

**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,	)	Subfile No. ZRB-2-0092
	)	
v.	)	
	)	
A & R PRODUCTIONS, et al.	)	
	)	
Defendants.	)	
_____	)	

**MOTION TO DISMISS COUNTERCLAIM FOR DECLARATORY JUDGMENT  
OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT**

The Plaintiff United States of America (“United States”) hereby moves the Court, pursuant to Fed.R.Civ.P. 12(b)(1) and (6), to dismiss the counterclaim for declaratory judgment asserted in Defendants’ *First Amended Answer and Counterclaim for Declaratory Judgment* filed October 3, 2011 [No. 2716] (“Amended Answer”) for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted. In the alternative, the United States moves the court to grant summary judgment against the Defendants on their counterclaim. In support of this motion, the United States asserts:

**STATEMENT OF MATERIAL FACTS**

1. Defendants' Amended Answer, on pages 2 – 4, asserts a counterclaim for declaratory judgment.
2. Defendants' counterclaim fails to state the grounds for the Court's jurisdiction and fails to allege that the United States has waived sovereign immunity to Defendants' counterclaim.
3. Defendants' counterclaim seeks declaratory relief concerning Defendants rights to develop a well and divert water under a permit issued by the New Mexico Office of the State Engineer ("OSE") and assigned Water Right File Number G-01068 (the "G-01068 permit"). Amended Answer at 4 and Exhibit A.
4. Defendants' counterclaim does not assert that any groundwater diversion Defendants have established pursuant to the referenced G-01068 permit is within the Zuni River Stream System or the geographic scope of this adjudication.
5. Indeed, as indicated by the OSE Water Right Summary for Water Right File Number G-01068 submitted herewith as Exhibit US-1, the point of diversion established pursuant to the G-01068 permit lies in Section 16 of Township 13 North, Range 17W, which is not within the geographic scope of this adjudication.
6. Neither in the August 4, 2003 *Amended Complaint*, nor in any other pleading filed in this action, has the United States sought relief against Defendants concerning their rights under the G-01068 permit. Other than a purely subjective and speculative "upon information and belief" statement on page 3 of the Amended Answer, Defendants have alleged no facts supporting their conclusory allegation that an actual controversy exists between them and the United States concerning their rights under the

G-01068 permit. Because the well in question is not within the Zuni River stream system, the United States has taken no action whatsoever with regard to any rights Defendants may have under the referenced permit.

### **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 (10<sup>th</sup> 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)).

Pursuant to Fed.R.Civ.P. 12(d), “[i]f, on a motion under Rule 12(b)(6) . . . matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” Rule 56, in turn, provides the “court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” While “[t]he burden of showing the absence of a genuine issue of material fact, and an entitlement to judgment as a matter of law is upon the movant, . . . a party opposing summary judgment ‘must do more than simply show that there is some metaphysical doubt as to the material facts.’” *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1196 (10th Cir. 2005) (quoting *Matsushita Electric Industrial Co. v. Zenith Radio Corporation*, 475 U.S. 574, 586 (1986)).

**ARGUMENT**

**I. Defendants' Counterclaim Should be Dismissed**

**A. Defendants' Counterclaim Fails to Allege Grounds for this Court's Jurisdiction**

This Court's May 21, 2003 *Order on Special Master's Report re Geographic Scope of Adjudication* at 1 (No. 200) ("May 21, 2003 Order") adopted the depiction of the Zuni River surface water drainage basin provided on the map attached to the January 6, 2003 *United States' Identification of Zuni River Stream System Boundary* (No. 156) and the further description provided in the January 14, 2003 *Supplemental Identification of Zuni River Stream System Boundary* (No. 158). The May 21, 2003 Order, at 1, further provided: "The groundwater diversions which lie within the surface boundaries shall be included in the adjudication. The groundwater considered shall be limited to that which lies within the surface boundaries, as though their lines were drawn vertically through the earth."

Consistent with the May 21, 2003 Order, the *Amended Complaint*, at 14, asserts:

The boundary of this adjudication is the surface water drainage of the Zuni River stream system. . . . Groundwater diversions which lie within the surface boundaries are included in this adjudication. The groundwater considered in this adjudication is limited to that which lies within the surface boundaries, as though their lines were drawn vertically through the earth.

Accordingly, the *Amended Complaint*, on its face, states no claim for relief concerning surface water or groundwater diversions that are not within the surface boundaries of the Zuni River stream system.

Because the *Amended Complaint* does not assert claims concerning groundwater diversions outside the Zuni River stream system, any counterclaim concerning such a diversion does not “arise[] out of [a] transaction or occurrence that is the subject matter of the [*Amended Complaint*],” Fed.R.Civ.P. 13(a)(1)(A), and therefore is not a compulsory counterclaim within the meaning of Rule 13.<sup>1</sup>

Rule 13(b), concerning permissive counterclaims, provides that a “pleading may state as a counterclaim against an opposing party any claim that is not compulsory.” However, such “permissive counterclaims must be supported by independent grounds of federal jurisdiction.” 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1422 at 202 (2010).

Accordingly, any counterclaim concerning a groundwater diversion that is presented in this case must either (1) assert that the diversion in question lies within the Zuni River stream system as defined by the orders of this Court, or (2) assert an independent ground of federal jurisdiction over a claim against the United States. Defendants’ counterclaim fails on both counts.

In addition to its failure to allege that Defendants’ diversion of water pursuant to their G-01068 permit is within the Zuni River stream system, Defendants’ counterclaim also fails to state any independent grounds for the court’s jurisdiction over the claim. Defendants’ Amended Answer, at 2, invokes 28 U.S.C. § 2201, the Declaratory Judgment Act.<sup>2</sup> However, “the operation of the Declaratory Judgment Act is

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<sup>1</sup> As a practical matter, if this were not the case, then any defendant named in this action having groundwater rights claims anywhere outside the Zuni River stream system in the State of New Mexico would be compelled to assert all such claims in this civil action.

<sup>2</sup> In pertinent part, 28 U.S.C. § 2201(a) provides:

In a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such

procedural only.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). By the Declaratory Judgment Act “Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction.... Jurisdiction . . . was not altered by the Declaratory Judgment Act.” *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). Accordingly, Defendants’ reference to the Declaratory Judgment Act only begs the question of what grounds the Court has to exercise jurisdiction.

“Because the jurisdiction of federal courts is limited, there is a presumption against ... jurisdiction, and the party invoking federal jurisdiction bears the burden of proof.” *Merida Delgado v. Gonzales*, 428 F.3d 916, 919 (10th Cir.2005) (quoting *Marcus v. Kan. Dep’t of Revenue*, 170 F.3d 1305, 1309 (10th Cir.1999)). Here, defendants have not alleged a basis for this court to exercise jurisdiction over their claims concerning the G-01068 permit. Moreover, Defendants have wholly failed to allege any applicable waiver of the sovereign immunity of the United States. Rule 13(d); 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* §1427 at 234 (2010) (“If defendant’s claim arises from a different transaction or occurrence, . . . then it is in effect an independent suit and it may be asserted as a setoff or a counterclaim only if the government has waived its sovereign immunity.”)

***B. Defendants’ Counterclaim Fails to State a Claim Upon Which Relief Can be Granted***

Moreover, even if jurisdiction were established, defendants have failed to allege any facts, other than their subjective speculation, to support their conclusory allegation that an actual controversy concerning the G-01068 permit exists between them

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judgment shall have the force and effect of a final judgment or decree and shall be reviewable as such.

and the United States. In *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941) the Court interpreted the “actual controversy” requirement to mean “whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interest, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007), quoted this *Maryland Casualty* holding and summarized other decisions by the Court as requiring “that the dispute be ‘definite and concrete, touching the legal relations of parties having adverse legal interests’; and that it be ‘real and substantial’ ....” (Citing *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937)). In contrast, Defendants here have alleged only entirely unspecified “information” and their speculative “belief” that Plaintiffs “intend” to take some future action concerning Defendants’ G-01068 permit. They therefore have not shown the existence of an actual controversy within the meaning of 28 U.S.C. § 2201.

Accordingly, Defendants’ counterclaim must be dismissed for lack of jurisdiction over the subject matter and for failure to state a claim upon which relief can be granted.

## **II. In the Alternative, the United States is Entitled to Summary Judgment on Defendants’ Counterclaim**

While the United States contends that Defendants’ Counterclaims should be dismissed because Defendants have failed to allege either grounds for this Court’s jurisdiction or a claim upon which relief can be granted, the United States further contends that the undisputed material facts asserted *supra*, at 2-4, establish that the

United States is entitled to summary judgment. The sole matter outside the pleadings presented by the United States in support of this motion is Exhibit US-1.

Exhibit A attached to Defendants' Amended Answer is a "Transaction Summary" for Water Right File Number G-01068, obtained from the OSE's online Water Administration Technical Engineering Resource System (W.A.T.E.R.S.) database on October 3, 2011. Exhibit US-1, submitted herewith, is the "Water Right Summary" for the same Water Right File Number, obtained from the same source on November 21, 2011. The Water Right Summary includes some information not shown on the Transaction Summary. In pertinent particular, Water Right Summary shows the location of the point of diversion for the G-01068 permit by the Public Land Survey System, to be in Section 16, Township 13N, and Range 17W.

Section 16 of Township 13 North, Range 17W, is not within the depiction of the Zuni River surface water drainage basin provided on the map attached to the January 6, 2003 *United States' Identification of Zuni River Stream System Boundary* (No. 156) or the further description provided in the January 14, 2003 *Supplemental Identification of Zuni River Stream System Boundary* (No. 158) and, therefore, by virtue of this Court's May 21, 2003 Order, the Defendant's point of diversion under the G-01068 permit is not within the area to be adjudicated in this civil action.

Thus, not only have Defendants' failed to allege that the water right they claim in their counterclaim lies within the geographic scope of this adjudication, in fact it does not lie within the geographic scope of this adjudication. Accordingly, the United States is entitled to a summary judgment denying Defendants any relief on their Counterclaim



**CONCLUSION**

For the foregoing reasons, the United States respectfully moves the Court to dismiss Defendants' Counterclaim or, in the alternative, to grant the United States summary judgment denying Defendants any relief on their Counterclaim.

Respectfully submitted,

/s/ Bradley S. Bridgewater  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on January 30, 2012, I filed the foregoing *Motion to Dismiss Counterclaim for Declaratory Judgment or, in the Alternative, for Summary Judgment* electronically through the CM/ECF system, which caused parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

\_\_\_\_\_/s/\_\_\_\_\_  
BRADLEY S. BRIDGEWATER