

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/LFG
ZUNI INDIAN TRIBE and NAVAJO NATION,)	
Plaintiffs-in-Intervention)	
)	
)	ZUNI RIVER BASIN
v.)	ADJUDICATION
)	
A & R PRODUCTIONS, et al.,)	Subfiles No. ZRB-1-0075

**STATE OF NEW MEXICO’S RESPONSE TO MOTION TO INTERVENE BY EDWARD
J. BAWOLEK AND SUZAN J. BAWOLEK**

NOW COMES the State of New Mexico *ex rel.* State Engineer (“State”), and responds to Defendants Edward J. Bawolek and Suzan J. Bawolek’s *Motion to Intervene by Edward J. Bawolek and Suzan J. Bawolek* (No. 2795) (“*Motion*”). The State requests this Court deny Defendants’ *Motion*, and in support thereof, states as follows:

I. Defendants’ *Motion* is Untimely

Defendants’ *Motion* is untimely. To the extent Defendants seek to be heard with regard to the State Land Office claims presented in the context of subfile ZRB-1-0075, they will have their opportunity during the later *inter se* phase of this adjudication.

Statutory water rights adjudications commence with a “subfile phase”, the purpose of which is to resolve all claims as between the Plaintiff(s) and the individual subfile defendants only. The instant adjudication lawsuit is currently in the subfile phase. Once all subfile claims have been resolved as between the plaintiff(s) and the individual subfile claimants, then an

adjudication moves into the *inter se phase*, where all parties can be heard with regard to the individual claimants' subfile claims.

Consistent with that approach, the New Mexico Supreme Court has held that “[n]o decree declaring the elements of water rights can be entered until after a ‘hearing to determine the relative rights of the parties, one toward the other’ . . .” *Tri-State Generation v. D’Antonio*, 149 N.M. 394, 403, 249 P.3d 932, 941 (Ct. App. 2010) (quoting *State Ex Rel. Reynolds v. Sharp*, 66 N.M. 192, 196-197, 344 P.2d 943, 945-946 (S. Ct. 1959)). In fact, every Court approved consent order entered in this case provides that “[t]he water right(s) described herein, if any, are adjudicated as between the United States, the State and the Defendant, subject to the right of any other water right claimant with standing to object prior to the entry of a final decree.” See e.g., January 31, 2012 *Consent Order* (No. 2755) (emphasis added).

Defendants, the Bawoleks, will have their opportunity to object, along with every other party with standing in this case, during the *inter se* phase of this adjudication. However, the time for that is not during this current subfile phase. For that reason, Defendants' *Motion* should be denied as untimely.

In addition, the Bawoleks' *Motion* to intervene is untimely because the State Land Office has only just been served with a proposed consent order with regard to subfile ZRB-1-0075, and is not required to respond until December 1, 2012. May 22, 2012 *Order Consolidating State Land Subfiles, Establishing Modified Procedures, and Setting Preliminary Schedule* (No. 2782). Matters associated with subfile ZRB-1-0075 will not be before the Court until that time.

II. Defendants are Already Named Parties to This Lawsuit

Defendants' *Motion* seeks “an order granting them leave to intervene as Defendants in Subfile ZRB-1-0075 Consolidated, pursuant to Fed. R. Civ. P. 24(a)(2), or in the alternative,

pursuant to Fed. R. Civ. P. 24(b)(1).” *Motion* at p. 1. However, Defendants are already named parties to this lawsuit. On June 27, 2012, the Court entered its *Order* allowing the substitution of Edward J. Bawolek and Suzan J. Bawolek for the Defendant J. Bawolek and Suzan J. Bawolek Revocable Trust. *Unopposed Order Granting Edward J. Bawolek and Suzan J. Bawolek Revocable Trust’s Motion to Substitute Party and Counsel* (No. 2794). As they are already parties to this cause of action, intervention for the Bawoleks under Fed.R.Civ.P. 24 is unnecessary, whether under section (a)(2) (Intervention of Right) or (b)(1) (Permissive Intervention).

III. Defendants’ *Motion* is Not Accompanied by a Pleading That Sets Out Their Claim

In addition, Defendants, the Bawoleks’ *Motion* was not accompanied by “a pleading that sets out the claim or defense for which the intervention is sought,” as required by the Rule. *See* Fed. R. Civ. P. 24(c) (“motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.”). Defendants’ *Motion* merely states that “the Bawoleks have a direct, substantial and immediate interest in the Subfile ZRB-2-0075.” *Motion* at ¶ 1.

WHEREFORE, Plaintiff State of New Mexico requests this Court deny Defendants’ *Motion to Intervene*.

Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on July 13, 2012, I filed the foregoing 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.