

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

UNITED STATES OF AMERICA	)	
and	)	07cv00681-BB
ZUNI INDIAN TRIBE	)	
Plaintiffs,	)	ZUNI RIVER BASIN
	)	ADJUDICATION
-v-	)	
	)	
STATE OF NEW MEXICO, ex rel. State	)	<b>Subproceeding 1</b>
ENGINEER, et al.	)	<b>Zuni Indian Claims</b>
Defendants	)	
_____	)	

**REPLY IN SUPPORT OF UNITED STATES' MOTION TO STRIKE ANSWER  
FILED BY NON-PARTIES**

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The Plaintiff United States of America (“United States”), by its undersigned attorney, hereby replies in support of the February 4, 2008 *United States’ Motion to Strike Answer Filed by Non-Parties* (Doc No. 186) (“United States’ Motion”). The only response filed to the United States’ Motion was the February 14, 2008 *Various Defendants’ Response in Opposition to United States Motion to Strike Answer Filed by Non-Parties* (Doc. No. 198) (“Response”).

As an opening matter, the United States notes that, by the terms of the initial paragraph of the Response, it, too, appears to have been filed on behalf of non-parties (“Respondents”). Accordingly, the Response was improperly filed and must also be stricken from the record in this Subproceeding.

While the Response makes several gratuitous attacks on the United States, and offers into the record for the first time an account of a number of *ex parte* communications between the law firm representing Respondents and various Court

personnel, it does not deny any of the assertions made in support of the United States' Motion. In particular, the Response concedes that:

- Pursuant to the Special Master's *Initial Scheduling and Planning Order* (Doc No. 151), the deadline for filing Answers to the United States' Subproceeding Complaint or the Zuni Supplemental Complaint was January 31, 2008.
- The challenged Answer filed by Non-Parties was filed after the Court-ordered deadline without leave of Court.
- Paragraph 2.2 of the Special Master's *Initial Scheduling and Planning Order*, specifies the parties who are entitled to participate in this Subproceeding.
- The individuals or entities listed on pages 3 and 4 of the United States' Motion neither were listed as parties in the *Initial Scheduling and Planning Order* nor were subsequently granted leave to intervene.

Apparently oblivious to the actual contents of the United States' Motion, the Response asserts, at 2, that "the United States never specifies why it does not believe that the various listed defendants are not proper parties to this litigation." To the contrary, the uncontested facts stated in Paragraph 2, pages 2 – 4, of the United States' Motion, and summarized in the third and fourth bullets above, fully establish the reasons why the Respondents are not parties.

The Respondents seek to go behind the literal language of the Special Master's *Initial Scheduling and Planning Order* and argue, belatedly, why the Respondents should be considered parties without having to comply with the Court's orders. In doing so, they disclose a repeated practice by counsel for Respondents of

ignoring the Court's scheduling orders whenever, in the unilateral view of counsel for Respondents, there is no prejudice to other parties. The Response concedes:

- “[T]he Court ordered that persons who wished to participate in the Zuni Subproceeding should file a Notice of Intent to Participate with the Court by October 26, 2007.” Response at 2.
- The Respondents’ notices of intent to participate were all filed after October 26, 2007.
- No Court order was entered, or even sought by Respondents, which granted Respondents leave to file their notices of intent to participate after October 26, 2007.

Curiously, the Response nonetheless argues that “[t]he individuals listed in the United States’ Motion did everything the Court asked them to do.”

Furthermore, Exhibit C to the Response discloses that a number of Respondents’ notices of intent to participate were first submitted to the Court attached to the *Amended Entry of Appearance* filed by Respondents’ counsel on November 21, 2007 and were not included among those that Respondents claim they were prevented from timely filing by technical difficulties. An examination of the record indicates that these include the notices of intent filed on behalf of:

Carole A. Bell  
Jack E. Bell  
Media A. Bell  
Kathleen Dolly  
Ross A. Garnaat  
Karalee Harris  
Wallace H. Jackson, Jr.

Alan & Elizabeth Lewis  
Anthony Charles Matkovich  
Penny Carlene Matkovich  
Diane S. Baretinicich Rev. Trust  
Karen Pettit  
Steven Pettit

Furthermore, the improperly-filed Answer (Doc. No. 185) that is the subject of the United States' Motion asserts, at 2, that it is filed on behalf of Tom Wolf, Jr. and Debra Ingram. No notice of intent to participate and no entry of appearance has ever been filed in this Subproceeding on behalf of those individuals. Nor do Respondents offer any evidence of electronic difficulties or *ex parte* assurances that could possibly justify those omissions.

Let the record be clear: the United States agrees that, particularly with regard to electronic filing difficulties, non-substantive *ex parte* communications with Court staff are sometimes essential. The United States is not objecting to the *ex parte* character of the communications described in the Response and its Exhibits. Instead, the United States is objecting to Respondents' unilateral presumption that such *ex parte* communications, or Respondents' private assessment as to whether their actions might cause prejudice to other parties, are sufficient to overrule the Court's docketed scheduling orders. The only citation of "authority" in the Response is to the January 17, 2007 *Administrative Order* filed in the main case (Doc. No. 956 in 01cv00072). That order cannot conceivably be read to say that an automatic extension of time is granted any time a paralegal calls the CM/ECF Help Desk. Nor do Respondents explain why they chose to ignore paragraph 1(a)(2)(A) of the CM/ECF Administrative Procedures Manual, cited on page 2 of the United States' Motion, which provides: "Individual filers may encounter situations or circumstances that hinder their ability to electronically file documents. In these exceptional circumstances, an attorney may petition the Court for permission to file documents in paper format." In each case wherein Respondents claim they were precluded from making a timely filing by electronic difficulties, the simple and obvious

solution was to promptly inform the Court – on the record – of the nature of the problem and request leave either to file in paper format or to make a late electronic filing. They failed to make such a motion and continue to argue that they had no obligation to do so.

Respondents attempt to belittle the United States' assertion that Respondents' conduct in defiance of the Court's scheduling orders has created a confused docket in this case. Nonetheless, those involved in water adjudications must contemplate at least the possibility that the records we create now will have to be deciphered by our successors. In this Subproceeding, there is a January 3, 2008 Order that specifies the parties to the adjudication and a late-filed February 1, 2008 Answer filed by individuals or entities that are not parties under the express terms of the earlier-filed Order. That record cannot be allowed to stand.

WHEREFORE the United States respectfully urges the Court to order that the *Various Defendants Answer to the United States' Subproceeding Complaint and Statement of Claims for Water Rights on Behalf of, and for the Benefit of, the Zuni Indian Tribe and Zuni Allottees and Answer to Zuni Indian Tribe's Supplemental Subproceeding Complaint*, filed February 1, 2008 (Doc. No. 185), and the February 14, 2008 *Various Defendants' Response in Opposition to United States Motion to Strike Answer Filed by Non-Parties* (Doc. No. 198) be stricken from the record in this Subproceeding.

DATED: February 22, 2008

Electronically Filed

/s/Bradley S. Bridgewater

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BRADLEY S. BRIDGEWATER

U.S. Department of Justice

1961 Stout Street – 8<sup>th</sup> Floor

Denver, CO 80294

(303) 844-1359

COUNSEL FOR THE UNITED STATES

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on February 22, 2008, I filed the foregoing *Reply In Support Of United States' Motion To Strike Answer Filed By Non-Parties* 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.

AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Participants by first class mail, postage prepaid:

JOSEPH DEAN BOND  
P.O. BOX 802  
RAMAH, NM 87321

SFFL, LLC  
P.O. BOX 3834  
MILAN, NM 87021

MILDRED C. CORDOVA  
10309 RIO PUERCO TR. SW  
ALBUQUERQUE, NM 87121

MATTHEW SILVA  
9204 CAMINO DEL SOL NE  
ALBUQUERQUE, NM 87111

DANIEL G. CORDOVA  
10309 RIO PUERCO TR. SW  
ALBUQUERQUE, NM 87121

PAUL WOLF, JR.  
HC 31 BOX 20  
FENCE LAKE, NM 87315

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