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**

JOINT RESPONSE TO OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDED DISPOSITION OF THE MAGISTRATE JUDGE

Plaintiffs the United States and the State of New Mexico ("Plaintiffs") respond to *Defendants' Objections to the Proposed Findings and Recommended Disposition by the Magistrate Judge* (ECF No. 3345) ("Defendants' Objections" or "Objections"). The Court should adopt the Magistrate Judge's *Proposed Findings and Recommended Disposition* (ECF No. 3337) ("Findings and Recommendations")[1] and overrule the Objections.

[1] The Findings and Recommendations are supported by and consistent with the arguments and evidence presented by Plaintiffs in:

A) *Joint Cross-Motion for Summary Judgment on the Disputed Water Right Claim and Response to Defendants' Motion for Summary Judgment* (ECF No. 3317-1) ("Joint Cross-Motion"); and
B) *Motion to Exclude Expert Opinion Testimony* (ECF No. 3316) ("*Daubert* Motion" based upon *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)).

I. INTRODUCTION

Defendants Craig and Regina Fredrickson ("Defendants") own approximately 640 acres within the Zuni River basin and on that property a single well is located; for the purposes of this subfile action that well has been designated 10A-5-W06. The water rights associated with 10A-5-W06 are the subject of this subfile proceeding and the Findings and Recommendations.

On the one hand, the parties were able to resolve those water rights tied to 10A-5-W06 associated with domestic water use. Consistent with practices established over the life of this adjudication, the parties have stipulated to a 0.7 acre-feet-per-year (AFY) water right for domestic uses from 10A-5-W06.[2] On the other hand, the parties were unable to resolve the water right claim tied to 10A-5-W06 associated with livestock water consumption. It was undisputed below that no livestock have been raised on the property and 10A-5-W06 has not been used to raise livestock since at least 2000, almost two decades ago.[3]

Below, the parties completed an extensive discovery process and presented motions for summary judgment. The parties presented a single dispute for resolution centered on Defendants' livestock use water right claim. Defendants moved for summary judgment and asked the Magistrate Judge to enter judgment in their favor in the amount of 3.779 AFY.[4] Defendants asserted that based on Defendant Craig Fredrickson's ("Mr. Fredrickson") expert opinion they were entitled to the water right claimed.[5]

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[2] Findings and Recommendations at 1.

[3] *Id.* at 11.

[4] *Id* at 1-2.

[5] *See generally Defendants' Motion for Summary Judgment* (ECF No. 3305) ("Defendants'

Plaintiffs responded to Defendants' Motion for Summary Judgment and simultaneously moved for summary judgement on the single outstanding issue; Plaintiffs also filed their *Daubert* Motion. In the *Daubert* Motion, Plaintiffs established that opinions asserted by Mr. Fredrickson in his expert report were inadmissible.[6] In our summary judgment motion, Plaintiffs established that without Mr. Fredrickson's opinions Defendants had no basis to prevail on their livestock use water right claim.[7]

The Magistrate Judge ruled in favor of Plaintiffs' two motions and against Defendants' Summary Judgment Motion. First, the Magistrate Judge correctly determined that Mr. Fredrickson was not an expert and that his proposed expert opinions were inadmissible.[8] Further, despite Defendants' assertions to the contrary, the Magistrate Judge also correctly determined that Mr. Fredrickson's opinions were not admissible as lay opinion pursuant to Fed R. Evid. 701.[9] The Court correctly determined that Mr. Fredrickson's opinions were not based on the perceptions of his five senses but were instead based upon purported scientific, technical, or specialized knowledge within the scope of Fed. R. Evid. 702.

Motion for Summary Judgment").

[6] *Daubert* Motion at 5-24.

[7] Joint Cross Motion at 14.

[8] The Magistrate Judge's decision here had two bases: 1) his analysis that Mr. Fredrickson was not in fact a qualified expert and 2) Defendants' concession that Mr. Fredrickson was not an expert. Findings and Recommendations at 4-5.

[9] *Id.* at 5-6.

With respect to Defendants' Motion for Summary Judgment and Plaintiffs' Joint Cross-Motion, the Magistrate Judge looked at these motions separately. For Defendants' motion, the Magistrate Judge correctly determined that because Defendants' motion was exclusively supported by Mr. Fredrickson's inadmissible opinions, the motion must necessarily fail.[10] The Magistrate Judge also ruled in the alternative. The Magistrate Judge concluded that even if a water right had existed, Defendants' water right claim must nonetheless fail as any right that might have existed had been abandoned since its last use at least 17 years ago.[11] In its analysis of abandonment, the Magistrate Judge correctly concluded that with the unreasonable period of nonuse a presumption of abandonment had arisen.[12] With a presumption of abandonment, the burden was rightfully on Defendants to establish excuses for non-use. Below, the only justification that Defendants presented for extended nonuse was their claim of drought.[13] The Magistrate Judge correctly found that Defendants' bare claim of "drought" was insufficient to overcome nearly two decades of nonuse.[14] Accordingly, the Magistrate Judge correctly found that any livestock use water right that might have existed in the past had been abandoned and Defendants' motion for summary judgment should be denied for this reason as well.

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[10] *Id.* at 10.

[11] *Id.* at 10-12. The Parties agreed below that since April 29, 1999, no livestock had been raised on Defendants' property surrounding 10A-5-W06. *Defendants' Response to Plaintiffs' Corrected Joint Cross-Motion for Summary Judgement and Motion to Exclude Expert Opinion Testimony* (ECF No. 3320) ("Defendants' Response to Cross-Motion").

[12] *Id.* at 11.

[13] *Id.* at 12.

[14] *Id.*

With respect to Plaintiffs' Joint Cross-Motion, the Magistrate Judge rightfully questioned whether Defendants had admissible evidence to support their livestock use water right claim and correctly concluded that they did not. Specifically, Defendants' 3.779 AFY livestock use water right claim was exclusively supported by the inadmissible opinions of Mr. Fredrickson and, without that evidence, Defendants had no basis to support their claim.[15] In the alternative, and consistent with the alternative basis articulated for denying Defendants' Motion for Summary Judgment, the Magistrate Judge concluded that any right that may have existed had been abandoned almost two decades ago.[16]

Defendants' Objections are centered on the Magistrate Judge's decision to grant Plaintiffs' Joint Cross-Motion, but they also appear to insist that this Court must grant them judgment on the existence and extent of a livestock use water right. First, Defendants claim that admissible evidence exists to support their livestock use water right claim.[17] Specifically, Defendants for the first time, claim that they are entitled to a livestock use water right between 1.1 AFY and 29+ AFY. Defendants argue that the 1.1 AFY quantity is based on assertions made in Plaintiffs' rebuttal report to Mr. Fredrickson's purported expert report and the 29+ AFY quantity is based on inference from a 1990 well declaration.[18] Defendants also argue that a water

[15] *Id.* at 10 and 12.

[16] *Id.* at 12.

[17] Defendants' Objections at 3-5.

[18] *Id.*

right can be inferred for them because other parties in the Zuni River Basin Adjudication had livestock use water rights recognized.[19]

Second, Defendants object to the Magistrate Judge's determination that any livestock use water right had been abandoned.[20] Specifically, Defendants claim that their claim of drought was sufficient to justify the almost two decade period of water non-use and overcome the presumption of abandonment.[21] Further, Defendants appear to contend that the Magistrate Judge's conclusion of an unreasonable period of non-use giving rise to the presumption of abandonment was unjustified. Specifically, Defendants now claim that between 2007 and 2009 they irrigated one quarter of an acre of their property to raise grass seed and this irrigation activity exercised their livestock use water right.[22]

Plaintiffs' response to Defendants' Objections are specified in the paragraphs below but can be summarized.[23] Having been rebuffed at every turn in the litigation below, Defendants now conjure new arguments not previously presented to the Magistrate Judge – and such arguments must be deemed waived by this Court. For Defendants' livestock use water right claim,

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[19] *Id.* at 4-5.

[20] *Id.* at 5-8.

[21] *Id.* at 5 and 7.

[22] *Id.* at 6-7 and 8.

[23] It is noteworthy that Defendants take no issue with certain aspects of the Magistrate's Order. Specifically, Defendants raise no objection to the Magistrate Judge's application of the summary judgment standard and the determination that Mr. Fredrickson's opinions on the host of matters presented in support of Defendants' motion for summary judgment and water right claim are inadmissible under both Fed. R. Evid. 701 and 702.

Defendants invent a new theory that they are entitled to an unspecified water right in the range of 1.1 AFY to 29+ AFY. Particularly as it related to the quantity element of a water right, Defendants' argument below was specific: Mr. Fredrickson's opinion was the exclusive basis for Defendants' livestock use water right claim in the specific amount of 3.779 AFY.[24] Defendants did not rely on a well declaration to establish water quantity. Defendants may not now rely on new theory to justify their new claim.

Likewise, for their Objection on the issue of abandonment, Defendants' claim of 2007-2009 irrigation water use was never raised below. In any event, Defendants' use of water to irrigate one-fourth of an acre is simply not an exercise of a livestock use water right based on water consumption by cattle. The consequence of an irrigation use from 10A-5-W06 is no different that the consequence of the stipulated domestic use from 10A-5-W06. Such irrigation use, even if the Court could properly consider it, does not explain the continuous period of non-use for the claimed livestock use water right that extends back almost two decades. And, ultimately, Defendants' claim of drought raised below does not justify the unreasonable period of nonuse that has spanned almost two decades.

The Findings and Recommendations are based on the arguments presented by the parties below and the Magistrate Judge's decision is well-reasoned and well-supported. The Court should overrule Defendants' Objections and adopt the Findings and Recommendations without change.

[24] Defendants' Motion for Summary Judgment at 16-26.

II. STANDARD OF REVIEW

As an initial matter, in this general stream adjudication, to the extent that a water right is contested between the parties, the water right claimants, here Defendants, have the burden to establish the elements of any water right in dispute: priority, quantity, purpose of use, period of use, and place of use.[25] As such, Plaintiffs have no burden to present evidence on or establish Defendants' contested water right claim.

Defendants challenge the Findings and Recommendations pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). Once timely and specific objections are raised to a magistrate judge's decision, the district court reviews the decision *de novo.*[26] However, one challenging a magistrate judge's decision is not only required to make objections timely and with specificity, but the challenger is also tied to the specific issues, arguments, and theories raised before the magistrate judge. A challenger's issues, arguments, and theories raised for the first time to the district court must be deemed waived.[27] Further, although a district court makes a *de*

[25] Findings and Recommendations at 8; *see also New Mexico v. Aamodt*, No. Civ. 66-6639 MV/WPL, Subfile PM-67833, (D.N.M. filed Feb. 24, 2014) (unpublished) (citing *Pecos Valley Artesian Conservancy Dist. v. Peters*, 193 P.2d 418, 421–22 (N.M. 1948)) (ECF No. 8119) at 6.

[26] *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996); *see United States v. Raddatz,* 447 U.S. 667, 674 (1980) ("on [ ] dispositive motions, the statute calls for a *de novo* determination, not a *de novo* hearing.").

[27] *United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) ("In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived."); *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *see also Greenhow v. Sec'y of Health & Human Servs.*, 863 F.2d 633, 638–39 (9th Cir. 1988) ("allowing parties to litigate fully their case before the magistrate and, if unsuccessful, to change their strategy and present a different theory to the district court would frustrate the purpose of the Magistrates Act."), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992).

novo determination of the magistrate judge's recommendations, the district court is not precluded from relying on the magistrate judge's proposed findings and recommendations.[28]

Here, the Findings and Recommendations were based on the parties' motions and the argument and evidence provided therein. No party challenges the summary judgment standard of review articulated in the Findings and Recommendations.[29] On *de novo* review of the specific issues, arguments, and theories raised below, the Court applies the same summary judgment standard of review. However, for those objections that consist of or contain issues, arguments, and theories not raised below, the Court should provide no review and simply overrule the objections.[30]

III. ARGUMENT

A. The Magistrate Judge correctly determined that Defendants had no admissible evidence to establish their livestock use water right claim.

Below, Defendants' prepared and presented Mr. Fredrickson's purported expert opinions

[28] *See Raddatz*, 447 U.S. at 676 ("in providing for a '*de novo* determination' rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.") (emphasis and case citation omitted) (quoting 28 U.S.C. § 636(b)(1)); *Bratcher v. Bray–Doyle Indep. Sch. Dist. No. 42*, 8 F.3d 722, 724–25 (10th Cir. 1993) (the district court's adoption of the magistrate judge's "particular reasonable-hour estimates" is consistent with a *de novo* determination, because "the district court 'may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate, . . . [as] 'Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.'"(quoting 28 U.S.C. § 636(b)(1))) (Emphasis and case citation omitted).

[29] Plaintiffs agree with the summary judgment standard of review as stated in the Joint Cross-Motion, at 8-11, and the Findings and Recommendations, at 7-9, and incorporate by reference that material here.

[30] *See* note 27, above.

as the principle basis for establishing the elements of their livestock use water right claim.[31] Particularly, Defendants devoted 10 pages of their brief to summarize Mr. Fredrickson's extensive opinions concerning the quantity associated with the livestock use water right claim.[32] Plaintiffs established that Mr. Fredrickson's opinions were not admissible as expert opinion under Fed. R. Evid. 702.[33] Without Mr. Fredrickson's opinions, Plaintiffs established that Defendants were without evidence to establish necessary element(s) of their livestock use water right claim.[34] Defendants' response to Plaintiffs' *Daubert* Motion was clear - they asserted that Mr. Fredrickson's opinions were admissible under Fed. R. 701 as lay opinion.[35] In reply, Plaintiffs established that Mr. Fredrickson's opinions were not admissible as lay opinion under Fed. R. Evid. 701.[36]

Today, Defendants' Objections present a host of new theories in an effort to resuscitate their water right claim. As an initial matter, Defendants new theory that they are entitled to an unspecified water right in the range of 1.1 AFY to 29+ AFY was never presented below an this new theory should be rejected in its entirety for not having been presented to the Magistrate

[31] *See generally* Defendants' Motion for Summary Judgment.

[32] *Id.* at 16-26.

[33] *See generally Daubert* Motion.

[34] *See* Joint Cross-Motion at 14.

[35] *See* Defendants' Response to Cross-Motion at 7-12.

[36] *Joint Reply on Plaintiffs' Cross-Motion for Summary Judgment and on the United States' Motion to Exclude Expert Opinion Testimony* (ECF No. 3327) ("Reply on Joint Cross-Motion") at 8-13.

Judge below.[37] Nevertheless, Plaintiffs will more specifically address the components of this new claim.

First, Defendants point this Court to a 1990 well declaration.[38] However, examination of Defendants' Motion for Summary Judgment reveals that they did not rely on that declaration to establish the 3.779 AFY water right quantity that they claimed.[39] In fact, the well declaration was barely mentioned once in the quantification context of the claim. In their response to the Joint Cross-Motion, Defendants did no more than vaguely suggest in passing that the 1990 well declaration "would seem to provide some factual basis for a ruling;"[40] hardly the basis for the 29+ AFY water right that Defendants calculate and claim today. Certainly, the Magistrate Judge could not have previously considered the effect of a well declaration if it was not argued to him.

Likewise, Defendants' Objection that their livestock use water right claim was supported by opinions of Plaintiffs' rebuttal expert was also not presented below.[41] Like the well declaration, Defendants do no more than once vaguely suggest in passing that Plaintiffs' expert "would seem to provide some factual basis for a ruling".[42] But in the same breath Defendants attacked Plaintiffs' expert claiming "Mr. Turnbull appears to suffer from the same shortcomings as

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[37] *See* note 27, above.

[38] Defendants' Objections at 3 and Exhibit 1.

[39] Defendants' Motion for Summary Judgment at 16-26.

[40] Defendants' Response to Cross-Motion at 16.

[41] *See* Defendants' Objections at 4.

[42] Defendants' Response to Cross-Motion at 16.

Mr. Fredrickson . . . ."[43] And, examination of their reply in support of Defendants' Motion for Summary Judgment reveals, in fact, that instead of relying on Plaintiffs' expert in any way, Defendants devoted their efforts to attacking those very opinions on which today they would like to rely.[44] More specifically, nearly their entire reply from below was devoted to challenging Plaintiffs' expert for purported errors and disagreements with Mr. Fredrickson's opinion.

Finally, like the aforementioned arguments, Defendants' Objection that this Court should "infer" a water right from the fact that a livestock well water right was previously recognized in another subfile action is, again, a new argument.[45] In the record from below, i.e. Defendants' summary judgment motion, response, and reply, Defendants made no suggestion that they are entitled to a water right based on an inference derived from water rights that may have been recognized for others. As this argument was not presented or argued to the Magistrate Judge below, it cannot now be relied on to reject the Findings and Recommendations.[46]

Below, in the face of Plaintiffs' Joint Cross-Motion and *Daubert* Motion, Defendants doggedly insisted that Mr. Fredrickson's opinions alone were sufficient to support the disputed water right claim. Examination of their motion, response, and reply from below reveals that Defendants did not argue, or even suggest, that quantification of their water right claim was based on anything other than Mr. Fredrickson's inadmissible opinion. There simply is no doubt

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[43] *Id.*

[44] *See Defendants' Reply to Response to Motion for Summary Judgement* (ECF No. 3324) at 2-11.

[45] *See* Defendants' Objections at 4-5.

[46] *See* note 27, *supra*.

that Mr. Fredrickson's opinions were the exclusive basis for quantification of the disputed claim. Defendants may not raise any new argument against the Findings and Recommendations. The well-settled precedent cited above in note 27 makes clear that only arguments specifically presented to the Magistrate Judge may properly form the basis of objection to this Court. Ultimately, Defendants' objections to the Magistrate Judge's decisions on the motions for summary judgement wholly consist of arguments that were not raised below. This Court has no choice but to overrule Defendants' Objections and to accept the Findings and Recommendations.

B. The 17-year period of nonuse was unreasonable, the Magistrate Judge correctly determined that no reasonable basis existed to justify such unreasonable nonuse, and the Findings and Recommendations cannot be overruled based on arguments not raised below.

Defendants object to the Magistrate Judge's decision that any livestock use water right had been abandoned after at least 17 years of non-use.[47] To support this objection, Defendants argue three points. First, Defendants argue that they never intended to abandon their water right and that they took actions that show a general intent not to abandon a water right. Second, Defendants argue that their belief of the existence of a drought justifies any period of non-use. Third, Defendants argue that, in fact, they exercised a livestock use water right between 2007 and 2009 to irrigate one-quarter acre of seed grass and, therefore, the 17-year period of nonuse was interrupted. Plaintiffs address these points in the paragraphs below, but in summary, each of

[47] The Magistrate Judge's decisions on abandonment were alternative findings based on the assumption that Defendants could establish their livestock use water right claim. Findings and Recommendations at 10. As discussed above, the Magistrate Judge correctly concluded that Defendants have no admissible evidence to establish all of the necessary elements of the water right that Defendants claimed and the Findings and Recommendations should be adopted on this basis alone.

Defendants' contentions is without merit.

In their Objections, Defendants claim that they never intended to abandon a water right. They contend that their actions over the years (tree thinning, erosion prevention, and re-seeding) show that they never intended to abandon a water right. But, the Magistrate Judge correctly concluded that Defendants' intent was not the relevant consideration once abandonment is presumed from an unreasonable period of nonuse.[48] New Mexico law is clear on this point.

> After a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for nonuse . . . to rebut the presumption of abandonment arising from such long period of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse.[49]

Therefore, Defendants "expressions of . . . intent" are not "fact[s] or condition[s] excusing such long nonuse" and simply do not result in overcoming the presumption of abandonment.

Defendants consistently offer a single reason for the unreasonable period of nonuse: their belief in the existence of drought. They presented this excuse below and the Magistrate Judge rightfully rejected it. At its core, Defendants contend that so long as they, or any land owner, believes that drought conditions exist, then any period of water nonuse, no matter how long, is justified. Were Defendants' contention true, it would permit water nonuse to extend into perpetuity and render abandonment meaningless. In this instance, Defendants recognize that the drought conditions that they claim exist do not impact the water available from 10A-5-W06;[50]

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[48] Findings and Recommendations at 11-12.

[49] *State ex rel. Reynolds v. South Springs Co.*, 80 N.M. 144, 148, 452 P.2d 478, 482 (1969) (citation omitted and emphasis added).

[50] Defendants' Objections at 5 ("the capacity of the well to produce water at 18+ gpm did not appear to have been affected by drought").

instead, they generally claim that the conditions throughout the grazing range are just not ready for grazing even though their property has gone un-grazed from nearly two decades.[51] The Magistrate Judge correctly observed that Defendants were not experts related to raising cattle (cattle management, ranch operations, grazing range ecology, etc.).[52] Likewise, they could not present expert opinion about the drought conditions and the impact of drought on any theoretical cattle operation. Beyond Defendants' personal beliefs about drought, the Magistrate Judge was left with no reason for the unreasonable period of nonuse that extended almost two decades. The Magistrate Judge correctly determined that Defendants' claim of drought as the excuse for an unreasonable period of nonuse was unjustified and insufficient.[53]

Finally, Defendants claim that they exercised the livestock use water right between 2007 and 2009 when they irrigated a quarter acre of land.[54] In essence, this argument disputes the Magistrate Judge's conclusion that "[i]t is undisputed that no livestock have been run on this property since at least 2000, and thus the well has not been used for livestock watering since that time".[55] But Defendants' objection today was not raised below to the Magistrate Judge and is therefore not a basis on which this Court can reject the Findings and Recommendations.[56] In fact,

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[51] *Id.* at 7 ("the drought continues and the rangeland has simply not recovered.").

[52] Findings and Recommendations at 12.

[53] *Id.*

[54] Defendants' Objections at 6-7.

[55] Findings and Recommendations at 11.

[56] *See* note 27, above.

Defendants admitted below they have not owned livestock or leased their land to others for the purpose of livestock grazing and/or watering and they never once suggested that they used their livestock use water right since they first became owners of 10A-5-W06.[57]

In any event, were this Court to consider the evidence of water use not presented below, Defendants erroneously conflate an irrigation use water right for a livestock use water right. Just as exercise of their domestic use water right cannot be relabeled a livestock water right, an irrigation use water right cannot be relabeled a livestock water right; these rights are not interchangeable as Defendants suggest. It is undisputed that a water right in New Mexico is based on historic beneficial use.[58] In fact, under New Mexico law an irrigation water right requires an additional designation of the parcel of land that is irrigated.[59] At no point throughout litigation of this subfile action have Defendants made an irrigation water right claim and prior to 2007 no other previous water user attempted to raise the crop that Defendants describe (seed grass). Defendants' *ipse dixit* that an irrigation water practice is an exercise of an otherwise unused livestock water right does not make it so. Their claim here is no more than a *post hoc* rationalization unsupported with any evidentiary substance in the record.

The Magistrate Judge correctly determined that, assuming a livestock use water right had existed, it had gone unused for at least 17 years and that such prolonged non-use was unreasonable and raised the presumption of abandonment. The Magistrate Judge correctly determined that the single claim that Defendants presented for the unreasonable, prolonged nonuse (drought) was insufficient to overcome the presumption of abandonment and that any livestock use water right that

[57] Defendants' Response to Cross-Motion at 3.

[58] *State ex rel. Erickson v. McLean*, 62 N.M. 264, 271, 308 P.2d 983, 987 (1957).

[59] N.M. STAT. ANN. § 72-1-2.

may have existed had been abandoned. That sound determination should not be disturbed.

IV. CONCLUSION

For the reasons given in the paragraphs above, Defendants' Objections should be overruled and this Court should adopt the Findings and Recommendations.

In their Objections, Defendants suggest that this Court appoint a settlement judge hold a settlement conference to resolve the outstanding issues to this subfile action. Plaintiffs do not believe that the services of a settlement judge or a settlement conference are justified or necessary.

Respectfully submitted this 13th day of March, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 13, 2017, 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_____