

UNITED STATES DISTRICT COURT
 DISTRICT OF NEW MEXICO

CLERK OF DISTRICT COURT
 DISTRICT OF NEW MEXICO

01 CV 00072 BDB/WWB (ACE)

United States,

Plaintiff

v.

A & R Productions, et al.,

Defendants

ZUNI RIVER STREAM
 SYSTEM ADJUDICATION

RE: DEFENDANT DAVIS'
 REVOCABLE TRUST, et al.,
 RESPONSE TO U.S. MOTION TO
 DROP/DISMISS DEFENDANT
 PARTIES

UNITED STATES' REPLY

The United States filed a motion on December 23, 2003, seeking an order from this Court to drop and dismiss some 240 landowner/defendants from this adjudication based on disclaimers of interest. (See Docket No. 294). Listed among the 240 landowner/defendants are Paul & Joann Davis, % Henry & Charlotte Yazzie, as well as Paul & JoAnn V. Davis Rev. Trust (the "Respondent"). See attached Appendix No. 1. Respondent objects to the United States' request that it be dropped/dissmissed from this adjudication because it continues to claim water right(s) in this lawsuit. The United States accedes to Respondent's request that it not be dismissed from this action. To that end, the United States is submitting separately for the Court's consideration a revised corrected Order omitting the dismissal of the interests of Defendants Paul & Joann Davis, % Henry & Charlotte Yazzie, and Paul & JoAnn V. Davis Rev. Trust.

Respondent also seeks attorneys fees from the United States for the time and expense of its response. (Docket No. 296). Respondent's request is frivolous in the first instance, for if

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Respondent merely had placed a phone call to counsel for the United States, Respondent's concerns could have been addressed to Respondent's satisfaction without any need for filing a response before this Court. Further, the United States' actions may be characterized as exemplary and in no way satisfy the burden of justifying attorneys fees. The United States sought to dismiss Respondent only after the purported purchaser of Respondent's property so notified the United States in writing of the purchase and disclaimed any water right associated with the parcel. See App. No. 1. The United States' reasonably relied on the disclaimer prior to including Respondent in its motion to dismiss.

BACKGROUND

The suit seeks to adjudicate all use of the surface and groundwaters of the Zuni River stream system. The party-defendants identified in the United States' complaint and amended complaint, numbering approximately 1900, include all those who at the time the complaint was filed were believed to own parcels of land within the Zuni River Basin. The party-defendants were identified from the property tax records of Cibola, McKinley and Catron Counties. Knowing that these tax records may cause landowner/defendants to be named to this adjudication in error, the United States provided "disclaimer of interest" forms to each named landowner/defendant. Many fully executed disclaimers of interests forms have been returned to the United States.

Among the disclaimers returned to the United States was one prepared by Charlotte Yazzie. On the form, Ms. Yazzie advises that she is "purchasing the property of Paul & Joanne Davis who are on the [U.S.' motion to drop/dismiss] list" and further advises "[a]t this point there is no surfaces irrigation or under ground water well." See App. No. 1. Based upon these

representations, the United States included in its motion to drop/dismiss from this adjudication Defendants Paul & Joann Davis, % Henry & Charlotte Yazzie, as well as Paul & JoAnn V. Davis Rev. Trust. In its Response to the United States' Motion to Dismiss, Respondent acknowledges that there is pending a sale of a certain amount of its property to Ms. Yazzie, but advises the sale is not yet final and, therefore, it continues to claim water right(s) associated with that property. Respondent advises it should not be dropped or dismissed from this adjudication. However, instead of calling counsel for the United States or notifying the United States in a letter as required by the Federal Rules of Civil Procedure Rule 11(c)(1)(A), Respondent instead chose to file a formal response with the Court and now seeks its attorneys fees for filing the unnecessary pleading.

REPLY

A. RESPONDENT'S REQUEST FOR ATTORNEYS FEES IS NOT APPROPRIATE AND IMPROPER UNDER THE FEDERAL RULES.

At the outset, the Court should deny Respondent's request for attorneys fees for preparing its response simply on the ground that Respondent could have avoided the need to file such a response -- and accruing any associated fees -- in the first instance. In seeking to drop/dismiss Respondent from this adjudication, the United States relied on a disclaimer prepared by a party claiming an interest in the parcel at issue. App. No. 1. Respondent does not dispute that it is in the process of selling the parcel to the disclaiming party. Instead, Respondent argues that it does not want to be dismissed because it still claims water rights. Rather than devote resources and energies toward filing a pleading, and then seeking attorneys fees, Respondent could have clarified the confusion with a simple phone call or letter to the United States, which would have

enabled the United States to amend its pleadings without further expense to the Respondent or a time investment by this Court. Instead, the Respondent chose to file its pleading with the Court. Had Defendants' attorney notified the undersigned by telephone that his client(s) continue to own property and continue to claim water right(s) associated with the property, there would be have been no need to file the formal response as the undersigned would have immediately notified the Court of the error and taken corrective action.

The Rule 11 of the Federal Rules of Civil Procedure in fact mandates that a party be provide an opportunity to cure a problem before attorneys fees are sought against that party. Here, Defendants Paul Davis and Paul & JoAnn V. Davis Rev. Trust have failed to comply with Rule 11(c)(1)(A) of the Federal Rules of Civil Procedure, which requires notice, consultation, and a request that the United States take appropriate corrective action before Respondent files a sanctions motion. As stated above, had Respondents or counsel contacted the undersigned before filing the formal response, the United States would have immediately removed the Respondents name from the motion to dismiss and associated papers and resubmitted for the Court's consideration an amended proposed Order reflecting same. There is simply no basis for imposition of sanctions in this instance .

B. THE UNITED STATES ACTED REASONABLY IN FILING ITS MOTION TO DISMISS.

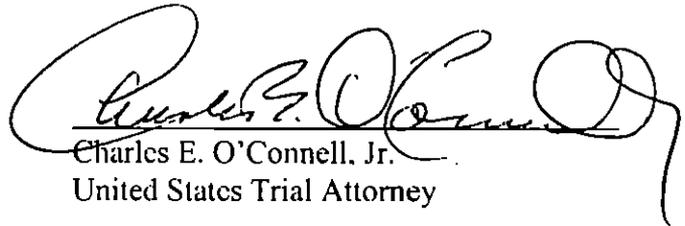
Even if Respondent had satisfied Rule 11's meet and confer requirement, Rule 11 would not subject the United States to attorneys fees here. The United States Supreme Court has made it abundantly clear that the primary purpose of Rule 11 is to deter frivolous filings and thus streamline the administration and procedure of the federal court. *Business Guides, Inc. v.*

Chromatic Communications Enters., Inc., 498 U.S. 533, 553 (1991); *Cooter & Gell v. Hartmarx Corp.* 496 U.S. 384, 393 (1990). Rule 11 thus imposes a duty on attorneys to authorize that they have conducted a reasonable inquiry and have determined that any papers filed with the court are well grounded. *Cooter & Gell*, 496 U.S. at 393. For the purpose of determining whether a pleading is factually well grounded, a court should examine, in light of the circumstances, the reasonableness of the pre-filing investigation of the facts supporting the document. See *Hoffman-LaRoche, Inc. v. Invamed, Inc.*, 213 F.3d 1359 (Fed. Cir 2000); *Harlyn Sales Corp., Profit Sharing Plan v. Kemper Fin. Servs., Inc.*, 9 F.3d 1263, 1269 (7th Cir. 1993). The standard is one of "reasonableness under the circumstances." *Gaiardo v. Ethgl Corp.*, 835 F.2d 479, 483 (3rd Cir. 1987). A reasonable inquiry does not require "that an investigation into the facts be carried to the point of absolute certainty." *Forbes v. Eagleson*, 228 F.3d 471, 488 (3rd Cir. 2000). Circumstances to be examined would include access to relevant facts especially where the facts are in control of the opposing party. See *Krim v. BancTexas Group*, 99 F.3d 775, 778 (5th Cir. 1996); *McGuire Oil Co. v. Mapco, Inc.*, 958 F.2d 1552, 1564 (11th Cir. 1992).

Here, the United States' inclusion of the Respondent in its motion to drop/dismiss cannot be considered as a violation of Rule 11 as it was based upon the information conveyed in the disclaimer of interest, i.e., that the Davis property was being sold and the purchaser claimed no water right for the property. The United States could not have known that Respondent's sale of property had not yet been finalized based on the information before it. The United States' motion to drop/dismiss Defendants Paul & Joann Davis, % Henry & Charlotte Yazzie, and Paul & JoAnn V. Davis Rev. Trust was filed on the strength of the above-mentioned Disclaimer of Interest. App. No. 1. It now appears that the information contained on the disclaimer form,

which was provided by the purported purchaser, is in error as the pending sale of Respondent's property has yet to be finalized and, indeed, there are outstanding water right claims associated with the property. However, that fact does not make the United States' reliance on the document unreasonable. Under these circumstances, the inclusion of Respondent in the motion to drop/dismiss is entirely reasonable under the facts known at the time.

RESPECTFULLY SUBMITTED this 9th day of January, 2004.


Charles E. O'Connell, Jr.
United States Trial Attorney

Yazzie

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

United States,)
)
 Plaintiff)
)
 v.)
)
 A & R Productions, et al.,)
)
 Defendants)

01CV00072BDB/WWD(ACE)

ZUNI RIVER STREAM SYSTEM
ADJUDICATION

RECORDS SECTION
03 AUG - 7 PM 3:36
STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO

DISCLAIMER OF INTEREST

The undersigned named defendant, for the reason(s) stated below, herewith disclaims any and all interest in the use of the surface or ground waters of the Zuni River Basin.

The undersigned does not use or presently claim a right to the use of surface or groundwater within the geographical boundary of the Zuni River Basin as the basin is described in the Court's Order On Special Master's Report re: Geographic Scope of Adjudication, dated May 21, 2003.

The undersigned does not hold fee title to land within the geographic boundaries of the Zuni River Basin as the basin is described in the Court's Order On Special Master's Report re: Geographic Scope of Adjudication, dated May 21, 2003.

It is understood that this disclaimer does not prejudice the right of the undersigned and/or his/her successor(s)-in-interest from petitioning in the future the State Engineer for a permit to put surface and/or groundwater in the Zuni River Basin to beneficial use nor does this disclaimer preclude the State Engineer from granting the undersigned and/or his/her successor(s)-in-interest a right to beneficially use the surface and/or groundwater in the Zuni River Basin. It is further understood that the priority date of a water right permit granted under the laws of the State of New Mexico can not be earlier than the date of this disclaimer.

Signature: Charlotte Yazzie

Corporation: _____

Print Name: CHARLOTTE YAZZIE

Date: 8-6-03

P.O. Box 2440
Gallup, NM 87305
(505) 726-8338

I'm purchasing the property of Paul & JoAnn Davis who are on the list at this point there is no ~~surfaces~~ surfaces irrigation or underground water well.

EXHIBIT
G

CERTIFICATE OF SERVICE

I hereby certify that on or before this 9th day of January, 2004, a true and correct copy of the foregoing was served by United States Postal Service first class, postage pre-paid mail to the following:

Stripp, William G., Esq.
P.O. Box 159
Ramah, NM 87321

Gabin, Special Master Vickie L.
U.S. District Court
P.O. Box 2384
Sante Fe, NM 87504-2384

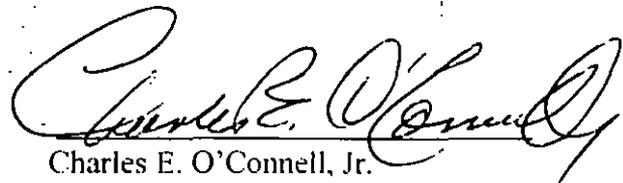
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