

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

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

and

NO. CV 01-72 BB/WDS

**ZUNI INDIAN TRIBE and
NAVAJO NATION,
Plaintiffs-in-Intervention,**

vs.

**A & R PRODUCTIONS, et. al.,
Defendants.**

**RESPONSE IN OPPOSITION TO STATE OF NEW MEXICO'S MOTION TO DISMISS
COUNTERCLAIM OF LUIS MARIO BAEZA**

NOW ENTERING COURT is William G. Stripp, Attorney at Law, on behalf of the Luis Mario Baeza, who files this Response in Opposition to State of New Mexico's Motion to Dismiss Counterclaim of Luis Mario Baeza (Document 1281).

1. The New Mexico Supreme Court has stated:

In New Mexico, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3. We have said that this fundamental principle "is applicable to all appropriations of public waters." State ex rel. State Eng'r v. Crider, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967). "As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to a beneficial use." State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch, 19 N.M. 352, 371, 143 P. 207, 213 (1914); accord

Snow, 18 N.M. at 694, 140 P. at 1048 ("[I]t is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives the appropriator the continued and continuous right to take the water."). The principle of beneficial use is based on "imperative necessity," *Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 181, 113 P. 823, 825 (1911), and "aims fundamentally at definiteness and certainty." *Crider*, 78 N.M. at 315, 431 P.2d at 48 (quotation marks and quoted authority omitted). It promotes the economical use of water, while also protecting the important interest of conservation. See *Yeo*, 34 N.M. at 620, 286 P. at 974.

State v. City of Las Vegas, 2004-NMSC-009, ¶ 34, 135 N.M. 375, 89 P.3d 47

2. Under New Mexico law, it is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives the appropriator the continued and continuous right to take the water.

3. The land owned by Luis Mario Baeza has been used for both residential and ranching purposes with corresponding beneficial use of the water. Furthermore, Luis Mario Baeza intends to apply available water to additional uses, including farming and ranching.

4. The intent to use all water that falls upon, flows through, or lies beneath land that Luis Mario Baeza owns or has an interest in is consistent with the New Mexico Supreme Court's definition of beneficial use.

CONCLUSION

The State of New Mexico's Motion to Dismiss Counterclaim of Luis Mario Baeza should be denied.

Date: October 18, 2007

Respectfully submitted,

----signed electronically-----

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Certificate of Service

I HEREBY CERTIFY that on October 18, 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----