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

UNITED STATES OF AMERICA,

and

STATE OF NEW MEXICO, ex rel. STATE ENGINEER,
Plaintiffs,

and

ZUNI INDIAN TRIBE, NAVAJO NATION

Plaintiffs-in-Intervention,

-vs-

A & R Productions, et al.,

Defendants.

No. 01cv00072-MV-WPL
Subfile No. ZRB-2-00098
JAY Land Ltd. Co., Yates Ranch Property LLP

DEFENDANTS' OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDED DISPOSITION OF THE MAGISTRATE (Doc. 3223)

Introduction

Defendants' objections fall into four classifications, each of which except the last one has subsidiary parts:

(1) Atarque Lake: (A) The Magistrate improperly rejected the Defendants' Declaration of Water Rights in Atarque Lake and the prima facie case in support of the water right created by the declaration of water right under NMSA § 72-1-3 (1961); (B) There is conflicting evidence respecting the abandonment of the water right in Atarque Lake and Defendants should have summary judgment(or there is conflicting evidence so that neither side should have summary judgment);

(2) 21 Wells: (A) The Magistrate improperly failed to recognize the prima facie case for the amounts of water reflected in the declarations of underground water rights under NMSA 72-12-5 (1931); (B) The Magistrate adopted an improper measure of stock watering underground water rights, by measuring and limiting Defendants' stock watering rights by the number of cattle watered rather than the amount of water beneficially used.

(3) Evaporation and other losses: (A) The Magistrate properly determined that evaporative losses should be included in water rights for Defendants and initially stated that Defendants should have summary judgment on that account, but then recommended that the Defendants' motion for summary judgment be denied in whole; and (B) The Magistrate failed to take into account the evidence presented by the Defendants of the amount of evaporative and other losses[1] which should be calculated as a part of the well and stock tank rights.

(4) Springs: The Magistrate improperly failed to recognize water rights in two springs, when there is evidence in the record sufficient to create a genuine issue of material fact with respect to them.

[1] It is unclear at this point whether the evidence is uncontradicted and in Defendants' favor or is contradicted, and creates a genuine issue of material fact which requires denial of the Plaintiffs' motion for summary judgment.

> OBJECTION 1. The proposed findings and recommendation incorrectly construe the requirements of NMSA 72-1-3, and Defendants correctly rely on the Declaration to create a prima facie case of the facts stated in the declaration.

The Atarque Lake declaration is Exhibit 1 (Doc. 3059-2) to Defendants' motion for summary judgment. (Doc. 3059) At page 6 of the recommended findings, the Magistrate adopts three non-existent or inapplicable requirements for the applicability of § 72-1-3 so as to create a statutory "presumption" of validity of a declared water right. The statute does not create a presumption. It provides that the declaration is "prima facie evidence of the truth of [its] contents". See NMSA § 72-1-3 (1961)[2].

The Magistrate states:

> [The Atarque Lake Declaration] does not satisfy § 72-1-3 because it [1] fails to state the date of first application to beneficial use, stating only that such date was, conveniently, before March 19, 1907; [2] fails to include a description of the land where the water was used to irrigate; and [3] most importantly, fails to establish continuity of use. In fact, the Shoenfeld Declaration establishes that there has not been continuous use of the water associated with Atarque Lake. Accordingly, I find that the presumption does not apply. [The numbering has been added by counsel.]

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[2] 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 . . . . Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.

The validity of the water right declaration is beyond the power of this Court to adjudicate. That function was administratively performed by the State Engineer when he accepted the declaration for filing. Unless the State Engineer's determination was "clearly incorrect" this Court is obliged to respect that decision. See Macias v. New Mexico Dept. of Labor, 21 F.3d 366 (10th Cir., 1994):

> There is . . . [a] compelling reason for a federal court to give deference to a state administrative agency's interpretation and application of a state statute which it is charged with administering. In this connection, New Mexico courts have held that although not binding, the interpretation of a state statute by a state agency charged with the administration of a statute [fn omitted] is persuasive and should not be overturned unless "clearly incorrect." [Citations omitted.]
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> [2] We do not believe that the Department's interpretation or application of the New Mexico Act is "clearly incorrect" and on that basis we affirm. Certainly, the Department's interpretation and application of . . . [the New Mexico statute there in issue] is both reasonable and plausible. In such circumstance a federal court should be slow to overturn the agency's interpretation and application thereof.

Neither of the Plaintiffs claimed that the State Engineer's acceptance of the Declaration was "clearly incorrect." They cannot do so now. United States v. Garfinkle, 261 F.3d 1030, 1031 (10th Cir., 2001).

[1] THE DECLARATION STATES THE DATE OF FIRST APPLICATION OF WATER. The Magistrate's referral (Doc. 3223, p. 6, 3rd full paragraph) to the "convenience" of the "on or before March 19, 1907" date in the Atarque Lake declaration, has no place in the

recommended decision. The "on or before March 19, 1907" means of declaring or adjudicating a water right has a long and respected history, having been used by the State Engineer, by declarants throughout the state, and by this and, as best counsel is aware, all other water adjudication courts in the state, all of which have adjudicated numerous rights as having a priority of "on or before March 19, 1907" or "March 19, 1907". See, e.g., the Chama River Hydrographic Survey Report, on file in this Court, pp. 118, 123, 124,125, 127, 129, 131, 150 (State of New Mexico, et al., v. Aragon, et al., 6:69-cv-07941-MV-KK); see also the Santa Cruz River Hydrographic Survey, pp. A- 7, A-12 (State of New Mexico v. John Abbott, et al., United States District Court, 68cv07488 and 70cv08650, showing the common use of the "on or before March 19, 1907" by the State Engineer and the Courts.

[2] THE DECLARATION SUFFICIENTLY DESCRIBES THE PLACE OF USE OF THE ATARQUE LAKE WATER. The magistrate gives as a reason for the rejection of the Atarque Lake water right declaration as prima facie proof that it "fails to include a description of the land where the water was used to irrigate". The assertion fails in two particulars:

(1) the Defendants claim that the water was used not only for irrigation, but for "stock watering, recreation, fishing, boating, swimming." For the latter purposes, the Magistrate gives no reason for the determination that the declaration is

insufficient. Furthermore, uses other than for irrigation are not appurtenant to real estate and no land description is possible or necessary. Walker v. United States, 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882.

(2) The Magistrate's recommendation overlooks paragraph 5 of the declaration in which the place of use is described, directly and by reference to a USGS map. The declaration in fact provides a description of the land, both in the body of the declaration, paragraph 5, by reference to the public land surveys, and by reference to an attachment to it of a 1972 quadrangle map prepared by the Plaintiff United States, which shows the boundaries of and the place of use of Atarque Lake.

[3] THE DECLARATION SUFFICIENTLY STATES THE CONTINUITY OF USE. The Magistrate rejects the declaration because it did not state the that the use of water in Atarque Lake was continual. It is not required to state that the use was continual. It is required to set forth the continuity, which went from before March 19, 1907, to sometime in 1970 or 1971. Defendants have set forth the "continuity" by stating the dates. Further, the State Engineer accepted it for filing, showing that he found it to conform with the requirements for filing, and under New Mexico law it affords to Defendants the prima facie proof they claim for it. The State Engineer's form contemplates that the declarant may set forth any exceptions to the continual use. His form

inquires: “since that time has been used fully and continuously for all of the above described purpose except as follows: _____” . See Exhibit 1 (Doc. 3059-2) I.e., it is plain on the face of his form that the State Engineer has conceded that the use could well be other than continuous, and need not be continuous in order for the water right to be declared. Or else, why would he ask for the exceptions? Nothing in state law says that water use must be continuous or that the declaration of water use must claim that it has been continuous. Once a water right comes into existence, it continues to exist until it is terminated by one of the means recognized by law: abandonment or forfeiture (or alienation, which is not at play here.) See II Hutchins, Water Rights Laws in the Nineteen Western States p. 256, et seq.

In addition see the discussion of the Macias case, supra, with respect to the obligation of the federal court to respect the State Engineer’s acceptance of the form for filing.

In respect to the substance of the nonuse, the Magistrate appears to opine that there is a requirement of “continual use” for the validity of a water right. As a matter of law there is no requirement of continual use in order for a water right to be valid. Nor is the “continual use” required to be set forth by the declaration statute a requirement of continual use - either for the validity of the water right or for the validity of the

declaration. Use interrupted or even ended is quite sufficient for a water right, which once established can be interrupted until the cows come home, provided it is not abandoned or forfeited. The lack of continuity does not affect the validity of the water right and hence should not affect the prima facie proof as allowed by the created by the declaration.

The Magistrate's recommendations fail to distinguish the issues respecting the filing of the declaration from the issues respecting the abandonment of the water rights. That distinction must be made. The Magistrate confuses the question of abandonment of a water right with the question of the Defendants' entitlement to file the declaration. The right to file and have the benefit of the declaration is not limited by the length of nonuse or the reasons for the nonuse. The statute speaks for itself and produces the statutory result - a prima facie showing, which in the absence of any other evidence is, by definition, sufficient to sustain the position of the claimant. Plaintiffs are capable of producing whatever proof exists to the contrary, which once in the record, places on the fact finder the job of deciding the issues. And, if the court finds, when it hears the facts and the competing proofs, that the 45 years of nonuse is not excused, it will rule for the Plaintiffs. If the Plaintiffs have no proof, and the Defendants have relied on the uncontradicted declaration, then the Court should rule for Defendants.

The Magistrate asserts, p. 9, first full paragraph, that there is an element of proof which Defendants did not meet in our showing of a lack of intent to abandon:

> While JAY presented competent and admissible evidence that the owners since 1978 have not intended to abandon any water right in Atarque Lake, that is not the only element they must meet to rebut the presumption of abandonment: JAY must also show reasons for nonuse. See *Elephant Butte Irr. Dist.*, 287 P.3d at 331. JAY failed to provide any valid reason for the nearly forty years of nonuse under its ownership and the ownership of its predecessors in interest.

The Magistrate confuses two separate issues and decides them as one. The first issue, which must be decided separately from the second, is whether Defendants are entitled to the statutory benefit of the declaration statute, 72-1-3. That issue was decided by the State Engineer when he accepted the declaration for filing. Macias, supra.

The second question facing the fact finder is the ongoing validity of the water right in Atarque Lake. The Magistrate recommends a summary judgment against the Defendants, because, he reasons, the Defendants showed no reason for the long non-use. This is not how the issues have been drawn by the motions. The United States refers in its motion (Doc. 3076, pp. 35-36) to the reasons it has found for the destruction of the dam: because cows got stuck in the mud and mosquitos. For the Court to conclude from those inferences that it may make the further inference of an intention to abandon is, as briefed and argued, improper.

The functionality of the declaration is beyond the reach of this Court. The declaration created the prima facie proof of the facts stated in it. The obvious, and immediate reason for the nonuse is that the dam, being gone, could not hold any water. Whether that proof is a sufficient reason for the nonuse is clearly a question of fact which defeats summary judgment. The Plaintiffs have not presented any legal argument or authority that a 30+ year[3] delay in rebuilding of a dam is as a matter of law unreasonable. The ever-shifting benefit of prima facie proof and presumptions from nonuse surely show there is a conflict of evidence requiring denial of the United States' motion for summary judgment.

The Magistrate asserts that under State v. Elephant Butte Irr. Dist., 2012-NMCA-090, 287 P.3d 324 at 331, the defense is obliged to show a reason for the extended non-use. At trial the Defendants may be obliged to do so, but they are not obliged to do so in order for their declaration to be effective. The declaration created their prima facie case, by stating that the dam had been destroyed, and it insulates them against summary judgment. "The dam was destroyed by 1971 and the water has not been used since that time." The reason for the nonuse is that the dam was not there so as to allow the use of the water. The lake was present in 1971, as shown by the USGS map entitled "Atarque

[3]Defendants assert that the proper time period stops when this case was filed, 2002.

Lake" a copy of which is attached to the declaration, and which on its face shows that the photographs from which the United States made the map were taken in 1971.)

> OBJECTION 2. The proposed findings and recommendation incorrectly measure the amount of Defendants' water rights not by the beneficial use to which they have been placed, but by the size of the ranch on which they are used and assumptions of the amount of water neeeded to raise cattle on that ranch.

With respect to each of the 21 contested wells the Magistrate erroneously recommends, in effect, that the amount of water of a water right is governed not by the amount of water beneficially used by virtue of that water right, but by factors outside of the beneficial water use by the appropriator. The fact which is improperly used by the Magistrate is the size of the ranch. The Magistrate improperly assumes, as does the United States, that the size of the ranch limits the size of the water rights which may be used in connection with it. The Magistrate therefore recommends that having taken more of the water "allotted"[4] to the ranch from one source, the water rights from other sources on the ranch are reduced, notwithstanding that water from each of the sources has been placed to beneficial use, which is as a matter of law the only factor which governs the size of the water right.

[4]There is no amount of water "allotted" to the ranch. The water right in each well is the result of beneficial use.

The recommendations are wrong on two accounts. The first is the use of the ranch size to limit the water rights which may be owned on it. The second is to limit the water rights by a factor invented for the first time in this case in which the water right for watering cattle is determined to be the amount of water actually consumed by each head of cattle which is then arbitrarily doubled in order to account for evaporation and other losses in delivering water or making it available to the cattle. The latter is accomplished without regard to the amount of evaporation, but is based only on the assumption used by the United States. The Defendants have placed in evidence the actual amount of evaporation. There is thus created an issue of fact and summary judgment against the Defendants is improper.

There is no basis for the arbitrary and arithmetic doubling of the cattle consumption in order to determine evaporation and other losses. Defendants have presented proof which shows the amount of evaporation from open water sources, which is far more than double the per-cow consumption adopted by the Magistrate. Summary judgment is improper for both concepts, as the Defendants have provided facts which, show that the evaporative and other losses (e.g., leakage) are far greater than the amount conceded by the United States. The United States asserts that 10 gallons per head per day is consumed. We say the amount consumed is far greater than that. See the Affidavit of Darrell Brown, Exhibit 7

(Doc. 3059-8), and Exhibit 10 (Doc. 3059-11) showing the amount as 60 inches of evaporation gallons per year. More important, however, is that the United States has arbitrarily doubled the cattle consumption to arrive at an amount of water consumed by evaporation, seepage and leakage from the watering facilities. The Brown affidavit shows that evaporation occurs from each of the watering facilities at the rate of 60 or more inches per year. That same evaporation occurs whether one cow, 100 cows or 1000 cows drink from a given watering facility. Multiple watering facilities at the ranch are essential because cattle cannot effectively travel more than the limited distances to water shown in Mr. Brown's affidavit. The United States proposed number does not take into account either the actual evaporation from the facilities or the number of facilities which are necessary to have water at an appropriate distance for the cattle on a large ranch such as this.

More important though, than what is necessary or essential for the cattle operation, is the question of what has been used for the cattle operation. The amount of water which has been used is the basis, the measure and the limit of the water rights. NM Constitution Art. XVI, Section 3. "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." The Courts and the commentators have all agreed that "an appropriator of water should not reasonably be limited in his

water right to his mimnimum needs." I Hutchins, supra, pp. 500-501. The actual need, consumption and beneficial use is shown by the Brown affidavit, and the amounts reflected for the wells should not be limited as the Magistrate recommends. Both the law and the facts are contrary to the Magistrate's recommendations.

> As in other appropriation states, in New Mexico a water right is measured by actual beneficial use. Under art. XVI, § 3, New Mexico Constitution, "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." In McBee v. Reynolds, 74 N.M. 783, 787-788, 399 P.2d 110, 113-114 (1965), we said:
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> > "Since Yeo v. Tweedy, 34 N.M. 611, 286 P. 970, it has been settled in this state that waters of underground streams, channels, artesian basins, reservoirs and lakes, the boundaries of which may be reasonably ascertained, are public and subject to appropriation for beneficial use. They are included within the term 'water' as used in Art. XVI, §§ 1-3, of our Constitution. * * *"
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> {23} Therefore, we can say that the measure of the right to appropriate water is actual beneficial use. In 5 Waters and Water Rights, § 408.2 at 76 (Robert Emmet Clark, Editor-in-chief 1972), the following is stated:
> "The term 'duty' in relation to water use refers to quantity: the amount of water necessary for effective use for the purpose to which it is put under the particular circumstances of soil conditions, method of conveyance, topography, and climate. STATE EX REL. REYNOLDS V. MEARS, 1974-NMSC-070, 86 N.M. 510, 525 P.2d 870 (S. Ct. 1974)

(Defendants did not present the calculation for each of the watering facilities, as that tedious task need not be the subject matter of the summary judgment proceedings. The Defendants sought, and the Court should grant the partial summary judgment they seek which sets forth the principle that beneficial use

includes the evaporative and other losses. That decision, if made, can be applied by the parties to all the watering facilities at the ranch without involving the Court.)

The Magistrate asserts that Defendants have not made any proof with respect to each of the 21 wells respecting the amount of water appropriated from it. The Magistrate ignores the declarations of underground water rights which were a part of these Defendants' motions with respect to well water rights. The Magistrate recommended, for example, that:

> because JAY presented evidence that well 10B-2-W04 was entitled to a significantly increased water right **that proportionally reduced rights in the surrounding wells**. JAY argues generally that the Court should reject the United States's calculations, but does not respond to the motion for summary judgment with respect to this well. JAY does not provide any argument as to why the water right in well 10A-2-W02 should not be reduced to 0.392 AFY **in light of well 10B-2-W04's ability to serve the area covered by well 10A-2-W02**. Because JAY bears the burden of establishing a water right beyond that which is offered by the United States and failed to present evidence or argument with regard to this well, I recommend that the Court find that JAY failed to meet this burden and adjudicate the following water right in this well.

The Magistrate makes the same recommendation with the same rationale not only for well 10A-2-W01, but for all 21 of the contested wells. Defendants' argument that the "proportional reduction" of the rights in the wells is improper goes to all of the wells. See the chart at p. 18 of these objections.

The Magistrate's recommendation presupposes that because the Highway well (well 10B-2-W04) supplies a large amount of water,

that supply makes the demand on the other wells less and therefore the water right in those other wells is smaller than as claimed. The whole argument is fallacious, because non-irrigation water rights, such as these, are not based on demand or the size of the land area served. They are based on the amount of water applied to beneficial use from each well. In order to justify any reduction by the Court below the amount applied to beneficial use there must have been a loss of the water right. Loss can only happen in a limited number of ways, none of which is at work here: alienation of the water right, e.g., by lease or sale; abandonment, or forfeiture. There is no claim that any of those have befallen these water rights. See II Hutchins, supra, p. 7. The use of the highway well in no manner "proportionally reduced rights in the surrounding wells", all of which remain intact.

Perhaps the confusion lies in the difference between appropriative rights and federal reserved rights. Appropriative rights are defined and measured by beneficial use. While federal reserved rights are at play in a separate part of this lawsuit, they play no role with respect to these Defendants' water rights. Federal reserved rights are governed by necessity:

> . . . the quantity of a federal reserved water right is not determined by the amount of water put to beneficial use; rather, it is determined by the amount of water necessary to carry out the primary purpose of the reservation. . . . STATE EX REL STATE ENG'R V. COMMISSIONER OF PUB. LANDS, 2009-NMCA-004, 145 N.M. 433, 200 P.3d 86

The amount of water applied to beneficial use is reflected in the declarations, Exhibits 12-1 through 12-13, 12-15 through 12 - 21, and 12 - 24, all of which are admissible in evidence under NMSA 72-12-5:

> Any person, firm or corporation claiming to be the owner of a vested water right from any of the underground sources in this act [72-12-1 through 72-12-10 NMSA 1978] described, by application of waters 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 well 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 records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.

The Magistrate recommends that:

> The United States moves for summary judgment in its favor regarding the 21 wells remaining in dispute. JAY failed to respond to this portion of the United States's motion, stating instead that the United States failed to identify the wells at issue. I disagree. The United States attached to its motion a one page document entitled "Attachment A – Atarque Ranch Remaining Contested Water Rights" (Doc. 3076 Ex. A), which lists the well identification numbers, the historic use, the priority date, and the quantity in AFY for each well.

The material relied on by the Magistrate - "Attachment A" is not admissible in evidence, but even if it were, Plaintiffs' summary judgment motion must be denied. The Magistrate states that Defendants did not respond to the United States' motion.

The United States has not attached anything that resembles proof of the reduced amounts of water from the wells. The

Hydrographic Survey shows differing amounts of water for the wells in question. Attachment A is not a part of the Hydrographic Survey. The hydrographic survey itself might, if raised, be considered in connection with a motion for summary judgment. See See NMSA §72-4-16 (1919). Even without the respect afforded by the introduction of the hydrographic survey the matter is clearly not properly subject to summary judgment for Plaintiffs. Defendants have placed before the Court Documents 3093 (12-1) through 3093 (12-21), all Exhibits to their motion and response to the United States motion. Those documents are the Defendants' Declarations of the Underground Water Rights of Defendants. See Doc. 3093, p. 14, showing, among other things, that indeed the Defendants did respond to the United States' motion respecting the wells. Even if Attachment A is properly before the Court and even if it might be considered in connection with a motion for summary judgment, the Defendants have controverted whatever facts are properly or improperly shown in it. It shows absolutely no facts which may be considered in connection with a summary judgment motion. See the following chart comparing Attachment A, with Defendants Exhibits 12-1 through 12-21 showing the United States' and Defendants' differing claims (only the Defendants' declarations are actually admissible in evidence on trial under NMSA 72-12-5 and should therefore be considered in this motion for summary judgment; the

United States' attachment A is not admissible even under the statute NMSA 72-4-16, since it is not the hydrographic survey, is not signed by the engineer performing the survey, and does not reflect the contents of the hydrographic survey which is on file):

United States Attachment A		Defendants' Corresponding Declarations in Evidence			
Well No	Amount of Water	Doc. No.	Ex. No.	Well No.	Amt Water (a/f)
10A-2-W01	0.392	3093-5	12-5	G-721	3.276
10A-2-W02	0.392	3093-11	12-11	G-729	3.00
10A-3-W02	0.392	3093-4	12-4	G-720	3.00
10A-4-W01	2.131	3093-12	12-12	G-730	3.00
10A-5-W01	2.131	3093-18	12-18	G-736	6.493
10B-1-W05	2.131	3093-7	12-7	G-725	3.00
10B-2-W01	0.392	3093-6	12-6	G-722	3.398
10B-2-W03	0.392	3093-2	12-2	G-717	3.00
10B-2-W04	28.91	3093-3	12-3	G-718	36.00
9B-2-W06	0.392	3093-13	12-13	G731	3.00
9B-4-W01	0.131	3093-1	12-1	G-716	3.248
9C-2-W03	0.392	3093-17	12-17	G-735	3.00
9C-2-W04	0.392	3093-15	12-15	G-733	3.627
9C-3-W01	0.392	3093-16	12-16	G734	3.379
9C-3-W02	0.392	3093-10	12-10	G-728	3.00
9C-3-W03	0.392	3093-8	12-8	G-726	3.876
9C-4-W01	0.392	3093-9	12-9	G-727	3.00
9C-4-W03	2.131	3093-21	12-21	G-739	3.00
9C-4-W04	2.131	3093-20	12-20	G738	3.00

9C-4-W05	2.131	3093-19	12-19	G737	3.00
9C-5-W01	2.131	3093-24	12-24	G-742	3.739

The following are not included in Attachment A, not the subject matter of Plaintiffs' Motion for Summary Judgment, and not contested by the Plaintiffs:

United States Attachment A		Defendants' Declarations in Evidence			
Well No	Amount of Water	Doc. No.	Ex. No.	Well No.	Amt Water (a/f)
No US Well No., Answer ¶ 144, p. 77		3093-14	12-14	G-732	3.314
9C-4-W02		3093-22	12-22	G-740	3.00
10B-2-W02		3093-23	12-23	G-741	3.00

At the very least the foregoing shows that the evidence before the Court reflects a genuine issue of material fact, meaning that summary judgment for the United States and New Mexico with respect to the wells should be denied. At best (for the Defendants) the Declarations are the only admissible evidence in the record and uncontradicted even by the hydrographic survey, summary judgment, if at all, should be entered for the Defendants.

Declarations of underground water rights are governed by NMSA § 72-12-5 (1931) (see p. 16, supra) which is essentially identical to the declarations statute for surface water. Its principal importance for the present objections is the last sentence, which shows that the declarations are admissible and should have been considered by the Magistrate and should be considered by the Court and be the basis for sustaining Defendants' objections to the portion of the Magistrate's

recommendations dealing with the 21 wells:

> . . . Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.
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> > OBJECTION NO. 3 CONTRADICTORY RULINGS The Magistrate's recommendation that the Court grant and that the Court deny the Defendants' motion with respect to evaporative losses is inconsistent with itself and incorrectly either grants relief to the United States or denies it to Defendants.

At page 9, the Magistrate asserts that

> Plaintiffs estimated 10 gallons per day per [[animal] unit] for losses alone.").) To the extent that the Defendants move for a Court order enshrining this principle[5], I recommend that the Court grant summary judgment in favor of the Defendants on the limited question of whether some loss can be accounted for in a water right. The Defendants also sought summary judgment on how to quantify a water right when loss is involved, but presented no clear argument on this point. Accordingly, I recommend that the Court deny the Defendants' motion for summary judgment on this.

At p. 35 the Magistrate states

> For the foregoing reasons, I recommend that the Court deny JAY's motion in full. I recommend that the Court grant-in-part and deny-in-part the United States's motion for summary judgment.

The evaporative losses were dealt with in our motion and Defendants presented a clear argument on the point with respect to every watering facility on the ranch which has any open water surface. The United States made no argument whatever in response to the claim for evaporation losses.

The Defendants' statement of undisputed facts (Doc. 3059-1,

[5]Defendants did not make any such motion and vehemently oppose any such principle.

p. 4 et seq. and argument (Doc. 3059-1, pp. 16-19), Mr. Brown's affidavit Exhibit 7 (Doc. 3059-8), Exhibit 8 (3059-9) and Exhibit 10 (Doc. 3059-11) are all clear. Pan evaporation multiplied by the open surface area of water facilities yields the amount of evaporation resulting from the use of the stock facilities and any other open water surface. We know from the uncontested part of the Answer (which incorporates the provisions of the United States' consent order) what the surface area of all open water facilities is. By applying the Plaintiffs' determination of pan evaporation (See Exhibit 8 (Doc. 3059-9)) we know the amount of evaporation from them.

The rest is arithmetic. If, for example, the surface area of a watering facility is 1000 square feet, and there is annual evaporation from it of five feet (60") then there is a consumption by evaporation of 5000 cubic feet of water. A cubic foot of water is 7.48 gallons[6]. 5000 multiplied by 7.48 = 37,400 gallons. That loss occurs irrespective of the number of cows drinking from the facility, and must be added to the amount consumed by the cows. Exhibit 7, Affidavit of Darrell J. Brown. ¶ 7 The United States' formula is not based in any measure on any measurements whatever, but purely on the assumed multiplier applied to the cattle carrying capacity.

[6]See the New Mexico State Engineer's website for a glossary of terms, including the measurement of a cubic foot of water: http://www.ose.state.nm.us/WR/glossary.php

Defendants have not set forth in this objection the surface area of each and every open watering facility. The principle that evaporation should be calculated based on pan evaporation and on that area is the critical part of the issue. If the Court should so decide there should be little difficulty on the part of the parties applying whatever rule applies to those facilities.

OBJECTION 4. The Magistrate improperly recommended that the Court grant summary judgment with respect to springs Nos. 10A-4-SPR02 and 10A-4-SPR03.

The Magistrate correctly defines the issue by stating that under the Miranda case (State ex rel., Reynolds v. Miranda, 493 P.2d 409, 411 (N.M. 1972) man made improvements are required in order to develop a water right, and recommends that the Court deny a water right in these two springs because there is no evidence of ma-made improvements in connection with them. The Magistrate acknowledges the United States' evidence that there are no man-made improvements in the two springs, but asserts that Defendants' evidence is insufficient to create a genuine issue of material fact. The Defendants' evidence is that the springs serve an additional excavated watering tank. Obviously, an excavated watering tank is a man-made improvement. That is the requirement of Miranda. The thrust of the Magistrate's recommendation is that as a matter of law, an excavated watering tank is not an improvement of man, and hence does not give rise

to a water right. Miranda does not so hold. Miranda was a case in which there was no work of man whatever. The water naturally flowed out of a draw and naturally spread itself out over the ground at the bottom of the draw. The Supreme Court held there was no water right. What is the difference here? As the Magistrate noted, the water from the springs feeds into the excavated watering tank. Miranda does not operate to deprive the appropriator of the benefit of his work.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

On this March 21, 2016, I serve the foregoing on all counsel and parties served by the Court's digital filing and service system.

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