

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.	)	
	)	<b>Subfile No. ZRB-2-0038</b>
A & R PRODUCTIONS, et al.	)	
	)	
Defendants.	)	
_____	)	

**JOINT CROSS-MOTION FOR SUMMARY JUDGMENT ON THE DISPUTED WATER  
RIGHT CLAIM AND RESPONSE TO DEFENDANTS’ MOTION FOR SUMMARY  
JUDGMENT**

Pursuant to Rule 56 Fed. R. Civ. P., D.N.M.LR-Civ. 56.1, and *Order Setting Discovery Deadlines and Adopting Joint Status Report* (Doc. 3201), Plaintiffs United States of America (“United States”) and the State of New Mexico (“New Mexico”) (collectively Plaintiffs) jointly move the Court for summary judgment on the contested water right claim associated with this subfile action (“Cross-Motion”). In addition, Plaintiffs submit their response to *Defendants’* (Craig and Regina Fredrickson – collectively “Defendants”) *Motion for Summary Judgement* (Doc. 3305) (“Defendants’ Motion”).

As Plaintiffs demonstrate below, no genuine dispute as to any material fact exists between the parties. The record establishes that Defendants’ claimed livestock-use water right, if it ever existed, was abandoned. In the alternative, the record also establishes that Defendants do not have admissible evidence to establish the necessary elements of their livestock-use water right claim. As a result and on either ground, the contested livestock-use water right claim for the

well found on Defendants' property in the Zuni River Basin must be denied and Plaintiffs are entitled to summary judgment.

In the event that the Court does not grant Plaintiffs' Cross-Motion for any reason, Defendants' Summary Judgment Motion must be denied as it raises disputed issues of material fact that prevent judgment from entering in their favor.

## **I. INTRODUCTION**

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 Defendants' property for evidence of historic, beneficial water use. *See Notice of Filing the Zuni River Basin Hydrographic Survey for Sub-Areas 9 and 10* (Doc. 393).<sup>1</sup> On Defendants' property, a single well was found and was labeled for identification purposes 10A-5-W06. Based on the information gathered during the Hydrographic Survey, Plaintiffs generated a Consent Order 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). After extended consultation through 2015, the parties narrowed their dispute to the water right claimed by Defendants for livestock use and Defendants filed their *Subfile Answer* (Doc. 3161).

Defendants claim a water right tied to well 10A-5-W06 for livestock use. Defendants' claim that this right arose during past ranching activities that occurred in the region years prior to their 2006 purchase of a single section of land.<sup>2</sup> It is this claim that is the narrow and exclusive

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<sup>1</sup> 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](http://www.zunibasin.com).

<sup>2</sup> A section of land is one square mile or 640 acres.

focus of Defendants' Summary Judgment Motion, this Cross-Motion, and the litigation of this subfile action.<sup>3</sup>

The Court is presented with two conflicting motions for summary judgment. Under nearly identical circumstances, this Court previously "approach[ed] these [combined] motions from the standpoint of the [Plaintiffs] as the movant." *Proposed Findings and Recommended Disposition*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0014, Doc. 3049 at 3. The same approach is appropriate here because Plaintiffs' Cross-Motion is not dependent on any factual circumstance associated with establishing a water right; such circumstances are presumed or are irrelevant. On the other hand, Defendants argue that the evidence they have marshalled to establish their livestock-use claim is so overwhelming that they have established beyond dispute every material fact and that they are entitled to judgment as a matter of law.

In this Cross-Motion, Plaintiffs raise two core challenges to Defendants' livestock-use water right claim. First, assuming that a livestock-use water right was created by the historic water use practices of previous landowner(s), it is undisputed that any livestock use water right has gone unused since at least April 29, 1999. More than seventeen years of nonuse is an unreasonable period of nonuse and, as such, raises the presumption that the water right has been abandoned. No basis exists that justifies such unreasonable nonuse and any water right that may have existed in the past has been abandoned.

Second, and in the alternative, assuming the livestock water right at issue has not been abandoned, New Mexico law requires the Defendants to establish the five elements associated with any livestock-use water right: purpose of use, priority, place of use, period of use, and

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<sup>3</sup> The parties have agreed that the Court may recognized a 0.7 acre-foot per year (AFY) water right associated with well 10A-5-W06 for domestic purposes. *Joint Status Report and Proposed Discovery Plan* (Doc. 3167-1) at 2.

quantity. Defendants' only support for their claimed right to 3.779 AFY from Well 10A-5-W06 is through Defendant Craig Fredrickson's Rule 26(a)(2)(B) Report. The admissibility of Mr. Fredrickson's opinions is challenged in the United States' *Motion to Exclude Expert Opinion Testimony* ("Motion to Exclude") filed simultaneously with this Cross-Motion. If the Motion to Exclude is granted and the Court excludes Mr. Fredrickson's testimony, this Cross-Motion for Summary Judgment should be granted as Defendants have no admissible evidence to establish the necessary elements of their livestock-use water right claim.

It is appropriate for the Court to address the Cross-Motion first because, if the Cross-Motion is successful on either of the two grounds described immediately above, it is not necessary to address Defendants' Motion. Nevertheless, in the event that the Court determines that Plaintiffs are not entitled to summary judgment on the Defendants' livestock-use water right claim for the reasons stated above, Defendants' Summary Judgment Motion must nevertheless be denied. As mentioned above, Defendants fundamentally rely on Mr. Fredrickson's numerous and varied assumptions, opinions, and conclusions to establish the claimed right of 3.779 AFY for historic livestock water use at some unstated time in the past. To establish this water quantity, Mr. Fredrickson goes to lengths to opine on the following: 1) how and where cattle seasonally watered, 2) how much cattle drank seasonally and at different stages of their life-cycles; and 3) how much water was lost annually during cattle operations that occurred more than two decades ago. Plaintiff's evidence establish that Mr. Fredrickson's numerous and varied assumptions, opinions, and conclusions are seriously flawed and inherently unreliable. As such, in the event that Mr. Fredrickson's assumptions, opinions, and conclusions are admissible evidence, a dispute over issues of material fact (namely, the quantity of water historically put to use to raise livestock) exists that prevent summary judgment in Defendants' favor.

## II. STATEMENT OF MATERIAL FACTS

Pursuant to Rule 56(c), Fed. R. Civ. P., and D.N.M. LR-Civ. 56.1(b), Plaintiffs present the undisputed material facts supporting this Cross-Motion. The Plaintiffs also respond to each fact asserted by Defendants in their Motion to be undisputed.

### A. Undisputed Material Facts in Support of Plaintiffs' Cross-Motion

1. Prior to April 29, 1999, the land owned by Defendants in the Zuni Basin was used to raise livestock and well 10A-5-W06 was used to water livestock. Defendants' Motion, Attachment H at 19:14 – 25; 42:8 – 20; 45:1 – 11.
2. Since April 29, 1999, the land owned by Defendants in the Zuni Basin has not been used to raise livestock and well 10A-5-W06 has not been used to water livestock. Attachment 3 and Motion to Exclude, Exhibit B at 19:11-25; 20:1-11; 28:7 – 17.

### B. Undisputed Material Facts in Support of Defendants' Motion<sup>4</sup>

1. The domestic use component of the water right for well 10A-5-W06 (Defendants' Motion at 9, Assertion of Material Fact #1).
  - a. Plaintiffs' Response – Defendants state a legal conclusion and do not present a purported undisputed material fact and Plaintiffs are not required to respond to Defendants' legal conclusion. Further, the domestic use

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<sup>4</sup> As described below, for each assertion of purported undisputed material facts, Defendants have done no more than to present their legal conclusion as to each of the five elements of their claimed livestock-use water right and to broadly point to various reports, publications, etc. as their basis for their assertions. Defendants' Motion at 9. As such, Defendants have presented no undisputed material facts and they have not carried their burden to establish that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(1) (“A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the records ... .” (emphasis added)); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (the burden to establish entitlement to judgment as a matter of law is on the moving party). Defendants' Motion must be denied on this ground alone.

component of a water right from well 10A-5-W06 is not in dispute as previously agreed to by the parties. *See Joint Status Report and Proposed Discovery Plan* (Doc. 3167-1) at 2.

2. Plaintiffs' previous settlement offer(s) presented through proposed Consent Orders (Defendants' Motion at 9, Assertion of Material Fact #2).
  - a. Plaintiffs' Response – Defendants assert a legal conclusion and do not present a purported undisputed material fact and Plaintiffs are not required to respond to Defendants' legal conclusion. Further, the fact and circumstances of previous settlement efforts between the parties is not at issue in this subfile action, is not admissible, and cannot be considered in a motion for summary judgment. *See* Fed R. Evid. 408 and Fed R. Civ. P. 56(c)(2).
3. The priority for a livestock-use water right associated with well 10A-5-W06 is December 31, 1955 (Defendants' Motion at 9, Assertion of Material Fact #3).
  - a. Plaintiffs' Response – Defendants assert a legal conclusion and do not present a purported undisputed material fact and Plaintiffs are not required to respond to Defendants' legal conclusion. Nevertheless, Plaintiffs have stated that **if** the Court were to recognize a livestock-use component of a water right associated with well 10A-5-W06, Plaintiffs agree that the priority for such right should be December 31, 1955. Defendants' Motion Exhibit A at RFA No. 1.
4. The purpose of use for a livestock-use water right associated with well 10A-5-W06 should be livestock watering (Defendants' Motion at 9, Assertion of

Material Fact #4).

- a.** Plaintiffs' Response – Defendants assert a legal conclusion and do not present a purported undisputed material fact and Plaintiffs are not required to respond to Defendants' legal conclusion. Nevertheless, Plaintiffs have stated that **if** the Court were to recognize a livestock-use component of a water right associated with well 10A-5-W06, Plaintiffs agree that the purpose of use for such right should be livestock watering. *Id.* at RFA No. 2.
- 5.** The place of use for a livestock-use water right associated with well 10A-5-W06 should be Defendants' Zuni Basin property (Defendants' Motion at 9, Assertion of Material Fact #5).

- a.** Plaintiffs' Response – Defendants assert a legal conclusion and do not present a purported undisputed material fact and Plaintiffs are not required to respond to Defendants' legal conclusion. Nevertheless, Plaintiffs have stated that **if** the Court were to recognize a livestock-use component of a water right associated with well 10A-5-W06, Plaintiffs agree that the place of use for such right should be Defendants' Zuni Basin property. *Id.* at RFA No. 4.

- 6.** The period of use for a livestock-use water right associated with well 10A-5-W06 should be 12 months (Defendants' Motion at 9, Assertion of Material Fact #6).

  - a.** Plaintiffs' Response – Defendants assert a legal conclusion and do not present a purported undisputed material fact and Plaintiffs are not required to respond to Defendants' legal conclusion. Nevertheless, Plaintiffs have stated that **if** the Court were to recognize a livestock-use component of a

water right associated with well 10A-5-W06, Plaintiffs agree that the period of use for such right should be 12 months. Defendants' *Id.* at RFA No. 8.

7. The quantity for a livestock-use water right associated with well 10A-5-W06 should 3.779 AFY (Defendants Motion at 9, Assertion of Material Fact #7).

a. Plaintiffs' Response – Defendants assert a legal conclusion and do not present a purported undisputed material fact and Plaintiffs are not required to respond to Defendants' legal conclusion. Further, the quantity of water claimed by Defendants is grossly in excess of historic beneficial use in any past year. To the extent that a water right might be recognized, Plaintiffs have rebutted the factual basis for the legal conclusion presented here that Defendants are entitled to a livestock-use water right in the amount of 3.779 AFY. Attachment A – Declaration of Scott Turnbull.

### **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*, 477 U.S. at 323 (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).

#### **IV. THE EFFECT OF DEFENDANTS’ BURDEN OF PROOF**

Although a party moving for summary judgment has the burden to establish that he/she is entitled to judgment as a matter of law, whether a party has the burden of proof at trial effects motions for summary judgment. A party with the burden at trial is entitled to summary judgment only if the record (pleadings, depositions, interrogatory responses, admissions, and affidavits) establishes that the party is entitled to the judgment sought. Fed R. Civ. P. 56. On the other hand,

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. The party without the burden of proof at trial 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.” *Proposed Findings and Recommended Disposition*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0014, Doc. 3049 at 3 (citing *Celotex*, 477 U.S. at 331).

Regardless of which party moved for summary judgment, “to the extent that any water

right is disputed,” as the users of the water “[s]ubfile Defendants generally bear the burden of proof in the first instance with respect to the disputed 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 is on the Defendants. *Proposed Findings and Recommended Disposition*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0014, Doc. 3049 at 3. Accordingly, Plaintiffs do not have a burden to establish any element of Defendants’ water right claim. In fact, Plaintiffs contend that Defendants have no livestock-use water right associated with well 10A-5-W06.

As described above, the parties’ single dispute here is centered on Defendants’ livestock-use water right claim. Defendants previously acknowledged their burden to establish every element of the water right they claim. *Joint Status Report and Proposed Discovery Plan* (Doc. 3167-1). That the entire burden of proof rests with Defendants is perfectly in accord with the Court’s previous determinations in this adjudication. *See, e.g., Proposed Findings and Recommended Disposition* (ZRB-2-0098) (Doc. 3223) at 3 (“The burden to establishing a water right would be on [Defendants]”). Nevertheless, in their Motion Defendants misstate that “the Defendants do not carry the burden of proof at trial.” *See* Defendants’ Motion at 5. Defendants also misstate that “Defendants have also demonstrated that the Plaintiffs have failed to make a showing sufficient to establish the existence of an element essential to the Plaintiffs’ case, and on which Plaintiffs will bear the burden of proof at trial.” *Id.* at 26. These assertions are contrary to their earlier representations, unsupported, and wrong; Plaintiffs have no burden to establish any element of a water right claimed by Defendants and that in fact does not exist.

Defendants’ incorrect legal assertions associated with the burden appears to be tied to their substantial efforts to rebut Plaintiffs’ basis for the previous consent order offer.<sup>5</sup> *See*

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<sup>5</sup> Plaintiffs previously offered to resolve the dispute with Defendants over their livestock-use claim, but Defendants did not accept this offer. With the presentation of this Cross-Motion for

Defendants' Motion at 10-14, § IV.2. But this effort was unnecessary as Plaintiffs have no burden to establish any component of Defendants' livestock claim. Further, the basis or existence of any previous settlement offer by Plaintiffs is not admissible and no longer relevant to this subfile action. Fed. R. Evid. 408.

## V. ARGUMENT

### A. The livestock-use water right claimed by Defendants has gone unused for at least seventeen years and has been abandoned.

The focus of dispute between the parties centers on Defendants' claim that they hold a water right associated with historic efforts to raise cattle in the region. However, even assuming that a livestock use water right came into existence at some time in the past, it is undisputed that such right has gone unused for at least seventeen years and continues to go unused today. Such long, ongoing nonuse is unreasonable and establishes the presumption that any water right has been abandoned.

#### 1. A presumption of abandonment of a water right is established by an unreasonable period of nonuse.

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 Co*, 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 § 1116 (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 the renunciation.

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Summary Judgment and the establishment that any livestock-use water right either has been abandoned or cannot be established, previous offers of settlement are specifically withdrawn. Plaintiffs do not recognize a water right associated with well 10A-5-W06 that includes a livestock-use component.

*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 abandonment, in New Mexico a presumption of abandonment arises after an unreasonable period of nonuse. *Montgomery v. Lomos Altos, Inc.*, ¶ 150 P.3d 971, 980-81 (N.M. 2006). Once the presumption arises, “the burden of proof shifts to the holder of the right to show the reasons for nonuse.” *South Springs*, 452 P.2d at 482. (Citation omitted).

**2. Since at least April 29, 1999, no water from well 10A-5-W06 has been used to raise livestock and such nonuse gives rise to the presumption of abandonment.**

Defendants readily admit that they have never raised livestock on their property or at any time. Motion to Exclude, Exhibit B at 19:11-25; 20:1-11; 28:7-17. The evidence developed during discovery established that by the 1990s the property currently owned by Defendants was part of a large ranch operation. Discovery also revealed that the well located on the property (well 10A-5-W06) was used to water cattle. Defendants’ Motion, Attachment H at 42: 8-20; 45:1-11. The ranch operation of the 1990s was owned and run by Tom and Tim Cox and covered approximately 140 square miles. *Id.* at 19:14-25. However, by the late 1990s the Cox family ceased raising livestock and began selling the real property that made up the ranch. Motion to Exclude, Exhibit C at 13:15-19. On April 29, 1999, the Cox family sold the section of land now owned by Defendants. Attachment 3. In 2006, Defendants purchased the property that is now the subject of this subfile action. Motion to Exclude, Exhibit B at 26:1-7. Since purchasing the property, Defendants have used the property as a part-time residence, living between their home in Albuquerque and the residence that now exists on their Zuni Basin property. *Id.* at 43:4-10. Thus, in the end and material to this Cross-Motion, it is undisputed that at least between April

29, 1999 and today, Defendants' property has not be used as part of a ranching operation, no livestock have been raised on Defendants property, and livestock have not been watered from well 10A-5-W06.

Any water right for livestock use associated with well 10A-5-W06 ceased at least 17 years ago. In fact, under analogous circumstances in the Rio Jemez Adjudication, this Court determined that a 16-year period of a water right's nonuse was unreasonable and raised the presumption of abandonment. Attachment B at 9 (Abousleman Opinion). Here, the Court is faced with a period of nonuse at least as long as that examined in the Rio Jemez Adjudication and, similarly, the period of nonuse here is necessarily unreasonable.

**3. No justification exists for the unreasonable period of nonuse.**

The New Mexico Supreme Court long ago established that once the presumption of abandonment arises after an unreasonable period of nonuse, abandonment can only be avoided if facts or conditions exist that excuse such long nonuse. *South Springs*, 452 P.2d at 482. By the same token, the court has also made clear that "mere[] expressions of desire or hope or intent" are insufficient to rebut the presumption. *Id.* As a result, the unreasonable 17-year period of nonuse here operates to place upon the Defendants the burden to show the reasons for nonuse.

Even assuming the existence of a pre-1999 livestock water right associated with well 10A-5-W06, Defendants cannot avoid abandonment after 17 years of nonuse. Defendants are not now and have never been ranchers who raise livestock. In their Motion for Summary Judgement, Defendants present no more than the following to explain why any livestock water right has been and remains unused:

well 10A-5-W06 which was used until the year 2000 [sic] to support cattle operations ... has since been used for domestic purposes ... The rangeland is being rested and rehabilitated from ongoing drought conditions. Defendants intend to reintroduce cattle to the land once the land recovers and water rights are adjudicated.

Defendants Motion at 2. Defendants' claim here amounts to nothing more than a subjective expression of a non-specific desire, hope, or intent to raise an unknowable number of livestock one day in the distant, unspecified, and unforeseeable future. Such an expression does not justify the long period of nonuse and it does not overcome the presumption of abandonment. The conclusion, here, is unavoidable - any water right that may have existed associated with the ranching operation and well 10A-5-W06 has been abandoned.

**B. Under Rule 702, Mr. Fredrickson is neither a qualified expert witness nor are his opinions admissible.**

In their Motion, Defendants rely exclusively on Mr. Fredrickson's purported expert testimony to establish that they are entitled to a livestock water right for well 10A-5-W06 in the amount of 3.779 AFY. To reach this conclusion, Mr. Fredrickson offers opinions on a wide variety of topics that Plaintiffs collectively refer to as "Cattle Operations." *See* Motion to Exclude at 3-4 (listing the many subjects on which Mr. Fredrickson offers expert opinions). As the United States argues in the Motion Exclude, Mr. Fredrickson, lacking any relevant education, training, and practical experience in, and having never published or testified on, any of the subjects comprising Cattle Operations, is not qualified to offer expert testimony on any of these topics. *Id.* at 6-13. In addition, even were the Court to qualify Mr. Fredrickson as an expert, the opinions Mr. Fredrickson offers are all inherently unreliable. *Id.* at 12-24. Plaintiffs incorporate in this Cross-Motion the arguments, evidence, and authority contained in their Motion Exclude. In the absence of Mr. Fredrickson's purported testimony, Defendants have no competent evidence to carry their burden of proof and their Motion for Summary Judgment should be denied.<sup>6</sup>

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<sup>6</sup> Because "the subject matter of [Mr. Fredrickson's] proffered testimony constitutes 'scientific, technical, or other specialized knowledge,' [Mr. Fredrickson] must be qualified as an expert

**C. An issue of material fact exists with respect to the historic quantity of water use that might be associated with any livestock-use water right.**

In their Motion Defendants seek judgment on their livestock-use water right claim and ask the Court to recognize a quantity of 3.779 AFY. *See generally* Defendants' Motion 16-26 § IV. 7. This quantity of water has never been used by Defendants to raise livestock, but Defendants claim that this amount of water was theoretically used from well 10A-5-W06 by the Cox family at some unidentified time in the past to raise livestock.

To establish this quantity of water, Defendants begin by relying on events and circumstances that they purport Mr. Tom Cox described during his deposition. From these purported events and circumstances, Defendants rely exclusively on Mr. Fredrickson's assumption and opinions to infuse meaning as it might relate to a host of topics including animal behavior, range ecology, ranch operations, water consumption, operational losses, and, ultimately, water quantity calculations. Mr. Fredrickson repeatedly states circumstances and assumptions, but often those circumstances and assumptions are not supported or are simply unreasonable. As a result, Defendants' evidence about how much water from well 10A-5-W06 was historically used to raise livestock is unreasonable and necessarily disputed by Plaintiffs. In the end, a disputed issue of material fact remains about the quantity of water that might be associated with Defendants' claimed water right.

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under Rule 702." *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004) (citing Fed.R.Evid. 702). Thus, Defendants cannot circumvent Rule 702 by offering Mr. Fredrickson's expert testimony as lay opinion pursuant to Federal Rule of Evidence 701. "[A] person may testify as a lay witness only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person." *United States v. Yeley-Davis*, 632 F.3d. 673, 684 (10th Cir. 2011) (quoting *LifeWise Master Funding*, 374 F.3d at 929). *See also* Fed.R.Evid. 701 (Adv. Comm. Notes (2000 Amend.)) ("[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.") (internal quotations and citations omitted).

The necessary starting point for considering the merits of the Defendants' 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. A water user in New Mexico may secure the right to use water only through historic 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, "[b]eneficial use shall be the basis, the measure[,] and the limit of the right to use of 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 v. Albuquerque-Bernalillo Cty. Water Utility*, 320 P.3d 492, 503(N.M. Ct. App. 2013) (quoting *State ex rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M 1957)). 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* (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 undisputedly demonstrated the quantity of water historically used from well 10A-5-W06 for raising livestock. They have not. In the paragraphs below, Plaintiffs present those principal assertions made by Defendants that Plaintiffs dispute. These assertions establish the issues of material fact remaining in dispute that prevent summary judgement for Defendants.

**1. Mr. Fredrickson has no reasonable basis to assume that a cattle herd watered exclusively from well 10A-5-W06 for a four or five month period.**

In their Memorandum, Defendants characterize the testimony of Mr. Cox as it relates to how cattle were managed during summer months and present Mr. Fredrickson's own assumptions and conclusions about historic cattle behavior and watering practices. Defendants' Motion 17-21. Mr. Fredrickson's assumption and conclusions that lead to his water quantity calculations are made in disregard of Mr. Cox's testimony and have no reasonable basis.

In his deposition, Mr. Cox generally described his ranching practices from July until November. Defendants Motion, Attachment H at 37:11:25; 44:1-4. During that time, his cattle herd (approximately 150 to 200 cow-calf herd) would be brought together to roam and graze over an unfenced area across more than 15 sections of land. *Id.* at 43:20-25; 44:1-4. During that time, Mr. Cox's herd would rely on four water sources: the Rincon Hondo well (i.e. well 10A-5-W06); Zuni Spring, the High Lonesome well; and the Perry Lake well. *Id.* at 42:2-20. During his deposition, he indicated his herd relied on these water sources equally; Mr. Cox gave no indication that his herd relied on any one water source to a greater or lesser degree. *Id.* at 43:17-25; 44:1-4. Mr. Cox also stated that when the herd was rounded up by November, they would be collected from over the entire area. *Id.* at 28:9-25.

In the Memorandum, Defendants assert the same unsupported conclusions Mr. Fredrickson makes in his expert report. But contrary to anything described by Mr. Cox, who actually managed the cattle herd, Mr. Fredrickson speculates the following: because well 10A-5-W06 was the first watering source that the herd experienced and that because the forage in the area would theoretically support the herd from July through November, the entire herd would water exclusively from well 10A-5-W06. *See* Defendants' Motion at 19-21. On this basis, Mr. Fredrickson attributes the entire water-demand of the herd for July through November to well 10A-5-W06. *See id.* at 21.

Mr. Fredrickson's speculation is unsupported by Mr. Cox's testimony or by any other historic evidence. In addition, as established by the United States' expert witness, Mr. Fredrickson's conclusions are simply unreasonable. Turnbull Declaration, Attachment A at ¶¶ 18-30. Imbedded in Mr. Fredrickson's conclusion is the unreasonable assumption that an entire cattle herd will completely exhaust all forage before wandering from a water source. *Id.* at ¶¶ 20-21.

Mr. Fredrickson's conclusion that Mr. Cox's entire cattle herd watered exclusively from well 10A-5-W06 at any time of the year is unfounded, unreliable, and unreasonable. As a result, disputed issues of material fact exist preventing summary judgement from entering in favor of Defendants.

**2. Mr. Fredrickson has no reasonable basis to conclude that a cow-calf pair historically consumed 19.66 gallons per day.**

To support their 3.779 AFY quantity Defendants rely on Mr. Fredrickson's conclusion that the Cox family cow-calf pairs consumed on average 19.66 gallons of water per day. Defendants' Motion at 24. Defendants broadly outline components of Mr. Fredrickson's analysis that contribute to his 19.66 gallons per day conclusion: animal class and weight, *id.* at 22;

temperature, *id.* at 22-23; and forage moisture content, *id.* at 23-24. Disregard or improper consideration of conditions that affect water consumption necessarily undermine the reliability and reasonableness of Mr. Fredrickson's water consumption estimate.

The United States' expert witness has examined Mr. Fredrickson's analysis and identified numerous instances in which Mr. Fredrickson has unreasonably disregarded or improperly considered important conditions that significantly affect water consumption. The United States' expert notes the following:

- 1) Mr. Fredrickson's water consumption estimate disregards water contributed to calves from milk, (Attachment A at ¶ 22);
- 2) Mr. Fredrickson improperly considered the moisture content of vegetation consumed by cattle, (Attachment A at ¶ 23 - 24);
- 3) Mr. Fredrickson improperly considered the effect of ambient temperature on water consumption, (Attachment A at ¶ 25 - 26); and
- 4) Mr. Fredrickson improperly compares and conflates the average annual daily water needs with the daily water needs of an animal in a controlled high temperature chamber, (Attachment A at ¶ 27 - 28).

Each condition ignored, overlooked, or misapplied by Mr. Fredrickson establishes that his gallon-consumption estimate is significantly overstated. In turn, his ultimate conclusion that Mr. Cox's herd consumed 3.779 AFY from well 10A-5-W06 in any year is unfounded, unreliable, and unreasonable. As a result, disputed issues of material fact exist preventing summary judgement from entering in favor of Defendants.

**3. Mr. Fredrickson has no reasonable basis to conclude that the Cox family ranching operation ever suffered water losses of 415,522 gallons annually from well 10A-5-W06.**

To support their ultimate water right claim, Defendants rely on Mr. Fredrickson's conclusion that the Cox family operation of well 10A-5-W06 resulted in water losses of 415,522 gallons or 1.275 AFY. Defendants' Motion at 24-25. In their Motion, Defendants only briefly discuss 202,080 gallons of the 415,522 gallon quantity that make up the "loss" portion of their 3.779 AFY claim. *Id.* at 25. For the remainder of the claimed quantity, Defendants do not more than point to twenty pages of Mr. Fredrickson's report and list a host of loss categories created by Mr. Fredrickson. *Id.* at 24-25 (citing Exhibit G at 50-69). But simply pointing to pages of an attached report and stating conclusions does not demonstrate the absence of a "genuine dispute as to any of material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. The Motion makes no attempt to address, much less establish as undisputed, the bulk (213,442 gallons) of the loss-component of Defendants' claimed right. For this reason alone the Motion must be denied. Nevertheless, the United States' expert rebuts the purported losses that Mr. Fredrickson includes in his broader loss analysis. Attachment A at ¶¶ 31-37. Here, the United States will go on to address the "weep hole" loss-component because Defendants provided brief discussion of this factual issue in their Motion.

Relying on Mr. Fredrickson's analysis, Defendants claim that a small "weep hole" exists in the underground casing of well 10A-5-W06 that continuously drains a short length of well piping extending above ground; Mr. Fredrickson calculates that a remarkable 197,103 gallons flowed through this weep hole while the Cox family ranched this area. Defendants Motion at 24-25. As an initial matter, Mr. Fredrickson's weep-hole analysis has little basis in fact: Mr. Cox never described this phenomenon in his deposition; Mr. Fredrickson has never observed this weep hole, Motion to Exclude, Exhibit B at 134:20-25; and not a single measurement of this loss exists *id.* at 136:24-25; 137:1-25; 138:1-25; 139:1-16. Mr. Fredrickson's conclusion is supported

only by his assumptions and their resulting calculations. In the end, these assumptions and resulting calculations are simply unreasonable. Attachment A at ¶ 34.

Further, Defendants remarkably insist that this weep-hole leakage constituted a “loss” to the well system, yet they admit that the water never leaves the well system. Defendants’ Motion at 25. Even under Mr. Fredrickson’s many assumptions for the weep hole, he recognizes that water flowing through the purported weep hole would flow into the well casing and down the same well from which it was drawn. Motion to Exclude, Exhibit B at 136:19-23. By the very nature of the weep-hole water described by Defendants, this water is not consumed or lost, it cannot be considered a loss-component of a beneficial use, and it certainly cannot be included in the quantity of water recognized as part of Defendants’ water right.

Defendants present no basis of support for their 1.275 AFY loss-component of their 3.779 AFY water right claim and they have not established that they are entitled to judgment as matter of law. Further, to the extent that Defendants have identified material facts associated with a loss-component of their claims right, Plaintiffs have established that these fact are disputed.

## **VI. CONCLUSION**

With respect to the Cross-Motion, no genuine dispute as to any material fact exists between the parties. The record establishes that Defendants’ claimed livestock-use water right, if it ever existed, has gone unused for at least 17 years and was abandoned. In the alternative, the record also establishes that Defendants do not have admissible evidence to establish the necessary elements of their livestock-use water right claim. As a result and on either ground, the contested livestock-use water right claim for the well found on Defendants’ property in the Zuni River Basin must be denied and Plaintiffs are entitled to summary judgment.

In the event that the Court does not grant Plaintiffs’ Cross-Motion for any reason,

Defendants' Summary Judgment Motion must be denied as it does not meet its burden to establish that Defendants are entitled to judgment as matter of law and substantial disputes of material fact remain between the parties that prevent judgment from entering in their favor.

Respectfully submitted this 14th day of September, 2016.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on September 14, 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