

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

UNITED STATES OF AMERICA,)	
)	
)	No. 01CV00072-MV/WPL
and)	
)	
STATE OF NEW MEXICO ex rel. STATE)	
ENGINEER,)	ZUNI RIVER BASIN
)	ADJUDICATION
Plaintiffs,)	
)	Subfile No. ZRB-4-0108
v.)	
A & R PRODUCTIONS, <i>et. al</i>)	
., Defendants.)	
_____)	

**JOINT MOTION FOR JUDGMENT ON THE PLEADINGS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Pursuant to Rule 12(c), Fed. R. Civ. P., Plaintiffs United States of America and State of New Mexico (“Plaintiffs”), move the Court for judgment on the pleadings in the above-entitled subfile proceeding. As grounds for relief in support of this Motion, Plaintiffs assert, as more fully set forth below, that the material facts regarding the water rights associated with the real property in the Zuni River Basin owned by Defendants Robert W. and Hannah C. Crooks (“Crooks”) are undisputed and Plaintiffs are entitled to judgment as a matter of law in the form of and consistent with the proposed Consent Order submitted as Attachment A hereto.

Pursuant to D.N.M.LR-Civ. 7.1, Plaintiffs consulted with the Crooks to determine their position on this Motion. The Crooks oppose the Motion.

I. INTRODUCTION

At the center of the parties' dispute is a single domestic well serving a house on the Crooks' property. Consistent with this Court's *Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 1, 2, and 3 (Excluding Ramah) of the Zuni River Stream System*, No. 01cv0072 BB/WDS-ACE, Doc. 838 (D.N.M. Sept. 28, 2006) ("Sub-Areas 1, 2, and 3 Order"), Plaintiffs prepared and presented the Crooks with a proposed Consent Order concerning the water rights associated with their property. The proposed Consent Order (Attachment A) constitutes the extent to which Plaintiffs have offered to stipulate. The proposed Consent Order describes the attributes of the proposed water right for the single well as follows:

WELL

Map Label: 3C-5-W029

OSE File No: G 02252

Priority Date: 10/23/1995

Purpose of Use: 72-12-1 DOMESTIC ONE HOUSEHOLD

Well Location: As shown on Hydrographic Survey Map 3C-5

S. 32 T. 11N R. 15W 1/4, 1/16, 1/64 SE NW NE

X (ft): 2,541,460 Y (ft): 1,507,066

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Amount of Water: Historical beneficial use not to exceed 0.7 ac-ft per annum

On February 20, 2008, counsel for the United States consulted with Dr. Crooks. The consultation did not result in a stipulation. The United States

subsequently filed a *Notice That The Consultation Period Has Ended*, Doc. 1739 (May 5, 2008). The Crooks then timely filed their *Subfile Answer*, Doc. 1768 (May 19, 2008) (“Subfile Answer”). The Crooks eventually amended their Subfile Answer. *See* Amended Subfile Answer, Doc. 2723 (Oct. 25, 2011) (“Am. Subfile Answer”). The Am. Subfile Answer amplifies and restates the arguments raised in the Subfile Answer. The relevant portions of the Am. Subfile Answer state:

I continue to believe there is reason to question the adequacy of the 0.7 acre feet/year offered in the settlement. I believe the Consent Order in this regard is inappropriately restrictive, inadequate, and arbitrary—and contradicts other authorities, including the U.S. Bureau of Reclamation and the American Ground Water Trust, which sets the figure at 1.0 acre feet/year for a residential family of four. However, I also believe that I will not prevail in this argument and, not wanting to waste the Court’s time, am prepared to accept the 0.7 acre foot figure.

The more important issue for me has always been the extenuating circumstance of owning three adjacent lots in the Timberlake Subdivision (governed by CC&Rs which restrict each lot to one residence.) I have one good well on one lot and a well on a second lot which produces saline/non-potable water. Good wells with potable water are rare in this area and extremely unpredictable. Although I cannot, at present, establish Historic Beneficial Use supporting three residences with my one good well, it is our family’s intention that residences for my children be built on the two adjacent lots and it seems reasonable and legitimate to request the right to use 2.1 acre feet/year (3 X 0.7 acre feet) from this well. I would point out that, one way or the other, 2.1 acre feet of water/year will eventually be drawn for these three lots.

Am. Subfile Answer at 2.

II. APPLICABLE LEGAL STANDARD

Fed. R. Civ. P. 12(c) provides: “After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” In this subfile proceeding, the

Plaintiffs' proposed Consent Order and the Crooks' Subfile Answer and Amended Subfile Answer represent the "pleadings" as that term is used in Fed. R. Civ. P. 7(a). *See* Sub-Areas 1, 2 and 3 Order at 3-5 (describing the generation and service of Consent Orders); at 5-7 (describing the process and requirements for filing a subfile answer); *Selman v. Delta Airlines*, Civ 07-1059 JB/WDS, 2008 WL 6022017, at *7 (D.N.M. Aug. 13, 2008) (describing the distinction made in Rule 7 between pleadings and motions). "A rule 12(c) motion is designed to provide a means of disposing of cases when the material facts are not in dispute between the parties." *Peña v. Greffet*, — F. Supp. 3d. — , —, No. CIV 12-0710 JB/KBM, 2015 WL 3860084, at *8 (D.N.M. June 17, 2015) (citing *Kruzits v. Okuma Mach. Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994)).

"Any party may move for judgment on the pleadings if no material facts are in dispute and the dispute can be resolved on both the pleadings and any facts of which the Court can take judicial notice." *Ramirez v. Wal-Mart Stores, Inc.*, 192 F.R.D. 303, 304 (D.N.M. Mar. 22, 2000) (citing Rule 12(c)). Because a motion for judgment on the pleadings "is generally treated in the same manner as a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, . . . [t]he court accepts all well-pleaded allegations of the non-moving party as true and views all facts in a light most favorable to the non-moving party." *Ramirez*, 192 F.R.D. at 304 (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998) and *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)). The Court should grant a motion for judgment on the pleadings "if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law." *Peña*, at *8 (citing *Ramirez*, 192 F.R.D. at 304).

III. ARGUMENT

Plaintiffs and the Crooks do not dispute any facts material to the determination of the water right associated with the Crooks' property in the Zuni River Basin. The Crooks only dispute the amount of water to which they are entitled for their domestic well. They do not dispute any other elements of the water right as proposed by Plaintiffs in the Consent Order. Even viewed in a light most favorable to the Crooks, the Am. Subfile Answer raises no factual or legal issues on the basis of which the Crooks could possibly establish an entitlement to a water right greater in quantity than that offered by the Plaintiffs. On the only two legal issues raised in the Am. Subfile Answer, as discussed below, Plaintiffs are entitled to judgment as a matter of law.

A. The Crooks' Objection To The Basin-Wide Standard For Domestic Wells Is Without Merit

The Crooks complain that the Plaintiffs have offered a quantity of water for the well—0.7 acre-feet per annum—that “is inappropriately restrictive, inadequate, and arbitrary—and contradicts other authorities. . . .” Am. Subfile Answer at 2. As the Court is aware, it was long ago established in this adjudication that, for domestic wells in the Zuni River Basin, Plaintiffs would offer water rights claimants “the higher of 0.7 acre-feet per annum, or an amount equivalent to historical beneficial use.” *Memorandum Opinion and Order*, No. 01cv00072-BB-ACE, Doc. 733 at 1-2 (D.N.M. June 15, 2006). *See State of New Mexico's Response to the Western New Mexico Water Preservation Association's Motion to Certify Questions to the New Mexico Supreme Court*, (Civ. No. 01 0072 BB/WWD-ACE, Doc. 406 (D.N.M. Nov. 30, 2005) at 7-9 (explaining the factual and legal bases underlying the decision “to presume this amount [0.7 acre-feet per annum] for domestic wells without requiring the claimant to submit any proof of

actual beneficial use”). The Court endorsed this approach because “New Mexico law is clear on the subject . . . that beneficial use defines the extent of a water right.” Mem. Op., Doc. 733 at 4. In their Am. Subfile Answer, the Crooks do not allege that they, or any of their predecessors-in-interest, have used a quantity of water in excess of 0.7 acre-feet per annum at any time in the past. On the contrary, the Crooks expressly admit that they cannot establish beneficial use of an amount of water from their well greater than 0.7 acre-feet. Am. Subfile Answer at 2.

The Crooks also complain that Plaintiffs have provided “insufficient evidence” of the sufficiency of the water right to which Plaintiffs have offered to stipulate. *Id.* As this Court also is aware, the Crooks, like every other domestic water user in the Basin, bear the burden of alleging and then establishing, based exclusively on historic beneficial use, that they are entitled to a water right of more than 0.7 acre-feet per annum for their well. *See Order*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0098, Doc. 2985 at 4 (D.N.M. Aug. 28, 2014) (“to the extent that any water right is disputed, Subfile Defendants generally bear the burden of proof in the first instance with respect to the disputed water right”); *Proposed Findings and Recommended Disposition*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0014, Doc. 3049 at 5 (D.N.M. May 27, 2015) (“The burden is on the [Subfile Defendants] to justify a water right above that which was offered by the Plaintiffs.” (citing Doc. 2985 at 2-3)). To the extent that the Crooks are arguing for a reallocation of the burden of proof in this action in aid of their effort to establish a larger water right, the Court should flatly reject that argument as contrary to well established New Mexico law. *See Order*, Doc. 2985 at 2-3.

B. The Crooks' Future Needs Are Not Relevant To The Determination Of The Water Right

The Crooks also cite their “family’s intention” to increase their water use at some unspecified time in the future in support of their claim to a water right greater than 0.7 acre-feet per annum. Am. Subfile Answer at 2. Such a declaration—that, at some future date, they could need more than 0.7 acre-feet per annum to meet their water needs—is antithetical to the beneficial use standard established under New Mexico law. Indeed, this Court, in response to similar arguments regarding “intention,” has squarely ruled that “mere intention . . . does not . . . establish historic domestic use.” Proposed Findings, Doc. 3049 at 8. *See id.* at 10-11 (“Mere assumption is insufficient to establish a water right.” (citing *State v. Aamodt*, No. Civ. 66-6639 MV/WPL, Subfile PM-67833, Doc. 8119 at 6 (D.N.M. Feb. 24, 2014))); and at 11 (“a substantial increase in a water right cannot be justified by mere speculation”).

Even accepting all of the statements in the Crooks’ Am. Subfile Answer as true and viewing them in the most favorable light to them, the Crooks state no factual or legal circumstances that can be construed to entitle them to a water right for their domestic well greater than the amount that Plaintiffs have offered in the proposed Consent Order. Indeed, the Crooks have acknowledged as much.

IV. CONCLUSION

WHEREFORE, based upon the foregoing argument and authority, Plaintiffs respectfully request that the Court enter an order granting judgment on the pleadings in favor of the United States and State of New Mexico and against the Crooks consistent with the rights set forth in the proposed Consent Order (Attachment A).

DATED this 30th day of October, 2015.

Electronically Filed

/s/ Andrew "Guss" Guarino
Andrew "Guss" Guarino
U.S. Department of Justice
South Terrace, Suite 370
999 18th St.
Denver, CO 80202
(303) 844-1343

Bradley S. Bridgewater
U.S. Department of Justice
South Terrace, Suite 370
999 18th St.
Denver, CO 80202
(303) 844-1359

COUNSEL FOR THE UNITED STATES

AND

/s/ Edward C. Bagley
Edward C. Bagley
Special Assistant Attorneys General
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150

COUNSEL FOR THE STATE OF NEW
MEXICO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 30, 2015, I filed the foregoing 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. In addition, I served Defendants Robert and Hannah Crooks by first class mail at the address below.

Robert W. and Hannah C. Crooks
P.O. Box 70
Ramah, NM 87321-0070

/s/ Andrew "Guss" Guarino