

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,)	
)	
v.)	
)	
A&R PRODUCTIONS, et al.)	
)	
Defendants.)	
_____)	

**UNITED STATES’ MOTION TO DISMISS COUNTERCLAIM OF DEFENDANT
JOANN V. DAVIS RESIDUAL TRUST**

Plaintiff United States of America (“United States”) hereby moves to dismiss the Counterclaim brought in the *Answer by Defendant JoAnn V. Davis Residual Trust to Amended Complaint and Counterclaim* (Doc. No. 1260) (“Answer of J.V. Davis Trust”).

INTRODUCTION

On September 6, 2007, Defendant JoAnn V. Davis Residual Trust dated July 28, 2003 filed an answer to the United States’ Amended Complaint. The answer included a Counterclaim. Answer of J.V. Davis Trust at 9. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the United States moves to dismiss the Counterclaim for failure to state a claim upon which relief can be granted.

STANDARD OF REVIEW

Rule 12(b)(6) permits a party to move for dismissal of a claim based upon the “failure of the pleading to state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). When ruling on a motion made pursuant to this rule, a court must accept as true the material facts alleged in the complaint. See Grossman v. Novell, Inc., 120 F.3d 1112, 1118 (10th Cir. 1997). A court may not dismiss an action unless “it appears that the plaintiff can prove no set of facts in support of the claims that would entitle the plaintiff to relief.” Id. (quoting Roman v. Cessna Aircraft Co., 55 F.3d 542, 543 (10th Cir. 1995)).

ARGUMENT

In the Counterclaim, Defendant “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.” Answer of J.V. Davis Trust at 9. Defendant is not and cannot be entitled to relief on this claim.

In New Mexico, water rights are determined exclusively by beneficial use. The New Mexico Constitution provides, “Beneficial use shall be the basis, the measure and the limit of the right to the use of water.” N.M. Const. art XVI, § 3. The principle that water rights are determined by beneficial use applies to all appropriations of public waters. See New Mexico ex rel. Martinez v. City of Las Vegas, 89 P.3d 47, 58 (N.M. 2004) (citing New Mexico ex rel. State Engineer v. Crider, 431 P.2d 45, 48 (N.M. 1967)). The only way to acquire a perfected right to water is to apply that water to a beneficial use. Id. (citing State ex rel. Community Ditches v.

Tularosa Community Ditch, 143 P. 207, 213 (N.M. 1914)). Accordingly, an appropriator can only acquire a right to as much water as he or she applies to a beneficial use. Id.

This Court has applied the beneficial use rule in this very case. In its June 15, 2006 *Memorandum Opinion and Order* (Doc. No. 733) denying the Western New Mexico Water Preservation Association's motion to certify questions to the New Mexico Supreme Court, this Court stated, "New Mexico law is clear on the subject. The constitutional provision and statutes . . . as well as abundant case law clearly state that beneficial use defines the extent of a water right." Mem. Op. at 4.

Here, Defendant makes no allegation that it has appropriated or beneficially used any, let alone all, of "the water that falls upon, flows through, or lies beneath land that it owns or has an interest in." Therefore, Defendant has failed to state a claim under New Mexico law for a water right. In addition, Defendant's assertion of a water right that is not based on beneficial use is contrary to the law of the case. The law of the case doctrine holds that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." United States v. Monsisvais, 946 F.2d 114, 115 (10th Cir. 1991) (quoting Arizona v. California, 460 U.S. 605, 618 (1983)). In its previous Memorandum Opinion and Order in this case, this Court has already affirmed the well-established rule that water rights in New Mexico are determined by beneficial use. Defendant cannot prevail on a claim that it has acquired water rights without beneficial use.

CONCLUSION

For the reasons stated above, the United States respectfully requests that the Counterclaim of Defendant JoAnn V. Davis Residual Trust dated July 28, 2003 be dismissed.

DATED: October 3, 2007

Electronically Filed

/s/ Bradley S. Bridgewater

BRADLEY S. BRIDGEWATER
U.S. Department of Justice
1961 Stout Street – 8th Floor
Denver, CO 80294
(303) 844-1359

COUNSEL FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on October 3, 2007, I filed the foregoing *United States' Motion To Dismiss Counterclaim Of Defendant Joann V. Davis Residual Trust* 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. AND I FURTHER CERTIFY that on such date I served the foregoing on the following non-CM/ECF Participants in the manner indicated:

Via Regular Mail:

D L Sanders
New Mexico Office of the State Engineer
PO Box 25102
Santa Fe, NM 87504-5102

Michael J Thomas
Commissioner of Public Lands
General Counsel
PO Box 1148
Santa Fe, NM 87504-1148

_____/s/_____
Bradley S. Bridgewater