

**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 ET AL.’S OBJECTIONS
TO THE SPECIAL MASTER’S REPORT AND RECOMMENDATIONS FOR
FEDERAL AND INDIAN WATER RIGHTS CLAIMS PROCEEDINGS**

Defendants Richard Davis Mallery et al., members of the Western New Mexico Water Preservation Association (“WNMWWPA”), by and through their undersigned attorneys, respectfully submit the following Objections to the Special Master’s Report and Recommendations for Federal and Indian Water Rights Claims Proceedings (Doc. No. 255), filed October 2, 2003 in accordance with Fed. R. Civ. P. 53 (e)(2).

INTRODUCTION

Defendants Richard Davis Mallery *et al.* filed a motion to dismiss this case without prejudice, or in the alternative, to stay the United States’ filing of notices of *lis pendens*, on September 30, 2003 (Doc. No. 246). The grounds for the motion are that there has already been a delay of almost three years due to the United States’ inadequate preparation prior to filing this action; the United States will continue to suffer from inadequate funding of the case thereby

preventing the United States from diligently prosecuting its case; the notice of *lis pendens* filed by the United States will cloud Defendants' titles during the pendency of the adjudication; and a dismissal of the adjudication *without prejudice*, pending completion of the hydrographic survey and investigation of Indian water rights, will not prejudice the Plaintiffs.

The Special Master filed her Report and Recommendations for Federal and Indian Water Rights Claims Proceedings on October 2, 2003 (Doc. No. 255). The Report and Recommendations recommend that the hydrographic survey of non-federal water rights claims and the preparation of federal and Indian water rights claims should proceed on parallel, roughly simultaneous tracks, with the work to be completed by fall, 2006, *i.e.* about three years from now. Defendants object to the Special Master's Report and Recommendations for Federal and Indian Water Rights Claims Proceedings ("Special Master's Recommendations" or "Recommendations") on the grounds that it is inconsistent, unfair, and prejudicial to Defendants without any corresponding benefit to the Plaintiffs.

OBJECTIONS

1. The "Simultaneous And Parallel Track" Language in the Recommendations Is Unfair and Inconsistent With the Actual Proceedings of the Case as Ordered By the Court.

The "simultaneous and parallel track" language in the Recommendations is unfair and inconsistent with the actual proceedings of the case as ordered by the Court. Currently, pursuant to the Court's September 24, 2003 Order, Defendants are required to file their water rights claims by updating their files with the Office of the State Engineer ("OSE") by December 31, 2003. *See* Order (Doc. No. 239). Under the Special Master's Recommendations, the federal and Indian claimants will have an *additional* two and a half years or more to file their claims. According to counsel for the OSE, the hydrographic survey is proceeding and the OSE plans to

begin making offers of judgment in early 2004. Depending on how the hydrographic survey proceeds, most, if not all, of the non-federal defendants could have an offer of judgment from the OSE before the federal and Indian claims are even filed. Therefore, from an adjudication management perspective, the recommended schedule of proceeding with the non-federal defendants will likely spawn much more litigation in the form of *inter se* proceedings which even when finalized between *inter se* parties will not bind the Tribe, therefore requiring even more litigation of the same issues. *See generally, State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, 99 N.M. 699, 663 P.2d 358 (1983).

2. The Recommendations Are Prejudicial to Defendants Because the Notice of *Lis Pendens* Will Continue To Cloud Their Titles Until the Case is Resolved.

The Recommendations are prejudicial to Defendants because the *lis pendens* will continue to be a cloud on their titles until the case is resolved. A notice of *lis pendens* clouds the title and effectively prevents the property's transfer until the litigation is resolved or the *lis pendens* is expunged. *Key v. Superior Court*, 2003 WL 22534225, 2 (Cal.App. 2 Dist. 2003). A recorded *lis pendens* renders property unmarketable and makes it unsuitable for use as security for a loan. *Ex parte State Dept. of Revenue*, 2003 WL 21949724, 5 (Ala.Civ.App.2003). A *lis pendens* remains effective for the duration of the case, including any periods of appellate review. *Salas v. Bolagh*, 106 N.M. 613, 615, 747 P.2d 259, 261 (Ct. App. 1987).

3. Defendants Will Be Needlessly and Irreparably Harmed if the Federal and Indian Claims are Not Filed in 2006 and Inadequate Federal Funding Pushes the Filing of Federal and Indian Claims Further Into the Future.

The Special Master acknowledges in her Report that the recommended schedule for development of federal and Indian claims is an “optimistic” goal. The United States affirms that “[t]he limited availability of federal monies, however, by necessity, will delay until the year 2007-08, filing and beginning the adjudication of all Tribal water claims.” *See United States'*

Response and Motion for Action (Doc. No. 264). While it states that it will “make every effort” to file the federal and Indian claims by mid-December 2006, the United States “stress, however, that completion of these tasks by mid-December, 2006, is *dependent upon the availability of federal funding.*” *Id.* (emphasis added). Defendants will be needlessly and irreparably harmed if the federal and Indian claims are not filed in 2006 and inadequate federal funding pushes the filing of federal and Indian claims further into the future.

CONCLUSION

Dismissing this case without prejudice will avoid needless prejudice to Defendant and will not prejudice the federal and Indian claimants. Dismissal will eliminate, albeit temporarily, the *lis pendens* currently clouding Defendants’ titles. Dismissal will not prevent the hydrographic survey from proceeding. Indeed, the statutory authority for general stream adjudications contemplates that the State Engineer will not enter into an adjudication proceeding until *after* completion of the hydrographic survey. NMSA 1978, § 72-4-15 (1907). Nor will dismissal preclude the United States from preparing its federal and Indian claims. And, dismissal will not extend the date of a final decree. Dismissal without prejudice minimizes the duration of the *lis pendens* and allows the case to proceed as rapidly as federal funding allows.

For the foregoing reasons, Defendants Richard Davis Mallery *et al.*, members of the Western New Mexico Water Preservation Association, respectfully request that the Court not adopt the Special Master’s Report and Recommendations for Federal and Indian Water Rights Claims Proceedings and, instead, grant Defendants’ motion to dismiss this case without prejudice pursuant to Fed. R. Civ. P. 41(b) for failure to prosecute. In the alternative, Defendants respectfully request the Court to place the case on the inactive docket and stay or expunge the filing of notices of *lis pendens* and for such further relief as the Court deems just and proper.

Dated: December 8, 2003.

Respectfully submitted,

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