

**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 JOANN V. DAVIS RESIDUAL TRUST**

NOW ENTERING COURT is William G. Stripp, Attorney at Law, on behalf of the JoAnn V. Davis Residual Trust, which files this Response in Opposition to State of New Mexico's Motion to Dismiss Counterclaim of JoAnn V. Davis Residual Trust (Document 1280).

1. The JoAnn V. Davis Residual Trust dated July 28, 2003 is a successor in interest to the Paul Davis and JoAnn V. Davis Revocable Trust dated May 10, 1981.

2. On March 31, 2004, the Paul Davis and JoAnn V. Davis Revocable Trust dated May 10, 1981 filed its notice claiming all water that falls upon, flows through, or lies beneath land that the trust owned or had an interest in. (See Document 320.)

3. Plaintiff State of New Mexico never challenged that claim.

4. 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

5. 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.

6. The land held by the JoAnn V. Davis Residual Trust dated July 28, 2003 has had many uses including ranching with up to 200 cows and 7 bulls, orchards, farming, including wheat, rye, corn and a variety of vegetables, several homes, a real estate office, a bed and breakfast, and a law office. The water has been used and there is an intent to apply the water to additional uses, including farming and ranching.

7. The intent to use all water that falls upon, flows through, or lies beneath land that the JoAnn V. Davis Residual Trust dated July 28, 2003 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 JoAnn V. Davis Residual Trust 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----