

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

UNITED STATES OF AMERICA,)
 ET AL.,)
)
 PLAINTIFFS,)
)
)
 v.)
)
)
 STATE OF NEW MEXICO)
 COMMISSIONER OF PUBLIC)
 LANDS, ET AL.,)
)
 DEFENDANTS.)
 _____)

CIV NO. 01-00072 BDB/WDS
 Subfile: ZRB-4-0313

 ZUNI RIVER BASIN
 ADJUDICATION

**FIRST AMENDED ANSWER
AND COUNTERCLAIM FOR DECLARATORY JUDGMENT**

COME NOW, Steve and Karen Pettit, Co-Trustees of the Steve and Karen Pettit Trust, dated July 19, 2005 (“Trust”), by and through their attorneys of record, Law & Resource Planning Associates, P.C., and hereby amend their Subfile Answer (Doc. 1798) and also file their Counterclaim for Declaratory Judgment as follows:

ANSWER

1. The Trust admits the allegations stated in ¶¶ 1 and 2 of the Amended Complaint (Doc. 222).
2. The Trust is without sufficient information to determine the truth of the allegations stated in ¶ 3 of the Amended Complaint and therefore denies the same.
3. The Trust admits the allegations stated in ¶¶ 4, 5, 6, and 7 of the Amended Complaint.

4. The Trust is without sufficient information to determine the truth of the allegations stated in ¶¶ 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23 of the Amended Complaint and therefore denies the same.

5. The Trust admits the allegations stated in ¶¶ 24 and 25 of the Amended Complaint.

ANSWER TO SUBFILE ZRB-4-0313 OFFER

6. In response to the specific Offer made by the Plaintiffs in Subfile ZRB-4-0313, the Trust states that the Offer was declined for the following reasons:

- a. The Offer includes a pond that is not on property owned by the Trust;
- b. The Offer does not include a pond that is on property owned by the Trust;
- c. The Offer includes only a .7 acre feet per annum water right under State Engineer Permit G-1982, while the permit specifically allows the Trust to divert up to three acre feet per annum of water for irrigation of up to one acre of non-commercial trees, lawn, or garden, and domestic and livestock uses, pursuant to NMSA 1978, §72-12-1 (2003).
- d. The Offer includes injunctive relief not requested in the Amended Complaint, which would preclude the Trust from continuing to develop any water rights under Declaration G-1999.
- e. The Offer includes injunctive relief not requested in the Amended Complaint which would preclude the Trust from using up to three acre feet per annum as allowed by permit No. G-1982.

AFFIRMATIVE DEFENSES

The Amended Complaint fails to state a claim for which relief may be granted.

COUNTERCLAIM FOR DECLARATORY JUDGMENT

1. This Counterclaim is brought pursuant to 28 USC §2201. There is an actual controversy between the Trust and Plaintiffs, including the United States of America and the New Mexico State Engineer, and the Trust seeks a declaration of the rights and/or legal relations between it and the plaintiffs.

2. Steve and Karen Pettit are co trustees of a Trust that owns real property located in the Zuni Basin and is included within the boundaries of the Zuni Adjudication. They currently reside full time on the property.

3. Steve and Karen Pettit, as co-trustees of the Trust, purchased the real property within the boundaries of the Zuni Adjudication for the purpose of building a retirement home and planting an orchard and other crops on the property.

4. The Trust owns at least one acre of land on which the Pettits, as co-trustees of the Trust, intend to plant an orchard and other crops.

5. In furtherance of their plans to live on the property during their retirement and pursue agricultural interests on the property, Steve and Karen Pettit applied for and obtained a well permit from the New Mexico State Engineer allowing them to divert sufficient water to irrigate one acre of non-commercial trees, lawn and garden, not to exceed three acre feet of water per annum. The well permit is designated as Permit No. G-1982. A copy of the Permit is attached hereto as Exhibit A.

6. Permit No. G-1982 was applied for and issued pursuant to NMSA 1978, § 72-12-1 (2003).

7. In addition to the permitted well, the land purchased by the Trust also has a well that was drilled prior to the declaration of the Gallup basin. The Trust filed a Declaration of the

well with the New Mexico State Engineer, which the State Engineer designated as Declaration No. 1999. A copy of Declaration No. 1999 is attached hereto as Exhibit B.

8. Pursuant to New Mexico law, an owner of a declared well that was drilled prior to the declaration of the basin has the right and ability to continue the development of his or her water right after the declaration of the basin in furtherance of a plan for the beneficial use of the water.

9. In reliance upon the issuance of Permit No. G-1982, the Pettits, as co-trustees for the Trust, drilled and equipped a well, enlarged their home, and are in the process of placing water from the well to beneficial use. The Pettits have now retired and live full time on the property.

10. The Pettits, as co-trustees for the Trust, are further developing the water rights in declared well No. G-1999 pursuant to New Mexico law.

11. Plaintiff New Mexico State Engineer, having issued permit No. G-1982, is estopped from preventing the Trust from diverting water from well G-1982 up to a maximum of three acre feet per annum.

12. Upon information and belief, the Plaintiffs, including the New Mexico State Engineer, intend to take action to prevent the Pettits, as co-trustees of the Trust, from further developing the water rights in declared well No. G-1999 and from diverting up to three acre feet per annum from permitted well No. G-1982.

13. The Trust has a property right in Permit No. G-1999 issued by the New Mexico State Engineer.

14. It is the public policy of the State of New Mexico, as expressed in NMSA 1978, § 72-12-1, to allow flexibility to owners of wells permitted under that section so that they may

divert sufficient water for domestic purposes, livestock purposes, and for irrigating up to one acre of non-commercial trees, lawn and garden.

15. Owners of wells with permits issued pursuant to NMSA 1978, § 72-12-1 may divert sufficient water for domestic use, livestock use, and to irrigate up to one acre of non-commercial trees, lawn and garden regardless of whether they have a vested water right established through prior beneficial use.

16. It is the public policy of the State of New Mexico to allow the continued development of a water right which was commenced prior to the declaration of the basin and to allow flexibility to use water for domestic, livestock, and irrigation on up to one acre of land for noncommercial trees, lawn and garden.

WHEREFORE, the Trust prays the Court to enter Judgment declaring the rights of the Trust as follows:

1. The Trust may continue to develop water rights from declared well No. G-1999 in furtherance of the plan for developing the water right;

2. The Trust may continue to develop well No. G-1999 in furtherance of the Trust's plan, notwithstanding the extent of the prior beneficial use of the well.

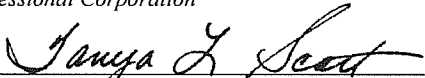
3. The Trust may divert sufficient water from well No. G-1982 for domestic purposes, livestock purposes, and for irrigation of up to one acre of non-commercial trees, lawn and garden, such amount not to exceed three acre feet per annum.

4. The Trust may divert up to three acre feet per annum from well No. G-1982 for domestic uses, livestock uses, and irrigation of up to one acre of noncommercial trees, lawn and garden, notwithstanding the extent of prior beneficial use of the well.

5. The New Mexico State Engineer is estopped to deny the Trust the ability to divert water sufficient to irrigate one acre of noncommercial orchard, lawn and garden under permit G-1982.

Respectfully submitted,

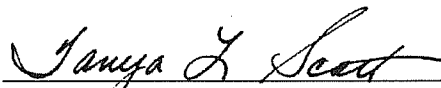
LAW & RESOURCE PLANNING ASSOCIATES,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 3, 2011, I filed the foregoing First Amended Answer and Counterclaim for Declaratory Judgment electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Filing to be served by electronic means.


Tanya L. Scott