301

Sandra S. Drullinger, *Pro Se*
818 E. Maple Street
Hoopston, IL 60942

David Candelaria, *Pro Se*
12000 Ice Caves Rd.
Grants, NM 87020

Richard W. Bowser, *Pro Se*
Joan D. Bowser, *Pro Se*
5 Hawk Ridge Rd.
Moriarty, NM 87035

Ann Hambleton Beardsley, *Pro Se*
HC 61, Box 747
Ramah, NM 87321



Jane Marx