

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO**

**UNITED STATES OF AMERICA
and
STATE OF NEW MEXICO, ex rel. STATE ENGINEER,**

Plaintiffs,

and

ZUNI INDIAN TRIBE, NAVAJO NATION,

Plaintiffs in Intervention,

vs.

NO. 01CV00072 BB/WDS

A & R PRODUCTIONS, et al.,

Defendants.

**ANSWER BY DEFENDANT JOANN V. DAVIS RESIDUAL TRUST
TO AMENDED COMPLAINT AND COUNTERCLAIM**

NOW ENTERING COURT is William G. Stripp, Attorney at Law, on behalf of the JoAnn V. Davis Residual Trust dated July 28, 2003 (hereafter "Defendant"), which answers as follows:

1. Paragraph 1 of the Amended Complaint states a legal conclusion, the accuracy of which will be determined by the district judge, and which does not require a reply by Defendant. To the extent that a reply is required, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments, because Defendant is unsure of what Plaintiffs are really seeking through this action.

2. Paragraph 2 of the Amended Complaint states a legal conclusion, the accuracy of which will be determined by the district judge, and which does not require a reply by Defendant. To the extent that a reply is required, Defendant is without sufficient knowledge or information sufficient to form a belief as to the truth of the averments in paragraph 2 of the Amended Complaint, because it appears that plaintiffs are attempting to merge a federal declaratory judgment action under 28 U.S.C. § 2201 with a State of New Mexico stream adjudication under NMSA, 1978, §§ 72-4-13 through 72-4-20, but plaintiffs have not followed the procedure established in the state statutes and it is unclear that a federal declaratory judgment action is appropriate.

3. Defendants admit that Plaintiff United States is claiming certain water rights, but are without sufficient knowledge to admit or deny what water rights plaintiff United States is claiming, and deny that plaintiff United States, acting in its own right or as trustee for plaintiffs in-intervention, has priority over any of the water rights that Defendant claims. Except as specifically admitted, Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 3 of the Amended Complaint.

4. Defendant admits the averments in Paragraph 4 of the Amended Complaint.

5. Defendant admits the averments in Paragraph 5 of the Amended Complaint.

6. Defendant admits that it claims an ownership interest in and rights to the surface water and groundwater on its properties and other properties it has an interest in, including, but not limited to the right to divert, impound, pump, and otherwise

use those waters. Defendant does not believe that the “Zuni River basin” or “Zuni River stream system” has been adequately identified. Defendant also does not believe that an adequate scientific basis has been shown that listed properties are hydrographically connected such that other named defendants are necessary and indispensable parties to a determination of Defendant’s water rights. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 6 of the Amended Complaint.

7. With regard to the averments in Paragraph 7 of the Amended Complaint, Defendant states that each district court order referred to in the paragraph speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 7 of the Amended Complaint.

8. With regard to the averments in Paragraph 8 of the Amended Complaint, Defendant admits that the Zuni Indian Tribe is a federally recognized tribe. Defendant denies that the Zuni Indian Tribe has owned and occupied lands within the Zuni River basin in New Mexico since time immemorial, and states that the term “time immemorial” is ambiguous and can be defined in many ways. Defendant states that the each order and statute described in Paragraph 8 speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 8 of the Amended Complaint.

9. With regard to the averments in Paragraph 9 of the Amended Complaint, Defendant denies that the Zuni Indian Tribe and its members have used waters of the Zuni River stream system in New Mexico from time immemorial. Defendant states that

each law of the United States and each law of Spain and Mexico speaks for itself, as does the decision in State of New Mexico v. Aamodt, 537 F.2d 1102 (10th Cir. 1976). Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 9 of the Amended Complaint.

10. With regard to the averments in Paragraph 10 of the Amended Complaint, Defendant states that each treaty, statute, executive order, federal law, or federal case decision, which is referred to, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 10 of the Amended Complaint.

11. With regard to the averments in Paragraph 11 of the Amended Complaint, Defendant admits that the Navajo Nation (a/k/a Navajo Tribe of Indians) is a federally recognized tribe. Defendant denies that the Navajo Nation occupied lands in the Zuni River basin since time immemorial. Defendant denies that the Navajo Nation and its members have used waters of the Zuni River stream system in New Mexico from time immemorial. Defendant states that each statute and executive order referred to in Paragraph 11 speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 11 of the Amended Complaint.

12. With regard to the averments in Paragraph 12 of the Amended Complaint, Defendant states that each law of the United States, which is referred to, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 12 of the Amended Complaint.

13. With regard to the averments in Paragraph 13 of the Amended Complaint, Defendant states that each statute and executive order, which is referred to, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 13 of the Amended Complaint.

14. With regard to the averments in Paragraph 14 of the Amended Complaint, Defendant states that federal law speaks for itself, as do the federal decisions, which are referred to. Defendant denies that members of the Ramah Band of Navajos have lived on and occupied lands in the Zuni River basin in New Mexico from time immemorial. Defendant denies that members of the Ramah Band of Navajos have used waters of the Zuni River stream system in New Mexico from time immemorial. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 14 of the Amended Complaint.

15. With regard to the averments in Paragraph 15 of the Amended Complaint, Defendant states that each treaty, statute, executive order, federal law, and federal decision, which is referred to, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 15 of the Amended Complaint.

16. With regard to the averments in Paragraph 16 of the Amended Complaint, Defendant states that the Presidential Proclamation, which is referred to, speaks for itself, as do the federal decisions. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 16 of the Amended Complaint.

17. With regard to the averments in Paragraph 17 of the Amended Complaint, Defendant states that the Presidential Proclamation, which is referred to, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 17 of the Amended Complaint.

18. With regard to the averments in Paragraph 18 of the Amended Complaint, Defendant states that each federal law, which is referred to, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 18 of the Amended Complaint.

19. With regard to the averments in Paragraph 19 of the Amended Complaint, Defendant states that each federal law, which is referred to, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 19 of the Amended Complaint.

20. With regard to the averments in Paragraph 20 of the Amended Complaint, Defendant states that the Executive Order, which is referred to, speaks for itself. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 20 of the Amended Complaint.

21. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 21 of the Amended Complaint.

22. Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Paragraph 22 of the Amended Complaint, because Defendant is unsure what plaintiffs are really seeking, and plaintiffs' request for the "application of the appropriate laws" is ambiguous and unspecific.

23. Defendant admits that plaintiff and the plaintiff-intervenors are claiming certain water rights, but deny that they have any ownership interest in or priority over any of the water rights that Defendant owns or claims. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 23 of the Amended Complaint.

24. With regard to the averments in Paragraph 24 of the Amended Complaint, Defendant admits that it claims an ownership interest in and rights to the surface water and groundwater on its respective properties or properties that it has an interest in, including, but not limited to the right to divert, impound, pump, and otherwise use those waters. Defendant does not believe that the "Zuni River stream system" has been adequately identified. Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments in Paragraph 24 of the Amended Complaint.

25. Defendant denies the averments in paragraph 25 of the Amended Complaint.

AFFIRMATIVE DEFENSES

1. As a first affirmative defense, Defendant asserts that this matter should be dismissed Under Rule 12(b)(6), because plaintiffs have failed to state a claim upon which relief can be granted.

2. As a second affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by estoppel.

3. As a third affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by laches.

4. As a fourth affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by waiver.

5. As a fifth affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by res judicata.

6. As a sixth affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by the Fifth Amendment to the United States Constitution in that it seeks to take private property for public use, without just compensation.

7. As a seventh affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by the Fourteenth Amendment to the United States Constitution in that the State of New Mexico, realigned as Plaintiff, is seeking to deprive Defendant of its property, without due process of law; and to deny Defendant the equal protection of the laws.

8. As an eighth affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by their failure to mitigate damages.

9. As a ninth affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by accord and satisfaction through previous settlement of plaintiffs' water rights claims and settlement of the water rights claims of the plaintiffs in intervention.

10. As a tenth affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by the doctrine of prescription or adverse possession of any water rights plaintiffs or plaintiffs in intervention are claiming.

11. As an eleventh affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by payment for any water rights plaintiffs are claiming.

12. As a twelfth affirmative defense, Defendant asserts that plaintiffs' amended complaint is barred by the non-use of any water rights that plaintiffs or plaintiffs-in-intervention are now claiming.

13. As a thirteenth affirmative defense, Defendant asserts that plaintiffs' complaint is barred by their abandonment of any water rights that plaintiffs or plaintiffs-in-intervention they are now claiming.

COUNTERCLAIM

1. Counterclaimant JoAnn V. Davis Residual Trust dated July 28, 2003 owns the following real property: A certain tract of land being TRACT A within SECTION 9, TOWNSHIP TEN (10) NORTH, RANGE FIFTEEN (15) WEST, N.M.P.M., containing approximately 243.0135 acres, as shown on the PLAT OF SURVEY filed February 13, 2006 in Book 15 Page 6366, Cabinet A Slot 389 records of the County Clerk of Cibola County, New Mexico; A certain tract of land being TRACT B within SECTION 23, TOWNSHIP TEN (10) NORTH, RANGE FIFTEEN (15) WEST, N.M.P.M., containing approximately 411.8445 acres, as shown on the PLAT OF SURVEY filed November 18, 2005 in Book 0015 Page 3309, Cabinet A Slot 3370 records of the County Clerk of Cibola County, New Mexico; THAT PORTION of SECTION 27, T10N, R15W, lying

North of State Highway 53 containing approximately 416.51 acres, Ref. PC10-16393, records of the County Clerk of Cibola County, New Mexico; SECTION 11, T10N, R15W, containing approximately 640 acres; SECTION 13, T10N, R15W, containing approximately 640 acres; SECTION 15, T10N, R15W, containing approximately 640 acres; SECTION 24, T11N, R15W, containing approximately 640 acres; SECTION 33, TOWNSHIP TEN (10) NORTH, RANGE FIFTEEN (15) WEST, N.M.P.M., LESS AND EXCEPT The Northeast One-Quarter (NE 1/4) AND the East One-Half (E 1/2) of the Northwest One Quarter (NW 1/4) of SECTION 33, containing approximately 400 acres; A tract of land within Section 1, T 10N R 16W, containing approximately 196.83 acres more or less, and described as follows: The NE 1/4 of the NE 1/4 of said Section 1, LESS AND EXCEPT that parcel of land described in Warranty Deed to the Andersons and Bissets containing approximately 10.70 acres filed 8/8/96, Bk. 10 page 3910, and The South 1/2 of the NE 1/4 of said Section 1, 1nd The North 1/2 of the SW 1/4 of said Section 1, and the NW 1/4 of the SW 1/4 of SE 1/4 of said Section 1, LESS AND EXCEPT that parcel of land described in warranty Deed to the Ivanoviches containing approximately 2.47 acres, filed 7/18/2000, Bk.15, page 5169.

2. Counterclaimant claims ownership of all water that falls upon, flows through, or lies beneath land that it owns or has an interest in, including, but not limited to the right to divert, impound, pump, and otherwise use those waters.

REQUEST FOR JUDGMENT

WHEREFORE, Defendant/Counterclaimant requests that this Court:

- (1) Deny the United States the prayer for relief as stated in the Amended Complaint;
- (2) Declare that Counterclaimant owns all water that falls upon, flows through, or lies beneath land that it owns or has an interest in, including, but not limited to the right to divert, impound, pump, and otherwise use those waters.
- (3) Award Defendant/Counterclaimant its attorney's fees and costs; and
- (4) Award Defendant/Counterclaimant such other and further relief as the Court may deem just and proper.

Date: September 6, 2007

Respectfully submitted,
----signed electronically-----
WILLIAM G. STRIPP
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Certificate of Service

I HEREBY CERTIFY that on the 6th day of September 2007, I filed the foregoing electronically through the CM/ECF system, which caused counsel and parties pro se who have entered an appearance to be served by electronic means.

----signed electronically by William G. Stripp, Attorney at Law----