

**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. 01cv00072-MV/LAM
)	
ZUNI INDIAN TRIBE, NAVAJO NATION,)	ZUNI RIVER BASIN
)	ADJUDICATION
Plaintiffs in Intervention)	
)	
v.)	Subfile No. ZRB-2-0014
)	
A & R PRODUCTIONS, et al.,)	
)	
Defendants)	
_____)	

**EDWARD J. BAWOLEK AND SUZAN J. BAWOLEK CROSS-CLAIM
AGAINST THE NEW MEXICO COMMISSIONER OF PUBLIC LANDS**

Edward J. Bawolek and Suzan J. Bawolek (hereinafter the "Bawoleks"), defendants *pro se* in Subfile ZRB-2-0014 of the above-captioned matter, hereby file their Cross-claim against The New Mexico Commissioner of Public Lands (hereinafter the "Commissioner") in this action.

Overview

Document [2918], the Bawoleks' Amended Answer to Amended Complaint [222] is incorporated herein by reference in its entirety.

I. Nature of the Action

1. The stated nature of this action, as provided in the Plaintiffs' Amended Complaint, [Doc. 222] is "an action seeking a comprehensive general stream system adjudication pursuant to federal law and NMSA 1978, §§72-4-13 to 72-4-20, of all claims to the right to the use of the waters of the Zuni River stream system in New Mexico as well as a declaration from this Court

setting forth the priority and extent of all parties right to the use of the waters of the Zuni River stream system."

II. Jurisdiction and Venue

2. The Bawoleks state that non-exclusive jurisdiction is conferred in this Court under 28 U.S.C. § 1345, and that this Court has non-exclusive venue under 28 U.S.C. §§ 111 and 1391(b)(2) and that relief may be granted pursuant to 28 U.S.C. §§ 2201 and 2202.

III. Parties

3. All those who claim a right or interest in the use of the waters of the Zuni River stream system in New Mexico are necessary and indispensable parties in this general stream system adjudication.

4. The Bawoleks were joined in this action (at the time as real parties at interest for the Bawolek Trust) as defendants on 1/26/2006 [Doc. 470]. The Bawoleks were substituted as Defendants *pro se* for the Bawolek Trust on 6/27/2012 [Doc. 2794].

5. The New Mexico Commissioner of Public Lands was joined in this action as defendant on 1/19/2001 [Doc. 1].

6. Both of the Bawoleks and the Commissioner have submitted to the Court's authority in this matter and are therefore are subject to the Court's authority in the matter at hand.

IV. Factual Background

7. The Bawoleks are the Lessees for Agricultural Lease GR1434 (hereinafter "the leased land") which commenced on October 1, 2011 and will expire at midnight September 30, 2016. Said lease encompasses Section 2, Township 5 North, Range 17 West N.M.P.M, Cibola County New Mexico. Further, the leased land includes water use features described in the ZUNI RIVER

BASIN ADJUDICATION HYDROGRAPHIC SURVEY REPORT FOR SUB AREAS 9 & 10 as Well 10C-4-W15 and Pond 10C-4-SP33. The water rights associated with these features were enumerated in a Consent Decree filed 3/28/2013 in this Action by the Commissioner and Plaintiffs [Doc. 2857], as identified by Subfile ZRB-1-0075 Consolidated.

8. The Bawoleks acquired the rights to the leased land when purchasing deeded lands immediately adjacent to the leased land. The Warranty Deeds conveyed said deeded lands from the prior owners to the Bawoleks "Together with all grazing rights to State of New Mexico Grazing Lease GR1434 dated October 1, 1996." A copy of the Warranty Deeds is provided as Exhibit A to this filing.

9. Grazing Lease GR1434 includes documented improvements, comprising Well 10C-4-W15 and Pond 10C-4-SP33. These improvements appear on required filings with the Commissioner, and redacted copies were provided to this Court in document [2795-1] as part of an earlier filing. A full copy of the current lease in effect for GR1434 is provided as Exhibit B to this filing.

10. The Commissioner explicitly recognizes that the lessee owns the water features (improvements) present on leased lands. Attention is directed to Exhibit C, a letter from the Commissioner to lessees, dated August 27, 2012. In that letter, the Commissioner writes "Recognizing that improvements belong to the lessee...physically using water wells...is prohibited without the consent of the agricultural lessee."

11. The Commissioner currently requires an assignment of water rights from any lessee making a new application to enter state trust land for "the discovery, appropriation, and diversion of groundwater to be put to beneficial use." A copy of the required application form is provided as Exhibit D.

12. The Bawoleks have not assigned any water rights to the Commissioner. Therefore the Bawoleks contacted Counsel for the Commissioner to inquire whether any previous lessees for GR1434 had made an assignment comparable to that shown in Exhibit D. Counsel for the Commissioner has not provided the Bawoleks with any records evidencing such assignment.

V. Causes of Action

13. This Cross-claim is brought pursuant to 28 USC §2201. There is an actual controversy between the Bawoleks and the Commissioner, and the Bawoleks seek a declaration of the rights and/or legal relations between them and the Commissioner.

14. The Bawoleks own real property located in the Zuni River Basin, and said property (hereinafter the "Bawolek Property") is included within the boundaries of the Zuni River Basin Adjudication. Appurtenant to the Bawolek Property are the rights to Grazing Lease GR1434 and ownership of the improvements on said lease.

15. Since their purchase of the Bawolek Property, the Bawoleks have continually restored and developed the water resources of said Property and have beneficially used and diverted water in continuance of historical beneficial use, as well as to their own purposes prior to their joinder in this Action. Analogously, the Bawoleks have beneficially used and diverted water in continuance of historical beneficial use on Grazing Lease GR1434 by virtue of the improvements thereon. By virtue of the Doctrine of Prior Appropriation, a water right (unless otherwise conveyed or transferred) belongs to the appropriator. Further, as owners of the improvements on Grazing Lease GR1434, the Bawoleks must necessarily be the appropriators of any water placed to beneficial use by those improvements.

16. As the appropriators of water by means of Well 10C-4-W15 and Pond 10C-4-SP33, the Bawoleks allege that they are the proper owners of any adjudicated water rights associated with these features.

17. New Mexico case law provides precedent for recognizing individual ownership of water rights associated with public lands. *See First State Bank v. McNew*, 33 N.M. 414, 269 P. 56 (1928). In the Syllabus By the Court, the Court summarized:

"5. Where one holding possessory right to public land for grazing purposes by virtue of an implied license from the federal government and the laws of New Mexico, and the ownership of sufficient living permanent water upon such range for the proper maintenance of cattle, signifies his intention to make a permanent water right incident to such public land, he may sell and verbally transfer said water rights with such possessory right in the land."

18. The Bawoleks have not conveyed any water rights to the Commissioner, and have received no evidence of any such conveyance occurring prior to their assumption of the rights to Grazing Lease GR1434.

19. The Bawoleks have a property right in the continued beneficial use of water as codified in the New Mexico State Constitution in art. XVI, §3.

20. The submission of this Cross-claim is timely, as the Plaintiffs have motioned the Court [in Doc. 2923] to set a pre-trial conference for settling the controversy between the Plaintiffs and the Bawoleks. The Court's response is pending. For purposes of efficiency, and in compliance with their duty under Fed. Rules of Civil Procedure 1, the Bawoleks contend that the

time is ripe to raise their controversy with the Commissioner so that it can be resolved in conjunction with the upcoming litigation.

VI. Prayer for Relief

20. WHEREFORE, the Bawoleks request that the Court:

(1) Enter Judgment recognizing that the Bawoleks' are the legitimate owners of water rights associated with Well 10C-4-W15 and Pond 10C-4-SP33.

(2) Enter an order to include said water features into Subfile ZRB-2-0014 for adjudication.

(3) Award the Bawoleks such other and further relief as the Court may deem just and proper.

Dated February 8, 2014.

Respectfully submitted,

By: /s/ Edward J. Bawolek and /s/ Suzan J. Bawolek
2200 West Sagebrush Court
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on February 8, 2014, I filed the foregoing Cross-claim electronically through the CM/ECF system, which caused CM/ECF participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Edward J. Bawolek
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