



**I. INTRODUCTION**

Defendants are the owners of two stockponds and three wells located in the Zuni River Basin that are at the focus of these subfile actions. Consistent with this Court's *Procedural and Scheduling Order for the Adjudication of Water Rights Claims (Ramah Sub-Area)*, No. 01cv0072 BB/WDS (ECF No. 954) (D.N.M. Jan. 11, 2007) ("Ramah Sub-Area Order"), Plaintiffs previously prepared and presented Defendants with settlement offers concerning the water rights associated with their stockponds and wells. The water rights to which Plaintiffs offered and are willing to stipulate are as follows:

**A. Subfile Action ZRB-5-0056**

**WELL**

**Map Label:** 3B-5-W063

**OSE File No:** None

**Priority Date:** 1/1/1970

**Purpose of Use:** PUBLIC UTILITY

**Well Location:** As shown on Hydrographic Survey Map 3B-5E

**S. 35 T. 11N R. 16W 1/4, 1/16, 1/64:** SW SE NW

**X (ft):** 2,524,278      **Y (ft):** 1,505,711

New Mexico State Plane Coordinate System, West Zone, NAD 1983

**Amount of Water:** 17.0 ac-ft per annum

**B. Subfile Action ZRB-5-0057**

**STOCKPOND**

**Map Label:** 3B-5-SP021

**Purpose of Use:** LIVESTOCK

**Priority Date:** 10/6/1997

**Source of Water:** Surface Runoff

**Point of Diversion:** Not Applicable

**Amount of Water:**

**Depth (ft):** 1.0

**Surface Area (sq.ft):** 2,055

**Storage Impoundment Volume (ac-ft):** 0.028

**Pond Location:** As shown on Hydrographic Survey Map 3B-5F

**S. 2 T. 10N R. 16W 1/4, 1/16, 1/64:** SE SW

**X(ft):** 2,525,103      **Y(ft):** 1,499,315

New Mexico State Plane Coordinate System, West Zone, NAD 1983

**Dam height (if greater than 9 ft):** 0.0

**WELL**

**Map Label:** 3B-5-W064

**OSE File No:** None

**Priority Date:** 1/1/1972

**Purpose of Use:** PUBLIC UTILITY

**Well Location:** As shown on Hydrographic Survey Map 3B-5E

**S. 35 T. 11N R. 16W 1/4, 1/16, 1/64:** SW NE NE

**X (ft):** 2,524,830      **Y (ft):** 1,507,095

New Mexico State Plane Coordinate System, West Zone, NAD 1983

**Amount of Water:** 17.0 ac-ft per annum

**WELL**

**Map Label:** 3B-5-W066

**OSE File No:** None

**Priority Date:** 1/1/1958

**Purpose of Use:** PUBLIC UTILITY

**Well Location:** As shown on Hydrographic Survey Map 3B-5F

**S. 2 T. 10N .R. 16W 1/4, 1/16, 1/64:** NW NE NE

**X (ft): 2,524,967 Y (ft): 1,504,307**

New Mexico State Plane Coordinate System, West Zone, NAD 1983

**Amount of Water:** 17.0 ac-ft per annum

Defendants did not accept Plaintiffs' settlement offer. On May 30, 2017, counsel for Plaintiffs attempted to consult with Defendants about these subfile actions but received no response from Defendants. The United States subsequently filed notices that the consultation period has ended.<sup>4</sup> Defendants then timely filed their subfile answers.<sup>5</sup> In response to Defendants' subfile answers, Plaintiffs filed their joint motions for judgment on the pleadings and supporting memoranda ("Judgment Motions").<sup>6</sup> In their Judgment Motions, Plaintiffs established that although Defendants expressed general dissatisfaction with Plaintiffs' settlement offers, Defendants made no water right claim of their own. As such, Plaintiffs

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<sup>4</sup> ECF Nos. 3378 and 3379.

<sup>5</sup> See *Notice of Errata Regarding Subfile Nos. ZRB-5-0056 and ZRB-5-0057* (ECF No. 3385) (concerning the subfile answers and transposed subfile action numbers).

<sup>6</sup> ECF Nos. 3399 and 3400.

established that Defendants were entitled no judgment other than that which Plaintiffs were willing to stipulate.

Defendants filed no response to the Judgement Motions. After the time period to file a response expired, Plaintiffs filed their notices that briefing was complete in which they articulated that per local rule “failure of a party to file and serve a response in opposition to a motion within the time prescribed for doing so constitutes consent to grant the motion.”<sup>7</sup>

On June 1, 2018, the Magistrate Judge issued his Findings and Recommendations. The Magistrate Judge correctly determined that Defendants failed to respond to the Judgment Motions. With only the subfile answers before the Court, the Magistrate Judge correctly determined that Defendants made no claim in their subfile answers that could justify the establishment of a water right. More specifically, the Magistrate Judge correctly determined that Defendants made no factual allegation to establish a water right under New Mexico law, namely, historic beneficial use. As such, the Magistrate Judge correctly concluded that Defendants were only entitled to judgement to the extent that Plaintiffs were willing to stipulate.

## **II. APPLICABLE LEGAL STANDARD**

Although not articulated in their Objections, presumably 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 magistrate judge’s decision *de novo*.<sup>8</sup> However, one challenging a magistrate judge’s

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<sup>7</sup> ECF Nos. 3407 and 3408 (quoting Local Rule D.N.M.LR-Civ. 7.1(b)).

<sup>8</sup> *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.”).

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 are deemed waived.<sup>9</sup> Further, although a district court makes a *de 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.<sup>10</sup>

Here, the Magistrate Judge issued Findings and Recommendations based on Plaintiffs' Judgment Motions and Defendants' subfile answers. On *de novo* review of the specific issues, arguments, and theories raised below, the Court applies the same standard of review to the Judgment Motions as applied by the Magistrate Judge. 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.

The standard of review for a motion for judgment on the pleadings is not in dispute as no

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<sup>9</sup> *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); see *United States v. Garfinkle*, 261 F.3d 1030-31 (10th Cir. 2001) (“In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.”); see also *Pevehouse v. Scibana*, 229 Fed.Appx. 795, 796 (10th Cir. 2007) (unpublished) (constitutional challenge waived by litigant's failure “to raise it before the magistrate.”).

<sup>10</sup> See *Raddatz*, 447 U.S. at 676 (“[I]n 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 omitted) (citing *Mathews v. Weber*, 423 U.S. 261, 275 (1976); *Bratcher v. Bray–Doyle Indep. Sch. Dist.*, 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) and *Raddatz*, 477 U.S. at 667, 676). (Emphasis omitted).

party challenges the standard of review articulated in the Findings and Recommendations. Fed. R. Civ. P. 12(c) provides: “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” In these subfile actions, the Plaintiffs’ proposed consent orders and Defendants’ subfile answers represent the “pleadings” as that term is used in Fed. R. Civ. P. 7(a).<sup>11</sup> “A rule 12(c) motion is designed to provide a means of disposing of cases when the material facts are not in dispute between the parties.”<sup>12</sup>

“Any party may move for judgment on the pleadings if no material facts are in dispute and the dispute can be resolved on both the pleadings and any facts of which the Court can take judicial notice.”<sup>13</sup> Because a motion for judgment on the pleadings “is generally treated in the same manner as a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, . . . [t]he court accepts all well-pleaded allegations of the non-moving party as true and views all facts in a light most favorable to the non-moving party.”<sup>14</sup> The Court should grant a motion for judgment on the pleadings “if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law.”<sup>15</sup>

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<sup>11</sup> See Ramah Sub-Area Order at 2-4 (describing the generation and service of Consent Orders); at 5-6 (describing the process and requirements for filing a subfile answer); *Selman v. Delta Airlines*, Civ No. 07-1059 JB/WDS, 2008 WL 6022017, at \*7 (D.N.M. Aug. 13, 2008) (describing the distinction made in Rule 7 between pleadings and motions).

<sup>12</sup> *Peña v. Greffet*, 110 F. Supp. 3d 1103, 1112 (D.N.M. 2015) (citing *Kruzits v. Okuma Mach. Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994)).

<sup>13</sup> *Ramirez v. Wal-Mart Stores, Inc.*, 192 F.R.D. 303, 304 (D.N.M. Mar. 22, 2000) (citing Rule 12(c)).

<sup>14</sup> *Id.* (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998) and *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)).

<sup>15</sup> *Peña*, 110 F. Supp. 3d at 1112 (citing *Ramirez*, 192 F.R.D. at 304).

### **III. ARGUMENT**

In their Objections, Defendants do not dispute the Magistrate Judge's findings or conclusions; instead, Defendants ignore them. Defendants issue 6 short paragraphs to articulate their objections. In the first three paragraphs, Defendants complain, as they did in their subfile answers, that Plaintiffs' settlement offer was insufficient. In the last three paragraphs, Defendants simply conclude that they filed subfile answers and they will prove some heretofore unspecified historic beneficial use at trial. Defendants' Objections are no basis on which this Court can grant any relief. Defendants' Objections should be overruled.

#### **A. Defendants specify no erroneous finding or conclusion issued by the Magistrate Judge.**

In his Findings and Recommendations, the Magistrate Judge made the following relevant findings:

- 1) a water right under New Mexico law is established on historic beneficial use of water;<sup>16</sup>
- 2) a claimant of a water right (here Defendants) has the burden to establish each of the necessary elements of a water right;<sup>17</sup>
- 3) Defendants failed to respond to Plaintiffs' Judgment Motions;<sup>18</sup> and
- 4) Defendants' subfile answers made no contention as to any factual allegation

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<sup>16</sup> Findings and Recommendations at 4–5.

<sup>17</sup> *Id* at 5.

<sup>18</sup> *Id.* at 6.



regarding claimed water rights or historical beneficial use of water.<sup>19</sup>

As an initial matter, Defendants did not respond to the Judgment Motions so they preserved no issue before the Magistrate Judge. Further, in their Objection Defendants raise no challenge to the Magistrate Judge's findings and, therefore, before this Court they articulate no basis to reverse the Magistrate Judge. In essence Defendants simply say "we object" to the Magistrate Judge's decision. However, it is well established in the 10th Circuit, that "an objection stating only 'I object' preserves no issue for review.'"<sup>20</sup> Therefore, Defendants raise no basis on which this Court can reverse the Findings and Recommendations.

**B. Defendants' dissatisfaction with Plaintiffs' settlement offer is no basis to reverse the Findings and Recommendations.**

In their Objections, Defendants state their dissatisfaction with Plaintiffs' settlement offer. At its core then, the Objections do no more than to restate the contents of the subfile answers. Defendants' dissatisfaction with Plaintiffs' settlement offer is no basis to either reverse the Findings and Recommendations or deny the Judgment Motions. As established in the Judgment Motions, the subfile answer presented no water right claim for this Court to resolve and Plaintiffs are entitled to judgment on the pleadings.

First, it is well established that compromise offers of settlement, including the basis for any offer, are inadmissible.<sup>21</sup> Therefore, Defendants' singular focus on the sufficiency of

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<sup>19</sup> *Id.*

<sup>20</sup> *One Parcel of Real Prop.*, 73 F.3d at 1060 (quoting *Lockert v. Faulkner*, 843 F.2d 1015, 1019 (7th Cir.1988)).

<sup>21</sup> Fed. R. Evid. 408.

Plaintiffs' settlement offer is not, and cannot be, the appropriate focus of Defendants' water right claim in these subfile actions. Related to this point, the Magistrate Judge correctly stated, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water.' In other words, a water user may acquire the right to use water through beneficial use."<sup>22</sup> But Defendants raised no such allegation concerning beneficial use in their subfile answers.

Second, by focusing on the sufficiency of Plaintiffs' settlement offer, Defendants' impliedly suggest that in these subfile actions it is Plaintiffs' responsibility to establish Defendants' water rights. Of course, such a suggestion is not warranted. The Magistrate Judge correctly stated, "the burden is on [Defendants] to justify a water right above those offered by the Plaintiffs in their respective settlement offers."<sup>23</sup> And, in this adjudication, the subfile answer is a claimant's principle basis to establish that it is entitled to a water right.

[The subfile answer] makes no factual statement whatsoever that it has historically used more water than what is offered in the proposed Consent Order. The Plaintiffs are not required to prove that the offered amount is the extent of the historical beneficial use. [Defendant] bears the burden of establishing historical beneficial use greater than that offered by the Plaintiffs.<sup>24</sup>

Finally, as mentioned above with Defendants' failure to respond to the Judgment Motions, Defendants preserved no issue for this Court to review. Nevertheless, the Magistrate Judge closely examined the subfile answers to determine if Defendants presented any basis on

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<sup>22</sup> Findings and Recommendations at 5 (citations omitted) (quoting N.M. Const. art. XVI, § 3).

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Proposed Findings and Recommended Disposition, Subfile No. ZRB-5-0014* (ECF No. 3277) at 5; *see also Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, Subfile No. ZRB-5-0014* (ECF No. 3351).

which to grant relief in Defendants' favor.<sup>25</sup> He correctly found that they did not: "[n]either [Defendant] contends that it has historically used more water than what is offered in the proposed Consent Order, nor have they made any factual allegations regarding their respective water rights or beneficial use thereof in either respective subfile."<sup>26</sup> Without articulating any factual basis for relief, Defendants are not entitled to judgment.

In the end, the Objections, like the subfile answers before them, present no legal or factual basis for a ruling from this Court in Defendants' favor.

#### IV. CONCLUSION

Based upon the foregoing, Plaintiffs request that the Court enter an order overruling the Objections, granting the Judgment Motions, and entering judgment on the pleadings in favor of Plaintiffs and against the Defendants consistent with the water rights set forth in Section I above.

Dated: June 29, 2018.

Respectfully submitted,

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<sup>25</sup> Per Local Rule D.N.M.LR-Civ. 7.1(b), Defendants' failure to respond to the Judgment Motions constitutes confession of those motions and on this ground alone the Findings and Recommendations should be approved and the underlying motions should be granted.

<sup>26</sup> Findings and Recommendations at 6.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29<sup>th</sup> day of June, 2018, I filed the foregoing electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Andrew "Guss" Guarino  
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