IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA)
and) No. 01cv00072-MV-WPL
STATE OF NEW MEXICO, ex rel.)
STATE ENGINEER,) ZUNI RIVER BASIN
) ADJUDICATION
Plaintiffs,)
)
v.)
) **Subfile No. ZRB-2-0098**
A & R PRODUCTIONS, et al.)
)
Defendants.)
_________________________________)

UNITED STATES' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, CROSS-MOTION FOR SUMMARY JUDGMENT ON ALL REMAINING ISSUES OF DISPUTE, AND MEMORANDUM IN SUPPORT

Pursuant to Rule 56 Fed. R. Civ. P., and D.N.M.LR-Civ. 56.1, Plaintiff United States of America ("United States") hereby submits its response to Subfile Defendants JAY Land Ltd. Co.'s and Yates Ranch Property LLP's ("Defendants") Motion for Partial Summary Judgment (Doc. 3059) and Memorandum in Support of Motion for Summary Judgment (Doc. 3059-1). In addition, the United States moves the Court for summary judgment on all remaining contested water right claims in Subfile No. ZRB-2-0098.[1]

As the United States will demonstrate below, no genuine dispute as to any material fact exists between the parties. Based upon the undisputed material facts, the United States is entitled

[1] The United States will refer to Defendants' Motion and Memorandum collectively as "Defs.' Motion;" to the property in the Zuni River Basin owned by Defendants as "Atarque Ranch;" and to this pleading as the "Cross-Motion." Although both the United States and the State of New Mexico are both plaintiffs, this Cross-Motion is brought by the United States alone. In the Cross-Motion, when referring to past collective actions of the United States and the State of New Mexico, reference will be made to "Plaintiffs."

to summary judgment as to all contested water rights associated with the Atarque Ranch property as a matter of law.

I. BACKGROUND OF THE PARTIES' DISPUTE

Pursuant to the *Interim Procedural Order Requiring All Water Rights Claimants to Update Their Water Rights Files with the State Engineer* (Doc. 208), the United States, acting through its employees, experts, and consultants, performed a Hydrographic Survey of the Zuni River Basin ("Basin") and examined Atarque Ranch for evidence of historic, beneficial water use. *See Notice of Filing the Zuni River Basin Hydrographic Survey for SubAreas 9 and 10* (Doc. 393).[2] Based on the information for Atarque Ranch gathered by the Hydrographic Survey, the United States generated a Consent Order, including descriptions of all surveyed beneficial uses of water on Atarque Ranch, and served the Consent Order on Defendants. *See Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 9 and 10 of the Zuni River Stream System* at 2-4, § II (Doc. 436). Defendants prepared their *Subfile Answer* (Jan. 25, 2014) (Doc. 2925) and identified the water feature descriptions in the Consent Order that they disputed. *See id.* at 5-6, § III.B. After extended consultation, the parties resolved many Atarque Ranch water rights, thereby narrowing the universe of claims in dispute. The parties no longer dispute the water rights attributes associated with the numerous man-made earthen impoundments (i.e., stock ponds) found on Atarque Ranch.

The disputed claims that remain between the parties, some of which constitute the subject matter of Defs.' Motion, include the following: (1) the water rights claimed for 21 of the 26 wells found on Atarque Ranch, s*ee* Subfile Answer at 2-13; (2) the water rights claimed for four

[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.

natural springs and ten natural depressions, *see id.* at 71-73 (springs) and 73–76 (depressions); and (3) the water right claimed for a large impoundment (commonly referred to as "Atarque Lake"), the dam for which was intentionally and completely destroyed before 1972, *see id.* at 73. *See Joint Status Report and Proposed Discovery Plan, Attachment A* (Apr. 10, 2014) (Doc. 2955-1) ("Joint Status Report – Attachment A").

A. Disputed Wells

Defendants first claim that they are entitled to a water right for additional quantities of water from the 21 Atarque Ranch wells that remain in dispute. Subfile Answer at 2-13.[3] For each of these wells, Defendants in their Subfile Answer assert quantities of water much larger than those offered by Plaintiffs in the Consent Order. However, neither of Defendants' identified experts, Don Alam and Darrell Brown, have quantified the historic and beneficial use of water from each well in dispute; nor have Defendants' experts linked any historic, beneficial use to a period of use to establish the priority claimed. In short, Defendants have not presented even a scintilla of evidence of the quantity of water historically, beneficially used from each well in dispute and the period of use associated with the priority claimed. In the absence of such evidence, Defendants are not entitled to summary judgment for the well water rights they assert.

Defendants further assert, again without any evidentiary basis, that, for the 21 disputed wells, Defendants are entitled to "5 feet per year" to account for evaporation losses. Defs.' Motion at 20; *see also id.* at 6 - 8 (Undisputed Facts ##15–27). However, to the extent that Defendants are entitled to a quantity of water for evaporation, Plaintiffs have already accounted for the reasonable evaporative losses associated with livestock consumption on Atarque Ranch

[3] The wells for which the water right remains in dispute are identified individually as 10A-2-W01, 10A-2-W02, 10A-3-W02, 10A-4-W01, 10A-5-W01, 10B-1-W05, 10B-2-W01, 10B-2-W03, 10B-2-W04, 9B-2-W06, 9B-4-W01, 9C-2-W03, 9C-2-W04, 9C-3-W01, 9C-3-W02, 9C-3-W03, 9C-4-W01, 9C-4-W03, 9C-4-W04, 9C-4-W05 and 9C-5-W01. *See* Attachment A. Defendants did not contest hydrographic findings for the other five wells, identified as 10A-3-W01, 10B-4-W01, 10B-4-W02, 10B-4-W03, and 10B-4-W04. *See* Subfile Answer at 3 and 6 – 8.

and have included that substantial quantity of water in the estimate of water rights for each disputed well contained in the Consent Order. In fact, as discussed in Section IV.B.1.c, *infra*, the quantity of water for evaporative losses that Plaintiffs have recognized for the wells that remains in dispute is more than 10 times greater than the "5 feet per year" claimed by Defendants in their Motion. In essence, Defendants have asserted a right to water for evaporative losses from the disputed wells that is substantially less than that to which Plaintiffs are willing to stipulate. Defendants thus do not raise a contested issue over which any dispute exists and, for each of the 21 wells in dispute, judgment should enter that quantifies the water right based on the quantities established in the Hydrographic Survey and as stipulated to by Plaintiffs.[4] *See* Attachment A.

B. Disputed Natural Springs and Depressions

Defendants next claim that they are entitled to a water right for several unimproved springs and natural depressions found on Atarque Ranch. *See* Subfile Answer at 71 – 73 ("Springs")[5] and 73 – 76 ("Stock Tanks").[6] With respect to these claims, New Mexico law establishes that neither the existence of natural, unimproved water features nor the utilization of such features result in a water right. Further, neither of Defendants' identified experts have quantified the historic and beneficial use of water from the unimproved springs claimed; nor

[4] Based upon additional information provided by Defendants in the fall of 2014, Plaintiffs informed Defendants that they would revise the water right quantities associated with the disputed wells to which Plaintiffs are willing to stipulate. A table, prepared by Scott Turnbull, the United States' expert, identifying the disputed wells and the water right attributes that Plaintiffs have established for each of them, is attached to this Cross-Motion as Attachment A and incorporated herein by reference. The table modifies the water right attributes for each disputed well, previously described in the *Joint Status Report – Attachment A*, to which Plaintiffs are willing to stipulate.

[5] Although Defendants include water rights claims for nine springs in the Subfile Answer, during the course of discovery they informed Plaintiffs that they were withdrawing claims for five of the eight springs. Therefore, water rights for only four of the originally claimed springs remain in dispute. Attachment D - Turnbull Affidavit at ¶ 16. Those springs are identified individually as 10A-4-SPR01, 10A-4-SPR02, 10A-4-SPR03 and 9C-4-SPR02.

[6] The United States examined the "Stock Tank" claims and identified that two were man-made impoundments not previously identified by the hydrographic survey. *See* Subfile Answer at 73-74, ¶ 1 and 75, ¶ 7. Consequently, Plaintiffs are willing to recognize two additional stock ponds along with the other stock ponds that will be recognized for Atarque Ranch.

have Defendants disclosed evidence to support the priority date claimed by Defendants. As is the case with the 21 wells in dispute, without a legal or factual basis to establish a water right for the water from each unimproved spring and depression in dispute, Defendants are not entitled to the water right they assert. For each of the remaining unimproved springs and depressions in dispute, judgment should enter against Defendants, and their water right claims for the identified springs and depressions should be denied.

C. Dispute Over "Atarque Lake"

Defendants finally claim that they are entitled to a substantial water right for a historic water feature, commonly referred to as "Atarque Lake," that has not existed in more than four decades. *See* Subfile Answer at 73 ("Surface Water Rights"). In their Motion, Defendants assert that they have established a *prima facie* case for an Atarque Lake claim. Defs.' Motion at 10-11. Defendants also assert that since the destruction of the Atarque Lake dam, any water right that might have existed has not been abandoned. *Id.* at 11-16.

Atarque Lake was an impoundment of water created by a substantial dam that was built before 1937.[7] The dam was destroyed by 1972. *See* Subfile Answer at 73. Despite their assertions, Defendants are not entitled to the statutory presumption of *prima facie* evidence outlined in NMSA 1978, § 72-1-3. As their summary judgment motion rests exclusively on this statutory presumption, Defs' Motion at 10-11, rather than upon competent facts, the Motion necessarily fails. Indeed, Defendants have produced no admissible evidence whatsoever of the historic, beneficial use of water from Atarque Lake and thus are not entitled to the water right they claim. Rule 56(e), Fed. R. Civ. P. Finally, contrary to Defendants' assertions, even if the Court were to recognize the existence of an Atarque Lake water right, whatever right existed was

[7] Examination of aerial photography taken in 1936 shows Atarque Lake. Attachment D – Turnbull Affidavit at ¶ 22.

abandoned long ago with the complete, intentional destruction of the substantial dam creating Atarque Lake. For Defendants' claim to a water right for Atarque Lake, judgment should enter against Defendants.

In sum, the only basis to recognize any aspect of a water right associated with the Atarque Ranch is historic, beneficial use. No dispute of material fact exists with respect to the water rights determined by the Hydrographic Survey. Neither controlling law nor competent evidence exists to support the Defendants' claims for any of the additional water rights they seek in their Motion. The United States is entitled to summary judgment as a matter of law on the Disputed Wells, the Natural Springs and Depressions, and Atarque Lake consistent with Attachment A.

II. STATEMENT OF MATERIAL FACTS

Pursuant to Rule 56(c), Fed. R. Civ. P., and D.N.M. LR-Civ. 56.1(b), in Attachment B, which the United States specifically incorporates by reference in this Cross-Motion, the United States responds to each fact asserted by Defendants in their Motion to be undisputed. In Attachment C, also by specific reference incorporated herein, the United States presents the undisputed material facts supporting this Cross-Motion.

III. APPLICABLE SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. Whether asserted by plaintiffs or defendants, this standard of review remains the same. 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 of Rule 56 omitted). A fact is "material" if, under the governing law, it could have an effect on the outcome of the action. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is "genuine" if a rational jury could find in favor of the nonmoving party on the evidence presented. *Id.* A mere "scintilla" of evidence is insufficient to successfully oppose a motion for summary judgment. *Id.* at 252. Following *Celotex* and *Anderson*, the Tenth Circuit has said that, when reviewing a motion for summary judgment, the district 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).

In this subfile action, both the United States and the Defendants have moved for summary judgment. Under nearly identical circumstances in a related subfile proceeding, where a subfile defendant sought a partial summary judgment and the United States sought summary judgment for all water rights associated with the subfile property, this Court "approach[ed] these motions from the standpoint of the United States as the movant." *Proposed Findings and Recommended Disposition*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0014, Doc. 3049 at 3. Regardless of which party moved for summary judgment, "to the extent that any water right is disputed," as the users of the water "Subfile Defendants generally bear the burden of proof in the first instance with respect to the water right." *Order*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0098, Doc. 2985 at 4. As a practical matter, then, the burden of persuasion at trial would be on the Defendants. *Proposed Findings and Recommended Disposition*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0014, Doc. 3049 at 3. Accordingly, the United States carries its summary judgment burden "by either (1) providing affirmative evidence negating an essential

element of [Defendants'] claim or (2) showing the Court that [Defendants'] evidence is insufficient to demonstrate an essential element of [Defendants'] claim." *Id.* (citing *Celotex*, 477 U.S. at 331). In addition, once the United States has carried its burden, Defendants must come forward with sufficient facts to establish that a disputed material fact exists.

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment … against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322. Absent an actual dispute of material fact, the United States is entitled to judgment as a matter of law.

IV. ARGUMENT

A. The measure and limit of a water right is established by evidence of historic beneficial use.

"New Mexico state law provides the substantive standards for this adjudication." *Proposed Findings and Recommended Disposition*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0014, Doc. 3049 at 4 (citation omitted). The necessary starting point for considering the merits of the Defendants' Motion and this Cross-Motion is to examine the manner in which a water right is established under New Mexico law.

The legal basis for establishing a water right under New Mexico law is well settled: "The unappropriated water . . . is hereby declared to belong to the public." Article XVI § 2, NMSA 1978, § 72-1-2 (1907). In other words, water within New Mexico belongs to the State. *State ex rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M 1957); *Carangelo v. Albuquerque-Bernalillo County Water Utility*, 320 P.3d 492, 503(N.M. Ct. App. 2013). A water user in New Mexico may secure the right to use water only 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 use the water." N.M. Const. Article XVI, § 3. "Put another way, 'the 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). This Court, in this adjudication, has succinctly articulated the controlling principles governing the establishment of a water right:

> New Mexico law is clear on the subject. The constitutional provision and statutes . . . as well as abundant case law clearly state that beneficial use defines the extent of a water right. This fundamental principle is applicable to all appropriations of public waters. Only by applying water to beneficial use can an appropriator acquire a perfected right to that water.

Memorandum Opinion and Order, No. 01cv00072-BB-ACE, Doc. 733 at 4 (citations and quotation marks omitted). Further, the amount of water, the priority, the purpose, and the periods and place of use, are *each* fundamental elements of a water right under state law that must be proven by a water right claimant, in this case by the Defendants.

> [The] 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).

Here, the focus of inquiry must be on whether Defendants have demonstrated beneficial use of water for Atarque Ranch in quantities greater than those identified by the Plaintiffs in the Hydrographic Survey. Ultimately, to the extent that Defendants seek to establish a water right under state law different from that which Plaintiffs are willing to recognize, the burden is Defendants to establish all necessary elements of a water right for each additional right claimed.

Order (Doc. 2985) at 2-3 ("[A]s a general rule the 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)).

The United States recognizes that the historic use of the land was principally to raise livestock, and more specifically cattle. Atarque Ranch appears to have no other particular historic use. Attachment C - United States Undisputed Fact #2. Therefore, for Defendants, as for all other Basin land owners, the United States has found sufficient plausible evidence to support water rights that were associated with raising livestock, specifically the consumptive water needed to raise cattle. In addition, for any other likely water use from an identifiable water source, Plaintiffs have also been willing to recognize additional water rights such as identifiable domestic water uses.

The Hydrographic Survey Report for Sub Areas 9 and 10, in which Atarque Ranch is located, at page 3-1, describes how the Plaintiffs determined the water right associated with 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 [(AU)] 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.

For each subfile associated with this adjudication, Plaintiffs made estimates of maximum possible livestock water consumption or depletion. *See* Attachment C - United States Undisputed Fact #3. To ensure that stock water users of the Basin had a sufficient water right to ensure that consumptive stock needs were met, Plaintiffs included an "efficiency factor of 0.5" in its livestock consumption estimate. This efficiency factor effectively doubled the quantity expected to have been consumed per animal unit (to 20 gallons/day) to account for incidental losses such as water management practices, evaporation, system leaks, spillage, etc. *Id.*

Once the livestock carrying-capacity and annual water needs were determined for Atarque Ranch, Plaintiffs divided the water quantity equally by the number of wells found on the ranch property. *Id.* at #5. During the course of this litigation, Defendants produced well records for a single well designated in the hydrographic survey as well 10B-2-W04, and commonly referred to as the "Highway Well." *Id.* These records established that water had been pumped from this well and piped broadly to 12 pasture areas spread throughout the ranch. *Id.* As a result of the information disclosed by Defendants, Plaintiffs agreed to recognize the maximum annual quantity of water pumped from the Highway Well and agreed to tie that quantity of water to a water right associated with that well. *Id.* However, because the livestock water right presented was already an estimate based on the maximum forage carrying capacity of the ranch, the water right associated with the 15 livestock wells for the areas to which water was pumped from the Highway Well was proportionately reduced. *Id.*

For this subfile, the hydrographic survey identified 97,427 acres of land owned by Defendants and associated with Atarque Ranch. *Id.* at #1. Based on the acreage and the total potential forage that might be developed each year on Atarque Ranch, Plaintiffs determined that

the Ranch could support up to 2,283 cattle or "animal units" of livestock each year. *Id.* at #4.[8] Based on annual daily water need estimates, Plaintiffs estimated that Atarque Ranch would need 51.146 AFY to support livestock needs each year. *Id.* at #4. For this subfile, Plaintiffs identified 24 wells associated with raising livestock on Atarque Ranch and assigned calculated quantities to each well. *Id.*

The Hydrographic Survey also identified 97 stock ponds that were constructed by creating earthen berms across surface water drainages such as washes or arroyos. Attachment D – Affidavit of Scott Turnbull at 3, ¶9. Plaintiffs have taken the position in the adjudication that such stock ponds are sufficient evidence of the beneficial use of surface water for livestock watering. In this subfile action, the parties have resolved the water rights associated with all man-made earthen impoundments.

In addition, as a result of the investigation of Atarque Ranch, the hydrographic survey consultants identified several dwellings in close proximity to 6 wells or otherwise connected to wells by piping (designated 10A-3-W01, 10B-2-W04, 10B-4-W01, 10B-4-W02, 10B-4-W03, 10B-4-W04). In this subfile action, the parties have resolved the water rights associated with all domestic water uses.

When a water claimant such as Defendants does not come to a settlement with Plaintiffs over water rights, the claimant has the burden to prove all elements of the water right they claim: priority, amount, purpose, periods and place of use. *See supra* at §III. Ultimately, the water right quantities and attributes that this Court can recognize for Atarque Ranch can only be based

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[8] Defendants have historically grazed far fewer cattle than the grazing capacity calculated in the Hydrographic Survey. According to the only livestock inventory provided by Defendants, a maximum number of cattle were grazed on Atarque Ranch in 1996 when approximately 1,380 cattle were grazed. Attachment C – United States Undisputed Fact #6; *see also* Attachment D – Affidavit of Scott Turnbull, Ex. 1 – Atarque Ranch Cattle Inventory. Since then, substantially lower numbers of cattle have been grazed on Atarque Ranch. *Id.*

on evidence of historic, beneficial use. As mentioned above and as calculated by Plaintiffs' consultants, all water rights associated with Atarque Ranch wells that remain in dispute and that are supported by the Hydrographic Survey are presented in Attachment A to this Cross-Motion. The law and facts supporting the rights outlined are not in dispute and Defendants do not present any admissible evidence with their Motion to establish otherwise. The United States thus is entitled to judgment as a matter of law and summary judgment should enter on Defendants' water rights consistent with the quantities and attributes presented in Attachment A to this Cross-Motion.

B. Defendants are not entitled to the additional, unresolved water rights asserted in their Subfile Answer.

Although Plaintiffs and Defendants were able to resolve many of the disputed issues concerning the water rights associated with Atarque Ranch (i.e., water rights for man-made earthen impoundments, domestic use water rights, and several well water rights), several points of disagreement remain. First, Defendants claim that they are entitled to a water right for an additional quantity of water from the 21 wells remaining in dispute. Subfile Answer at 2-13. Second, Defendants claim that they are entitled to a water right for several natural, unimproved springs and depressions found on Atarque Ranch. *See id.* at 71-73 (labeled "Springs") and 73-76 (labeled "Stock Tanks"). Third, Defendants claim that they are entitled to a substantial water right for Atarque Lake. *See id.* at 71-73. Plaintiffs address both the law and the facts as they pertain to each of the three disputed areas. The applicable law and the undisputed facts or, as the case may be, the absence of supporting admissible evidence, establish that Defendants are not entitled to the additional water rights they claim. This Court thus should deny Defendants' Motion and enter judgment for the United States as a matter of law.

1. Defendants are not entitled to the disputed well water rights asserted in

the Subfile Answer.

For the 21 wells that remain in dispute, Defendants assert water right quantities that are far in excess of the quantities determined in the Hydrographic Survey. Subfile Answer at 2-13. The stark difference between Plaintiffs' and Defendants' respective positions on this issue is illustrated by comparing the cumulative water right quantity from wells that Plaintiffs are willing to recognize and that Defendants claim. From wells found on Atarque Ranch, the Hydrographic Survey identified and Plaintiffs are willing to recognize stock watering water rights from all 24 livestock wells in the total amount of 51.146 AFY.[9] From these same wells, Defendants assert stock watering water rights claims totaling more than twice the Hydrographic Survey determination. Examination of the evidence produced by Defendants in support of their claim for additional water rights quantities from wells falls far short of the requirements of the applicable law.

As described above, the right to use water in New Mexico is exclusively quantified by the historic, beneficial use of water. *Carangelo*, 320 P.3d at 503. For raising livestock, the water beneficially used is that water consumed by livestock. To calculate the water right associated with grazing livestock on Atarque Ranch, Plaintiffs estimated the maximum forage made available for grazing to be 469,200 pounds per section. Attachment C - United States Undisputed Fact #4. In other words, whether grazed by cattle, horses, sheep, or elk, the amount of forage available within Atarque Ranch is a limiting factor with respect to the number of grazing animals the Ranch can support. In contrast, Defendants can establish no more than that, in 1996, on Atarque Ranch a maximum of 1,380 cattle were grazed at any one time. *Id.* at #6; *see also* Attachment D – Affidavit of Scott Turnbull, Ex. 1 – Atarque Ranch Cattle Inventory.

[9] As already mentioned, only 21 well water rights remain in dispute.

The focus of Plaintiffs' inquiry was on livestock because that was the historic, beneficial use of the land and its water. In estimating the water consumption needs of cattle at 10 gallons per day per AU, Plaintiffs also factored in consumptive water losses that might occur when delivering water to livestock, including leaks, spillage, and evaporation. Attachment C - United States Undisputed Fact #3. Ultimately, to account for losses not only for Defendants but for all livestock water users in the Basin, Plaintiffs estimated 10 gallons per day per AU for losses alone. This effectively doubled the consumption estimates for livestock watering and applied 20 gallons per day per AU in Plaintiffs' calculations. *Id.* Therefore, for the 21 wells that remain in dispute, Plaintiffs have estimated that for Atarque Ranch up to 25.573 AFY of water was consumed for animal consumption and 25.573 AFY was consumed as a result of losses delivering water to livestock. *Id.* at ##3-4.

In response to the Subfile Answer and the claim for a substantially larger quantity of water from wells across the Ranch, Plaintiffs through discovery requested that Defendants specify the basis for claiming water rights quantities in excess to those determined in the Hydrographic Survey and offered by Plaintiffs. Plaintiffs inquired:

> Interrogatory No. 1 – For each well identified in the *Subfile Answer of Defendants Yates Ranch Property, LLP and Jay Land, LTD* (January 25, 2014) (Doc. 2925) (at pages 8 through 13) for which Defendants "denied" the water right previously stated/offered by Plaintiffs, identify all documents that relate to or reflect the beneficial use of water from each well in dispute.

Plaintiffs' (First) Joint Discovery Requests To Defendants Yates Ranch Property LLP And Jay Land Ltd. (Dec. 9, 2014). Defendants responded to the interrogatory with seven paragraphs of text as follows:[10]

[10] For clarity of reference, the United States has inserted sequential numbering for the paragraphs comprising Defendants' interrogatory response.

ANSWER TO INTERROGATORY NO. 1

[1] The pumping records of the Highway Well (X-ref 10) relate to and reflect the beneficial use of water from that well. Those records have already been provided to you as a part of Mr. Alam's report.

[2] There are no pumping records for any of the other wells. Documents which relate to or reflect the beneficial use of water from them are those showing the maximum numbers of cattle watered from all watering devices served by the well, the transportation losses (consisting of leakage from pipelines), seepage, and annual evaporation from each device. The evaporation is determined by multiplying the surface area of those devices by the annual pan evaporation. Hence, the documents showing the surface area of the watering devices consist of the report of Donald Alam, which has been provided to you. Pan evaporation is shown in State Engineer [of New Mexico] Technical Report 31, Characteristics of the WATER SUPPLY IN NEW MEXICO, by W.E. Hale, L.J. Reiland, and J.P. Beverage, prepared in cooperation with the United States Geological Survey, 1965, a copy of excerpts of which is provided herewith. Other documents showing rates of evaporation are referred to in the report of Darrell Brown, which is submitted to you contemporaneously herewith. Leakage specific to Atarque Ranch is not shown in any documents of which we have knowledge. Leakage and leakage rates are discussed generally in "A Guidebook for Reducing Unaccounted-for Water" Texas Water Development Board Revised August 1999 (TWDB GB-2 91-0504).

[3] The declarations and amended declarations of owner of underground water rights are (State Engineer) Nos. G-716, G-717, G-718, G-720, G-721, G-722, G-725, G-726, G-727, G-728, G-729, G- 730, G-731, G-732, G-733, G-734, G-735, G-736, G-737, G-738, G- 739, G-740, G-741, G-742.

[4] The declarations which the Defendants' predecessors attempted to file with the State Engineer, and the State Engineer's receipt therefor are produced in response to the RFP herein.

[5] 27 pages of a document or documents dated September 1938, and captioned or entitled "Grazing Surveys Water Resources Record, Division of Grazing, Region 7" which cannot, because of their size, readily be duplicated or scanned. You may inspect the same upon reasonable notice to counsel for these Defendants, and, as you wish, copy them.

[6] A map of Atarque Ranch modified 11-13-14.

[7] 1936 aerial photos.

The only evidence that might be construed to support Defendants' assertion that they are entitled to additional water quantities from each disputed well is incorporated in paragraphs 1 and 2 of their interrogatory response. As discussed in subsections a and b, *infra*, none of that evidence is sufficient to support Defendants' position that they are entitled to water rights greater than or different from those rights that Plaintiffs are willing to recognize.

a. Pumping records from the Highway Well do not support the additional well water right quantities asserted by Defendants.

With respect to paragraph 1 of Defendants' interrogatory response, the mere act of pumping water from a well does not itself establish a water right; only historic, beneficial use defines the limit of a water right, including the water right quantity and the water pumped must be put to such use. Nevertheless, as described in the paragraphs above, Plaintiffs were informed of the pumping records associated with the Highway Well and have in fact incorporated that information into their Hydrographic Survey analysis. Attachment C - United States Undisputed Fact #5. Defendants' records reveal that the maximum water pumped from the Highway Well occurred in 2006 and amounted to 28.91 AFY. *Id.* This water was pumped through miles of piping to approximately 12 distant pastures. *Id.* As a result and because the carrying capacity of Atarque Ranch is limited by available forage, Plaintiffs have been willing to recognize an increased water right quantity associated with the Highway Well and a corresponding decrease in the water right quantity associated with the 15 wells near the 12 pastures served. *Id.*

Thus, although Plaintiffs are willing to incorporate the pumping records of the Highway Well into a recognized water right for that well, the pumping records referenced and relied upon by Defendants do not support an increase in the total water rights claims for other wells asserted

in the Subfile Answer beyond that offered for Atarque Ranch in toto.

b. Defendants have provided no basis for quantifying the historic, beneficial use of water by cattle in a manner different from that used in the Hydrographic Survey.

With respect to paragraph 2 of Defendants' interrogatory response, Defendants at first blush appear to assert that the water quantities they claim for the wells in dispute find support in evidence of larger quantities of water historically consumed by cattle. However, the only disclosed document that gives any description of the number of cattle at Atarque Ranch is a 1991-2006 cattle inventory with a herd size between 531 and 1,380 cattle in any one year. Attachment C - United States Undisputed Fact #6. The document does not establish a quantity of water historically and beneficially consumed by cattle on Atarque Ranch. Tellingly, the expert reports of Defendants' only identified experts, Mr. Don Alam (a conservation consultant) and Mr. Darrell Brown (Atarque Ranch manager),[11] are devoid of any attempt to quantify the water historically and beneficially consumed by cattle at Atarque Ranch at any time in the past, whether 1991-2006 or at any other time. That is to say, neither Mr. Alam nor Mr. Brown offer any opinion in their expert reports regarding the annual quantity of water historically and beneficially consumed by cattle from any well in dispute.[12] In sum, Defendants offer no evidence to establish a quantity of water historically and beneficially consumed by cattle at Atarque Ranch and no evidence to support the disputed quantities of water asserted in the Subfile Answer.

With the exception of the Highway Well documentation described above, Defendants

[11] For the purposes of this Cross-Motion, the qualifications of Mr. Alam and Mr. Brown are assumed to be sufficient to establish them as experts and the opinions made by them in their expert reports are not challenged but assumed to be true.

[12] At most, in his expert report Mr. Brown offers no more than a possible maximum range of water consumption for a cow and calf unit (between 20-60 gallons per unit per day) that is supported by no study he has performed and is unsupported by the studies on which he purportedly relies. *See* Attachment D – Turnbull Affidavit at 5, ¶ 15.

proffer no record of measurements of water produced and consumed by cattle from the numerous wells found on Atarque Ranch that remain in dispute. In addition, Defendants have prepared and presented no expert opinion that supports a water consumption quantity for cattle at any time in the past from any of the wells in dispute. Accordingly, Defendants cannot establish the well water quantities asserted in the Subfile Answer and the United States is entitled to judgment as a matter of law.

c. Plaintiffs have stipulated to a water right quantity for evaporative losses that is greater than the quantity for such losses that Defendants assert.

In their Motion, Defendants assert that the water right associated with the 21 wells in dispute must include a quantity of water for the evaporation of water in the amount of "5 feet per year." Defs.' Motion at 20. In support of this position, Defendants present numerous facts that purport to establish the evaporative loss associated with the wells. *Id.* at 4-8 (Undisputed Facts ##9-27). Even assuming these facts as true for purposes of Defendants' Motion and this Cross-Motion,[13] the quantity of water embraced within the "5 feet per year" of evaporative loss from every stock tank[14] on Atarque Ranch claimed by Defendants is much less than the quantity of evaporation to which Plaintiffs have already stipulated. Unless Defendants wish to now reject Plaintiffs' stipulation and accept a lower quantity of well water for evaporative loss, no dispute of fact or law exists between the parties and Defendants' Motion should be denied.

New Mexico law is clear on this point and can be concisely summarized. As mentioned above, "Beneficial use shall be the basis, the measure and the limit of the right to the use of

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[13] To ensure that each alleged fact is addressed, the United States has responded to each of Defendants' assertions of fact. *See* Attachment B - United States' Response to Defendants' Statement of Undisputed Facts. Whether disputed or not, Defendants assertions of facts associated with evaporation are not material and not the subject of a contested issue for the reasons explained.

[14] For the purposes of this discussion, "stock tanks" refers to the steel/concrete structures that were built and connected to wells to capture water flowing from the unregulated wells found on Atarque Ranch.

water." N.M. CONST. Art. 16 § 3. "Beneficial use" means the "direct use or storage and use of water by man for a beneficial purpose." N.M. CODE R. 19.26.2.7(D) (2014). The use must not only be for a beneficial purpose, but also "reasonable in relation" to that purpose. *Erickson*, 308 P.2d at 987. Thus, excessive diversion of water cannot be regarded as a diversion to beneficial use, but as waste. *Id.*

In New Mexico, courts have strengthened the policy against waste by establishing a requirement of maximum utilization. In *Kaiser Steel v. W.S. Ranch Co.*, 467 P.2d 986, 989 (N.M. 1970), the New Mexico Supreme Court declared:

> Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.

To determine whether an application of water to a beneficial purpose is a reasonable, beneficial use or waste, courts will consider the circumstances of the use in light of the principle of maximum utilization. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1134 (10th Cir. 1981). For example, courts may find waste where the circumstances indicate:

> extravagant application for the purpose appointed or… [a] misapplication which can be avoided by the exercise of a reasonable degree of care to prevent loss, or [the] loss of a volume which is greatly disproportionate to that actually consumed.

Erickson, 308 P.2d at 987.

The New Mexico Supreme Court has found the continuous and uncontrolled flow from an artesian well for the potential irrigation of grass and stock watering to be waste, and thus not a beneficial use entitled to recognition under the law. *Erickson*, 308 P.2d at 987. Similarly, the Tenth Circuit, applying New Mexico law, has determined that storage of water in a reservoir leading to 93% evaporation was too excessive compared to both potential future water exchanges and small increases in power generation to be considered a reasonable, beneficial use. *Jicarilla*

Apache, 657 F.2d at 1135-36.

A water right is not established based on the size of a tank or the capacity of a well pump; a water right is based on historic, beneficial use. To estimate the quantity of water necessary for raising cattle, Plaintiffs recognized that losses occur due to evaporation in the process of watering cattle. To arrive at the water right quantity associated with the beneficial use of raising livestock, the Plaintiffs estimated the maximum livestock carrying capacity of Atarque Ranch to be 2,283 AU.[15] Attachment C - United States Undisputed Fact #4. Plaintiffs then multiplied this figure by 20 gallons/day to determine the quantity of water consumed by that number of livestock. *Id.* As explained above in Section IV.A, for each AU, Plaintiffs estimated that the reasonable losses for this beneficial use was 50% of the total, or 10 gallons per animal unit per day. Consequently, one-half of Plaintiffs' stipulation of 51.146 AFY for the total well water right for Atarque Ranch, or 25.573 AFY, is attributable to losses due to evaporation, leaks, and spills. Attachment C – U.S. Undisputed Fact ## 3-4.

For the 21 wells remaining in dispute, most pump water by use of a windmill pump. *Id.* at #7. The amount of water pumped by windmills is unknown because water is pumped whenever the wind blows. *Id.* at #7. At each well remaining in dispute, Defendants, or previous owners, have constructed 21 circular steel/concrete uncovered tanks or troughs of 30-35 feet in diameter and 7 circular uncovered tanks or toughs 15 feet in diameter. *Id*. Using Defendants' assertion that they are entitled to "5 feet per year" for evaporation, the 28 troughs associated with each well in dispute would evaporate no more than 2.461 AFY. *Id.* The amount of evaporative

[15] It is important to note here that Plaintiffs' willingness to stipulate to water right based upon the maximum carrying capacity of Atarque Ranch is not a water right based on historic, beneficial use but a proxy for historic beneficial use developed as a fair, even-handed means to analyze the water rights of all land owners in the Zuni River Basin. The same analysis applied to every other rancher was applied to Defendants. In fact, Plaintiffs' livestock carrying capacity estimate for Atarque Ranch of 2,283 AU exceeds Defendants' evidence of the maximum number of cattle grazed on Atarque Ranch in any one year (1,380 cattle) by nearly a factor of 2. Attachment C - United States Undisputed Fact ## 4 and 6.

loss actually claimed by Defendants is *more than ten times less* than the loss calculated by Plaintiffs and incorporated into the well water right for the remaining 21 disputed wells. *Id.*

No genuine dispute of law or material fact exists between Plaintiffs and Defendants on whether evaporation can be incorporated into a water right and whether evaporation was adequately incorporated into the water right to which Plaintiffs have stipulated. The United States does not challenge New Mexico law that recognizes that a water right might include a quantity for losses that are reasonably related to the beneficial use of watering livestock. For all of the remaining 21 wells in dispute, Defendants argue for a water right with a cumulative 2.461 AFY component for evaporative losses. The quantity of water to which Plaintiffs have already stipulated for evaporative losses more than 10 times that amount. Unless Defendants wish to reject Plaintiffs' stipulation and accept the vastly smaller quantity of water for losses they claim, no issue of material fact remains between the United States and Defendants.

2. Defendants are not entitled to water rights associated with natural, unimproved springs and depressions.

In the Subfile Answer, Defendants assert that they are entitled to water rights for additional water features not appearing in the Hydrographic Survey. Subfile Answer at 71-73 ("Springs") and 73-79 ("Stock Tanks"). Examination of the additional water features claimed by Defendants reveals that these features are natural, unimproved springs and depressions for which, as a matter of law, Defendants are not entitled to a water right.[16]

Watering livestock is a beneficial use of water for agriculture that can result in a water

[16] The springs and impoundments that remain in dispute between Plaintiffs and Defendants are Canyon Springs, Jaralosa Springs, and Los Alamos Springs (consisting of two springs) (*see id.* at 71-72) and the ten unnamed impoundments listed at paragraphs 2, 3, 4, 5, 6, 8, 9, 10, and 12 (*see id.* at 74-76 of the Subfile Answer). The water rights associated with the unnamed impoundments listed at paragraphs 1, 7, and 11 have been recognized as man-made earthen impoundments and resolved per agreement between the parties. The man-made impoundment associated with ¶ 11 was incorporated into the impoundment identified as 10B-2-SP20 in the Hydrographic Survey and needs no separate identification or recognition.

right. *Walker v. United States*, 162 P.3d 882, 886, n.3 (N.M. 2007). Yet, the mere drinking of water by livestock does not result in a water right. At a minimum, to establish an agricultural water right under New Mexico law there must be a "man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use." *State of New Mexico, ex rel. Reynolds, v. Miranda*, 493 P.2d 409, 411 (N.M. 1972). Therefore, New Mexico law imposes three fundamental requirements to establish a water right for agriculture: 1) a man-made diversion; 2) the intent to apply water to beneficial use; and 3) actual application of water to beneficial use. *Id.* Absent any of the three requirements, water use by livestock does not become a water right. *Id.* at 410 (" 'The intent, diversion, and [beneficial] use must coincide.' ") (quoting *Harkey v. Smith*, 247 P. 550 (N.M. 1926)).

When flowing, the springs in question that emerge on Atarque Ranch are unimproved. Attachment C - United States Undisputed Fact #8. The impoundments in question are likewise not constructed and do not divert water as the result of human act, but rather are natural depressions where water gathers after precipitation events. *Id.* Livestock that consumes from such sources "only manifest an intention to reap nature's bounty gratuitously provided." *Miranda*, 493 P.2d at 411.

Accordingly, Defendants cannot establish a water right for the natural spring and depression claims that remain in dispute, and the United States is entitled to judgment as a matter of law.

3. Defendants do not have an Atarque Lake water right.

Defendants assert they are entitled to summary judgment for a substantial water right associated with Atarque Lake. Defs.' Motion 10-11; *see also* Subfile Answer 73 ("Surface Water Rights"). The sole evidentiary basis supporting Defendants' claim is a declaration

executed by Defendant's counsel, Mr. Shoenfeld, in 2004, *after* Defendants were served and joined as parties to this case (Doc. 3059-2) ("Shoenfeld declaration") and the presumption authorized by NMSA 1978, § 72-1-3. Defendants claim that the Shoenfeld declaration constitutes *prima facie* evidence described under NMSA 1978, § 72-1-3. Defs.' Motion at 11. They argue that "the effect of the declaration here is to create a *prima facie* case which, unless rebutted by competent evidence, entitle Defendants to summary judgment." *Id.*

Defendants' attempt to bootstrap into existence a water right associated with Atarque Lake by means of the Shoenfeld declaration fails on two counts. First, the declaration simply does not meet the requirements of NMSA 1978, § 72-1-3 and, for that reason, does not entitle Defendants to the benefit of the statutory presumption that Defendants seem to think § 72-1-3 operates to provide.[17] Second, even assuming that Defendants have satisfied the requirements of § 72-1-3, this *prima facie* "evidence" does not *per se* satisfy Defendants' summary judgment burden for the simple reason that it does not constitute evidence at all for purposes of summary judgment. *See Celotex Corp.*, 477 U.S. at 321 (summary judgment movants carry the heavy burden to establish absence of genuine issue of material fact). And because Defendants present the Shoenfeld declaration as their only support for their water right claim for Atarque Lake, they cannot meet their burden and the Motion necessarily fails.

In the end, Defendants' reliance upon the Shoenfeld declaration's creation of a purported presumption has no practical effect. The declaration neither satisfies the statutory requirements that give rise to a presumption nor the burden Rule 56 places upon them. In fact, no admissible

[17] Of course, Mr. Shoenfeld is and has been Defendants' lawyer throughout this proceeding; he is not a witness and never has been identified as one. Mr. Shoenfeld cannot both represent Defendants and be a witness to this contested subfile action. *See* NMRA 16-307. Mr. Shoenfeld completed the declaration as Defendants' authorized agent based, presumably, on instruction provided by Defendants.

evidence exists to support the assertions made in the Shoenfeld declaration or otherwise to establish a water right under the Atarque Lake claim.

a. Defendants may not receive the benefit of a statutory presumption under NMSA 1978, § 72-1-3 and are not entitled to summary judgment on a water right associated with Atarque Lake.

The exclusive evidentiary basis for Defendants' motion for summary judgment for their Atarque Lake claim rests on the permissible, rebuttable presumption authorized under NMSA 1978, § 72-1-3. Defendants imply that the 2004 Shoenfeld declaration satisfies the requirements of the statute and triggers the benefits of the statutory presumption. Yet, examination of both the statute's requirements and the contents of the 2004 Shoenfeld declaration reveal that the declaration *fails* to satisfy the statute's requirement. Therefore, Defendants are not entitled to any presumption under the statute.

Not every declaration for a water right meets the statutory presumption resulting in *prima facie* evidence under § 72-1-3. The statute in relevant part states:

> Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. … Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.

NMSA 1978, § 72-1-3. By its plain language, the statute requires that water right claimants submit a declaration that specifies the following critical facts:

1) the beneficial use to which said water has been applied;

2) the date of first application to beneficial use;

3) that water was continuously put to beneficial use;

4) the location of the source of the water; and

5) if the water has been used for irrigation, a description of the land (and owner of the land) on which the water has been used.

Such specific statements are facts that Plaintiffs (and the Court) can examine, verify, and, if necessary, dispute. Without such specificity, declarations become meaningless because water claimants would be free to claim whatever water rights they desired rather than water rights established by and limited to historic, beneficial use based upon competent evidence.

In 2004, Defendants, acting through counsel, prepared the Shoenfeld declaration for Atarque Lake. Defs.' Motion - Exhibit 1. In that declaration, Defendants made allegations that can be analyzed based on the requirements of § 72-1-3:

1) the beneficial use to which said water has been applied - livestock, irrigation, and recreation (fishing, boating, swimming), Shoenfeld declaration at 1;

2) the date of first application to beneficial use – unstated time before March 19, 1907, *id* at 2;

3) that water was continuously put to beneficial use - the dam was destroyed by 1972 and the water has not been used since that time, *id* at 2;

4) the location of the source of the water – latitude and longitude of the dam identified, *id* at 1; and

5) if the water has been used for irrigation, a description of the land (and owner of the land) on which the water has been used – no description of the land irrigated provided, *id*.

The 2004 Shoenfeld declaration specifies no date of first application to beneficial use for any one of the many declared beneficial uses broadly described (livestock, irrigation, and recreation). Instead, the declaration only vaguely asserts that water was first applied to some or all of the non-specified beneficial uses sometime "before March 19, 1907." Defs.' Motion Exhibit 1 at 2.[18] What is more, Defendants freely admit that no water has been put to beneficial use from Atarque Lake since at least 1971: "[t]he dam was destroyed by 1972." *Id.* Therefore, Defendants do not and cannot assert that water was continuously put to beneficial use. Finally, despite asserting a water use associated with irrigation, Defendants make no attempt to provide a description of the land on which the water has been put to use. *Id.* at 2, ¶ 5. In the Shoenfeld declaration, Defendants provide no indication of where such a substantial irrigation effort might have occurred on Atarque Ranch and the location of such irrigation remains unknown.

NMSA 1978, §72-1-3 provides that a water right claimant may receive the benefit of a permissive, rebuttable presumption if the claimant can declare the specific information required by the statute. It is self-evident that, for the presumption to arise under the statute, the claimant must satisfy the statute's requirements. Here, despite their implied claims to the contrary, as outlined in the paragraphs above, Defendants' declaration does not satisfy § 72-1-3. Therefore, the Shoenfeld declaration is not *prima facie* evidence of any water right associated with Atarque Lake.

b. Defendants do not have admissible evidence to support either the Shoenfeld declaration or the Atarque Lake claim.

Even if the Court were to determine that the Shoenfeld declaration satisfied the

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[18] Defendants' assertions here are not grounded in fact but rather are employed for convenience and appear to be little more than a transparent attempt to avoid the need to produce a water right permit. Since March 19, 1907, any entity seeking to acquire a water right to the surface waters of New Mexico has been required to first make application to the state engineer. NMSA 1978, § 72-5-1. Without such application in place with the State Engineer, Defendants cannot establish a water right for any date after the 1907 cutoff.

requirements of NMSA 1978, § 72-1-3 and that the statements made therein are *prima facie* evidence of their truth, such *prima facie* evidence is thoroughly rebutted by the fact that no evidence exists to support specific, critical factual assertions made in the Shoenfeld declaration. Further, no evidence exists otherwise to establish critical elements of a water right associated with Atarque Lake under New Mexico law. *See Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 29, 141 N.M. 21, 30, 150 P.3d 971, 980 (citing New Mexico precedent to the effect that § 72-1-3's "'prima facie' showing merely establishes the fact if not rebutted").

As established above, a water right is established when the water right claimant establishes the date of first application of water (priority), the beneficial use, amount of water historically applied, and the periods and place of use. *See* NMSA 1978, § 72-4-19. Without admissible evidence to establish each interrelated element, Defendants are not entitled to a water right decreed by the Court.

Defendants made broad, yet specific, assertions in the Shoenfeld declaration concerning 1) the first application of Atarque Lake water to beneficial use, 2) the beneficial use of Atarque Lake water, 3) the quantity of water applied to beneficial use from Atarque Lake, and 4) the quantity of water subject to storage in Atarque Lake. Defs.' Motion Exhibit 1. In their Subfile Answer, Defendants additionally claimed that 100 AFY was used for livestock and 300 AFY was use for irrigation; otherwise, the Subfile Answer for the Atarque Lake claim simply echoed the assertions of the Shoenfeld declaration. Subfile Answer at 73.

Both the Shoenfeld declaration and Subfile Answer were recently prepared by Defendants' counsel in connection with this litigation. Necessarily, all evidence that existed to support Defendants' assertions should have been preserved for examination in connection with this subfile litigation. *See Philips Electronics North America Corp. v. BC Technical*, 773 F.

Supp. 2d 1149, 1195 (D. Utah 2011) ("litigants have a duty to preserve documents or materials … that may be relevant to ongoing and potential future litigation."); *Zubulake v. UBS Warburg, LLC,* 220 F.R.D. 212, 216 (S.D.N.Y. 2003) ("the obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation"). If any document or witnesses existed to support the assertions made in 2004 and 2013, one fairly could expect Defendants to identify them. Yet, Defendants' responses to discovery detail absolutely no admissible evidence to support what was asserted or otherwise to establish the critical elements of a water right for Atarque Lake. First, Defendants have identified no evidence to establish the existence of historic, beneficial use of water from Atarque Lake. Second, Defendants have identified no evidence to establish any quantity of water historically put to beneficial use from Atarque Lake. Third, Defendants have identified no evidence to establish the date of first application of the water of Atarque Lake to beneficial use or, for that matter, to establish any date upon which the water of Atarque Lake was put to beneficial use.

Given the immense size of Defendants' claim for a water right associated with Atarque Lake,[19] Plaintiffs asked Defendants to identify all documents that reflect the beneficial use of water from Atarque Lake. Defendants responded by specifying the following documents:

1) Declarations either filed at or attempted to be filed at the office of the State Engineer of New Mexico;
2) USGS quad sheet entitled "Atarque Lake";
3) aerial photographs;

[19] Both the Shoenfeld declaration and the Subfile Answer specify a storage water right of "755 acres." Shoenfeld declaration at 2; Subfile Answer at 73. In addition, the Shoenfeld declaration, asserts a storage quantity of 21,000 AFY. Shoenfeld declaration at 3.

4) Homesteading in the Thirties, Ray Boyett, Sleeping Fox Enterprises, Santa Fe, 1974;
5) New Mexico Place Names, A Geographical Dictionary, T.M. Pearce, University of New Mexico Press 1965; and
6) The Place Names of New Mexico, Robert Julyan, University of New Mexico Press, Albuquerque, 1996.

See Attachment F - Plaintiffs' Interrogatory No. 8 and Defendants' Response. Examination of each of the aforementioned documents reveals no more than a single, indirect reference to an activity that might be considered a beneficial use (i.e., fishing).[20] Defendants identified no other document reflecting the beneficial use of water from Atarque Lake. Further, these documents provide no support for any conclusion about the quantity of water associated with a beneficial use. *See Jicarilla Apache,* 657 F.2d at 1135 ("[For a right to store water], it is essential that there shall have been a beneficial use which is more than speculative."). None of these documents indicate that water in the amount of "755 acres"[21] or 21,000 acre feet[22] was put to historic, beneficial use as asserted in the Shoenfeld declaration and the Subfile Answer.

Next, Plaintiffs asked Defendants to identify the witnesses that might possibly establish any element of a water right from the waters of Atarque Lake. Defendants candidly acknowledged that they had *no* witness to establish any element of a water right from the waters of Atarque Lake. Instead, Defendants stated that they would rely exclusively on "public records

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[20] In the book "Homesteading in the Thirties," the author describes working alone for one summer in the 1930s living in a one-room cabin at Atarque Lake where he collected fees from fishermen. Homesteading in the Thirties, at 39 – 44. Although recreation might alone constitute beneficial use, Defendants have no evidence to establish any quantity of water that might be necessary for such a beneficial use. Cf. *Jicarilla Apache,* 657 F.2d at 1136-37 (whether and how a water right might be established solely for recreational uses has not yet been established under New Mexico law). Further, the statements found in the book are not evidence but constitute inadmissible hearsay. Fed. R. Evid. 801.

[21] 755 acres is the greatest extent of the surface area Defendants assert for Atarque Lake. Shoenfeld declaration at 2.

[22] 21,000 acre feet is the greatest quantity of water Defendants assert to be impounded for Atarque Lake. *Id.* at 3.

and matters of which judicial notice may be taken." Attachment F - Plaintiffs' Interrogatory No. 9 and Defendants' Response.[23]

Further, the Subfile Answer specifically alleges a specific quantity of water from Atarque Lake associated with raising livestock. Subfile Answer at 73. Given that livestock could not have relied upon the waters of Atarque Lake in the decades since the dam's destruction, Plaintiffs asked Defendants for the basis for the assertion in their Subfile Answer of a 100 AFY water right claim for livestock from the waters of Atarque Lake. Defendants responded:

> The water was used for cattle and sheep according to "Homesteading in the Thirties" by Ray Boyette; the number of sheep reported to have been raised or grazed at Atarque ranch was up to 15,000. We are searching for the source of the latter information and will provide it to you if and when it is found.

Attachment F - Plaintiffs' Interrogatory No. 15(D) and Defendants' Response. As mentioned above, Mr. Boyette's memoir is not admissible evidence and, even if the contents of the memoir were considered, Mr. Boyette's memoir makes no mention of cattle or sheep being watered from Atarque Lake. It bears repeating that Defendants have never produced any documentary evidence or identified any witness to support the claim that up to 15,000 sheep were raised and supported from Atarque Lake at any time. In addition, Defendants have produced no expert report that supports the assertion that Atarque Ranch has ever been or could be grazed by 15,000 sheep; nor has any expert retained by Defendants opined that up to 15,000 sheep corresponds in any way to a historic 100 AFY beneficial use.

Finally, the Subfile Answer specifically alleges a specific quantity of water from Atarque Lake associated with irrigation. Subfile Answer at 73. Given that no land has been nor could have been irrigated by the waters of Atarque Lake for decades, Plaintiffs asked Defendants for

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[23] The public records to which Defendants refer were discussed in the paragraph above.

the basis for their assertion of a 300 AFY water right claim for irrigation. The only information provided in discovery by Defendants associated with irrigation is as follows:

> Pumping equipment was found and remains on the flat lands, approximately 100 acres, above and to the east and south of the Atarque dam site, for which there is no reason other than irrigated farming, irrigated pasture or commercial water sales at that location.

Attachment F - Plaintiffs' Interrogatory No. 15(E) and Defendants' Response. The existence of pumping equipment does not create a water right. Defendants have produced no other evidence to support the claim that the pumping equipment found has anything to do with irrigation. Defendants have identified no witness capable of testifying of beneficial use of 300 AFY for irrigation from Atarque Lake. Attachment F - Plaintiffs' Interrogatory No. 9 and Defendants' Response. Throughout discovery, Defendants have produced no expert report to support the assertion that the pumping equipment was irrigation equipment; that 100 acres of Atarque Ranch was ever irrigated; or that an unspecified 100-acre area corresponds in any way to a historic beneficial use of 300 AFY.

The broad yet specific statements in the Shoenfeld declaration and the Subfile Answer concerning an Atarque Lake water right consist of nothing more than unsubstantiated speculation unsupported by any competent evidence. Defendants were given every opportunity to disclose evidence to support their assertions and they failed to do so. Accordingly, Defendants cannot establish the necessary, critical elements to establish a water right associated with Atarque Lake. Defendants have no admissible evidence (documents or witnesses) to establish the existence of historic, beneficial use of water, any quantity of water historically put to beneficial use, or any date of application of the water of Atarque Lake to beneficial use. The speculations that Defendants might make in 2004, 2013, or today of what or how water might have been used from Atarque Lake more than four decades ago cannot establish a water right under New Mexico

law. Therefore, the United States is entitled to judgement as a matter of law on Defendants' water right claim concerning Atarque Lake.

c. Even if the Court were to find that a water right for Atarque Lake ever existed, such a water right has been abandoned.

Having assumed in their Motion that they have met their burden to establish a water right from the waters of Atarque Lake, Defs.' Motion at 10-11, Defendants dedicate the bulk of their argument defending that water right from Plaintiffs' claim of abandonment. *Id.* at 11-16. As the paragraphs above make abundantly clear, Defendants have not and cannot establish a water right for Atarque Lake. Nevertheless, if the Court were ultimately to recognize a water right for any reason, the remarkably long, ongoing period of nonuse of water and the known circumstances by which the dam impounding Atarque Lake was destroyed conclusively establishes that any water right associated with the lake was abandoned long ago.

1. Abandonment of any Atarque Lake water right is established by the unreasonable 43-year period of non-use.

In New Mexico, it is well established that a water right holder can lose a water right through abandonment. *State of New Mexico, ex rel. Reynolds v. South Springs*, 452 P.2d 478 (N.M. 1969). Abandonment of a water right "is the relinquishment of the right by the owner with the intention to forsake and desert it." *Id.* at 481 (quoting 2 Kinney on Irrigation and Water Rights, 2d Ed. 2012 § 116 (1912)).

> [Abandonment] may be effected by a plain declaration of an intention to abandon it; and it may be inferred from acts or failures to act so inconsistent with an intention to retain it that the unprejudiced mind is convinced of its renunciation.

Id. (quoting *Green Valley Ditch Co. v. Franz*, 129 P. 1006, 1008 (1913) and *North American Exploration Co. v. Adams,* 104 F. 404, (8th Cir. 1900)). Although the initial burden to establish abandonment is on the party that asserts it, in New Mexico a presumption of abandonment arises

after an unreasonable period of non-use. *Montgomery*, 2007-NMSC-002, ¶ __, 141 N.M. 21, 150 P.3d 971, 980-981 (N.M. 2006). In *South Springs*, the presumption was held to arise after a 32-year period of non-use. *South Springs*, 452 P.2d at 480. And once the presumption arises, "the burden shifts to the holder of the right to show the reasons for nonuse." *Id.*, at 482.

Here, Defendants readily admit that Atarque Lake and any related historic, beneficial use of water ended no later than 1972 with the destruction of the dam. Defs.' Motion at 2, Undisputed Fact #2.[24] That means the period of non-use for any presumed Atarque Lake water right has run for not less than 43 years, 11 years beyond the period of non-use held in *South Springs* to establish a rebuttable presumption of abandonment. The 43-year period of non-use operates to place upon the Defendants the burden "to show the reasons for nonuse."

Despite this burden, Defendants give no reasons for nonuse. Defendants expend considerable effort in their Motion attempting to establish that the operative period of non-use extended for only the "7 or 8 year" period between 1971 and 1978 after the dam's destruction but prior to Defendants' acquisition of Atarque Ranch. Defs.' Motion at 11-16. It is for this period of time only that Defendants contend "there is no explanation of non-use," *id.* at 11-12. For the period of their own ownership, Defendants claim an intention never to abandon or relinquish any water rights from Atarque Lake. Defs.' Motion at 2, Undisputed Facts #4 through 8. In two affidavits, Defendants baldly assert this lack of intentionality. *See* Defs.' Motion - Exhibits 5 and 6. Indeed, the affidavits lack any facts buttressing the claimed intention. For

[24] The United States has been unable to pinpoint precisely when the dam impounding Atarque Lake was destroyed. The 1972 USGS map "Atarque Lake, N. Mex." attached to the Shoenfeld declaration reveals that the Atarque Lake area labeled "Dry Lake" under the map's symbols and the dashed blue lines around the lake indicate indefinite or unsurveyed boundary. Attachment D – Turnbull Affidavit at ¶ 24 and Exhibit 2. As stated on the map itself, the topography of the lake was done by photogrammetric methods from 1971 aerial photography and field checked in 1972. Therefore, the dam was destroyed sometime before 1971 when photographs were taken. Nevertheless, for purposes of this Cross-Motion, the United States does not dispute the assertion first made in the Shoenfeld declaration that the dam was destroyed by 1972.

example, neither affidavit includes any evidence of efforts to rebuild the dam or otherwise develop, re-establish, or reclaim a water right from Atarque Lake. The absence of any such facts both belies the *post hoc* statements of intention contained in the affidavits and leaves Defendants unable to overcome the presumption they face. *Compare Atencio v. Richfield Canal Co.*, 177 Colo. 22, 492 P.2d 620 (S.Ct. 1972) (failure to reconstruct destroyed dam for over 50 years resulted in loss of priority to use water formerly diverted by destroyed dam). In short, with the presumption of abandonment squarely raised by the undisputed circumstances here, Defendants present not one reason for 43 years of nonuse. Defendants were required to establish that but for such reasons, they would have re-established the historic beneficial use of water. *See South Springs*, 452 P.2d at 482. Defendants have not and cannot carry their burden on abandonment.

2. By destroying the dam, the previous owner of Atarque Lake intended to abandon any water right.

Defendants assert that "[n]othing is known of the intentions of the owner of Atarque Lake from 1971 to 1978." Defs.' Motion at 3, Undisputed Fact #3. In fact, substantial, convincing evidence exists of the intentions of the owners of Atarque Ranch with respect to any Atarque Lake water right. To the extent that previous owners had any knowledge of an Atarque Lake water right, they intended to abandon it when they destroyed the dam. The 43-year period of nonuse since its destruction confirms and reinforces that any water right was abandoned long ago.

Upon receiving the Shoenfeld declaration, Mr. Joseph H.M. Fields of the New Mexico Office of the State Engineer went to Atarque Ranch to investigate the Atarque Lake water right claim. Attachment E – Deposition of Joseph Fields. Mr. Fields spoke with the Atarque Ranch manager and was informed that the dam had been intentionally destroyed in the early 1970s because cows were getting stuck in the mud, there was an unacceptable number of mosquitos,

and the area had become nothing more than a bog. *Id* at 40. In other words, the evidence of intent gathered by Mr. Fields established that previous owners destroyed the dam specifically to drain the area of water and end a nuisance.

Further, examination of the 1972 USGS Map attached to the Shoenfeld declaration reveals that the area that was considered the bed of Atarque Lake has been bisected by a light duty road. Shoenfeld declaration at 6; s*ee also* Attachment D – Turnbull Affidavit at ¶ 24 and Exhibit 1 (providing a clearer color copy of the map attached to the Shoenfeld declaration). This road continues to exist and can be seen today from modern satellite imagery. Attachment D – Turnbull Affidavit at ¶ 24 and Exhibit 3 (aerial images of Atarque Ranch from 1996, 2005, and 2014). As well, examination of aerial photography of the dried lake bed also reveals the construction of livestock fencing that also bisects the former lakebed of Atarque Lake. *Id.*

The intentional destruction of the dam by 1971 was no insignificant task. As the Shoenfeld declaration estimated, the dam was 35 feet high, 150 feet long, and made up of stone, mortar, concrete, timbers, and earth fill. Shoenfeld declaration at 3. Today, only remnants of the dam remain and the dam would have to be completely rebuilt to impound the immense quantity of water Defendants claim. Attachment D – Turnbull Affidavit at ¶ 26 and Exhibit 4 (photographs of the destroyed dam site). As described above, the dam was destroyed to remove the boggy, mosquito infested nuisance that the impounded water had become. If these circumstances establish anything, they establish that at the time the dam was intentionally destroyed, the previous owner of Atarque Ranch intended to abandon any water right that might have existed. Likewise, the establishment of a road and livestock fencing on the lakebed are substantial improvements that are inconsistent with an Atarque Lake water right. The road has existed since 1971 when the data were collected to make the 1972 USGS Map. The fence was

constructed by 1996, during the tenure of Defendants' ownership. By creating these permanent structures across the lake bed, the previous owners of Atarque Ranch expressed a clear intent to relinquish any water right associated with the Lake.

Contrary to Defendants' assertion that "nothing" is known of the previous owners' intentions with respect to Atarque Lake, a great deal is known. What is known is that the previous owners of Atarque Ranch took substantial actions that are fundamentally inconsistent with holding an established water right and that display a clear intent to abandon any water right that might have existed associated with Atarque Lake.

V. CONCLUSION

No material fact remains in dispute concerning the water rights for Atarque Ranch and the United States is entitled to judgment as a matter of law. Defendants are entitled to those water rights, based on the Hydrographic Survey, as offered by Plaintiffs. The Court should enter judgment in favor of the Defendants for the water rights described in Attachment A. The Court should enter judgment against Defendants for all other claimed water rights that remain in dispute.[25]

Respectfully submitted this 18th day of August, 2015.

/s/ Andrew "Guss" Guarino
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[25] In the event the Court denies Defendants' Motion and grants Plaintiffs' Cross-Motion, the United States, in cooperation with Plaintiff State of New Mexico and Defendants, will prepare a final order for the Court's signature that incorporates all water rights associated with this subfile action.

COUNSEL FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 18, 2015, 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________