

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/WDS
ZUNI INDIAN TRIBE and NAVAJO NATION,)	
Plaintiffs-in-Intervention)	
)	
)	ZUNI RIVER BASIN
v.)	ADJUDICATION
)	
A & R PRODUCTIONS, et al.,)	

STATE OF NEW MEXICO’S MOTION TO DISMISS
COUNTERCLAIM OF DEFENDANT JOANN V. DAVIS RESIDUAL TRUST

The State of New Mexico *ex rel.* State Engineer (“State”) hereby moves to dismiss the counterclaim of Defendant Joann V. Davis Residual Trust date July 28, 2003 (Doc. No. 1260) (“Counterclaim”) pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for its failure to state a claim under which relief can be granted, and in support thereof, states as follows:

1. The Counterclaimant “claims ownership of all water that falls upon, flows through, or lies beneath land that it owns or has an interest in, including, but not limited to the right to divert, impound, pump, and otherwise use those waters.” Counterclaim, ¶ 2.
2. The New Mexico Constitution provides that beneficial use is the “measure, the basis and the limit” of all water rights in New Mexico. N.M. Const. art. XVI, §3.
3. This Court has applied that provision in this case, in its denial of the Western New Mexico Water Preservation Association’s Motion to Certify Questions to the New Mexico Supreme Court (Doc. No. 396). In its Memorandum and Opinion, the Court stated, “New Mexico law is clear on the subject. The constitutional provisions and statutes . . . as well as

abundant case law clearly state that beneficial use defines the extent of a water right.”

Memorandum Opinion and Order, p. 4 (Doc. No. 733).

4. Counterclaimant makes no allegation that it has appropriated or beneficially used “all the water that falls upon, flows through, or lies beneath land that it owns or has an interest in,” and therefore has failed to state a claim under New Mexico law for a corresponding water right.

WHEREFORE, the State requests the Court dismiss the counterclaim of Defendant Joann V. Davis Residual Trust date July 28, 2003 pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim under which relief can be granted.

Electronically Filed

/s/ Edward C. Bagley

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 26, 2007, I filed the foregoing State of New Mexico's Motion to Dismiss Counterclaim of Defendant Joann V. Davis Residual Trust date July 28, 2003 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.