

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

UNITED STATES OF AMERICA, and)	
STATE OF NEW MEXICO, ex rel. STATE)	No. CV 01-00072 MV/JHR
ENGINEER,)	
)	ZUNI RIVER BASIN
Plaintiffs,)	ADJUDICATION
)	
and)	
)	Subfile No. ZRB-1-0148
ZUNI INDIAN TRIBE, NAVAJO NATION,)	
)	
Plaintiffs in Intervention,)	
)	
v.)	
)	
A & R PRODUCTIONS, et al.,)	
)	
Defendants.)	
)	

**PLAINTIFFS UNITED STATES OF AMERICA’S AND STATE OF NEW MEXICO’S
MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW
IN SUPPORT THEREOF**

Pursuant to Fed. R. Civ. P. 56, D.N.M.LR-Civ. 56.1, and the *Order Setting Case Management Deadlines and Discovery Parameters* (Doc. 3455), Plaintiffs United States of America (“United States”) and State of New Mexico ex rel. State Engineer (“State”) (together, “Plaintiffs”) respectfully move this Court to enter summary judgment on those water rights in the Zuni River Basin (“Basin”) associated with the real property owned by Subfile Defendant Norma M. Meech, individually and as the successor-in-interest to Walter V. Meech (“Meech” or “Defendant”). No disputed issue of material fact exists concerning the priority, amount, purpose, place of use, and point of diversion associated with the water rights held by Meech and, all as

more fully set forth below, the United States and State are entitled to judgment as to all the water rights associated with Meech's property as a matter of law.

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 Basin and examined the Meech property for evidence of historic, beneficial water use. *See Notice of Filing the Zuni River Basin Hydrographic Survey for Sub-Areas 4 and 8* (Doc. 339). Five water features were found on the Meech property—two wells and three ponds. Based on the information gathered during the Hydrographic Survey, which included a consultation and multiple information exchanges with Defendant and her representatives, Plaintiffs developed and served the Consent Order on Defendant. *See Amended Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 4 and 8 of the Zuni River Stream System* (Doc. 387) at 3-5, § II. After on-again, off-again consultations between 2006 and 2019 were unable to fully resolve the parties' dispute over the water right claims, Meech filed her *Subfile Answer* (Doc. 3449).

At the center of the parties' dispute are the two wells that serve as the water supply for the Meech's Tinaja Quarry, a limestone mining operation that is part of C&E Concrete, a family business owned by Norma Meech and Walter L. Meech, her son. Ironically, the parties have been unable to agree on the quantification of the water rights for the two wells despite the fact that both wells are metered and C&E Concrete has submitted monthly pumping data to the New Mexico Office of the State Engineer ("OSE") for twenty years. Simply put, the parties disagree

about the effect of the *Mendenhall* doctrine¹ on the determination of Meech's water rights for those wells.

The parties' disagreement about the quantification of the water rights for the three ponds also arises out of an interpretation of New Mexico water law. While the parties agree about the quantity of water the ponds are capable of impounding and storing, they disagree about whether Meech's water rights stemming from the ponds should account for evaporative losses. Both disagreements present purely legal issues for the Court's determination. No fact material to either issue is disputed.

II. STATEMENT OF MATERIAL FACTS

Consistent with Fed. R. Civ. P. 56(c)(1)(A) and D.N.M.LR-Civ. 56.1(b), Plaintiffs assert that the following facts are material to this Motion, well-established of record, and undisputed:

1. The real property associated with Subfile No. ZRB-1-0148 is located in the NW¼ of Section 4, Township 9 North, Range 13 West, New Mexico Principal Meridian, within Sub-area 8 of the Zuni River Basin and contains five water features—two wells and three ponds.

Declaration of Thomas W. Ley ("Ley Decl.") (attached hereto as **Exhibit 1** and incorporated herein by reference), at 5-6, ¶ 9 and Attachment A (Hydrographic Survey map).

2. Meech, the State, and the United States stipulate and agree to all elements of the water rights for the two wells and three ponds except the quantity of water to which Meech is entitled for each water feature. *Joint Status Report and Proposed Discovery Plan* ("Joint Status Report") (Doc. 3453) at 2-5 (stipulations). This includes the purposes, priority dates, locations,

¹ See discussion, *infra*, at 11-13, § IV (Point 2).

and water sources for each of the water features. *Id.*

3. In the *Zuni River Adjudication Hydrographic Survey Report for Sub-areas 4 and 8*, the two wells located on the real property associated with Subfile No. ZRB-1-0148 are identified by the Hydrographic Survey ID numbers 8B-1-W10 (OSE file number G00336) (“Well 8B-1-W10”) and 8B-1-W11 (OSE file number G00337) (“Well 8B-1-W11”), respectively. Ex. 1 at 6-7, ¶ 10 and Attachment A.

4. Meech drilled Wells 8B-1-W10 and 8B-1-W11 in 1988 and 1990, respectively, prior to the New Mexico State Engineer’s extension of the Gallup Underground Water Basin in 1994. Joint Status Report (Doc. 3453) at 4-5; N.M. Admin. Code 19.27.33.8(B) and (C).

5. The historic pumping capacity of Well 8B-1-W10 is seven (7) gallons per minute. *See* Walter Meech Dep. Excerpts (attached hereto as **Exhibit 2** and incorporated herein by reference), at 22:24-24:22 and Meech Dep. Ex. 3 (amended well declaration file G-336).

6. During the period from 2001 to 2020, Meech has utilized a well meter to record on a monthly basis the quantity of water pumped from Well 8B-1-W10 and has submitted the meter readings to the OSE. Ex. 1 at 7-8, ¶¶ 13-14; Ex. 2 at 27:22- 28:17; Edward Morlan Dep. Excerpts (attached hereto as **Exhibit 3** and incorporated herein by reference), at 22:22-24:7, 25:14-24.

7. Well 8B-1-W10 has not produced water since 2012. Ex. 1 at 7-8, ¶¶ 13-14; Ex. 2 at 39:6-40:6; Ex. 3 at 41:24-42:10.

8. During the period from 2001 to 2020, the maximum annual pumping rate for Well 8B-1-W10 occurred in 2006 and amounted to 2.04 ac-ft. Ex. 1 at 7-8, ¶ 13.

9. The historic pumping capacity of Well 8B-1-W11 is sixty (60) gallons per minute. Ex. 2 at 25:11-27:9, 55:3-18 and Meech Dep. Ex. 4 (amended well declaration file G-337).

10. During the period from 2001 to 2020, Meech has utilized a well meter to record on a monthly basis the quantity of water pumped from Well 8B-1-W11 and has submitted the meter readings to the OSE. Ex. 1 at 8-9, ¶¶ 17-18; Ex. 2 at 27:22- 28:17; Ex. 3 at 22:22-24:7, 25:14-24.

11. During 2016 and 2017, Meech undertook extensive repairs on Well 8B-1-W11 to improve the well's production capacity and reliability. Ex. 2 at 52:14-64:21.

12. During the period from 2001 to 2016, before the repairs described in paragraph 11 were completed, the maximum annual pumping rate for Well 8B-1-W11 occurred in 2008 and amounted to 44.98 ac-ft. Ex. 1 at 8-9, ¶ 17.

13. During the period from 2017 to 2020, after the repairs described in paragraph 11 were completed, the maximum annual pumping rate for Well 8B-1-W11 occurred in 2019 and amounted to 67.93 ac-ft. *Id.* at 9, ¶ 18.

14. From the time Wells 8B-1-W10 and 8B-1-W11 were drilled through 2020, all the water Meech has pumped from the wells has been put to beneficial use in the limestone mining and processing operation at the Tinaja Quarry. Ex. 2 at 22:16-23; Ex. 3 at 10:16-12:14.

15. Meech contends that she is entitled “to continue to develop her pre-basin water rights from [Wells 8B-1-W10 and 8B-1-W11] pursuant to the long-held plan to continue limestone mining activities.” Joint Status Report (Doc. 3453) at 7.

16. In the *Zuni River Adjudication Hydrographic Survey Report for Sub-areas 4 and 8*, the three ponds located on the real property associated with Subfile No. ZRB-1-0148 are identified by the Hydrographic Survey ID numbers 8B-1-SP34, 8B-1-SP66, and 8B-1-SP69B, respectively. Ex. 1 at 9, ¶ 19 and Attachment A.

17. Ponds 8B-1-SP34 and 8B-1-SP66 are used for livestock purposes, and historically

have been filled by surface runoff. *Id.*, ¶ 20.

18. Pond 8B-1-SP69B is used for industrial purposes, and historically has been filled by water pumped directly and continuously from Wells 8B-1-W10 and 8B-1-W11. *Id.*, ¶ 21; Ex. 2 at 74:15-76:18; Ex. 3 at 25:25-26:14.

19. The United States determined during the Hydrographic Survey that Pond 8B-1-SP34 is capable of impounding and storing 0.167 ac-ft of water; that Pond 8B-1-SP66 is capable of impounding and storing 1.933 ac-ft; and that Pond 8B-1-SP69B is capable of impounding and storing 0.540 ac-ft. Ex. 1 at 10, ¶ 22.

20. As it has done throughout the Hydrographic Survey, the United States calculated the storage impoundment volume of the ponds by (a) measuring pond depth and surface area, (b) multiplying the measured area in square feet by the measured depth in feet, and (c) multiplying the result by a factor of 0.6 to account for pond shape irregularities. *Id.* at 11, ¶ 25.

21. Meech does not dispute the amount of water that the United States determined during the Hydrographic Survey can be impounded and stored in each of the ponds. Joint Status Report (Doc. 3453) at 7. Meech contends, however, that the United States' quantification should "account for evaporative losses from the ponds, which is also a beneficial use of water." *Id.*

III. STANDARD OF REVIEW

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. The moving party bears the initial burden of "showing ... that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met this burden, the nonmoving party must identify specific

facts that show the existence of a genuine issue of material fact requiring trial on the merits. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The nonmovant must identify these facts by reference to “affidavits, deposition transcripts, or specific exhibits incorporated therein.” *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998) (citations omitted). A fact is “material” if, under the governing law, it could have an effect on the outcome of the lawsuit. *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.* Although the record and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmovant, *see Muñoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1164 (10th Cir. 2000), a mere “scintilla” of evidence is insufficient to successfully oppose a motion for summary judgment. *Anderson*, 477 U.S. at 252.

Even where, as here, the United States and State have moved for summary judgment, “to the extent that any water right is disputed,” the user of the water “generally bear[s] the burden of proof in the first instance with respect to the disputed water right.” *United States v. A & R Productions*, No. 01cv00072 MV/WPL, Subfile ZRB-2-0098, Doc. 2985, at 4 (D.N.M. Aug. 28, 2014) (Order). As a practical matter, then, the burden of persuasion at trial would be on Meech. *See id.*, No. 01cv00072 MV/WPL, Subfile ZRB-2-0014, Doc. 3049, at 3 (D.N.M. May 27, 2015) (Proposed Findings and Recommended Disposition). Accordingly, the United States and State carry their summary judgment burden “by either (1) providing affirmative evidence negating an essential element of [Meech’s] claim or (2) showing the Court that [Meech’s] evidence is insufficient to demonstrate an essential element of [their] claim.” *Id.* (citing *Celotex*, 477 U.S. at

331). In addition, once the United States and State have carried their burden, Meech must come forward with sufficient facts to establish that a disputed material fact exists.

In our view, 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.

IV. ARGUMENT

POINT 1: MEECH'S OWN EVIDENCE OF BENEFICIAL USE COMPELS A WATER RIGHT OF 2.04 ACRE-FEET PER YEAR FOR WELL 8B-1-W10 AND 67.93 ACRE-FEET PER YEAR FOR WELL 8B-1-W11

As this Court has declared repeatedly over the course of this adjudication: "New Mexico state law provides the substantive standards for this adjudication." *See, e.g., A & R Productions*, No. 01-cv-0072 MV/WPL, Subfile ZRB-5-0014, Doc. 3277, at 3 (D.N.M. June 1, 2016) (Proposed Findings and Recommended Disposition). In New Mexico, beneficial use is the basis of a water right. N.M. Const. Art. XVI, § 3. Beneficial use has been defined as "the use of such water as may be necessary for some useful and beneficial purpose in connection with the land from which it is taken." *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 29, 62 N.M. 264, 273, 308 P.2d 983, 988 (citation omitted). *See also* N.M. Admin. Code 19.26.2.7(D) (defining beneficial use as "[t]he direct use or storage and use of water by man for a beneficial purpose including, but not limited to, agricultural, municipal, commercial, industrial, domestic, livestock, fish and wildlife, and recreational uses."). "The concept requires actual use for some purpose that is socially accepted as beneficial." *State ex rel. Martinez v. McDermott*, 1995-NMCA-060, ¶ 10, 120 N.M. 327, 330, 901 P.2d 745, 748.

Based on the undisputed evidence of beneficial use of the water pumped and diverted from Wells 8B-1-W10 and 8B-1-W11 by Meech in C&E Concrete's limestone quarrying operations, most of which Meech and C&E Concrete have provided, Meech is entitled to a water right for Well 8B-1-W10 in the amount of 2.04 acre-feet per year ("AFY") and for Well 8B-1-W11 in the amount of 67.93 AFY. We address the undisputed evidence supporting the quantification of the water right for each well in turn.

A. Well 8B-1-W10

The United States and the State have quantified Meech's water right for Well 8B-1-W10 based on the meter readings that record on a monthly basis the quantity of water pumped from the well. Understanding that "[a] diversion alone is not beneficial use," *McDermott*, 1995-NMCA-060, ¶ 12, 120 N.M. at 331, 901 P.2d at 749, Plaintiffs are satisfied that the meter readings are an accurate proxy for Defendant's "ultimate, actual beneficial use of the water resulting from the diversion." *Id.* See also Undisputed Fact 14, *supra*, at 5 (all the water Meech has pumped from the wells has been put to beneficial use in the limestone mining and processing operation at the Tinaja Quarry). Although the meter readings display a wide variance in the annual amount of water pumped during the years 2001 to 2012 when Well 8B-1-W10 was operational, see Undisputed Facts 6 and 7, *supra*, at 4,² the United States and the State, consistent with their approach throughout this adjudication, have quantified the water right for Well 8B-1-W10 at 2.04 AFY based on undisputed evidence of the highest maximum annual pumping rate from the time the well was drilled to the present. Undisputed Fact 8, *supra*, at 4.

² Based on the historic meter readings for Well 8B-1-W10, the well produced a high of 2.04 AFY of water in 2006, and a low of 0.046 AFY in 2007. Ex. 1 at 7-8, ¶ 13.

B. Well 8B-1-W11

The United States and the State similarly have quantified Meech's water right for Well 8B-1-W11 based on the meter readings used to record on a monthly basis the quantity of water pumped from that well. These meter readings also display a fairly wide variance in the annual pumping rate, *see* Undisputed Fact 10, *supra*, at 5,³ with a notable overall increase in the rate since the well underwent significant and extensive repairs. *Id.* *See also* Undisputed Fact 11, *supra*, at 5. Plaintiffs acknowledge this repair work and the well's increased production in their quantification of the water right for Well 8B-1-W11 at 67.93 AFY, again based on undisputed evidence of the highest maximum annual pumping rate from the time the well was drilled to the present, which occurred in 2019. *See* Undisputed Fact 13, *supra*, at 5.

POINT 2: PLAINTIFFS' QUANTIFICATION OF THE WATER RIGHT FOR WELLS 8B-1-W10 AND 8B-1-W11 ACCOUNTS FOR THE APPLICATION OF MENDENHALL AND THE RELATION-BACK DOCTRINE

Meech contends that the Plaintiffs' quantification of the water right for Wells 8B-1-W10 and 8B-1-W11 is insufficient because it does not "recognize planned future beneficial use pursuant to *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083," 68 N.M. 467, 362 P.2d 998. Subfile Ans. (Doc. 3449) at 1. *See also* Undisputed Fact 15, *supra*, at 5. As far as the United States and the State can tell, Meech seeks a water right for the wells not only for water actually diverted and placed to beneficial use, but also for water Meech might pump and divert in the future. In other words, Meech claims that *Mendenhall* entitles her to a continuously expanding water right unmoored from the beneficial-use requirement. As explained below, however,

³ Based on the historic meter readings for Well 8B-1-W11, the well produced a high of 67.93 AFY of water in 2019, and a low of 16.72 AFY in 2005. Ex. 1 at 8-9, ¶¶ 17-18.

Meech's claim to an ever-expanding water right is not only antithetical to the prior appropriation doctrine and the concept of beneficial use, but to the *Mendenhall* doctrine as well.

In *Mendenhall*, the New Mexico Supreme Court construed how the declaration of an underground basin affects the development of a groundwater right. New Mexico's groundwater code allows the State Engineer to assert administrative jurisdiction over a groundwater basin by entering a special order defining the declared boundaries of an underground basin. NMSA 1978, § 72-2-8(B)(4) (1967); § 72-12-20 (1983). Before the State Engineer declares a groundwater basin by special order, a claimant may establish a water right without permit from the State Engineer. But after a basin is declared, a permit is required. In 1949, Mendenhall's predecessor landowner planned and commenced a project to irrigate lands before the declaration in 1950 of the groundwater basin where his well was located. As the Supreme Court stated the issue:

Does a landowner who lawfully initiates the development of an underground water right and carries the same to completion with reasonable diligence acquire a water right with a priority date as of the beginning of his work, notwithstanding the fact that the lands involved were put into a declared artesian basin before work was completed and water put to beneficial use on the ground?

Mendenhall, 1961-NMSC-083, ¶ 1, 68 N.M. at 468, 362 P.2d at 999. The Court answered this question in the affirmative and allowed Mendenhall to relate back his water right's priority to the date when his predecessor's work began on the project, prior to the declaration of the basin, and to continue to develop his water right in accordance with the project as originally planned:

We are convinced that appellants having legally commenced drilling their well on or before May 31, 1949, and having proceeded diligently to develop the water and place it to beneficial use on the 248.49 acres in the crop year 1950, they thereby acquired a good and valid water right therefor with a priority date of May 31, 1949, as found by the Special Master, and that the intervening order

extending the Roswell Artesian Basin on February 6, 1950, in no way affected the legality or validity of the appropriation.

Id. 1961-NMSC-083, ¶ 29, 68 N.M. at 475, 362 P.2d at 1004.

Subsequent cases applying *Mendenhall* made clear that actual beneficial use is an essential element of any claim seeking to relate back with respect to development of a water right initiated prior to the State Engineer's declaration of an underground water basin. In *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, 95 N.M. 560, 624 P.2d 502, the New Mexico Supreme Court stated the test most clearly and directly:

We think that the proper test was set out in *Mendenhall*. It requires the developer to: (1) legally commence drilling their well prior to declaration of the basin; (2) proceed diligently to develop the water pursuant to a plan; and (3) *apply the water to beneficial use*.

1981-NMSC-017, ¶13, 95 N.M. at 563, 624 P.2d at 505 (emphasis added). More recently, this Court, in a dispute in the Jemez River adjudication much like the instant one, “identifie[d] four elements of a *Mendenhall* claim: (1) pre-basin initiation of groundwater rights; (2) due diligence; (3) completion of the appropriation; and (4) the *application of those rights to actual beneficial use within a reasonable time*.” *United States v. Abousleman*, No. 83-1041 JC, 1999 WL 35809618, at *3 (D.N.M., May 4, 1999) (Mem. Op. and Order) (emphasis added). “The notion that a pre-basin right must be put to beneficial use within a reasonable time is consistent with *Mendenhall* and its progeny.” *Id.* at 4 (citing New Mexico cases).

Here, the United States and the State have strived—based on Meech's and C&E Concrete's own pumping records for Wells 8B-1-W10 and 8B-1-W11—to quantify the water rights associated with each well based on the amount of water actually put to beneficial use. In doing so, Plaintiffs have construed Meech's water rights in the context of both the New Mexico

constitutional requirement of beneficial use and *Mendenhall*'s relation-back principle. Indeed, the quantification of the water right for Well 8B-1-W10, drilled in 1988 prior to the Gallup Underground Water Basin's declaration in 1994, *see* Undisputed Fact 4, *supra*, at 4, is based on historic pumping data for 2006, some eighteen years after Meech drilled the well. And the assigned priority date—October 31, 1988—relates back to the drilling date.

The same is true for Well 8B-1-W11, though the period of well development and relation back is even more pronounced. Meech drilled Well 8B-1-W11 in 1990, again before the State Engineer declared the Gallup Underground Water Basin. *Id.* Based on the undisputed evidence that Meech and C&E Concrete have continued to develop the well to the present, *see* Undisputed Fact 11, *supra*, at 5, the United States and the State quantified the well's water right based on 2019 pumping data. And although that beneficial use occurred almost thirty years after the well was drilled, the assigned priority date—October 31, 1990—relates back to the drilling date.

In sum, Meech's claims that "[b]eneficial use will continue to expand as the open pit [at the Tinaja Quarry] is enlarged and more and more water for dust abatement at the limestone mine is needed," Joint Status Report (Doc. 3453) at 7, are simply not relevant to the quantification of the water right for Wells 8B-1-W10 and 8B-1-W11.⁴ The United States and the State determined the water rights based on undisputed evidence of historic beneficial use and, in doing so, have accounted for all relevant legal precedent, including the *Mendenhall* doctrine.

⁴ A correlative principle to the constitutional requirement of beneficial use is that "mere intention," no matter how well-planned, "does not ... establish historic [water] use." *A & R Productions*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0014, Doc. 3049, at 8 (D.N.M. May 27, 2015) (Proposed Findings and Recommended Disposition). *See id.* at 10-11 ("Mere assumption is insufficient to establish a water right." (citing *State v. Aamodt*, No. Civ. 66-6639 MV/WPL, Subfile PM-67833, Doc. 8119, at 6 (D.N.M. Feb. 24, 2014))); and at 11 ("a substantial increase in a water right cannot be justified by mere speculation").

POINT 3: EVAPORATIVE LOSS IS NOT A BENEFICIAL USE AND MEECH IS NOT ENTITLED TO A WATER RIGHT FOR THE STOCKPONDS THAT QUANTIFIES EVAPORATIVE LOSSES

Meech contends that she is entitled to a water right for the three ponds that accounts for evaporative losses:

Defendant does not dispute the amount of water listed in the “Stipulations” section above as the amount impounded by the ponds on Defendant’s property for livestock and industrial purposes. However, the impounded amount does not account for evaporative losses from the ponds, which is also a beneficial use of water and for which Defendant is entitled recognition as a valid part of her water rights.

Joint Status Report (Doc. 3453) at 7. This position contravenes the constitutional beneficial-use requirement. New Mexico law is clear on this point and can be concisely summarized. As mentioned above, “Beneficial use shall be the basis, the measure and the limit of the right to the use of water.” N.M. Const. Art. XVI, § 3. “Beneficial use” means the “direct use or storage and use of water by man for a beneficial purpose.” N.M. Admin. Code 19.26.2.7(D). The use must not only be for a beneficial purpose, but also “reasonable in relation” to that purpose. *McLean*, 1957-NMSC-012, ¶ 22, 62 N.M. at 271, 308 P.2d at 987. Thus, excessive diversion of water cannot be regarded as a diversion to beneficial use, but as waste. *Id.* 1957-NMSC-012, ¶ 20, 62 N.M. at 270, 308 P.2d at 987.

The New Mexico courts have strengthened the policy against waste by establishing a requirement of maximum utilization. In *Kaiser Steel Corp. v. W.S. Ranch Co.*, the New Mexico Supreme Court declared:

Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.

1970-NMSC-043, ¶ 15, 81 N.M. 414, 417, 467 P.2d 986, 989. To determine whether an application of water to a beneficial purpose is a reasonable, beneficial use, or whether it is waste, courts will consider the circumstances of the use in light of the principle of maximum utilization. *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133-34 (10th Cir. 1981). For example, courts may find waste where the circumstances indicate “extravagant application for the purpose appropriated or ... misapplication which can be avoided by the exercise of a reasonable degree of care to prevent loss, or loss of a volume which is greatly disproportionate to that actually consumed.” *McLean*, 1957-NMSC-012, ¶ 21, 62 N.M. at 271, 308 P.2d at 987.

The New Mexico Supreme Court has found the continuous and uncontrolled flow from an artesian well for the potential irrigation of grass and stock watering to be waste, and thus not a beneficial use entitled to recognition under the law. *Id.*, 1957-NMSC-012, ¶ 24, 62 N.M. at 271, 308 P.2d at 987. Similarly, the Tenth Circuit, applying New Mexico law, has determined that storage of water in a reservoir leading to “the 93% loss of the water stored” to evaporation was “too wasteful and speculative to constitute a beneficial use under the state law.” *Jicarilla Apache*, 657 F.2d at 1135-36 (footnote omitted).

The burden, of course, is on Meech to “justify a water right above that which was offered by the Plaintiffs.” *A & R Productions*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0098, Doc. 3223, at 4 (D.N.M. Mar. 7, 2016) (Proposed Findings and Recommended Disposition). To meet that burden here, Meech must prove that the evaporative loss of water is necessary for the “maximum utilization” of the two stock ponds—Ponds 8B-1-SP34 and 8B-1-SP66—and the third pond—8B-1-SP69B—utilized in the production of sand and gravel at the Tinaja Quarry. As explained below, Meech’s burden is consistent with the methodology the United States has

employed throughout the adjudication.

During the Hydrographic Survey, the United States, its experts, and representatives of the State met with water users to obtain users' identification of the water features appurtenant to their lands and to allow users to demonstrate the basis of their claimed water use. Ex. 1 at 10, ¶ 23. If at all possible, Plaintiffs developed consent orders based upon specific evidence of actual historic beneficial use demonstrated by the water users. *Id.* See also discussion, *supra*, at 2, § I (describing the process as it was employed in this subfile proceeding). When—and this is the case here with respect to the three ponds—a water user failed to demonstrate actual historic use, the United States' experts applied the broad assumptions described in the Hydrographic Survey Report to develop default water rights. Ex. 1 at 10, ¶ 23.

The Hydrographic Survey Report for Sub-Areas 4 and 8 describes the assumptions and methodology employed to develop default water rights for ponds. First, the United States' experts assumed the duty of water assigned to a pond is based upon its capacity and the number of times a pond fills during a year is not estimated. *Id.* at 11, ¶ 25. Next, the experts employed the following methodology to determine pond capacity.

Pond depths were estimated based on the high-water mark observed in the field. Pond boundaries were delineated in the office prior to the field visit. Using GPS units, the boundaries were verified/modified in the field and then they were brought into GIS for area calculations. The capacity of the pond was calculated by multiplying the depth times the area times a factor of 0.6 that accounts for the irregularity of the pond's geometry.

Id. Finally, it is important to note that, throughout the Hydrographic Survey and adjudication process and in the absence of information from a water user to the contrary, the experts considered evaporation losses from ponds filled from surface runoff, wells, or springs an

incidental use of water “too wasteful and speculative to constitute a beneficial use under” New Mexico law. *Jicarilla Apache*, 657 F.2d at 1135-36 (footnote omitted); Ex. 1 at 11, ¶ 25.

To date, Meech has made no effort to satisfy her burden to substantiate evaporative losses as a historic beneficial use of Ponds 8B-1-SP34, 8B-1-SP66, and 8B-1-SP69B. In the absence of evidence sufficient to carry that burden, Plaintiffs calculated the water right for each of the ponds as they have for all similar water features throughout the Hydrographic Survey and adjudication.

V. CONCLUSION

WHEREFORE, based upon the foregoing undisputed material facts, argument, and authority, Plaintiffs United States of America and State of New Mexico respectfully request that the Court enter an order (i) granting summary judgment in their favor and against Subfile Defendant Norma M. Meech and (ii) declaring the water rights associated with the subject property, in the following form:

WELL

Map Label: 8B-1-W10

OSE File No: G00336

Priority Date: 10/31/1988

Purpose of Use: INDUSTRIAL

Well Location: As shown on Hydrographic Survey Map 8B-1

S. 4 T. 09N R. 13W 1/4, 1/16, 1/64 NW NW SE

X (ft): 2,607,519 Y (ft): 1,471,622

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

Amount of Water: 2.04 ac-ft per annum

WELL

Map Label: 8B-1-W11

OSE File No: G 00337

Priority Date: 10/31/1990

Purpose of Use: INDUSTRIAL

Well Location: As shown on Hydrographic Survey Map 8B-1

S. 4 T. 09N R. 13W 1/4, 1/16, 1/64 NW NW SE

X (ft): 2,607,491 Y (ft): 1,471,524

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

Amount of Water: 67.93 ac-ft per annum

POND

Map Label: 8B-1-SP34

Purpose of Use: LIVESTOCK

Priority Date: 12/31/1952

Source of Water: Surface Runoff

Point of Diversion: Not Applicable

Amount of Water:

Depth (ft): 3.0

Surface Area (sq.ft): 4,034

Storage Impoundment Volume (ac-ft): 0.167

Pond Location: As shown on Hydrographic Survey Map 8B-1

S. 4 T. 09N R. 13W 1/4, 1/16, 1/64 NW SE NE

X (ft): 2,608,845 Y (ft): 1,470,572

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

POND

Map Label: 8B-1-SP66

Purpose of Use: LIVESTOCK

Priority Date: 12/31/1985

Source of Water: Surface Runoff

Point of Diversion: Not Applicable

Amount of Water:

Depth (ft): 10.0

Surface Area (sq.ft): 14,033

Storage Impoundment Volume (ac-ft): 1.933

Pond Location: As shown on Hydrographic Survey Map 8B-1

S. 4 T. 09N R. 13W 1/4, 1/16, 1/64 NW NW SW

X (ft): 2,606,739 Y (ft): 1,471,479

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

POND

Map Label: 8B-1-SP69B

Purpose of Use: INDUSTRIAL

Priority Date: 7/7/2005

Source of Water: Wells

Point of Diversion: Fills from wells:
8B-1-W10 (Location X(ft): 2,607,519; Y(ft): 1,471,622)
8B-1-W11 (Location X(ft): 2,607,491; Y(ft): 1,471,524)

Amount of Water:

Depth (ft): 6.0

Surface Area (sq.ft): 6,539

Storage Impoundment Volume (ac-ft): 0.540

Pond Location: As shown on Hydrographic Survey Map 8B-1

S. 4 T. 09N R. 13W 1/4, 1/16, 1/64 NW NE NE

X (ft): 2,608,788 Y (ft): 1,472,432

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

DATED: March 15, 2021

Respectfully submitted,

JEAN E. WILLIAMS
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 15, 2021, I filed the foregoing *Plaintiffs United States of America's and State of New Mexico's Motion for Summary Judgment and Memorandum of Law in Support Thereof* 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.



Samuel D. Gollis