

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 THE ORDER FOR SUPPLEMENTAL BRIEFING

INTRODUCTION

In its Cross-Motion,¹ the United States established that no material fact existed with respect to the claimed Atarque Lake water right. First, the United States established that Atarque Ranch had no admissible evidence to support its claims to water rights for beneficial use of water from the stored waters of Atarque Lake.² Second, to the extent that this Court might conclude that any Atarque Lake water right arose at any time in the past, the United States established that such water rights had been abandoned. Abandonment in this instance was established by the exceptionally long period of non-use (more than 4 decades), the intentional destruction of the dam in 1971, and the substantial actions taken by Atarque Ranch that were flatly inconsistent with an intent to maintain a water right.³

¹ *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* (August 18, 2015) (Doc. 3076).

² Cross-Motion at 5 – 6 and 23 – 33.

³ *Id.* at 5 – 6 and 33 – 37.

Subsequently, this Court instructed the parties to consider whether the doctrine of forfeiture had any application to the claimed Atarque Lake water right.⁴ At its core, the question raised by the Court is whether the statutory conditions of forfeiture have been met for any Atarque Lake water right at any time in the past. Since 1907, water right forfeiture in New Mexico has been governed by statute and the statute has consistently required a 4-year period of nonuse. The statute was amended significantly in 1965 and thereafter required notice of forfeiture to be issued by the state engineer before forfeiture could occur. But the 1965 notice requirement had no effect on circumstances that existed before June 1, 1961. To the extent that this Court might recognize any Atarque Lake water right arising before June 1, 1961, the record establishes that the right has been unused for the 4-year statutory period of time and has been forfeit.

This supplemental brief presents the United States' analysis of the application of forfeiture to any Atarque Lake water right that this Court might recognize.

⁴ *Order for Supplemental Briefing* (January 28, 2016) (Doc. 3190).

ARGUMENT

For a water right to be forfeit, the statutory elements of forfeiture must be met. New Mexico statute established that a water right unused for a 4-year period between 1907 and 1965 was forfeit. The record establishes no use of Atarque Lake water before destruction of the dam in 1971. Under the *assumption* that an Atarque Lake water right arose, does the record also establish that an Atarque Lake water right remained unused for a 4-year period between 1907 and 1965?

In its Cross-Motion, the United States relied on *State of New Mexico ex rel. Reynolds v. South Springs Co.*, 452 P.2d 478 (N.M. 1969) to establish that to the extent any Atarque Lake water right might be recognized, the right had been abandoned at least since 1971 when the dam to the impoundment was intentionally destroyed.⁵ Throughout its *South Springs* analysis, the Supreme Court of New Mexico considered both abandonment and forfeiture and observed that “forfeiture and abandonment have been used interchangeably” leading, unfortunately, to confusion.⁶ Nevertheless, the United States’ analysis in the Cross-Motion is correct and application of abandonment to any Atarque Lake water right is appropriate.

Not surprisingly, the doctrines of forfeiture and abandonment share common ground; this common ground is most likely the source from which confusion has emerged. Both doctrines presuppose the existence of a water right. Both doctrines include consideration of the time period that a water right goes unused. And under both doctrines, if their elements are found, water rights are lost.⁷

Nevertheless, abandonment and forfeiture are distinct. Abandonment stems from New Mexico common law.⁸ Further, abandonment raises the question of the water right holder’s

⁵ Cross-Motion at 33 – 34.

⁶ *South Springs*, 452 P.2d at 480 - 481.

⁷ See generally *South Springs*.

⁸ *Id.* at 481 – 482.

intent, namely, did the water right holder intend to abandon the right.⁹ After an unreasonable period of non-use, the water right holder's intent to abandon is presumed and the burden becomes the water right holder's to establish sufficient "reasons for nonuse."¹⁰

Forfeiture, on the other hand, is and always has been a creature of statute. New Mexico has had a forfeiture statute since 1907.¹¹ Forfeiture does not present a question of intent; instead, it triggers an involuntary loss of a water right after a 4-year period of non-use.¹² Forfeiture fosters established New Mexico policy to put water to the greatest good for the greatest number of people.¹³

In 1965 the State of New Mexico amended the forfeiture statute and required that after the period of nonuse, "notice and declaration of nonuser" must be given by the state engineer.¹⁴ After notice and declaration of nonuser, the amended statute provided the water right holder an additional year to beneficially use water.¹⁵ If after notice and the additional year the water remained unused, then the water right forfeits.¹⁶

⁹ *Id.*

¹⁰ *Id.* at 482.

¹¹ See Attachment A. In Attachment A, the United States presents the New Mexico statute (as amended) establishing the doctrine of forfeiture from 1907 through 1965. Notably, the statute as amended was titled both "abandonment" (1915 and 1929) and "forfeiture" (1941, 1957, and 1965); this too possibly contributed to the source of historical confusion between the doctrines. Since 1965, the New Mexico forfeiture statute has remained unchanged for purposes relevant to this subfile action.

¹² *South Springs*, 452 P.2d at 481 (quoting 2 Kinney on Irrigation and Water Rights, 2d ed. 2020-2021 § 1118 (1912)).

¹³ *Id.* at 481.

¹⁴ Attachment A at 2 – NMSA § 72-5-26 (1965).

¹⁵ *Id.*

¹⁶ *Id.*

Importantly, the 1965 statute recognized that “the condition of notice and declaration of nonuser shall not apply to water which has reverted to the public by operation of law prior to June 1, 1965.”¹⁷ Therefore, as a result of the 1965 amendment, any water right that was unused beginning June 1, 1961 became subject to notice and declaration requirement. By the same token, any water right unused beginning prior to June 1, 1961 remained unaffected by the 1965 amendments.¹⁸

Since New Mexico established the doctrine of forfeiture, the statute has recognized that the “waters for storage reservoirs” were excepted from forfeiture. *See* Attachment A at 1 – (citation to the 1907 statute). This exception is grounded in established New Mexico law and given the nature of a state-law based right to store water, makes sense. In New Mexico, a right to store water does not arise simply from the act of impounding water; water may not be stored for speculative purposes or for the sake of hoarding water from others.¹⁹ A right to store water cannot stand alone; it must be closely tied to an underlying water right and its beneficial use of water.²⁰ Thus, the forfeiture question remains tied to whether the beneficial use of water from the impoundment has stopped for the 4-year forfeiture period; if the underlying water right is forfeit, a storage right does not and cannot stand alone.

The Court asks the parties to examine whether forfeiture applies to the claimed Atarque Lake water right. In short, forfeiture applies to any Atarque Lake water right that the Court might

¹⁷ *Id.*

¹⁸ Today, the forfeiture statute continues to include a notice and declaration requirement like the one that was first introduced in 1965. NMSA §72-5-28 (1978). The United States does not contend that since June 1, 1965 Atarque Ranch was provided a notice and declaration of nonuse by the state engineer.

¹⁹ *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1135 (10th Cir. 1981).

²⁰ *Id.* (“[For a right to store water], it is essential that there shall have been a beneficial use which is more than speculative.”).

recognize. But it is difficult to analyze the applicability of forfeiture without knowing when that right arose (i.e. 1907, 1917, 1927, etc.) and for what purpose. Nevertheless, if the requirements of the applicable forfeiture statute were met, then any Atarque Lake water right that might have been established is subject to all past, relevant forfeiture statutes.

As the United States established in the Cross-Motion, Atarque Ranch has no evidence to establish historic, beneficial use of water from Atarque Lake; to establish any quantity of water historically put to beneficial use from Atarque Lake; or to establish any date in the past upon which the water of Atarque Lake was put to beneficial use.²¹ But if the Court were to recognize any water right arising at any time in the past, then the same evidentiary record establishes forfeiture's 4-year non-use period. From the four-year period May 31, 1961 – May 31, 1965 extending back to the “before March 19, 1907” period referenced in the unsupported Shoenfeld declaration,²² the evidentiary record establishes that any Atarque Lake water right was unused and therefore subject to forfeiture.

In the event the Court were to recognize an Atarque Lake water right for any beneficial use and in the event that such right arose before June 1, 1961, no evidence exists to establish that water was put to use at any time thereafter. Thus, any such water right would be forfeit.

CONCLUSION

In its Cross-Motion, the United States established that the record was without evidence to establish an Atarque Lake water right at any time in the past. The United States also established that even if this Court were to recognize a water right arising at any time in the past, such water right was certainly abandoned with the intentional destruction of the dam in 1971.

²¹ Cross-Motion at 23 – 33.

²² See Cross-Motion at 27.

Given the entirety of the record presented by Atarque Ranch to support its Atarque Lake claim, the Court need not issue any decision with respect to the applicability of forfeiture. Nevertheless, to the extent that the Court finds it necessary to consider forfeiture, it should also recognize that the record, devoid of any evidence establishing water use at any time before 1971, establishes that any water right went unused for the statutory 4-year period. Any water right that the Court might recognize arising before June 1, 1961 has been forfeited.

Respectfully submitted this 25th day of February, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 25, 2016, 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