

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

UNITED STATES OF AMERICA and)	
STATE OF NEW MEXICO, ex rel. STATE)	
ENGINEER,)	
Plaintiffs,)	
)	
and)	No. 01cv0072 BB/WDS
ZUNI INDIAN TRIBE and NAVAJO NATION,)	
Plaintiffs-in-Intervention)	
)	
)	ZUNI RIVER BASIN
v.)	ADJUDICATION
)	
A & R PRODUCTIONS, et al.,)	

STATE OF NEW MEXICO’S REPLY TO DEFENDANT JOANN V. DAVIS RESIDUAL
TRUST’S RESPONSE IN OPPOSITION TO STATE’S MOTION TO DISMISS
COUNTERCLAIM

The State of New Mexico *ex rel.* State Engineer (“State”) hereby replies to Defendant Joann V. Davis Residual Trust dated July 28, 2003’s Response in Opposition to State of New Mexico’s Motion to Dismiss Counterclaim (“Response”) (No. 1318), and in support thereof, states as follows:

1. The Counterclaimant’s Response argues that its “intent to apply” water is sufficient to support a claim “to use all water that falls upon, flows through, or lies beneath land that it owns or has an interest in.” Response, ¶ 7.
2. Counterclaimant’s Response does not correctly state the law.
3. As the State pointed out in its Motion to Dismiss, the New Mexico Constitution provides that beneficial use is the “measure, the basis and the limit” of all water rights in New Mexico. N.M. Const. art. XVI, §3.

4. Furthermore, since 1907, New Mexico law has required that a person “intending to acquire the right to the beneficial use of any [surface] waters . . . shall first make an application to the state engineer for a permit to appropriate.” § 72-5-1 NMSA 1978.

5. The same is true with regard to ground water. Any person intending to acquire the right to the beneficial use of any underground water in the Zuni River stream system must first apply to the state engineer for a permit. § 72-12-1, et seq. NMSA 1978.

6. Counterclaimant makes no allegation that it has appropriated or beneficially used “all the water that falls upon, flows through, or lies beneath land that it owns or has an interest in.” Nor has it alleged that it has applied for, or obtained the permits required to do so. It has therefore failed to state a claim under New Mexico law for a corresponding water right.

WHEREFORE, the State requests the Court dismiss the counterclaim of Defendant Joann V. Davis Residual Trust date July 28, 2003 pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim under which relief can be granted.

Electronically Filed

/s/ Edward C. Bagley

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 31, 2007, I filed the foregoing State of New Mexico's Motion to Dismiss Counterclaim of Defendant Joann V. Davis Residual Trust date July 28, 2003 electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.