

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

UNITED STATES OF AMERICA)	
and)	
STATE OF NEW MEXICO, <i>ex rel.</i> STATE)	
ENGINEER,)	
)	
Plaintiffs,)	
)	No. 01cv00072 BB
and)	
)	ZUNI RIVER BASIN
ZUNI INDIAN TRIBE, NAVAJO NATION,)	ADJUDICATION
)	
Plaintiffs in Intervention,)	Subfile No. ZRB-1-0075
)	Consolidated
v.)	
)	
A & R PRODUCTIONS, et al.)	
)	
Defendants.)	
)	

**UNITED STATES' RESPONSE TO MOTION TO INTERVENE BY EDWARD J.
BAWOLEK AND SUZAN J. BAWOLEK**

The Plaintiff United States of America (“United States”) hereby responds in opposition to the June 28, 2012 *Motion to Intervene by Edward J. Bawolek and Suzan J. Bawolek* (No. 2795) (“Bawolek Motion”). The Bawolek Motion must be denied because it is superfluous, or moot: the Bawoleks logically cannot intervene in this civil action because they are already parties to it, and their motion otherwise identifies no relief that they seek.

I. The Bawoleks Are Already Parties

The Bawolek Motion, at 1, purports to seek a Court order granting the Bawoleks “leave to intervene as Defendants . . . pursuant to Fed.R.Civ.P. 24(a)(2), or in the alternative, pursuant to Fed.R.Civ.P. 24(b)(1).” However, by virtue of the Court’s

June 27, 2012 *Unopposed Order Granting Edward J. Bawolek and Suzan J. Bawolek Revocable Trust's Motion to Substitute Party and Counsel* (No. 2794), Edward J. Bawolek and Suzan J. Bawolek were substituted as parties defendant in this action pursuant to Fed.R.Civ.P. 25(c), replacing the Edward Bawolek & Suzan Bawolek Trust ("Bawolek Trust"). The Bawolek Trust, in turn, was joined as a party defendant by the Court's January 26, 2006 *Order Granting Motion to Join Additional Parties Defendant* (No. 470), and the Bawoleks, acting as trustees of the Bawolek Trust, waived service of a summons on February 25, 2006 (No. 568, filed March 13, 2006). In consequence, it is undisputable that the Bawoleks are already parties to this civil action and subject to the personal jurisdiction of this Court.

The Bawolek Motion literally states that the Bawoleks seek to intervene in Subfile ZRB-1-0075 Consolidated.¹ However, Rule 24, by its terms, has application only to civil actions, not to subfiles of a civil action created pursuant to the Court's inherent case management authorities. *See, e.g.*, Fed.R.Civ. P. 16(c)(2)(L). For example, Rule 24(a)(2), invoked by the Bawoleks, provides a right of intervention to a movant who "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may" (emphasis added) have certain specified consequences for the movant. Similarly, Rule 24(b)(1)(B) gives the Court discretion to allow intervention by one who "has a claim or defense that shares with the main action a common question of law or fact." (Emphasis added.) *Cf.* Rule 25(c) (permitting a "transferee to be substituted in the action" (emphasis added)); *see also* Fed.R.Civ.P. 2 ("There is one form of action – the civil action.").

¹ At various places, the Bawolek Motion also refers to "Subfile ZRB-2-0075 Consolidated." As there is no such subfile, the United States assumes these references are typographical errors and are intended to refer instead to Subfile ZRB-1-0075 Consolidated.

Accordingly, the Bawolek Motion is moot. They neither need, nor are able, to intervene pursuant to the terms of Fed.R.Civ.P. 24, because they are already parties to this action.

II. The Bawolek Motion Otherwise Fails to Specify Any Relief Sought

The Bawolek Motion, at 3, asserts that “the Bawoleks request that the scope of their participation be limited to water features identified . . . as Well 10C-4-W15 and Pond 10C-4-SP33,” but the motion nowhere specifies what relief they seek with respect to those features. Moreover, at the present time there is no relief that the Bawoleks need to seek in order to protect their interests in Well 10C-4-W15 and Pond 10C-4-SP33, or any other any features located on State Trust Lands.

Under the terms of the Court’s May 22, 2012 *Order Consolidating State Land Subfiles, Establishing Modified Procedures, and Setting Preliminary Schedule* (the “Consolidation Order”), through at least December 1, 2012, and until either the United State submits a signed consent order to the Court for approval and filing, or the Plaintiffs file a Notice That the Consultation Period Has Ended with respect to Subfile ZRB-1-0075 Consolidated, the Plaintiffs and the Defendant Commissioner of Public Lands (“Commissioner”) are to be engaged in settlement discussions. During that consultation period, no substantive issues concerning the subfile will be before the Court. Consolidation Order at ¶¶ 3-5. The United States fully anticipates that the Commissioner will communicate with holders of leases of State Trust Lands during the course of those consultations and, if the Bawoleks have particular concerns about water use features on their leasehold, they would do well to communicate those concerns to the Commissioner.

However, until either a consent order for the subfile is submitted to the Court, or the Commissioner files a subfile answer pursuant to ¶6 of the Consolidation *United States' Response to Motion to Intervene by Edward J. Bawolek and Suzan J. Bawolek*, Page 3

Order, there is no issue concerning the subfile that is framed for decision by the Court. Moreover, even after the Court acts on a submitted subfile consent order and/or enters a final order on any disputed issues raised by the Commissioner's subfile answer, the Bawoleks will have a full opportunity to be heard with respect to any interest they assert concerning the water rights involved in Subfile ZRB-1-0075 Consolidated. As provided by the language included in each and every consent order or subfile judgment in this adjudication, the Court's resolution of the subfile will be binding only as between the United States, the State, and the subfile Defendant [i.e., the Commissioner in the present subfile], "subject to the right of any other water right claimant with standing to object prior to the entry of a final decree." Thus, assuming that the assertions of the Bawolek Motion are all true, and if the resolution of Subfile ZRB-1-0075 Consolidated as between the Plaintiffs and the Commissioner does not satisfy whatever as-yet-unspecified concerns the Bawoleks may have, the Bawoleks will have an opportunity to raise their concerns before a final decree is entered in this action.

However, at the present time, and on the face of the Bawolek motion, the relief the Bawoleks may seek with regard to Well 10C-4-W15, Pond 10C-4-SP33, or any other aspect of Subfile ZRB-1-0075 Consolidated, is a matter of pure speculation. The Bawolek Motion must be denied because it does not seek any relief other than the inapplicable intervention.

CONCLUSION

Accordingly, because the Bawoleks are already parties to this civil action, and because their motion otherwise seeks no specific relief, the United States respectfully requests that the Bawolek Motion be denied.

Respectfully submitted,

/s/ Bradley S. Bridgewater
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on July 13, 2012, I filed the foregoing *United States' Response to Motion to Intervene by Edward J. Bawolek and Suzan J. Bawolek* electronically through the CM/ECF system, which caused parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

_____/s/_____
BRADLEY S. BRIDGEWATER