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, v. A & R PRODUCTIONS, et. al., Defendants.	)	No. 01cv00072-MV-WPL ZUNI RIVER BASIN ADJUDICATION Subfile No. ZRB-2-0038

DEFENDANTS' RESPONSE TO PLAINTIFFS' CORRECTED JOINT CROSS-MOTION FOR SUMMARY JUDGEMENT AND MOTION TO EXCLUDE EXPERT OPINION TESTIMONY

Pursuant to Rule 56 Fed. R. Civ. P., and D.N.M.LR-Civ. 56.1, Defendants *Pro Se,* Craig L. Fredrickson and Regina R. Fredrickson (hereafter the "Defendants") respectfully submit *Defendants' Response to Plaintiffs' Corrected Joint Cross-Motion for Summary Judgement and Motion to Exclude Expert Opinion Testimony*, (Doc 3317-1 and Doc 3316). The paragraphs below constitute Defendants' Memorandum in support of this response.

In the corrected joint Cross-Motion, Plaintiffs have moved to deny Defendants' pre-basin water right with respect to livestock, alleging that well 10A-5-W06 has been abandoned. Plaintiff, the United States of America, has also moved to exclude the testimony of the Defendant, Mr. Fredrickson, under the authority of *Daubert* v. *Merrell Dow Pharms., Inc.,* 509 U.S. 579 (1993), and its progeny. The State of New Mexico ex rel. State Engineer has joined that exclusion effort in the corrected joint Cross-Motion.

Defendants have not abandoned their livestock-use water right but have acted responsibly to resolve all issues associated with this adjudication while maintaining livestock grazing readiness in the face of an ongoing drought and a protracted adjudication schedule. With respect to Defendant's written assessment of historic livestock use in support of summary judgement in their favor, Plaintiffs simply disagree with the Defendants' conclusions but will not or cannot provide any admissible evidence in support of the livestock-use water right they were willing to recognize. Instead Plaintiffs have withdrawn their settlement offer and now seek to deny Defendants any livestock-use water right whatsoever under the guise of a *Daubert* challenge. Defendants maintain that their written assessment of historic beneficial livestock use is based upon lay opinion and is not the proper focus of a *Daubert* inquiry.

Both the joint Cross-Motion and the Motion to exclude should consequently be denied. However, should the Court find in favor of the Plaintiffs Motion to exclude, the Defendants should nevertheless be granted default judgement on their *Motion for Summary Judgement* as the Plaintiffs have failed to respond to an order of the Court.

As the Defendants will demonstrate below, no genuine dispute as to any material fact exists between the parties. Based upon the undisputed material facts, the Defendants are entitled to a summary judgment finding as a matter of law. The authority for Defendants request for summary judgement has previously been provided (Doc. 3305 at 4-6).

I. STATEMENT OF MATERIAL FACTS

Defendants respond to each fact asserted by Plaintiffs in their corrected joint Cross-Motion.

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 (Plaintiffs' Cross-Motion at 5, Assertion of Material Fact A.1. [Doc 3317-1]).

   a. Defendants' Response – Defendants agree that, based on the warranty deed for the property (Doc 3305-9 at 3) and the deposition of former rancher Tom Cox, Section 19, Township 5N, Range 18W N.M.P.M. was used to raise livestock and well 10A-5-W06 at the NE ¼ of the NE ¼ of the NW ¼ of that section was used to water livestock prior to April 29, 1999.

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 (Plaintiffs' Cross-Motion at 5, Assertion of Material Fact A.2. [Doc 3317-1]).

   a. Defendants' Response – Defendants have no knowledge of the use of Section 19, Township 5N, Range 18W N.M.P.M. with respect to raising livestock or the use of well 10A-5-W06 at the NE ¼ of the NE ¼ of the NW ¼ of that section with respect to watering livestock during the period April 29, 1999 through February 20, 2006; Defendants did not own the property during that time period. Defendants deny that since February 21, 2006 the section and subject well have not been used to raise and water livestock. Estray cattle have grazed on Defendants' land and watered at Defendants' well (Doc. 3305-8 at 5 [Figure 31]), most recently during the summer of 2015. Riders on horseback

have also watered their animals at Defendants' well. Defendants admit that they have not owned livestock or leased their land to others for the purpose of livestock grazing and/or watering since February 21, 2006 due to drought. However, Defendants have not abandoned their livestock-use water right for well 10A-5-W06.

II. ARGUMENT

Here the Defendants respond to Plaintiffs' allegation that the livestock-use water right claimed by the Defendants has been abandoned. Defendants cite *State of New Mexico, ex rel. Reynolds v. South Springs Co.*, 1969-NMSC-023, 80 N.M. 144, 452 P.2d 478. Abandonment derives from the water right holder's intent to relinquish the right. A long period of nonuse, alone, does not constitute intent to abandon, but the burden shifts to the holder of the right to explain the nonuse. Plaintiffs cite a dissimilar situation in the Rio Jemez Adjudication (Abousleman Opinion) where the Village of Cuba admitted that it never intended to use its irrigation water right after 16 years of nonuse and took no action during the relevant time that would have protected the claimed water right and/or would have rebutted the presumption of abandonment (Doc 3315-2 at 10). However, in the Defendants' situation the requirements for an inference of abandonment are not present.

Defendants' Motion for Summary Judgement (Doc 3305 at 1-4) provides a background summary of Defendants' long history of attempts to establish their water right through the adjudication process. On October 10, 2006 Defendants were informed that the Plaintiffs would recognize a water right of no more than 0.336 AFY for livestock use, a mere 1.2% of the declared capacity of well 10A-5-W06, and 0.000 AFY for domestic use. The cumulative amount

was less than that being used by Defendants at the time under a permit allowing the use of up to 3 AFY for domestic use and was grossly insufficient in quantity to re-establish and maintain a viable livestock operation centered on Defendants' property. Moreover, Defendants' land has suffered from severe drought since 1995, Attachment 1 (Cox Dep. 20:6-7); long-term drought conditions persist on Defendants' land to this day as documented by regional and national U.S. Drought Monitor maps, Attachment 2. As described below, Defendants have been proactive in addressing drought-related issues since purchasing the property in 2006.

Defendants met with Plaintiffs on July 17, 2007 regarding the subfile and were given no assurance that Plaintiffs would recognize any additional amount of water. Despite Defendants' written attempts to reengage, eight years went by without any verbal or written communication from the Plaintiffs. On June 2, 2015 Plaintiffs finally responded and suggested the willingness to recognize a domestic-use water right as well as a livestock-use water right sufficient in quantity to maintain a viable livestock operation if drought conditions abated. The parties could not close the small difference between offered and claimed historic livestock usage and Plaintiffs now seek to deny Defendants any livestock-use water right whatsoever.

From the onset, Defendants were specifically advised by Plaintiffs not to sign a Consent Order until "you agree with everything" (Attachment 3 at 25.Q.). Defendants were also assured that ultimately their water right would be confirmed and, "once the adjudication is complete," the water right could not be taken away except through legal procedure (Attachment 3 at 1.Q., 2.Q., 4.Q., 5.Q., 8.Q., 10.Q. and 11.Q.). Defendants have acted upon this advice, assurance and belief, and have been responsive throughout the adjudication process. Defendants have been understandably unwilling to purchase cattle without knowledge of the amount of water that

would be recognized by the Court to support them. The very fact that the Defendants have remained engaged in asserting their livestock-use water right for the past 10 years is evidence the Defendants have never intended to abandon their livestock-use water right.

Notwithstanding drought conditions and beginning in 2006, Defendants met with and registered their property with the Farm Services Agency (Attachment 4); consulted with the Natural Resources Conservation Service ("NRCS") and implemented an NRCS site-specific plan to rehabilitate the drought-stricken land for livestock (Attachment 5); constructed dozens of brush and rock dams to mitigate erosion along entrenched cow trails; cleared encroaching rabbit brush, snakeweed and junipers from dozens of acres of rangeland; repaired and maintained fencing and livestock water infrastructure; established a Western Wheatgrass seed production operation for use in reseeding and erosion control (Attachment 6); inquired with adjacent private landowners on additional land purchase or lease for livestock; inquired with the Bureau of Land Management on the transfer of adjacent public land grazing allotments; and filed a livestock application with Cibola County and paid taxes in 2008 on range cows (Attachment 7). While the poor condition of the rangeland precluded the actual placement of livestock on Defendants' property in 2008, well 10A-5-W06 has watered horses and estray cattle over the past 10 years. Mr. Fredrickson has testified under oath to the above and there is no evidence or basis to conclude otherwise (Doc. 3316-2 at 7 [Fredrickson Dep. 34:20-35:13]). Plaintiffs now seek to renege on their prior assurances that Defendants' water right would be recognized and take advantage of the protracted adjudication process and their lack of responsiveness as an excuse to seize Defendants' property rights in water.

Defendants have never declared an intention to abandon any water right, nor have Defendants' actions given rise to a presumption of abandonment. Plaintiffs erroneously suggest that Defendants have never raised cattle (Doc 3316-2 at 7 [Fredrickson Dep. 36:4-7]) and that this in some way would represent a reason to deny their livestock-use water right in the first place. Notwithstanding the fact that Plaintiffs were unwilling to recognize a water right in sufficient quantity for domestic and livestock use until June 2, 2015, drought alone excuses nonuse and drought remains a long-term issue on Defendants' land in western Cibola County, New Mexico, an issue beyond Defendants' ability to control. Plaintiffs' corrected Cross-Motion to deny Defendants' livestock-use water right must be denied.

III. RESPONSE TO MOTION TO EXCLUDE EXPERT OPINION TESTIMONY

Here the Defendants respond to Plaintiffs' *Motion to Exclude Expert Opinion Testimony* (Doc. 3316) under the authority of *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), and its progeny. Plaintiffs contend that Mr. Fredrickson is neither a qualified expert nor are his opinions reliable with respect to a determination of the elements of a water right associated with livestock-use of well 10A-5-W06 and, therefore, his opinion testimony should be excluded.

1. Defendants' Written Opinions Represent Lay Opinions

By virtue of their objection to Plaintiffs' offers, the Defendants were required to address the historic beneficial use of well 10A-5-W06 for watering cattle and establish each element of a livestock-use component: priority, beneficial use, place of use, period of use, and amount. In accordance with Rule 26 (a)(2)(B) of the Federal Rules of Civil Procedure, Mr. Fredrickson prepared a report, using the format of an expert witness report, containing a complete statement

of all opinions used to establish these elements, including the bases and reasons for these opinions, as well as the facts or data that were considered (Doc. 3305-7 through 3305-10).

There is little complexity to the issues at hand and it was unnecessary to stray beyond the evidence in the record or technical literature cited on the subject of livestock and their needs and habits. Defendants relied upon personal observations and upon publications prepared by the United States Department of Agriculture (including the NRCS), the National Research Council, various university and extension service experts in the relevant fields, and local meteorological data as reference material to assess historic water usage.

The relevant science is basic, established and non-controversial. It is not a complex or theoretical topic nor is the methodology exotic. Defendants fundamentally relied upon the 1990 declaration of water right for the subject well and followed the very methodology employed by the Plaintiffs to calculate the amount of water use by livestock, i.e., number of cattle times the water requirement per animal. The important distinction was Defendants' use of valid drinking water rates for the various classes of cattle that rancher Tom Cox testified were supported by well 10A-5-W06. Consumptive losses associated with delivering the needed water were also assessed and a complete set of all associated calculations were provided to the Plaintiffs to review and reproduce as a test of their reliability.

In reality, the opinions or inferences contained within the Defendant's report do not require any specialized knowledge and could be reached by any ordinary person. As such they do not represent expert opinion. The most important attributes of the individual evaluating the various elements of livestock water use are the ability to read, to comprehend and to apply common sense. Indeed, water right's issues are typically dealt with in a one-on-one meeting

between a claimant and a staff member of the New Mexico Office of the State Engineer ("OSE"). Any expertise associated with Defendant's calculations was limited to the use of equations for fluid flow, equations for population decay rate, and the interpolation or extrapolation of tabulated data; these are basic skills of any engineer but the associated equations are readily available to anyone through the internet. All other mathematical computations are within easy reach of a middle-school algebra student.

Within the context of *Daubert* and with respect to the subject motion, Plaintiffs conflate the roles of a scientist and engineer when they are two different but complementary fields. Scientists are the ones who create the theories while engineers are the ones who implement them. Simply stating as the Plaintiffs do that the proffered testimony constitutes "scientific, technical, or other specialized knowledge" does not make it so. Plaintiffs confuse lay testimony and expert testimony with respect to the Defendant's report and the bases for "opinions" contained therein. Defendants cite Fed. R. Evid. 701 as authority. Defendant's opinions are limited to lay testimony and, as such, Defendant's written report, despite the title, is not subject to exclusion under Fed. R. Evid. 702.

From the Committee of Rules, Rule 701 was amended in 2000 to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures

that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson. See Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 108 (1996) (noting that "there is no good reason to allow what is essentially surprise expert testimony." and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process") See also United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of Federal Rule of Criminal Procedure 16(a)(1)(E)").

Defendants do not represent Mr. Fredrickson as having any expertise outside his actual experience in conducting technical analysis as an engineer. Defendant's experience and qualifications to offer his opinions on the elements of a livestock-use water right have been fully disclosed. Defendant has not sought to evade any disclosure requirement.

Rule 701 does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. See, e.g, United States v. Figueroa-Lopez, 125 F.3d 1241, 1246 (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or other specialized knowledge within the

scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

Plaintiffs have failed to show that the discussion, negotiation or determination of claimants' water right under New Mexico water law requires expertise governed by the standards of Rule 702. Water right's claimants are varied in their level of knowledge and use of water, but do not require scientific, technical, or other specialized knowledge to resolve their claims with or to apply and receive a permit from OSE.

The Rule 701 amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." Asplundh Mfg. Div. v. Benton Harbor Eng' g, 57 F.3d 1190, 1196 (3d Cir. 1995).

Defendants purchased and maintained rangeland and water infrastructure for the purpose of raising cattle as a future source of income and sustenance. Defendants have educated themselves and are aware of the requirements involved in developing and/or leasing their property for grazing and watering livestock. Mrs. Fredrickson is experienced in raising cattle and Mr. Fredrickson has relevant experience having worked on a quarter horse ranch. Collectively, they have knowledge and experience pertaining to livestock management and knowledge and experience in maintaining well and water delivery infrastructure.

The Rule 701 amendment incorporates the distinctions set forth in State v. Brown, 836 S.W.2d 530, 549 (1992), a case involving former Tennessee Rule of Evidence 701, a rule that

precluded lay witness testimony based on "special knowledge." In Brown, the court declared that the 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." The court in Brown noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule. Mr. Fredrickson offers opinions on the basis of what he has personally observed and/or read.

Plaintiffs' *Motion to Exclude Expert Opinion Testimony* contains blatantly false allegations and insulting characterizations of Mr. Fredrickson's motives but, in the end, is an irrelevant argument and therefore not further addressed. The Court should deny Plaintiffs' Motion to exclude Mr. Fredrickson's testimony on the basis that it does not constitute expert opinion testimony. Defendants do address Plaintiffs' mischaracterization of the use of data by Mr. Fredrickson to form opinions as referenced in Plaintiffs' Motion to exclude, see section 4. below.

2. Plaintiffs have Failed to Respond to an Order of the Court

The parties submitted a *Joint Status Report and Proposed Discovery Plan* (Doc. 3167-1 at 6-7, paragraphs e. and f.) indicating that both parties would prepare written expert reports in association with the livestock-use water right of well 10A-5-W06. The Joint Status Report filed by the parties was adopted as an order of the Court (Doc. 3201 at 1). The Defendants prepared their report on a timely basis (Doc. 3305-7 through 3305-10). Plaintiffs committed to produce a written expert report from Mr. Turnbull to rebut the opinion of any expert witness retained by the

Defendants, including Mr. Fredrickson's opinions, in accordance with the Joint Status Report. Plaintiffs did so in the form of a July 7, 2016 report entitled "Zuni River Basin Determination of Water Uses for Subfile ZRB-2-0038" (Attachment 8). It provides little visibility into the computational assessment of livestock water use of Defendants' well or context for the assumptions made. Plaintiffs choose not to reveal Mr. Turnbull's written expert report in their joint Cross-Motion but, instead, offered an alternative and conflicting declaration (Doc. 3315-1).

The obvious implication of the production of Plaintiffs' written expert report is that Plaintiffs were of the belief that Mr. Fredrickson was qualified to opine on this topic as of July 7, 2016, subsequent to Mr. Fredrickson's deposition (Doc. 3316-2). If Mr. Fredrickson is not a qualified expert as Plaintiffs now contend, he could not and did not produce a "written expert report" in the first place. In that circumstance, and at the time Plaintiffs arrived at that conclusion, Plaintiffs should have produced a written expert report from Mr. Turnbull that established the factual basis for the livestock-use component water right as required by the Joint Status Report agreement (Doc. 3167-1 at 6-7, paragraph f.). Plaintiffs' livestock-use water right offer is described in Attachment 1 to the *Joint Status Report and Proposed Discovery Plan* (Doc. 3167-2).

No such written expert report establishing factual basis has ever been produced by the Plaintiffs despite the order of the Court adopting the Joint Status Report and the responsibility of both parties to abide by its plain language. Instead, the Plaintiffs have specifically withdrawn their water right offer (Doc. 3317-1 at 10-11 [footnote 5]) as they were entitled to do (Doc. 3167-1 at 2-3 [footnote 1]) but as a way of circumventing their agreement to support the factual basis for the settlement offer in the first place. The failure to produce a written expert report that

establishes the factual basis for Plaintiffs' water right settlement offer, an offer that was rejected by the Defendants as having no evidentiary basis, is an admission by Plaintiffs that there was no factual basis to begin with and that they had been negotiating in bad faith all along. This argument is contained in Defendants' *Motion for Summary Judgement* as factual assertion #2, "Plaintiffs' Livestock Use Water Right Offer: Amount – 3.024 AFY, Has No Evidentiary Basis" (Doc. 3305 at 10-14).

While Plaintiffs retained the right to withdraw their water right offer, they cannot be forgiven from the responsibility to prepare the expert report in the defense of the factual basis for their water right offer as agreed and per order of the Court. Plaintiffs failed to do so at the time they concluded that Mr. Fredrickson was not qualified to expertly opine and have conspicuously dismissed Defendants' factual assertion #2 (Doc. 3317-1 at 6) on the basis that "the fact and circumstances of previous settlement efforts between the parties is not at issue in the subfile action, is not admissible, and cannot be considered in a motion for summary judgement." If so, why did Plaintiffs agree to produce a factual basis written expert report in the first place? The commitment to produce a factual basis written report was not made during compromise negotiations and therefore is not negated by Fed. R. Evid. 408.

In addition, Defendants specifically dispute Plaintiff's characterization that Defendants' have done no more than present their legal conclusion as to the five elements of their claimed livestock-use water right (Doc. 3317-1 at 5 [footnote 4]). This is an unfair characterization. Defendants' have cited particular parts of the material in the record in support of each and every assertion of material fact made. The implication that Plaintiffs should be granted summary judgement on the sole basis that Defendants' formatting of a motion is atypical would be unjust.

Should the Court agree with Plaintiffs that Mr. Fredrickson's opinion testimony is expert testimony that he is unqualified to provide, Defendants should be granted default judgement on their *Motion for Summary Judgement* as the Plaintiffs would have failed to respond to the order of the Court to produce a written expert report from Mr. Turnbull that established the factual basis for the livestock-use component water right as required by the Joint Status Report agreement. Authority for this sanction is provided pursuant to Rule 16 Fed. R. Civ. P. and Rule 37 Fed. R. Civ. P. Under Rule 16(f)(1)(C) whereby, on motion *or on its own*, the Court may issue any just orders, including that authorized by Rule 37(b)(2)(A)(vi) rendering a default judgement against the disobedient party, if a party fails to obey a scheduling or other pretrial order. Should the Court require such a motion, Defendants will provide one.

3. Plaintiffs Seek to Deny Defendants Any Livestock-Use Water Right

There were early opportunities for Plaintiffs to raise a concern regarding Mr. Fredrickson's qualifications or the nature of the opinions pursuant to this water right determination. The Court in its January 19, 2016 Order Setting Pretrial Conference (Doc 3176 at 2) requested that "Counsel should also be prepared to discuss the use of scientific evidence and whether a *Daubert* hearing is needed." The February 16, 2016 Clerk's minutes of that meeting reflect the fact that the Defendants intended to proceed pro se, and that Defendant, Mr. Fredrickson, would serve as their expert witness and therefore would provide a written report. The Plaintiffs did not raise any concern regarding the qualifications of Mr. Fredrickson to fill this role nor did they opine on the nature of the evidence associated with resolution of water right claims.

Plaintiffs subsequently have had ample time, knowledge and opportunity to request a *Daubert* inquiry or challenge. It is only now, more than seven months after the pretrial conference, more than two months following Mr. Fredrickson's deposition and more than one month following Defendants' Motion for Summary Judgement (Doc 3305), that they have seen fit to raise a concern. Plaintiffs' Motion to exclude simply seeks to quiet the voice of the Defendants and is an obvious attempt to deny Defendants the legal right to their property in water under the guise of a *Daubert* challenge. If accepted, its effect would be to deny the Court the opinions of the Defendants, vis-à-vis the Plaintiffs, in evaluating the facts in dispute.

Even if Plaintiffs successfully argue that Mr. Fredrickson somehow prepared an expert witness report containing expert opinion but is now unqualified to provide expert opinion testimony in that regard, the Court would still have before it the written expert report of Mr. Turnbull (Attachment 8) as well as the pre-basin declaration of water right for well 10A-5-W06 (Doc. 3305-8 at 18-21). These documents would seem to provide some factual basis for a ruling on Defendants' livestock-use water right, i.e. a pre-basin well declaration and an expert opinion on the amount of livestock water use albeit with reference to Defendant's excluded testimony. However, Mr. Turnbull appears to suffer from the same shortcomings as Mr. Fredrickson is alleged to have as an expert witness.

Mr. Turnbull's credentials (Attachment 8 at 34) do not show that he has ever testified in any litigation before, has never published any books or peer-reviewed articles on any relevant topics at issue here, has no academic training in the agricultural sciences, has only made himself familiar with the relevant topics for the specific needs of this proceeding, has never worked in the agricultural industry, and/or has never owned or raised cattle. In addition, Mr. Turnbull

possesses no first-hand, site-specific knowledge of Defendants' land or livestock water infrastructure.

Defendants have the right to file a competing motion to exclude the expert opinion testimony of Mr. Turnbull. Should Defendants do so, and should the Court then exclude the expert opinion testimony of both parties, it would appear that the Court would have insufficient evidentiary basis for any ruling on Defendants' livestock-use water right.

4. Response to Plaintiffs' Mischaracterization of Defendant's Opinions

Plaintiffs' falsely impugn Defendant and accuse Mr. Fredrickson of cherry-picking the deposition of Mr. Cox, with respect to the Amado well in the winter and the Zuni Spring, the High Lonesome well and the Perry Lake well in the summer (Doc. 3316 at 17), stating that Defendant's written report had concluded that these were not significant or reliable sources. Plaintiffs themselves admit that no water right was assigned to Zuni Spring (9C-6-SPR01) under Subfile ZRB 2-0091, presumably because it was undeveloped (Doc. 3305-11 at 3 [response to question 4]). Plaintiffs' Hydrographic Survey field notes (Attachment 9) indicate that the Amado well was "abandoned." Although the field notes mistakenly label this well 9C-5-W03, Plaintiffs admit that this is the Amado well by virtue of the photo numbers (Doc. 3305-11 at 2 [response to question 1]) and the location by section, township and range confirms it as well. The Amado well was assigned a livestock use water right of 1.841 AFY under Subfile ZRB 2-0091 despite the fact it was abandoned, had no storage capability and was supported by a single, 518-gallon drinker that was allowed to continuously overflow during its historic use (Doc. 3305-11 at 18-21). Plaintiffs also refer to the Perry Lake well, a well that is actually the High Lonesome well outside the Zuni Basin (Doc. 3305-11 at 7 [Cox Dep. 40:7-41:1]). Plaintiffs state that Defendant

had characterized the High Lonesome well as not significant or reliable. This is simply untrue. Defendant evaluated the forage available at the High Lonesome well in favorable and unfavorable years of forage production and concluded that it represented an alternative source of forage for cattle in such unfavorable years (Doc. 3305-11 at 30-34 and at 40).

Plaintiffs then refer to the Perry Canyon well which Defendant admits he considers not significant or reliable. The location of this well is unknown except that it too is outside the Zuni Basin, and according to Mr. Cox its water was contaminated with gypsum, it had no storage capability, it was supported by a single drinker that continuously overflowed and it was shared with a neighbor whose usage requirement is unknown (Doc. 3305-11 at 18-21). Plaintiffs' conclusion that Defendant ignored Mr. Cox's deposition testimony is simply wrong.

Plaintiffs point to another example of alleged cherry-picking, that being leakage from the water storage and delivery system. While Mr. Cox did not recall leakage, Defendant produced photographic evidence of historic leakage and repairs on the infrastructure and calculated the associated loss as 52,260 gallons per year (Doc. 3305-8 at 1-3). Plaintiffs accuse Mr. Fredrickson of applying a 7% loss rate to calculate this number which is untrue. The Defendant calculated the loss based on observed reduction in water level in the main storage tank but compared that loss to the 57,106 gallons per year that could be calculated by applying the 7% loss rate observed in other livestock water delivery systems.

Plaintiffs also accuse Defendant of cherry-picking with respect to periodically refreshing the water in the drinkers to remove algae. This practice is common in the cattle industry (Doc. 3305-7 at 56-57). It is also discussed in the reply to Plaintiffs' Response to Defendants' Motion for Summary Judgement. In summary, Plaintiffs' accuse Defendant of ignoring Mr. Cox's

"highly relevant witness testimony" and making "selective use of facts". If so, Mr. Fredrickson would surely have calculated his cow-calf pair water consumption rate on the basis of Mr. Cox's estimate of 30 gallons per day per cow-calf pair instead of the maximum rate the Defendant claims of 24.05 gallons per day (Doc. 3305-7 at 53-54).

Plaintiffs also accuse Mr. Fredrickson of blindly calculating the available forage proximate to well 10A-5-W06 and applying the entire amount to the needs of the summer season herd despite fencing that separated the winter herd from summer herd near Defendants' well. This accusation is simply untrue. Defendant compared the total available forage to the needs of cattle present during both the winter and the summer seasons (Doc. 3305-7 at 38 [Table 5]).

Plaintiffs also accuse Mr. Fredrickson of unsupported conclusory assertions with respect to the straight line distance and trail distance between the Rincon Hondo and High Lonesome wells. Defendant admits that no cattle have been observed on the trial however a cow trail path is clearly visible and a straight line path requires scaling and descending sheer cliffs. Common sense was applied by following the trail. More importantly, even the straight line distance of 4.99 miles is greater than the two-mile limit typical of cattle foraging distance from a water source (Doc. 3305-7 at 22-23).

Respectfully submitted this 28th day of September, 2016.

Craig Fredrickson /s/ Craig Fredrickson

Regina Fredrickson /s/ Regina Fredrickson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 28, 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.

Electronically Filed

/s/ Craig Fredrickson

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