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, v. A & R PRODUCTIONS, et al. Defendants.	)))))))))))))	No. 01cv00072-MV-WPL ZUNI RIVER BASIN ADJUDICATION **Subfile No. ZRB-2-0014**

UNITED STATES' AND STATE OF NEW MEXICO'S RESPONSE TO EDWARD J. BAWOLEK AND SUZAN J. BAWOLEK MOTION REQUESTING PARTIAL SUMMARY JUDGMENT

Plaintiffs the United States of America and the State of New Mexico *ex rel.* State Engineer ("Plaintiffs") respond to Defendants' Edward J. Bawolek and Suzan J. Bawolek (hereinafter the "Bawoleks") *Motion Requesting Partial Summary Judgment* (Doc. 3006) and *Memorandum in Support of Their Motion Requesting Partial Summary Judgment* (Doc. 3006-1) (collectively referred to hereafter as "Bawolek Motion"[1]). Plaintiffs request that this Court deny the Bawoleks' request for partial summary judgment concerning the water right in well designated 10C-4-W14 (hereafter referred to as "well W14").

I. INTRODUCTION

In connection with this subfile action, Plaintiffs, acting through their experts and consultants, have performed a Hydrographic Survey of the Zuni River Basin ("Basin") and

[1] Throughout this Response, when referencing the Bawoleks' arguments Plaintiffs will refer to specific pages or exhibits of the Bawoleks' *Memorandum in Support of Their Motion Requesting Partial Summary Judgment* (Doc. 3006-1).

examined the property owned by the Bawoleks in the Basin for evidence of past beneficial water use. *See Notice of Filing the Zuni River Basin Hydrographic Survey for SubAreas 9 and 10* (October 24, 2005) (Doc. 393).[2] Based on information gathered and consistent practices followed for every other non-Indian land owner in the Basin, Plaintiffs determined the state-law based water rights that are associated with the Bawoleks' property and that should be recognized by this Court. Plaintiffs proposed the recognition of these water rights to the Bawoleks in the form of a proposed Consent Order. *Joint Status Report and Proposed Discovery Plan* (April 9, 2014) (Doc. 2954-1) ("Joint Status Report – Attachment A").

Generally speaking, with respect to the water rights associated with their property the Bawoleks disagree with the Plaintiffs on two important points. First, the Bawoleks claim that insufficient water quantity has been determined for the use of four wells and assert they are entitled to a greater quantity because, among other things, each structure that formerly existed on their property is entitled to a water right for historic and future domestic use. *Joint Status Report and Proposed Discovery Plan* (April 9, 2014) (Doc. 2954) at 2-3. Second, the Bawoleks assert that every water feature found on their property, namely wells and earthen impoundments[3], should be recognized with a water right that includes "wildlife use" as a prior beneficial use for such water right. *Id.* These are principal points of contention between Plaintiffs and the Bawoleks over the water rights to which the Bawoleks are entitled. *Id.* However, only the first point of contention has been raised, in part, by the Bawolek Motion.

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[2] The Hydrographic Survey has been filed with the Court (*see* Doc. 393) and posted to the Zuni Basin Adjudication website found at www.zunibasin.com.

[3] "Earthen impoundments" are otherwise known as "stock ponds" and will be referred to as such throughout the remainder of this Response. Stock ponds are constructed by creating an earthen berm across any surface water drainage such as a wash or an arroyo.

In the Bawolek Motion now before the Court, the Bawoleks raise very limited issues concerning their dispute with Plaintiffs and focus exclusively on the quantity of water used from well W14. First, the Bawoleks assert that well W14 historically and simultaneously served four residences.[4] Bawolek Motion 6 ¶ 17. Second, they assert that in 2007 they pumped approximately 1,500,000 gallons of water (estimated to be an "annualized" quantity of 5.48 acre feet per year ("AFY")) from well W14. Bawolek Motion 10 ¶ 25. With this pumped amount and based on a purported paradox created by the Court, the Bawoleks conclude that they are entitled to a water right with a 1939 priority based on the annualized quantity of the water pumped in 2007.

Plaintiffs' response to the Bawolek Motion is straightforward. Even if the Court were to admit the factual material presented by the Bawoleks and find it to be credible, it would still find the legal and factual supports for the Bawoleks' argument lacking. First, although Plaintiffs are willing to accept the single existing dwelling near well W14 as plausible evidence of beneficial domestic use of up to 0.7 AFY of water from the adjacent well, no aspect of the doctrine of prior appropriation supports the Bawoleks' assertion that the mere existence of any structure on the property at any time over the course of a century is sufficient evidence of past beneficial use to establish an additional water right from well W14. Importantly, the evidence on which the Bawoleks rely does not demonstrate that the single, now-unoccupied dwelling on the Bawoleks' property existed at the same time that any of the ruins were also occupied. Most importantly though, no evidence exists that any of the three ruins used well W14 at any time as a water

[4] On the Bawoleks' property near well W14, one unoccupied but habitable structure exists. *See* Bawolek Motion Exhibit 2 at 19 (designated "House 1" in Bawolek Motion Exhibit 2 - 7). Plaintiffs recognize a water right associated with annual domestic (indoor/outdoor household) water use at this location. In addition, on the Bawoleks' property exist the ruins of at least three structures that may have been dwellings. *Id.* (designated "Ruin 1," "Ruin 2," and "Ruin 3" in Bawolek Motion Exhibit 2 - 7). Plaintiffs deny that there is any evidence water diverted from well W14 was beneficially used for domestic, or any other purposes at the location of these ruins.

supply. Second, the mere pumping of water, without putting it to beneficial use, is not the basis for a water right. Without evidence of actual beneficial use, the Bawoleks' pumping of 1,500,000 gallons of water in 2007 constitutes a waste of water contrary to New Mexico law. As such, the Bawoleks are not entitled to summary judgment and the Bawolek Motion must be denied.

II. STANDARD OF REVIEW

The standard of review for a motion for summary judgment is well established. As articulated by the Supreme Court:

> a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). (Internal quotations omitted). Following *Celotex* and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Tenth Circuit has said that, when reviewing a motion for summary judgment under Fed. R. Civ. P. 56, the court must "view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992). Indeed, it is critical to a motion for summary judgment that to the extent the motion is supported by facts not admitted or stipulated to, the information be both admissible evidence and verified. *Rohr v. Allstate Financial Services*, 529 Fed. Appx. 936, 940 n.2 (10th Cir. 2013) (unpublished); *Thomas,* 968 F.2d at 1024.

III. DISPUTED AND UNDISPUTED ISSUES OF MATERIAL FACT

The Bawoleks assert a host of facts to support their Motion. They expressly represent that these facts are both material and not in dispute. Plaintiffs address each asserted fact below.

BAWOLEK FACTUAL ASSERTIONS CONCERNING WELL W14		
Bawolek factual assertions	**Whether the asserted fact is undisputed by Plaintiffs**	**Whether the asserted fact is relevant to the determination of the Bawoleks' water rights**
1. Well W14 priority date is 12/31/1939	Plaintiffs have agreed to a priority date of 12/31/1939 for water rights based on historic beneficial use from well W14 of up to 1.088 AFY. *See* Doc. 2954-1. Plaintiffs have not stipulated and do not now stipulate that any water rights and water use beyond that which Plaintiffs have stipulated to would also have a priority date of 12/31/1939.	Not relevant
2. Well W14 was drilled prior to the declaration of the Zuni River Basin.	Not disputed	Not relevant
3. Well W14 was measured by the Bawoleks from 2/25/2007 to 12/30/2007 (309 days), with an indicated production of 1,512,618 gallons.	Not disputed	Not relevant
4. The measurements detailed in undisputed fact number 3 were completed prior to the Court's temporal limit for this adjudication.	Not disputed	Not relevant
5. Four residences were simultaneously occupied on the Bawoleks' property during the interval from 1937 to 1951.	Disputed. The Bawoleks' expert does not assert or establish that four residences were simultaneously occupied on the Bawoleks' property during the interval from 1937 to 1951. At most, the Bawoleks' expert establishes no more than the possibility that simultaneous	Relevant but not material

	occupancy may have occurred.	
6. "Plaintiffs are willing to presume a water right of 0.7 acre-feet per annum for domestic wells without any proof of actual beneficial use."	Disputed. For purposes of making compromise offers, Plaintiffs have been willing to acknowledge that each identified domestic use associated with a particular point of diversion (*i.e.* well), is plausible evidence of a .7 AFY beneficial use of water.	Relevant but not material
7. Plaintiffs have established a precedent for recognizing a domestic beneficial use for wells based upon historical residences.	Disputed. Any statement made in conjunction with the compromise of a claim is not admissible to prove or disprove the validity of a disputed claim. Fed. R. Evid. 408.	Not relevant; not admissible
8. Plaintiffs have only recognized one residence as being served by well W14	Not disputed. Plaintiffs admit that the existing residence is plausible evidence of up to .7 AFY of beneficial use of water from the adjacent well.	Not relevant
9. All wells on the Bawoleks' property excepting well W14 have priority dates on or after 12/31/1971.	Not disputed. For all other wells on the Bawoleks' property and for the quantities identified by Plaintiffs, Plaintiffs have stipulated to priority dates of 12/31/1971 or after.	Not relevant
10. Well W14 is a point of diversion (fills) the following stock ponds on the Bawoleks' property: 10C-4-SP20; 10C-4-SP21; 10C-4-SP22; 10C-4-SP23 and 10C-4-SP24	Not disputed. Water is supplied to the stock ponds from surface water runoff and also from water piped from well W14.	Relevant to establishing an agreed livestock watering purpose of use for well W14, but not the claimed quantity of that use.

In response and for the purpose of refuting the Bawolek Motion, Plaintiffs assert and establish the following undisputed material facts.

PLAINTIFFS FACTUAL ASSERTIONS CONCERNING WELL W14

Undisputed Factual Assertions	Source
The straight-line distance between well W14 and Ruin 1, Ruin 2, and Ruin 3 is 2.2 miles, 0.68 miles, and 0.86 miles, respectively.	Affidavit of Scott Turnbull - Attachment A at ¶ 15.
The distance between well W14 and the unoccupied but habitable house (House 1) is 160 feet.	Affidavit of Scott Turnbull - Attachment A at ¶ 15.
No piping exists that connects W14 to Ruin 1, Ruin 2, or Ruin 3.	Affidavit of Scott Turnbull - Attachment A at ¶ 15.

IV. ARGUMENT

A. As a matter of law, the Bawoleks have not established the existence of undisputed, material facts to support their motion and their motion should be denied.

The crux of the Bawolek Motion appears to center on material described in the report of Douglas H. M. Boggess, which is simply attached to the motion as Exhibits 2 - 7. In reliance on Mr. Boggess' report, the Bawoleks assert it is undisputed that "[f]our residences were simultaneously occupied on the Bawoleks' property during the interval from 1937 to 1951." *Id.* at 2 and 6-7 ¶18. However, Mr. Boggess did not make this factual conclusion. Further, the Bawoleks present insufficient basis for their asserted "undisputed" facts to support any claim for a water right and the motion must fail.

1. The Bawoleks have not presented sufficient evidence of a greater beneficial use of water from well W14 than that to which Plaintiffs have stipulated.

Even if the Court were to take all statements made in Mr. Boggess' report as true, the Court should nonetheless deny the Bawolek Motion.

The best starting point for considering the substance of Bawolek Motion is to examine how the Bawoleks' claim for well W14 differs from the right that Plaintiffs are willing to recognize for the Bawoleks. Attachment B is a more thorough summary of the findings of the Plaintiffs' Hydrographic Survey with respect to well W14, upon which Plaintiffs have offered to recognize a 1.088 AFY water right with a 12/31/1939 priority for domestic and livestock watering purposes.

The legal basis for establishing a water right is well settled in New Mexico "The unappropriated water . . . is hereby declared to belong to the public." Article XVI § 2, NMSA 1978, § 72-1-2 (1907). In other words, fundamentally water within New Mexico belongs to the state. *State ex rel. Erickson v. McLean*, 1957–NMSC–012, ¶ 23, 308 P.2d 983, 987; *Carangelo v. Albuquerque-Bernalillo Cnty Water Util.*, 2014–NMCA–032, ¶ 35, 320 P.3d 492, 503. A water user in New Mexico may secure the right to use water through beneficial use and, like many other western states, when necessary the state will administer the water right consistent with the doctrine of prior appropriation. N.M. Const. Article XVI, § 2, NMSA 1978, § 72-1-2. Of central importance, "beneficial use shall be the basis, the measure[,] and the limit of the right to the use of water." N.M. Const. Article XVI, Section 3. "Put another way, '[t]he amount of water which has been applied to a beneficial use is . . . a measure of the quantity of the appropriation.'" *Carangelo*, 320 P.3d at 503 (quoting *Erickson,* 308 P.2d at 987). As such, the amount of water, along with priority, purpose, and periods and place of use, is a fundamental element of a water right that must be proven by a water right claimant, in this case the Bawoleks.

> Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

NMSA 1978 § 72-4-19. (Emphasis added).

In this general stream adjudication, the Court has previously embraced the principles articulated above and found them equally applicable to domestic and non-domestic uses of groundwater. *Memorandum Opinion and Order* (June 5, 2006) at 5 (Doc. 733) ("Neither the WNMWPA nor Davis cite any authority which supports the proposition that domestic uses are exempt from the beneficial use requirement which exists under state law, nor do they cite support for their suggestion that domestic uses should enjoy special treatment in this water rights adjudication"). Here, the focus of the Bawolek Motion is the groundwater right specifically associated with well W14.

Well W14 is located on the Bawoleks' property and appears to have been drilled by December 31, 1939.[5] Examination of the well in conjunction with performing the hydrographic survey, including visits to the property, revealed that a habitable but unoccupied house lay in very close proximity to well W14. Attachment A – Turnbull Affidavit at ¶¶ 6 and 15. In addition, the well appeared to be connected to five stock ponds by pipe. *Id.* at ¶ 7. Finally, in the area of well W14 and from piping leading back toward well W14, Plaintiffs observed the remnants of a rather disperse non-functional drip-irrigation system. *Id.*

Like virtually all of the open land of the Zuni River Basin, Plaintiffs have recognized that the historic use of the land was principally to raise livestock, and more specifically cattle. *Id.* at ¶ 8. Therefore, for the Bawoleks, as for all other Zuni River Basin land owners, Plaintiffs have been willing to recognize water rights that were associated with raising cattle, specifically the amount of water used in raising cattle.

[5] All facts asserted in the remainder of this section are made part of this Court's record and supported by the Affidavit of Scott Turnbull, which has been attached to this response as Attachment A and hereafter referred to as "Attachment A – Turnbull Affidavit."

The Hydrographic Survey Report for Sub Areas 9 and 10, at page 3-1, describes how the Plaintiffs determined the amount of water used from livestock wells:

> Livestock – The duty of water for stock wells is the estimated water use of livestock that could be or is actually sustained by the area served by the well. The water use of cattle was calculated based on the information prepared by State of New Mexico. The area of land in which the well is located was determined from property ownership maps and database obtained from Cibola Assessors office. Carrying capacity is based on the number of "animal units" that can be sustained on an area of land, with one cow or five sheep equivalent to one unit. The land carrying capacity, which is the number of animals that a habitat maintains in a healthy, vigorous condition, was assumed to be 15 animal units per section, or the count provided by the owner, whenever applicable. The 15 animal units per section estimate is based on information from the New Mexico Department of Agriculture. The water consumption of an animal unit is estimated at an average of 10 gallons/day (488 feet^3 per year or 0.0112 acre-feet per year) (Wilson and Lucero, 1997). An efficiency factor of 0.5 was assumed to account for consumptive and other losses.

The "efficiency factor of 0.5" effectively doubled the quantity expected to have been used by the livestock to account for incidental losses such as evaporation, spillage, and, importantly, wildlife consumption. Once the livestock carrying-capacity and annual water needs were determined for the Bawoleks' property, Plaintiffs divided the water quantity by the number of wells found on the Bawoleks' property. For this subfile case, Plaintiffs identified six wells and assigned 0.168 AFY to each well, including well W14, for the historic beneficial use associated with raising livestock on the entirety of the Bawoleks' property. Attachment A – Turnbull Affidavit at ¶ 10.

In addition, as mentioned above, well W14 lies in very close proximity to a habitable, but unoccupied house. *Id.* at ¶¶ 6 and 15. Where dwellings have been reasonably determined to have relied on or used an identifiable well, Plaintiffs have been willing to accept that such association is plausible evidence of historic beneficial use of up to 0.7 AFY (or 625 gallons per day) of water. *See State of New Mexico's Response to the Western New Mexico Water Preservation Association's Motion to Certify Questions to the New Mexico Supreme Court*

(November 30, 2005) at 9-10 (Doc. 406). Fundamentally, Plaintiffs' willingness to use an evidentiary presumption of a specific quantity of water for historic domestic use is a substantial benefit to the Bawoleks, as they have not been required to prove actual historic beneficial use. *Id.* For well W14, Plaintiffs have offered to presume a use of 0.7 AFY from well W14 to serve the nearby but currently unoccupied dwelling.

Finally, as mentioned above, Plaintiffs' hydrographic survey consultants observed the remnants of a unique, but no longer functional, drip irrigation system apparently leading to scores of specific single plant locations broadly scattered on the Bawoleks' property. Attachment A – Turnbull Affidavit at ¶¶ 6 and 12. This irrigation system appears to lead back to well W14 as the water source for the system. Plaintiffs are willing to recognize that this past irrigation system is plausible evidence of a historic beneficial use. Because no record of this activity can be found except for the piping and vegetation remnants observed, Plaintiffs' hydrographic survey consultants have quantified the past beneficial use based on the consumptive needs of shrub-type plants located at the sites that apparently were irrigated by the system. Based on the number of drip lines observed and the approximate irrigation area affected by the drip lines, Plaintiffs' consultants have calculated that an irrigator would need to divert no more than 0.22 AFY to irrigate vegetation at the sites under the drip system. *Id.* at ¶12. Therefore, for the final component of the historic beneficial use associated with well W14, Plaintiffs have stipulated to a 0.22 AFY use from well W14 to serve the nearby but no longer functional drip irrigation system.

Ultimately, the total historic beneficial use of water from well W14 was calculated by Plaintiffs' consultants to be 1.088 AFY (0.168 AFY + 0.7 AFY+ 0.22 AFY). Plaintiffs also

stipulated that water from well W14 could be diverted to several stock ponds.[6] However, consistent with New Mexico law, the quantity of water for the water right associated with well W14 is limited to that amount which could be identified as being historically, beneficially used for livestock, domestic, and irrigation purposes. No basis exists to increase the quantity of use from a well simply because it has been connected by pipe to a stock pond.

2. The Bawoleks claim a water right for domestic uses that is greatly in excess of water historically, beneficially used from well W14.

In their motion, the Bawoleks appear to assert that they are entitled to an amount of water of 0.7 AFY for every ruin and the existing dwelling on their property. *See* Bawolek Motion, section IV.1 at 6-10 ¶¶18-24. The Bawoleks principally rely on research performed by Mr. Doug Boggess to support their assertion that three ruins and a currently unoccupied dwelling were simultaneously occupied. *Id.* at 7 ¶18 and Exhibits 2 - 7. The Bawoleks also implicitly assume that each of the ruins and dwellings simultaneously relied on well W14 for domestic water needs. *See id.* However, examination of the evidence on which the Bawoleks rely (*i.e.*, Mr. Boggess' report), does not establish the factual proposition that multiple structures were simultaneously occupied. Furthermore, the Boggess report does not establish that anyone from the ruins ever used water from well W14 for domestic use.

a. The ruins and single unoccupied house that are on the Bawoleks' property near W14 were not simultaneously occupied.

In their motion, the Bawoleks assert that they should be entitled to a much larger water right from well W14 based upon use from not one but four structures found on their property: three possible dwellings structures which lie in utter ruins, plus the standing but unoccupied

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[6] Well W14 was identified as a point for diversion to the following five stock ponds: 10C-4-SP20 through 10C-4-SP24. *See* Attachment A – Turnbull Affidavit at ¶ 14 and Attachment B.

dwelling mentioned above.[7] The Bawoleks assert that it is undisputed that "[f]our residences were simultaneously occupied on the Bawoleks' property during the interval from 1937 to 1951." Bawolek Motion at 2 (emphasis added). These facts are neither established nor undisputed.

The evidence relied upon by the Bawoleks to assert that "four residences were simultaneously occupied" does not establish that the structures were ever simultaneously occupied. According to Mr. Boggess, he went to the Bawoleks' property in May 2014 and accomplished the following steps:

1) he identified and mapped three ruins and the habitable but unoccupied house:

   Ruin 1 - *id.* Exhibit 2 at 21 – 31 and Exhibit 3 at 1 – 2;[8]

   Ruin 2 - *id.* Exhibit 4 at 2 – 12 and Exhibit 5 at 1;[9]

   Ruin 3 – *id.* Exhibit 3 at 3 – 12 and Exhibit 4 at 1;[10] and

   House 1 – *id.* Exhibit 5 at 8 – 18 and Exhibit 6 at 1 – 7;[11]

2) at each of the four sites, he identified, to the extent possible, cans, glass, ceramic pieces, metal pieces, and miscellaneous items in the immediate area;[12]

3) to the extent possible, he identified a date range for any item found based on

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[7] Images of the unoccupied house and the scant remnants of the ruins can be found in the Bawolek Motion at Exhibit 2 at 30 (Ruin 1); Exhibit 4 at 10 (Ruin 2); Exhibit 3 at 12 (Ruin 3); Exhibit 5 at 18 (House 1).

[8] The exhibits attached to the Bawolek Motion are not independently page numbered and Plaintiffs reference to the counted page of the exhibit. The counted page numbers of the exhibit correspond to pages 21-33 of Mr. Boggess' Report.

[9] The counted page numbers of the exhibit correspond to pages 45-56 of Mr. Boggess' Report.

[10] The counted page numbers of the exhibit correspond to pages 34-44 of Mr. Boggess' Report.

[11] The counted page numbers of the exhibit correspond to pages 63-80 of Mr. Boggess' Report.

[12] See citations immediately above corresponding the page numbers of Mr. Boggess' report concerning his examination of each ruin and house.

discernable manufacturing characteristics - *id.* Exhibit 2 at 8 – 16;

4) he traced the record title to the three separate parcels of land on which the dwelling ruins and the unoccupied house are located - *id.* Exhibit 2 at 25 – 27 (Ruin 1); Exhibit 4 at 6 (Ruin 2); Exhibit 3 at 6–7 (Ruin 3); and Exhibit 5 at 59 (House 1); [13] and

5) from the potential date range associated with items found and title records examined, he identified a potential time range of occupancy for each ruin (assuming it was a dwelling) and the house; Exhibit 2 at 6 Table 3.

Plaintiffs do not dispute that Mr. Boggess examined the Bawoleks' property. Nor do Plaintiffs dispute that from the detritus found around each site, a determination could be made of approximate manufacturing dates for a few of the scattered items. Further, Plaintiffs do not dispute that Mr. Boggess researched and determined the three separate chains of title through the numerous grantors/grantees who have held title to the three parcels on which the four structures reside and of which the Bawoleks are now the single, present owner. However, these narrow facts that might be established from Mr. Boggess' work, do not support the Bawoleks' claim of simultaneous occupancy, nor are these facts sufficient to carry a summary judgment motion.

From title records and the detritus scattered in the vicinity of each site, Mr. Boggess established a potential range over which each of the structures may have been occupied. Tables 2 and 3 from Mr. Boggess' report state precisely the only information he was able to discern about each structure – no more than a potential range of overlapping occupancy dates: 1931 – 1951 (Ruin 1); 1933 – 1953 (Ruin 2); 1933 – 1953 (Ruin 3) and 1937 – present (House 1). *See*

[13] Mr. Boggess identified that Ruin 1, Ruin 2, and Ruin 3 were located on separate parcels of land; independently patented in the 1930s and subsequently transferred to a series of different land owners. The unoccupied house that is still standing on the property (House 1) and in close proximity to well W14 is on the same parcel but not in close proximity to Ruin 2. *Id.* Exhibit 2 at 20.

id. Exhibit 2 at 6 Table 2 and Table 3. Further, from the material examined no one can determine with any precision when an artifact was dropped, under what circumstances an artifact was left on the ground, when a structure was constructed, or when a structure was occupied. Mr. Boggess reported the little that the materials might be able to show – a broad date range over the course of decades when an artifact might have been left and when some occupancy might have occurred. *Id.* Mr. Boggess certainly did not establish the Bawoleks' factual conclusion that "[f]our residences were simultaneously occupied . . . during the interval 1937 to 1951." *See* Bawolek Motion at 2. In fact, beyond Mr. Boggess establishing the mere possibility of simultaneous occupancy, no additional evidence supporting such a proposition exists. Therefore, the Bawoleks' motion for summary judgment on this point must fail.

b. No evidence exists that the three ruins found on the Bawoleks' property each relied on well W14 for domestic water needs.

Even if this Court were to assume that the three ruins and the unoccupied house were simultaneously occupied, the Bawoleks have not established the critical element that the occupants, if any, of the ruins relied on well W14 for their water.

As described above, for the Bawoleks to establish additional water tied to well W14 and associated with a total of four dwellings, the Bawoleks must also establish that domestic water for each dwelling was supplied from well W14. The Bawoleks' argument concerning water rights for additional domestic uses centers entirely on the existence and occupancy of dwellings. They attempt to force into existence a large additional amount of water from this bare circumstance; yet, they overlook or ignore the source of water for such a right. At best, the Bawoleks only implicitly assert that occupants of the four dwellings all simultaneously were supplied water from well W14. For each of the ruins, no such evidence exists.

There is no evidence that occupants of the ruins at any time supplied their domestic water needs from well W14. Most importantly, no piping has ever been identified to show an actual connection between well W14 and the three ruins. Attachment A – Turnbull Affidavit at ¶ 15. In addition, the ruins are each a considerable distance from well W14. Using the nomenclature used by Mr. Boggess, the straight-line distance from Ruin 1 to well W14 is 2.2 miles; the straight-line distance from Ruin 2 to well W14 is 0.68 miles; and the straight-line distance from Ruin 3 to well W14 is 0.86 miles. *See id.* By comparison, the unoccupied house (House 1) is in very close proximity to well W14: 160 feet distant.[14] *See id.*

Furthermore, Mr. Boggess' title history work on the parcels that currently make up the Bawoleks' property is particularly revealing on this point. Using available documents, Mr. Boggess established a chain of title for the three separate parcels on which the ruins and the unoccupied house exist. Bawolek Motion Exhibit 2 at 25 – 27 (Ruin 1); Exhibit 4 at 6 (Ruin 2); Exhibit 3 at 6–7 (Ruin 3); and Exhibit 5 at 8 (House 1). The results of his examination from land patents in the early 1930s reveal that the three parcels were <u>independently owned</u> until a single owner acquired all three in 1953. *See id.* Exhibit 2 at 5-6 (Table 1 – "Chain of Ownership for Bawolek Property"). Before single ownership of the three parcels occurred in 1953, the record contains no suggestion that occupants of Ruin 1, Ruin 2, or Ruin 3 simultaneously secured their water from well W14. In fact, for the critical period the Bawoleks focus on to establish simultaneous occupancy (1937 – 1957), two of the land owners did not own the land parcel on which well W14 is found. *See id.* And, after single ownership was finally achieved in 1953, the Boggess report clearly suggests that at least two of the ruins were utterly abandoned. There is

[14] It is for this structure that Plaintiffs have willingly acknowledged evidence of and a corresponding water tight for a single domestic use.

nothing to suggest that well W14 was ever used to serve more than the single household of the original landowner.

Ultimately in his research, Mr. Boggess' examination of available documents is revealing as to water use in the Zuni River Basin almost a century ago. In his research, Mr. Boggess identified a compilation of family histories that specifically describes statements of one resident of the 1930s who apparently resided at Ruin 1. Mr. Boggess states that the resident described "water for family use was hauled from a Mr. Hubble's well, three miles distant." Bawolek Motion Exhibit 2 at 26. Yet, the record of title detailed by Mr. Boggess for the land parcel on which well W14 is located reflects that the parcel was never owned by anyone with the surname "Hubble." *See* Bawolek Motion Exhibit 4 at 6. Mr. Boggess' work has firmly established that those who dwelled at Ruin 1 were not using water drawn from well W14. The implication for the remaining two ruins is equally firm.

Even for the dwelling ruin that occupies the same parcel as the unoccupied house (Ruin 2), again no piping exists between the ruin and well W14 and no evidence establishes that any occupant of the ruin relied on well W14 at any time. Also, based on Mr. Boggess' investigation, the most generous potential range of existence/occupancy for Ruin 2 is 1931 to 1953 and the most generous potential range of existence/occupancy for the unoccupied house is 1937 to 2014. Bawolek Motion Exhibit 2 at 6 Table 3. The more likely, yet still speculative, scenario is that Ruin 2 was finally and ultimately abandoned when single ownership of the three properties was achieved. *See* Bawolek Motion Exhibit 4 at 10.

The facts marshalled by the Bawoleks are simply insufficient to establish the large amount of water that they seek. The evidence is insufficient to establish a past domestic water use based upon alleged occupancy of the three ruins. In fact, the physical location of the ruins

and the title-evidence marshalled by the Bawoleks largely defeat their express and implied factual contentions.

Plaintiffs have stipulated to historic past domestic use from well W14 based on the use from a single dwelling (House 1). That is the only element of a water right for domestic use associated with well W14 that this Court should recognize. The Court should deny the Bawoleks' request to recognize an additional amount of water for any alleged domestic uses associated with the three ruins on their property.

3. The Bawoleks' pumping records are not evidence of actual beneficial use of water.

The Bawoleks next argue that since they acquired the property on which well W14 is found, they have independently established a water right associated with well W14. Bawolek Motion, subsection IV.2 at 10–12 ¶¶ 25–29. According to the Bawoleks, in 2007 they installed a meter on well W14 and recorded pumping during that year over the course of 309 days. *Id.* at ¶25. During that time, the Bawoleks pumped an astonishing 1,512,618 gallons ("annualized" by the Bawoleks to be 5.48 AFY) and diverted that water to five stock ponds and to their house[15]. *Id.* With respect to the water diverted from well W14 to simply empty into five stock ponds, such water diversion alone does not create a water right; instead, is constitutes waste and receives no recognition or protection under New Mexico law.

The Bawoleks present an argument based on several unfounded premises to arrive at an unfounded conclusion. First, the Bawoleks state that the United States' claim on behalf of the Zuni Nation to fill stock ponds from available sources is recognition (or admission) by the

[15]With respect to water from well W14 to meet the needs of a domicile, the water right associated with such use has been recognized by Plaintiffs and is addressed above. However, that quantity is no more than .7 AF. Attachment A – Turnbull Affidavit at ¶ 11.

United States of the Bawoleks' right to fill their stock ponds from well W14. *Id.* at ¶26. Next, the Bawoleks assert that the Court's orders of May 12, 2004 (Doc. 330) and December 4, 2008 (Doc. 1988) preclude the Bawoleks from filing any declaration with the Office of the State Engineer to establish their beneficial water use. *Id.* at ¶28. Finally, the Bawoleks claim that the combined effect of the Court's orders create an unacceptable paradox and prevent the Bawoleks from establishing a new water right and from tying their current pumping to an earlier water right. *Id.* at ¶ 29. Therefore, the Bawoleks conclude, the water right they now claim is justified and must be recognized. *Id.*

The Bawoleks' argument here reflects a fundamental misunderstanding of the law. As described above, under New Mexico law the right to use water is established by the appropriation of water for a beneficial use. *See* subsection IV.A.1, above. To the extent that the Bawoleks seek to establish an additional amount of water than that which Plaintiffs are willing to recognize, the Bawoleks have the burden to prove that they applied an additional amount of water to beneficial use. *Joint Status Report and Proposed Discovery Plan* (April 9, 2014) (Doc. 2954); *see also* August 28, 2014 *Order* (Doc. 2985) at 2-3 ("[A]s a general rule [t]he burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right" (citations omitted)). How the United States asserted a reserved water right under federal law on behalf of the Zuni Nation (Doc. 1125) has absolutely no bearing on whether the Bawoleks can establish a state-law based water right. The Bawoleks do not have a claim for a water right under federal law. Further, this Courts' previous orders in no way prohibit the Bawoleks from filing a declaration with the Office of the State Engineer nor create some sort of paradox that can only be resolved by recognizing a water right for the Bawoleks for 5.48 AFY from well W14.

The Court's previous orders speak for themselves, are easily understood, and do not create the paradox that the Bawoleks describe. In its *Memorandum, Opinion, and Order on Motion for Expedited Hearing* (May 11, 2004), the Court determined that a decision of the State Engineer was not preclusive on the Court to consider matters presented and otherwise independently addressed by the Office of the State Engineer. (Doc. 330) at 3-4. In its *Order Granting Motion to Define Temporal Scope of Adjudication and Clarifying Effect of Consent Orders* (December 12, 2008), the Court placed a temporal limit on this adjudication and ordered that only those water rights established and "having priority dates senior to the date of the entry of this Order" would be considered in this adjudication. Doc. 1988 at 1. The 2008 Order says nothing about the Bawoleks' ability to present evidence of water use after December 12, 2008. In fact, the evidence to which the Bawoleks refer was collected in 2007 and the 2008 Order has no apparent impact on the 2007 evidence. The fact is that any evidence collected after 2008 is almost always irrelevant to establish the historic, beneficial use of a water right established by December 12, 2008. The dilemma that Bawoleks profess does not exist. No order or series of orders of this Court inhibits the Bawoleks' ability to establish a water right with whatever relevant evidence they have available.

Further, the Bawoleks' attempt to "annualize" a water quantity is a claim to a future water right for water which they have never pumped or appropriated. *See* Bawolek Motion 10 ¶ 25 ("1,512,618 gallons, equivalent to an annualized usage of 5.48 [AFY]." (emphasis added)) Actual beneficial use, not future use, is the "basis, the measure and the limit of the right to the use of water" N.M. Const. Article XVI, Section 3 The Bawoleks' attempt to claim water rights by claiming "annualized" water that they "could" have pumped from their wells in no way supports a water right.

The Bawoleks present no law or evidence to support entering judgment in favor of the Bawoleks for an amount of water from well W14 of 5.48 AFY. The Bawoleks' efforts to pump a large quantity of water from well W14 into five different stock ponds does not establish actual beneficial use of that amount of water. Rather, it appears that after the water was pumped it simply evaporated. Such excessive pumping that serves no historic beneficial use constitutes waste under New Mexico law. *Cf. Erickson*, 308 P.2d at 988 (continuous pumping from a well for the professed beneficial use to grow native grasses constituted waste); *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1134 (10th Cir. 1981) (stored water that is predominately lost to evaporation is not beneficial use of water, constitutes waste, and cannot result in a water right, *citing Erickson* at 987-88).

The Bawoleks' claim to a water right associated with pumping records from 2007 and thereafter does not establish or otherwise justify this Court entering judgment in favor of the Bawoleks for a 5.48 AFY water right from well W14.

V. CONCLUSION

For the reasons articulated in the paragraphs above, the Bawolek Motion should be denied.

Respectfully submitted this 15th day of December, 2014.

/s/ Andrew "Guss" Guarino
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 2014, I filed the foregoing 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.

__/s/ Andrew "Guss" Guarino________