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-BDB/LFG
ZUNI INDIAN TRIBE, NAVAJO NATION,	)	ZUNI RIVER BASIN ADJUDICATION
Plaintiffs in Intervention	)	
v.	)	Subfile No. ZRB-1-0075 Consolidated
A & R PRODUCTIONS, et al.,	)	
Defendants	)	

REPLY BRIEF IN SUPPORT OF MOTION TO INTERVENE IN SUBFILE ZRB-1-0075 CONSOLIDATED

Edward J. Bawolek and Suzan J. Bawolek (hereinafter the "Bawoleks"), defendants *pro se* in Subfile ZRB-2-0014 of the above-captioned matter, hereby submit this Reply Brief in Support of their pending motion (hereinafter the "Bawolek Motion", [Doc. 2795]) seeking leave to intervene as Defendants in Subfile Proceeding ZRB-1-0075 Consolidated (hereinafter the "Consolidated Subfile"). This reply brief responds to the answer briefs filed by the United States of America (the "USA") [Doc. 2797] and the State of New Mexico *ex rel.* State Engineer (the "OSE") [Doc. 2798]. The foregoing parties are collectively referred to as the "Plaintiffs." The USA and OSE adopt similar arguments in their answer to the Motion; the OSE raises an additional argument in its Brief that will also be addressed.

INTRODUCTION

The USA observes in its Brief that the Bawolek Motion in some places makes reference to subfile ZRB-2-0075 Consolidated, and correctly concludes that this is a typographical error, the intended reference being ZRB-1-0075 Consolidated. The Bawoleks apologize to the Court for this unintentional mistake.

Plaintiffs object to the Bawolek Motion on the grounds that the Bawoleks are already named parties to this adjudication. *See* USA Brief at pg 1; OSE Brief at pg 2. Plaintiffs also raise an objection arguing that the Bawolek Motion in stating "a direct, substantial and immediate interest" in the Consolidated Subfile proceeding (as a consequence of holding Grazing Lease GR1434) fails to specify the relief sought (USA Brief at pg 3) and was not accompanied by a pleading that sets out their claim (OSE Brief at pg 3). Plaintiffs also argue that the Bawoleks will have an opportunity to raise their concerns during the inter se phase of this adjudication, and on this basis the OSE asserts the Bawolek Motion to be untimely (OSE Brief at pg 1).

The Bawoleks reply as follows:

I. The Bawolek's Status as Defendants in Another Subfile is Irrelevant.

Plaintiffs argue that the Bawolek Motion is moot, given that the Bawoleks have already been joined in the above-captioned action. The Bawoleks stipulate to their having been joined in the action, said joinder being associated with subfile ZRB-2-0014.

The threshold issue in this instance is what rights the Bawoleks would have with respect to the ZRB-1-0075 Consolidated subfile if they were not already joined in the above-captioned action with respect to subfile ZRB-2-0014: In particular, on the merits of their Motion, would the Bawoleks be permitted to directly participate in the negotiations for ZRB-1-0075 Consolidated?

If the answer is affirmative, the Bawolek Motion should be granted. The intent behind Fed. R. Civ. P. 24(a)(2) and Fed. R. Civ. P. 24(b)(1) as invoked by the Bawoleks is the protection of their rights as a matter of law.

The USA would have the Court conclude that Rule 24 does not apply to a specific subfile, but only to the action as an entirety. This is a logically flawed argument: As the subfiles are part of the action, the Federal Rules of Civil Procedure which govern the action must necessarily apply to the subfiles as well. Indeed, by way of example, the USA routinely invokes Fed. R. Civ P. 55(b)(2) when moving for default judgment against particular subfile defendants. By the USA's logic, if the Federal Rules of Civil Procedure did not govern subfiles, its invocation of Rule 55 would be invalid. To further dissect the USA argument, attention is directed to its citation of Fed.R.Civ.P. 16(c)(2)(L) as purportedly illustrating that Rule 24 is limited to the action and not applicable to the subfiles of an action. This is especially perplexing as the cited Rule 16 section reads:

> **"(2)** ***Matters for Consideration.*** At any pretrial conference, the court may consider and take appropriate action on the following matters: … **(L)** adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;"

Nothing in the USA Rule 16 citation speaks to the applicability of Rule 24 in an action as an entirety alone; rather it strengthens the Bawoleks' position by recognizing the authority and discretion of the Court to establish procedures for managing complex cases such as this adjudication.

To this point, the Bawoleks respectfully point out that water adjudications are complex, and often require special considerations and treatment by the Court. The Court recognizes this fact. For example in the Special Master's Report and Recommendation for Federal and Indian Water Rights Claims Proceedings [Doc. 255] on pg 4 the Special Master stated:

> "This adjudication has already departed from the usual way of doing business. For example, the order requiring that water rights claimants must step forward and declare their interests in advance of the hydrographic survey was designed in part to expedite the non-federal subfile phase."

The Court has considerable discretion in how it chooses to interpret and implement the Federal Rules of Civil Procedure, and has the authority to go so far as to waive the local rules in the interest of justice: D.N.M. LR-Civ. 1.7. *See also* D.N.M. LR-Civ. 1.3(b): "These rules supersede all previous local civil rules and govern all actions pending on or filed after their effective date, unless the Court otherwise orders." (emphasis added)

The Bawoleks also note that Plaintiffs themselves have for all practical purposes treated each subfile as if it were a separate action. This is evidenced by the fact that each subfile negotiation is conducted separately. Further, defendants named in the above action are frequently made signatory parties to multiple subfiles. By way of example attention is directed to [Doc 1165], Consent Decree signed by Garland G. Lewis and Dee Ann Lewis for ZRB-5-0042 and [Doc 1182], Consent Decree also signed by Garland G. Lewis and Dee Ann Lewis for ZRB-3-0096.

Finally, in at least one instance a defendant's name appears in two waivers of service showing that Plaintiffs in this instance served the defendant multiple times: *See* [Doc. 415],

Waiver of Service by Luella Clawson & Carman Kay Johnston on 10/24/05 and [Doc. 416] Waiver of Service by Luella Clawson & Janis McDorman on 10/21/05 (emphasis added). Thus, the Plaintiffs own actions would have the Court treat each subfile as effectively independent from the others. For this reason, the Plaintiffs' attempt to exclude the Bawoleks from the Consolidated Subfile negotiations on the basis of narrowly interpreting Rule 24 is nothing more than a procedural tactic to deny the Bawoleks' rights. In fact if the Bawoleks have any legitimate claim to the water rights at issue in the Consolidated Subfile, they must be permitted to intervene as an indispensable party. This is supported by case law, e.g.: In *United States of America v. Bluewater-Toltec Irr. Dist.* , 580 F. Supp. 1434, 1441 , affd., 806 F.2d 986 (DNM 1984) the court said, "In a New Mexico water rights adjudication, a water rights claimant is an indispensable, rather than nominal party." Id., citing with approval *New Mexico ex rel. Reynolds v. W.S. Ranch Co*., 69 N.M. 169, 174-75, 364 P.2d 1036 (1961). Moreover, the court said, "Section 72-4-17, N.M. Stat. Ann. (1978), requires that record claimants and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties to a general adjudication. Before a decree as provided in section 72-4-19, N.M. Stat. Ann. (1978), can be entered, known claimants must be impleaded." United States of America v. Bluewater-Toltec Irr. Dist. , supra, 580 F. Supp. At 1438, citing with approval New Mexico ex rel. Reynolds v. Sharp, 66 N.M. 192, 196, 344 P.2d 943, 945 (1959). Plaintiffs have not attempted to argue that the Bawoleks are only nominal parties with respect to the Consolidated Subfile; the Bawoleks' intervention is therefore permitted as a matter of right. It strains credibility to argue that the Bawoleks as indispensable parties to the Consolidated Subfile may not participate in its negotiation, but must be limited to objections during the *inter se* portion of this adjudication.

II. The Bawolek's Motion Specifies the Relief Sought to a Standard Already Having Precedent in this Action. Further, Plaintiffs' Arguments, If Accepted at Face Value, Would Place the Bawoleks Into an Untenable Position With Respect to Protection of Their Rights.

The USA in its Brief at pg 3 alleges that "The Bawolek Motion Fails to Specify any Relief Sought"; the OSE makes essentially the same argument in its Brief at pg 3 stating "Defendants' *Motion* is Not Accompanied by a Pleading that Sets Out Their Claim." The Bawoleks respectfully direct the Court's attention to [Docs 48 and 49] which comprise the Zuni Indian Tribe's Motion to Intervene and an associated Support Memorandum. The Zuni Motion to Intervene was granted by the Court; the Bawolek Motion is substantially similar to the Zuni Motion in degree of specificity and construction of the pleadings. Thus, precedent exists for acceptance of the Bawolek Motion. Further, the Bawoleks contend that the Plaintiffs are creating a legal paradox to entrap the Bawoleks: Plaintiffs contend that the Bawolek Motion essentially lacks the requisite specificity to meet the requirements for intervention in the Consolidate Subfile, but absent the authority to intervene, the Bawoleks cannot say with greater certainty which aspects of their water rights are in dispute and the specific relief sought. This Court noted in [Doc 2555] on pg 3 that "The Court has no wish to rely on procedural errors committed by *pro se* litigants to decide issues as important as the extent of the litigants' water rights." The Court went on further stating on pg 5 (in reference to default judgments): "there is a strong preference for allowing parties to litigate the merits of cases." The Bawoleks pray that this preference for litigation on the merits will apply here and that the Court will reject the circular logic employed by the Plaintiffs.

III. Plaintiffs Mis-Characterize the Nature of the *Inter Se* Proceeding. The *Inter Se* Proceeding Is Inappropriate to the Rights at Issue in This Instance. Therefore, the Bawolek's Motion is Timely.

Plaintiffs take the position that the Bawoleks will have an opportunity to assert their rights with respect to the Consolidated Subfile at a later time in this adjudication. The USA fails to articulate specifically at what point that opportunity will occur, stating in their Brief at pg 4 "…the Bawoleks will have an opportunity to raise their concerns before a final decree is entered in this action." The OSE explicitly states in their Brief at pg 1 "To the extent Defendants seek to be heard with regard to the State Land Office claims presented in the context of subfile ZRB-1-0075, they will have their opportunity during the latter *inter se* phase of this adjudication." The OSE uses this assertion to argue that the Bawoleks' Motion is untimely.

Assuming that the USA is also implying that the Bawoleks should wait until the *inter se* phase of this adjudication to assert their rights, the Plaintiffs collectively have mis-characterized the nature of the *inter se* proceeding: In an *inter se* proceeding, Defendant holders of junior water rights typically raise issues with respect to the priority of Defendant holders of more senior water rights. In the Consolidated Subfile matter, the Bawoleks could reasonably find themselves in the position of challenging the Commissioner's negotiated water rights as failing to fully comprehend historical and beneficial use, since those water rights impact the economic benefit of Bawoleks' grazing lease. In this instance, the Commissioner would arguably have to re-open negotiations for a broader water right with Plaintiffs. The *inter se* process does not comprehend this eventuality, as the State Engineer would have to be a party to the negotiation. In fact, the State Engineer is precluded from participation in the *inter se* proceeding. The OSE citation of *Tri-State Generation v. D'Antonio*, 149 N.M. 394, 403, 249 P.3d 932,*** is ironically

appropriate because the Court found at [***939]: "None of the statutory provisions discussed above, nor any published decision addressing them, suggests that the State Engineer has authority to engage in an *inter se* process." Thus, although the *inter se* phase of the adjudication might permit the Bawoleks to contest the seniority of the Commissioner's water rights, it fails to provide a process by which the Commissioner's rights may be re-negotiated with the Plaintiffs (specifically with the OSE), to the benefit of the Bawoleks. The Bawoleks should, more appropriately, be allowed to intervene as requested so that they are able to directly negotiate the relevant rights with the Plaintiffs.

Given the limitations of the *inter se* process, there is no justifiable reason for delaying the Bawoleks' participation in the Consolidated Subfile proceeding, given that their participation is already anticipated: The Court, throughout this proceeding, has been sensitive to the issue of time, and has favored the application of judicial discretion so as to reduce the time required to ultimately settle this Matter, For example, attention is directed to the Special Master's Report and Recommendation for Federal and Indian Water Rights Claims Proceedings [Doc. 255]: on pg 4, the Special Master stated: "At the same time I believe that this Court now has an opportunity to approach a water rights adjudication with the expectation that it will be prosecuted, and completed, within a reasonable period of time. … the sooner all rights are adjudicated and capable of administration, the sooner water rights claimants will enjoy a measure of certainty regarding their rights." Granting the Bawolek Motion will enable timely resolution of the Bawoleks' interests, and facilitate the ultimate conclusion of this adjudication[1]. In the alternative, requiring the Bawoleks to seek remedy in the *inter se* phase of the adjudication will raise

[1] In that Report, the Special Master, discussing the adjudication schedule noted "Optimism is still legal in the State of New Mexico."

complicating issues which will only further delay the conclusion of the adjudication, to the detriment of all.

IV. The Bawoleks Have Already Attempted to Protect Their Rights Following the Plaintiff's Recommendations, To No Avail.

In the USA Brief at pg 3, the USA states "The United States fully anticipates that the Commissioner will communicate with holders of leases of State Trust Lands during the course of those consultations and, if the Bawoleks have particular concerns about water use features on their leasehold, they would do well to communicate those concerns to the Commissioner." As a point of fact, the Bawoleks have contacted counsel for the Commissioner on multiple occasions to express their concerns:

1. On or about July 14, 2004, the Bawoleks mailed a letter to S. Hughes, State Land Office Associate Counsel, in response to an inquiry from the State Land Office. An electronic copy of this letter has been provided in supporting documents to this Brief.
2. On or about June 16, 2006, the Bawoleks mailed another letter to S. Hughes, State Land Office Associate Counsel, in response to an inquiry from the State Land Office. An electronic copy of the letter has been provided in supporting documents to this Brief. In that letter, Bawoleks state "It is our opinion that the water rights ultimately assigned to GR-1434 will have direct economic impact to us. We therefore urge the Commissioner of Public Lands to vigorously defend said water rights."
3. On May 7, 2012, Bawoleks sent an electronic communication to Mr. David A. Stevens, Associate Counsel Commissioner of Public Lands and the New Mexico State Land Office. That letter reiterated Bawoleks' concern and expression of a

material interest in any settlement reached with respect to water rights. A copy of the communication is provided in supporting documents to this Brief.

4. Having received no reply to any of the communications supra, the Bawoleks also mailed a copy of the May 7, 2012 communication via the US Postal Service, First Class with a Certificate of Mailing, to Mr. Harry Relkin, General Counsel for the Commissioner of Public Lands and the New Mexico State Land Office. A copy of the cover letter and Certificate of Mailing are provided in supporting documents to this Brief.

The communications enumerated supra show that the Bawoleks have in fact been working to vigorously defend their rights in the Consolidated Subfile and have communicated their concerns to the Commissioner. However, Bawoleks note that simply because the United States "anticipates the Commissioner will communicate with holders of leases of State Trust Lands," said anticipation by the USA has no force of law in this Matter and in no way obligates the Commissioner to take any action on Bawoleks' behalf. In their Motion, Bawoleks specifically request the Court allow intervention "so as to assert positions that may be at variance with positions and claims asserted by the Commissioner." In review, the course of action advocated by the USA has been ineffective at providing any assurance that the Bawoleks' rights in this Matter will be protected. The Court's granting of the Bawolek Motion will remedy that situation.

CONCLUSION

Plaintiffs' objections to the Bawolek Motion are not substantively directed to the Bawoleks' right to intervene in the Consolidated Subfile, but raise predominantly procedural arguments against the Motion. The analysis supra shows that Plaintiffs' arguments are fundamentally flawed, even when considered from the limited scope of procedural considerations. Even if the Bawoleks can intervene during the *inter se* phase of this adjudication, practical considerations favor early intervention. Early recognition of the Bawoleks' intervention right can only help timely conclusion of the adjudication process, especially given the potential for raising new legal issues if justice is delayed. For reasons articulated, the Bawoleks pray this Court to grant their Motion to Intervene in Subfile ZRB-1-0075 Consolidated.

Dated July 22, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on July 22, 2012, I filed the foregoing Reply Brief in Support of Motion to Intervene in Subfile ZRB-1-0075 consolidated 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.

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