

**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-MV/WPL
)	
ZUNI INDIAN TRIBE, NAVAJO NATION,)	ZUNI RIVER BASIN
)	ADJUDICATION
Plaintiffs in Intervention)	
)	
v.)	Subfile No. ZRB-2-0014
)	
A & R PRODUCTIONS, et al.,)	
)	
Defendants)	
)	

**BAWOLEKS' COMBINED REPLY TO PLAINTIFFS' RESPONSE RE BAWOLEKS'
MOTION REQUESTING PARTIAL SUMMARY JUDGEMENT AND RESPONSE TO
THE UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT**

Edward J. Bawolek and Suzan J. Bawolek (hereinafter the “Bawoleks”), defendants *pro se* in Subfile ZRB-2-0014 of the above-captioned matter, hereby file this brief in compliance with the Court's *Order Setting Discovery Deadlines and Adopting Joint Status Report* [Doc. 2958]. Said Order specifies that a combined briefing be filed in support of Defendants' motion for partial summary judgment and responsive to Plaintiffs' cross-motion. Accordingly, this brief comprises two components:

1. The Bawoleks' Reply to *United States' and State of New Mexico's Response to Edward J. Bawolek and Suzan J. Bawolek Motion Requesting Partial Summary Judgment* [Doc. 3012, hereinafter "the Response."]

2. The Bawoleks' Response to *United States' Cross-Motion for Summary Judgment* [Doc. 3013, hereinafter "the US Cross-Motion."].

In general the Bawoleks will address these document separately, but in some instances relevant cross-references will be made.

The Bawoleks request that this Court grant their motion for partial summary judgment and deny the United States' cross-motion for summary judgment.

1. THE BAWOLEKS' REPLY

I. INTRODUCTION

The premise behind the Bawoleks' Motion for Partial Summary Judgment are straightforward: Well W14 is entitled to a water right exceeding Plaintiffs' recognized offer for two reasons, either of which is sufficient of itself to justify the larger right. Plaintiffs' arguments to the contrary are misleading and in some cases mis-characterize the Bawoleks' actions. Further, Plaintiffs attempt to prevail by procedural means where their arguments fail on merit. This Court has early on articulated its policy is to disposition this case based on merit [Doc. 287].

With respect to the matter instant, evidence exists despite Plaintiffs' arguments to the contrary, to support the assertion that Well W14 either supported multiple, simultaneous dwellings. This alone justifies the historical beneficial water rights claimed by the Bawoleks. Plaintiffs first question the credibility of a well-qualified expert witness who established the

existence of said dwellings, and then failing in that argument, imply that the dwellings never relied on Well W14 to any extent.

Further, the Bawoleks have utilized Well W14 and its supporting infrastructure in continuation of its historical configuration, and have acquired data quantifying the water placed to beneficial use. Here Plaintiffs do not dispute the quantitative measurements but instead argue that the Bawoleks have attempted to establish a new water right. That argument failing they contest that the Bawoleks have not applied the water to beneficial use, but conveniently have resisted Bawolek's evidence to the contrary on procedural grounds.

Throughout the Response and the US Cross-Motion, Plaintiffs have continually referred to the residence in closest proximity to Well W14 as "unoccupied." The Bawoleks traverse this characterization and in contrast state that the residence is "intermittently occupied." While admittedly not the primary habitation used by the Bawoleks when they are present on their property, said residence continues to be employed as a guest house, hunter's quarters, and recreational retreat. Plaintiffs' characterization is misleading and the Bawoleks are concerned that allowing said characterization to continue uncontested could be construed as an abandonment of the Bawoleks' water rights associated with said residence.

II. STANDARD OF REVIEW

The standard of review has already been discussed in the Bawoleks' Motion for Partial Summary Judgment [Doc. 3006] and in the Response [Doc. 3012].

III. REPLY TO DISPUTED AND UNDISPUTED ISSUES OF MATERIAL FACT

Plaintiffs argue that a number of undisputed factual assertions are not relevant to the Bawoleks' claimed water right for Well W14. In other instances they admit relevancy but allege

the facts are either disputed or not material. The Plaintiffs' tabulated their responses; said table is reproduced infra with the Bawoleks' reply appended below each line item:

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. <i>See</i> 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
Bawoleks' Reply: Assertions 1 & 2 are relevant because the drilling of the well prior to the declaration of the basin removed the requirement for making a declaration to the State Engineer as to the purpose of the well. As a consequence the Plaintiffs' assertions that the wells beneficial uses are limited to livestock watering and domestic use are opinion and not based on legitimate record-keeping requirements for the Bawoleks or prior owners of the property.		

<p>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.</p>	<p>Not disputed</p>	<p>Not relevant</p>
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Bawoleks' Reply: The Bawoleks question Plaintiffs' reasoning - i.e., how can a measurement of beneficial water use *not* be relevant to the establishment of a water right? In particular, the production measurement represented supra was obtained by utilizing Well W14 and its associated infrastructure consistent with historical use.

<p>4. The measurements detailed in undisputed fact number 3 were completed prior to the Court's temporal limit for this adjudication.</p>	<p>Not disputed</p>	<p>Not relevant</p>
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Bawoleks' Reply: This issue was addressed in the Bawoleks' Motion for Partial Summary Judgment [Doc. 3006]; the Bawoleks state that the document speaks for itself.

<p>5. Four residences were simultaneously occupied on the Bawoleks' property during the interval from 1937 to 1951.</p>	<p>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 occupancy may have occurred</p>	<p>Relevant but not material</p>
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Bawoleks' Reply: Plaintiffs' are mischaracterizing the relative certainty of the expert witness's opinion and operating outside their field of expertise. Further, the Plaintiffs' expert has no identifiable experience in the relevant science of archeology and therefore cannot offer any expert rebuttal outside of mere opinion. Speaking further to Plaintiffs' argument: while Bawoleks' expert witness, assuming *arguendo*, discusses probable ranges of occupancy for multiple historical dwellings on the Bawolek property, those ranges have considerable overlap - a period of fifteen years. Thus, even if some uncertainty were to exist in the exact dates, it is inconceivable that the basic premise - i.e., simultaneous occupancy of four home sites, is incorrect. The assertion is material in view of Plaintiffs' representations to this Court as to the standard of proof they maintain is acceptable for a domestic water right.

<p>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."</p>	<p>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>i.e.</i> well), is plausible evidence of a .7 AFY beneficial use of water.</p>	<p>Relevant but not material</p>
<p>7. Plaintiffs have established a precedent for recognizing a domestic beneficial use for wells based upon historical residences.</p>	<p>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.</p>	<p>Not relevant; not admissible</p>

Bawoleks' Reply: The Bawoleks are at a loss to understand how Plaintiffs can dispute their own representation (Assertion 6) to this Court and effectively restate that representation with equivocation while denying its relevancy. In the Response at pg. 2 Plaintiffs assert "Based on information gathered and consistent with practices followed for every other non-Indian water right owner in the Basin, Plaintiffs determined the state-law based water rights associated with the Bawoleks' property that should be recognized by this Court." Said statement establishes the relevancy for Assertion 7 and its admissibility: Assertion 7 is not directed solely to the admissibility of the Bawoleks' claim, but also to the veracity of Plaintiffs' representations to this Court.

<p>8. Plaintiffs have only recognized one residence as being served by well W14</p>	<p>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.</p>	<p>Not relevant</p>
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Bawoleks' Reply: The assertion is relevant because it speaks to the crux of the Bawoleks claim, i.e., that Plaintiffs have failed to recognize all of the residences historically served by Well W14.

<p>9. All wells on the Bawoleks' property excepting well W14 have priority dates on or after 12/31/1971.</p>	<p>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.</p>	<p>Not relevant</p>
<p>Bawoleks' Reply: This assertion is relevant because it establishes that no water sources other than Well W14 existed during the timeframe of simultaneous occupancy for the four identified historical home sites on the Bawolek property. Plaintiffs have not identified any alternative sources of water in closer proximity than Well W14 to said home sites. Plaintiffs claim to have identified evidence of alternate water supply to one home site; Bawoleks speak to this assertion infra in IV. Arguments.</p>		

<p>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</p>	<p>Not disputed. Water is supplied to the stock ponds from surface water runoff and also from water piped from well W14.</p>	<p>Relevant to establishing an agreed livestock watering purpose of use for well W14, but not the claimed quantity of that use.</p>
<p>Bawoleks' Reply: Relevancy to claimed quantity of use is discussed infra in IV. Arguments.</p>		

Plaintiffs, in the Response, offer three additional factual assertions. They are reproduced immediately infra with the Bawoleks' replies:

<p>PLAINTIFFS' FACTUAL ASSERTIONS CONCERNING WELL W14</p>		
<p>Plaintiffs' factual assertions</p>	<p>Whether the asserted fact is undisputed by the Bawoleks</p>	<p>Bawoleks' Reply: Whether the asserted fact is relevant to the determination of the Bawoleks' water rights for Well W14</p>
<p>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.</p>	<p>Not disputed.</p>	<p>Relevant to establishing Well W14 was the closest source of water for residences at said ruins.</p>

The distance between well W14 and the unoccupied but habitable house (House 1) is 160 feet.	Not disputed.	Relevant but not material. The nominal distance between a water source and its point of use does not impact the validity of its water right.
No piping exists that connects W14 to Ruin 1, Ruin 2, or Ruin 3.	Not disputed.	Not relevant.

IV. ARGUMENT IN REPLY

Plaintiffs allege that the Bawoleks' expert (Mr. Boggess) fails to establish the simultaneous occupancy of four historical houses on the Bawolek property, arguing that at most, Mr. Boggess' investigation establishes a potential for such occupancy. Plaintiffs further contend that "...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." [the Response at pg. 15]. Neither the Plaintiffs, nor their expert, have any identifiable credentials in the sciences of Classical Archeology and Anthropology, and are therefore not qualified to make assertions to the Court as to what is or is not possible within the capabilities of those sciences. The degree of certainty in Mr. Boggess' analysis is best assessed with reference to his statement on pg. 5 of his report: "The archaeological and historical data, therefore, shows as many as four homes in use concurrently between 1937 and potentially as late as 1951, with two of the homes in use between 1951 and as late as 1964, and one continuing in use (Tables 2 and 3)." To the extent that any uncertainty can be read into Mr. Boggess' statement, the Bawoleks contend that the totality of data compiled by Mr. Boggess exceed the threshold for credibility propounded by the Plaintiffs themselves in their representations to this Court. (C.f., Doc. 406 at pg. 9: "Evidence of such greater use can be deduced from various, readily observable

facts and circumstances.") Plaintiffs argue that those representations are not admissible by virtue of being made in conjunction with the compromise of a claim. The Bawoleks counter that said statements are nevertheless admissible by virtue of Plaintiffs' allegation that they have treated the Bawoleks' claims "...consistent with practices followed for every other non-Indian water right owner in the Basin..." (the Response at pg. 2). Were this true, the Bawoleks contend that they could have reached agreement with Plaintiffs long ago. The Bawoleks' perception of differential treatment is informed not only by their direct interactions with Plaintiffs, but also by reference to the Court's rulings (C.f. Doc. 2555) in this adjudication.

Plaintiffs, after failure to discredit the existence and simultaneous occupancy of four historical residences on the Bawolek property, proceed to allege that said residences have not been proven to utilize Well W14 for their water supply. After discrediting Mr. Boggess, his expertise, and his science, they proceed to rely on his research in an attempt to establish that the residences used alternative water sources, in particular that the family residing at Ruin 1 employed water from a well owned by a Mr. Hubble.

In reply, the Bawoleks state that the facts, when properly interpreted, do support the Bawoleks' claims: the history of Ruin 1 predates the priority date for Well W14 by eight years. It is reasonable to presume, therefore, that the residents of the house at that site utilized a source of water other than a well which did not yet exist. Bawoleks will stipulate that the record supports the residents at Ruin 1 used water from a well owned by a Mr. Hubble *at one time*. This in no way precludes use of a more proximate water source when such a source becomes available.

While alleging that the former residents at Ruin 1 utilized water from a well owned by Hubble, in contradiction Plaintiffs further argue that because the other historical residences were

(at the time) on disparate properties with different owners from the land owner possessing Well W14, those different owners would not have utilized Well W14 as their water source. Plaintiffs attempt to further this argument by tabulating the distances between Well W14 and the Ruins, presumably to imply that the relative distances precluded use of the well. In reply, the Bawoleks contend that the Plaintiffs' own data show that Well W14 at the time of its drilling was the closest water source to any of the ruins in question. Plaintiffs' expert fails to identify in the alternative any closer source of water having a priority date sufficiently early to have served the associated residences. Indeed, the Bawoleks' own review of the consent decrees filed in this matter have convinced them that no alternative source of water existed.

Plaintiffs' utilization of the reference to the Hubble well implicitly accepts the premise that residents of the era collaborated and shared resources. The Bawoleks agree with this premise and contend that the most reasonable presumption is that said residents would therefore utilize the closest, most convenient resources available, especially given the cost and inconvenience of travel. The absence of any piping connecting the Ruins to Well W14 or any other water source, only furthers the argument favoring use of the closest available water source. This argues overwhelmingly that Well W14 served the residences enumerated.

As an argument separate from the issue of historical residences served by Well W14, the Bawoleks presented their own pumping data in order to quantify their beneficial use of water from said well. Plaintiffs allege first that the Bawoleks' data are not relevant, then contend that the Bawoleks' usage is not beneficial, but wasteful and not consistent with historical use. The Plaintiffs also take issue whenever the Bawoleks have presented their data as an annualized usage. The Bawoleks reply to this last issue first: Plaintiffs, in crafting all of the consent decrees

in this adjudication, have exclusively employed an annualized tabulation for all water rights. The Bawoleks, in assessing their measurements, have extrapolated to annualized amounts in conformity to the format of the decrees. If Plaintiffs are proposing an alternative formulation, they have not so communicated to the Bawoleks. Further, even if the Bawoleks' measurements are taken as absolutes for the calendar year in which they were acquired they represent amounts in excess of the Plaintiffs' proposed recognized rights. Thus Plaintiffs contentions with respect to annualized quantities represent a distraction from the truly relevant issues comprising the controversy between Plaintiffs and the Bawoleks.

As prelude and background to addressing the question of beneficial use, the Bawoleks draw the Courts' attention to some undisputed facts concerning the Bawoleks' property, extracted from the Plaintiffs' Water Rights tabulation [as presented in Doc. 3013-2]: A review of said document reveals that the water features on the Bawolek property as enumerated comprise six wells and 25 stock ponds. The Plaintiffs' expert calculates that the Bawolek property can support 30 animal units (AU) of cattle (Plaintiffs' expert report at pg. 22). Assuming *arguendo* that this estimate is reasonable, the Bawoleks now raise the question as to why their property has such a large number of stock ponds and wells, if the only historical purpose of said water features was to support livestock grazing? Given the limited animal capacity, it is remarkable that previous owners would go to such lengths for livestock needs alone. One or two stock ponds, and perhaps a well, would be more than sufficient to meet the needs of the livestock burden, and would more closely align with the configuration of other properties and subfiles in proximity to the Bawoleks property. (C.f. Hydrographic survey map 10C-4, filed by Plaintiffs in this adjudication).

In fact, the large number of stock ponds on the Bawolek property would effectively enable every two grazing cows to have their own stock pond! This represents an extraordinary level of accommodation to an animal raised for food. In the alternative, the Bawoleks contend that the significant number of water features on their property represents a different intent on the part of the previous owners, specifically, control and improvement of the ecosystem, i.e., to the benefit of wildlife. A well or stock pond require significant cost and effort to create; the previous owners of the property would have to perceive some benefit outside of livestock needs, which would be easily met with only a minimal installation of water features. Furthering this argument, the Bawoleks point to the undisputed fact that Well W14 is diverted to five stock ponds. Why not only one? If the historical use for the Well W14 were simply constrained to livestock grazing, a diversion to a single stock pond alone would have sufficed.

In light of the above, the Bawoleks' utilization of Well W14 for the filling and sustenance of its associated five stock ponds is clearly an ongoing continuation of an historical use pattern established by previous owners. The Bawoleks did not create any new diversions or uses requiring an application to the State Engineer; they merely quantified their use in accordance with state law.

We now turn to Plaintiffs' allegation that the Bawoleks merely wasted the water to evaporation and provided no evidence of beneficial use. The Bawoleks contention is that the water used to fill stock ponds provides a benefit to wildlife that should not be evaluated solely on the basis of what an animal drinks. The Bawoleks have provided Plaintiffs with explanation and evidence to justify filling stock ponds not only for consumptive use, but to provide habitat considered essential by those who lease the Bawolek property for hunting purposes. One

example can be found in filings previously made with this Court; attention is directed to Exhibit B, Part II, from the Bawoleks' Amended Answer [Doc. 2918-3]. Page 17 of the that file (enumerated as page 37 of the complete Exhibit) presents a redacted correspondence between Edward J. Bawolek and Mr. Brian Mason which discusses the need to provide elk with suitable wallows. In addition Plaintiffs were provided with photographs of elk in proximity to several water features on the Bawolek property. Plaintiffs allege there is no correlation between the water features and the presence of wildlife; the Bawoleks contend that there is. Further, the evidence presented by the Bawoleks supports a justifiable and beneficial use for the water diverted into the stock ponds on the Bawolek property. Given that the wildlife supported by the Bawoleks' actions belongs not to the Bawoleks, but to the public, the Bawoleks' utilization of their water features to support wildlife not only supports the Bawoleks' interests, but a public interest as well. This clearly transcends the threshold for beneficial use.

The characterization that the Bawoleks are intent upon wasting water is especially galling to the Bawoleks in light of their longstanding efforts to work with public agencies to manage their land and its ecosystem responsibility. The Bawoleks are keenly aware of the drought, the importance of water, and the need to manage its use. Evidence of this is again found in material already provided to this Court: Attention is directed to the Bawoleks' Amended Answer Exhibit B Part II [Doc. 2918-3] at Pages 8 & 9 (enumerated as pages 28 and 29 of the complete exhibit), reproducing correspondence the Bawoleks had with the United States NRCS (National Resources Conservation Service) as early as 1999. Currently, the Bawoleks are exploring a project with the NRCS to timber approximately 160 acres of their property, primarily for the purpose of improving the watershed and aquifer recharge. This point would be ancillary to the

matter at hand, excepting the Plaintiffs' insinuations libeling the Bawoleks' stewardship. If the Bawoleks were so intent upon wasting water, why would they be so concerned about improving its supply?

Plaintiffs allege that the Bawoleks' provision of water for wildlife in general, and elk in particular, exceeds any justifiable need. Plaintiffs' expert, Mr. Turnbull, states in his affidavit [Doc. 3013-1 at pg. 8] that "...an adult elk has a comparable animal unit equivalent of 0.7 AU, as stated in the literature. Therefore, both the forage and water needs are 30% less than a single cow." Mr. Turnbull's statement is incorrect and misleading. The references cited in his expert report do not address water consumption by elk; said references speak only to forage requirements. Plaintiffs were challenged on this point during discovery with a Request for Admissions; the Requests and Plaintiffs' responses are reproduced immediately infra:

RFA 5 - Admit that the following statement is true: The Wilson and Lucero Report referenced by Plaintiffs' Expert Witness, Mr. Scott Turnbull, makes no mention whatsoever, either explicit or implicit, of reasonable water requirements for any of [sic] elk and elk habitat.

Objection of the Plaintiffs – Plaintiffs objects to this RFA as the report describe in the RFA speaks for itself and it is unnecessary for the United States to restate or admit to the contents of the report. The Plaintiffs object to the discovery request as unreasonable and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(2)(C).

Response of Plaintiffs – Plaintiffs admit that the Wilson and Lucero report provide a description of the reasonable water requirements of cattle and not elk.

RFA 6 - Admit that the following statement is true: The Wilson et. al. report referenced by Plaintiffs' Expert Witness, Mr. Scott Turnbull, makes no mention whatsoever, either explicit or implicit, of reasonable water requirements for any of elk and elk habitat.

Objection of the Plaintiffs – Plaintiffs objects to this RFA as the report describe in the RFA speaks for itself and it is wholly unnecessary for the United States to restate or admit to the contents of the report. The Plaintiffs object to the discovery request as unreasonable and seeking information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. Fed. R. Civ. P. 26(b)(2)(C).

Response of Plaintiffs – Plaintiffs admit that the Wilson et al. report provide a description of the reasonable water requirements of cattle and not elk.

Nothing in Mr. Turnbulla's credentials, nor in the references cited in his report, justifies any expert conclusion as to legitimate allocations of water for wildlife support in general, and elk in particular.

Finally, the Bawoleks traverse the argument made by the United States that its claim for water rights associated with filling stock ponds is an issue of federal law only and not relevant as a precedent. In their research, the Bawoleks encountered the following discussion which traverses the United States' contention:

Overall, the doctrine of federal reserved water rights represents a limited exception to the general rule that individual states govern water rights within their respective borders. See [New Mexico, 438 U.S. at 702](#) ("Where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to the state law."). Generally, water rights must be obtained by appropriation under state water law, even if those rights are developed in land owned by the federal government. See [Cal. Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64, 55 S. Ct. 725, 79 L. Ed. 1356 \(1935\)](#) (stating that "following the [Desert Land Act] of 1877, if not before,

all non-navigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain").'

2. THE BAWOLEKS' RESPONSE TO PLAINTIFFS' CROSS-MOTION

V. INTRODUCTION

Plaintiff United States (hereinafter Plaintiff US) alleges that no issue of material fact exists concerning the priority, amount, purpose and place of use, and point of diversion associated with the Bawoleks' water rights. The Bawoleks disagree, excepting that points of diversion are not in contention. Plaintiff US contends that it has made a determination of the Bawoleks' water rights "...consistent with practices followed for every other non-Indian water right owner in the Basin..." The Bawoleks have traversed this contention supra and will not address this point further. The Plaintiff US has devoted considerable argument to its disagreement with the Bawoleks respecting the beneficial water use by an irrigation system associated with Well W14; this is a moot point as the Bawoleks arguments, both in their Motion for Partial Summary Judgment [Docs. 3006, 3006-1] and discussion supra, do not rely on any computations or estimations of the irrigation system's capacity to support their claimed rights for Well W14. Plaintiff US' continuing focus on this topic represents a distraction and waste of the Court's time.

VI. STANDARD OF REVIEW

The standard of review appropriate to a Motion for Summary Judgment has already been discussed in the Bawoleks' Motion for Partial Summary Judgment [Doc. 3006] and in the Response [Doc. 3012]. Here the Bawoleks echo and reiterate Plaintiff US' citation of Fed. R. Civ. P. 56 that the court must "view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment."

VII. DISPUTED AND UNDISPUTED ISSUES OF MATERIAL FACT

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

PLAINTIFF US' FACTUAL ASSERTIONS CONCERNING BAWOLEKS' WATER RIGHTS		
Plaintiff US factual assertions	Whether the asserted fact is undisputed by the Bawoleks	Whether the asserted fact is relevant to the determination of the Bawoleks' water rights
1. Based upon plausible evidence of historic, beneficial use, Plaintiffs have stipulated to the recognition of water rights associated with the historic, beneficial use of water on the Bawoleks' property.	Disputed. Plaintiffs have ignored evidence provided by the Bawoleks which argue for water rights differing from Plaintiffs' stipulation.	Relevant only to the extent that Plaintiffs' stipulation supports Bawoleks' claim.
2. The Bawoleks' estimate of water capacity associated with non-functioning drip irrigation system is not based upon evidence of irrigation of a specific crop.	Not disputed.	Not relevant; moot.

<p>3. Similar to other open land in the Basin, the Bawoleks' property appears to have been historically used to raise livestock and water features found on their property (wells and stock ponds) were used to supply water to livestock.</p>	<p>Disputed. Bawoleks stipulate that their land and associated water features have been employed for raising livestock, but contend that their land is not "similar" to other land in the Basin, as evidenced by a significant excess of wells and stock ponds beyond those needed solely to service the livestock capacity of the land.</p>	<p>Relevant but not material to Bawoleks' claim: Historical livestock grazing on the Bawoleks' property does not preclude other uses.</p>
<p>4. The water pumped by the Bawoleks from wells 10C-4-W08; 10C-4-W13; 10C-4-W14; and 10C-4-W16 between 2007 and 2013 are greatly in excess of any known estimate of wildlife water needs.</p>	<p>Disputed. Plaintiffs' expert offers no credible estimate to counter Bawoleks' claim as discussed infra.</p>	<p>Relevant</p>

VIII. ARGUMENT IN RESPONSE

The arguments made supra by the Bawoleks in section **IV. ARGUMENT IN REPLY** are equally valid in response to Plaintiff US' Cross-Motion and will be repeated only to the embellish only to the extent the Bawoleks believe necessary to inform and benefit the Court:

Plaintiffs have adequately characterized their dispute with the Bawoleks as being focused on quantity of water rights from four wells and purpose of use. The Bawoleks have already outlined their claim in particular for Well 10C-4-W14 ("Well W14") and have provided two mutually exclusive arguments (historical residences and Bawoleks' own metering records) to support a water right in excess of the Plaintiff US' stipulation.

A key point of contention remains the application of water to the beneficial use of wildlife. Plaintiffs position is that the Bawoleks' claims are unreasonable and not based on any

supportable data, with water features on the Bawoleks' property having been solely historically to livestock grazing. In reply, the Bawoleks contend that Plaintiffs have failed to recognize and provide any plausible explanation for the plethora of water features on the Bawolek property which far exceed the infrastructure needed to sustain a minimal livestock population.

Plaintiffs claim to have provided "...the only undisputed evidence concerning the needs of elk..." [Doc. 3013 at pg. 15]. Bawoleks traverse this assertion for reasons detailed supra, in brief, Plaintiffs expert did not reference any materials speaking to the water requirements of elk or other wildlife and lacks any credentials to draw any conclusions of his own. At most, Plaintiffs' expert found limited documentation for estimating the forage consumption for elk. This does not speak to the habitat requirements for the species. In contrast, the motivation for and extent of the Bawoleks' provision of water for wildlife can be found in their communications with outfitters and conservationists and the Bawoleks' simply used the existing water resources placed into existence by prior owners to do so, continuing a pattern of historical beneficial use.

IX. CONCLUSION

The best prism with which to view the Bawoleks' arguments is as follows: If the Court grants Plaintiffs' Cross-Motion, will the Bawoleks, as responsible stewards of the land, be able to utilize the water on their property in the future as they, and the preceding owners, have done in the past? Granting Plaintiffs' Cross Motion will answer in the negative, to the detriment of the Bawoleks and the public. For these reasons, the Bawoleks pray this Court to grant their Motion for Partial Summary Judgment and to deny Plaintiff US' Cross-Motion.

Dated December 30, 2014.

Respectfully submitted,

By: /s/ Edward J. Bawolek and /s/ Suzan J. Bawolek
2200 West Sagebrush Court
Chandler, AZ 85224
(602) 376-1755
bawolek@cox.net

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on December 30, 2014, I filed the foregoing BAWOLEKS' COMBINED REPLY TO PLAINTIFFS' RESPONSE RE BAWOLEKS' MOTION REQUESTING PARTIAL SUMMARY JUDGEMENT AND RESPONSE TO THE UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT 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.

/s/ Edward J. Bawolek
Edward J. Bawolek
2200 West Sagebrush Court
Chandler, AZ 85224
(602) 376-1755
bawolek@cox.net