

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’ CONSOLIDATED REPLY IN SUPPORT OF MOTIONS TO
DISMISS COUNTERCLAIMS**

Plaintiff United States of America (“United States”) hereby replies to the *Response in Opposition to United States’ Motion to Dismiss Counterclaim of Paul Davis Survivor’s Trust* (Doc. No. 1325) (“Paul Davis Trust Response”), the *Response in Opposition to United States’ Motion to Dismiss Counterclaims of JoAnn V. Davis Residual Trust* (Doc. No. 1326) (“JoAnn V. Davis Trust Response”), the *Response in Opposition to United States’ Motion to Dismiss Counterclaim of Lisa Baeza* (Doc. No. 1327) (“Lisa Baeza Response”), and the *Response in Opposition to United States’ Motion to Dismiss Counterclaim of Luis Mario Baeza* (Doc. No. 1328) (“Luis Baeza Response”).¹ Based on the identity of issues raised in the responses, the Paul Davis Trust Response and the JoAnn V. Davis Trust Response will be

¹ The motions to which these responses relate are Documents 1285, 1286, 1287, and 1288.

collectively referred to herein as the “Trust Responses.” Likewise, the Lisa Baeza Response and the Luis Baeza Response will be collectively referred to as the “Baeza Responses.”

The United States concurs in, and adopts by this reference, the arguments of law stated in the *State of New Mexico’s Reply To Defendant JoAnn V. Davis Residual Trust’s Response In Opposition To State’s Motion To Dismiss Counterclaim* (Doc. No. 1347), the *State of New Mexico’s Reply To Defendant Paul Davis Survivor’s Trust’s Response In Opposition To State’s Motion To Dismiss Counterclaim* (Doc. No. 1358), the *State of New Mexico’s Reply To Defendant Luis Mario Baeza’s Response In Opposition To State’s Motion To Dismiss Counterclaim* (Doc. No. 1360), and the *State of New Mexico’s Reply To Defendant Lisa Baeza’s Response In Opposition To State’s Motion To Dismiss Counterclaim* (Doc. No. 1364). By way of a further reply, the United States asserts the following:

The Responses Fail to Show that the Counterclaims State Claims Upon Which Relief May be Granted

1. New Allegations Stated for the First Time in the Responses Should Not be Considered

1.1 On a Rule 12(b)(6) Motion to Dismiss, Material Outside the Pleadings May be Excluded from Consideration

Both the Trust Responses and the Baeza Responses contain, for the first time, allegations that the Defendants have made beneficial use of water on their properties. These late allegations are unsupported by affidavits or otherwise, and may be considered by the Court only if the Court converts the United States’ motion to dismiss into a motion for summary judgment pursuant to Fed.R.Civ.P. 56 and allows all parties to present supporting material. Fed.R.Civ.P.

12(b); Alexander v. Oklahoma, 382 F.3d 1206, 1214 (10th Cir. 2004) (“Where a party has moved to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted and matters outside of the pleadings have been presented to the court for consideration, the court must either exclude the material or treat the motion as one for summary judgment.”); Fonte v. Board of Managers of Continental Towers Condominium, 848 F.2d 24, 25 (2d Cir. 1988) (“Rule 12(b) gives district courts two options when matters outside the pleadings are presented in response to a 12(b)(6) motion: the court may exclude the additional material and decide the motion on the complaint alone or it may convert the motion to one for summary judgment under Fed.R.Civ.P. 56 and afford all parties the opportunity to present supporting material.”). The United States urges the Court to exclude the new allegations in the responses from consideration because, even if properly substantiated by affidavits or other evidence, these allegations could not sustain the claim to “ownership of all water that falls upon, flows through, or lies beneath land that [the Defendant] owns or has an interest in” that Defendants pled in each of the Counterclaims.

1.2 The Mere Intent to Use Water, Without Actual Application of Water to Beneficial Use, Does Not Establish a Water Right Under New Mexico Law

All of the responses appear to admit that beneficial use is the basis, the measure and the limit of the right to the use of water under New Mexico law. However, they lamely attempt to obfuscate the failure of the counterclaims to allege such beneficial use by asserting abstractly that “[t]he intent to use all water that falls upon, flows through, or lies beneath land” owned by Defendants is “consistent” with the law of beneficial use.

An intent to use water is consistent with beneficial use, but it is not by any means sufficient to establish beneficial use or a water right. C.f., Sun Vineyards, Inc. v. Luna County Wine Development Corp., 107 N.M. 524, 528, 760 P.2d 1290, 1293 (1988) (“It is the act of putting the water to beneficial use, not the intent to do so, that is the measure and the limit to the vesting” of a transferred right.) Indeed, the responses all concede that an intent to apply water must be “followed with due diligence toward application and ultimate application” to establish a right to take water. Nonetheless, neither the counterclaims, nor the responses, assert that Defendants have made application, exercised due diligence toward application, or even that they in fact have the intent to apply “all water that falls upon, flows through, or lies beneath” their property. While the responses belatedly assert some past uses and an intent “to apply available water to additional uses, including farming and ranching,” the responses do not assert that these existing or intended additional uses consume or would consume, or require diversion of, all of the water claimed by the counterclaims. The counterclaims themselves say nothing whatsoever about actual use, or even intent to use, any of the water claimed.

Accordingly, the counterclaims should be dismissed. To the extent the responses indicate these defendants now desire to amend their counterclaims to seek only a judicial determination of the existence and priority of their water rights under the applicable New Mexico law, they seek a relief identical to that prayed for in the United States Amended Complaint (Doc No. 222) and the amended counterclaims would be purely redundant. See Mille Lacs Band of Chippewa Indians v. Minnesota, 152 F.R.D. 580, 582 (D. Minn. 1993) (Affirming magistrate judge’s denial of leave to amend answer to include a counterclaim where the “proposed counterclaim is redundant and will be moot upon disposition of the plaintiffs’ claims.”)

1.3 The March 31, 2004 Notice of Claim of Water Rights (Doc. No. 320) is Irrelevant

The Trust Responses differ from the Baeza Responses by the inclusion of three paragraphs that allege (1) that each Trust is a successor in interest to the Paul Davis and JoAnn V. Davis Revocable Trust dated May 10, 1981, (2) that the Paul Davis and JoAnn V. Davis Revocable Trust dated May 10, 1981 filed a notice on March 31, 2004 (Doc. No. 320) (“March 31, 2004 *Notice*”) claiming all water that falls upon, flows through, or lies beneath land that the trust owned or had an interest in, and (3) that the United States “never challenged that claim.” However, the Trust Responses contain no assertion, or any citation of legal authority suggesting, that the March 31, 2004 *Notice* has any legal significance relevant to the United States’ motions to dismiss the counterclaims asserted on behalf of the Trusts. Indeed, it has none.

The March 31, 2004 *Notice* referenced by the Trust Responses was not a pleading, see Fed.R.Civ.P. 7(a), or a motion, Fed.R.Civ.P. 7(b)(1), and the United States had no obligation to file any response thereto. Moreover, unlike the Paul Davis Survivors Trust Dated July 28, 2003 and the JoAnn V. Davis Residual Trust Dated July 28, 2003, which were joined as parties defendant by this Court’s November 1, 2006 *Order Granting Motion to Join Additional Parties Defendant* (Doc. No. 857), the Paul Davis and JoAnn V. Davis Revocable Trust dated May 10, 1981 was not named as a defendant in the United States *Complaint or Amended Complaint*, ever joined as a party to this action pursuant to Fed.R.Civ.P. 19 or 20, or granted leave to intervene pursuant to Fed.R.Civ.P. 24. Accordingly, the March 31, 2004 *Notice* is a legal nullity to the extent filed on behalf of the Paul Davis and JoAnn V. Davis Revocable Trust

dated May 10, 1981. Nothing whatsoever of relevance to the United States' motions to dismiss can be inferred from any lack of a response to the March 31, 2004 *Notice*.

On the record, the United States has in fact filed timely "challenges" to the trusts' counterclaims asserting ownership of all water that falls upon, flows through, or lies beneath land they own or have an interest in, specifically: the motions to dismiss to which the Trust Responses are responding. See Doc. No. 1285 and Doc. No. 1286. The March 31, 2004 *Notice* is not material to those motions.

2. Defendant Paul Davis Survivor's Trust Has Conceded Dismissal of Its Counterclaim Based on Shares in the Ramah Valley Acequia Community Ditch and the Ramah Land and Irrigation Company

The *United States' Motion to Dismiss Counterclaim of Defendant Paul Davis Survivor's Trust*, at page 3, asserted that Defendant had failed to make "any allegation that it has appropriated, or applied to beneficial use, any water in connection with shares Defendant alleges it owns in the Ramah Valley Community Ditch Association and the Ramah Land and Irrigation Company." The Paul Davis Trust Response omits any reference to ownership of shares, or water rights associated with them, and therefore concedes that the Defendant's Counterclaim, to the extent based on alleged ownership of such shares, should be dismissed.

CONCLUSION

For the reasons stated above, the United States respectfully urges the Court to dismiss the Counterclaims filed by Defendants Paul Davis Survivor's Trust dated July 28, 2003

(Doc. No. 1259), JoAnn V. Davis Residual Trust dated July 28, 2003 (Doc. No. 1260), Lisa Baeza (Doc. No. 1262), and Luis Mario Baeza (Doc. No. 1261).

DATED: November 1, 2007

Electronically Filed

/s/ Bradley S. Bridgewater

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 1, 2007, I filed the foregoing *United States' Consolidated Reply In Support Of Motions To Dismiss Counterclaims* 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.