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, and ZUNI INDIAN TRIBE, NAVAJO NATION, Plaintiffs in Intervention, v. A & R PRODUCTIONS, et al., Defendants.	No. CV 01-00072 MV/JHR ZUNI RIVER BASIN ADJUDICATION **Subfile No. ZRB-1-0148**

PLAINTIFFS UNITED STATES OF AMERICA'S AND STATE OF NEW MEXICO'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT (DOC. 3491)

INTRODUCTION

Plaintiffs United States of America ("United States") and the State of New Mexico ex rel. State Engineer ("State") (together, "Plaintiffs") hereby submit their Reply supporting their Motion for Summary Judgment (Doc. 3491) ("Reply Brief"). In this Reply Brief, the United States and the State address the three key arguments raised in Norma M. Meech's Response to Plaintiffs' Motion for Summary Judgment (Doc. 3496) ("Meech Response").[1]

[1] The United States and the State of New Mexico brought this action seeking a general stream adjudication pursuant to federal and New Mexico law. *See* Am. Compl. (Doc. 222, Aug. 4, 2003), at 12, ¶ 1. In her Response, Meech questions the United States' standing to challenge her water rights. Meech Resp. at 1-2, n.1. While Meech appears to concede that the United States possesses rights to water senior to her own, it is important to remember that none of the United States' water rights—whether in its capacity as trustee or for itself—have yet to be adjudicated. Meech's assertion that "the

REPLY TO RESPONSE TO STATEMENT OF MATERIAL FACTS

Pursuant to D.N.M.LR-Civ. 56.1(b), the United States and the State reply as follows to those facts asserted at pages 3-5 in the Meech Response that Plaintiffs dispute:

A. In response to Plaintiffs' Statement of Material Fact ("SOF") No. 5, Meech contends Well 8B-1-W10 produced in 2002 a quantity of water far in excess of the well's production capacity. Meech Resp. at 3, ¶ 5. As explained, *infra*, at 11-15 (Point II), Meech's unsubstantiated claim is implausible based both on the well's documented production capacity and the meter readings from the well submitted to the New Mexico Office of the State Engineer ("OSE") and is insufficient to show the existence of a genuine issue of material fact.

B. Meech's disagreement with SOF No. 8 suffers from the same infirmity as her contention regarding SOF No. 5 and should be disregarded for the same reasons.

ARGUMENT

POINT 1: PLAINTIFFS ARE ENTITLED TO JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF *MENDENHALL*'S APPLICATION TO WELLS 8B-1-W10 AND 8B-1-W11

Meech fails to address the *Mendenhall* doctrine correctly, and has written the reasonable time requirement out of the law. She admits *Mendenhall* does not provide for a never-ending water right, yet claims the right to expand for more than 130 years when New Mexico law provides that a reasonable time is less than 20. Her citation to the alien law of other states is unavailing and not analogous, while the New Mexico cases she relies upon deal with municipalities' water rights, which the State legislature has given unique status, and which State Engineer permits have given a fully legal (and very finite) right to expand.

United States cannot be harmed by any water right recognized by this Court for Meech," *id.*, is therefore speculative and without basis.

Meech's arguments are without merit. No fact question regarding *Mendenhall*'s application remains, and Plaintiffs are entitled to judgment as a matter of law on the issue of its application.

A. Meech Admits *Mendenhall* Does Not Provide For A Never-Ending Water Right, Yet Claims The Right To Expand Her Right For More Than 130 Years

Meech admits "[t]he relation-back doctrine [under *Mendenhall*] certainly does not provide for a never-ending water right," saying that statement "bears no resemblance to Meech's assertions in this litigation." Meech Resp. at 8. But despite insisting she "is not requesting an ever expanding right," Meech plainly is seeking one that would continue to expand for at least the next century. *Id.* at 12 ("C&E Concrete, the family business, owns a very valuable limestone quarry that contains a mineral deposit that will be mined over the next hundred years."). And lest there be any confusion about that time frame, Meech repeats later in her brief that "[t]he expected time frame for full development of the mine is over the next one hundred years." *Id.* at 13. Given that, to date, the two wells that were drilled on the property in 1988 and 1990 have already been in use for more than 30 years, the total period for which Meech claims a right to expand her water use under *Mendenhall* is more than 130 years.

But as is unavoidably clear in New Mexico law, under *Mendenhall* "water users have *a reasonable time* after an initial appropriation to put water to beneficial use." *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 35, 135 N.M. 375, 387, 89 P.3d 47, 59 (emphasis added). *See also State ex rel. State Engineer v. Crider*, 1967-NMSC-133, ¶ 26, 78 N.M. 312, 316, 431 P.2d 45, 49 (extending doctrine of relation back to municipalities whose populations and water needs may increase "within a reasonable period of time"); *Rio Puerco Irr. Co. v. Jastro*, 1914-NMSC-041, ¶ 6, 19 N.M. 149, 153, 141 P. 874, 876 (actual appropriation within a reasonable time

necessary to application of doctrine of relation back); *Keeny v. Carillo*, 1883-NMSC-005, 2 N.M. 480, 493 (holding that due diligence and completion of work within reasonable time are necessary for relation back). Despite more than a century of law on the topic, Meech fails to discuss exactly what constitutes "a reasonable time" under the *Mendenhall* doctrine.

B. A Reasonable Time Under *Mendenhall* Is Less Than 20 Years

A survey of New Mexico legal authority tells us that a reasonable time under *Mendenhall* is more than 4 years but less than 20. *See*, *e.g.*, *State ex rel. Reynolds v. Rio Rancho Estates*, 1981-NMSC-017, ¶ 12, 95. N.M. 560, 563, 624 P.2d 502, 505 (4 years not too long when steps taken to complete the well); *State ex rel. Martinez v. McDermett*, 1995-NMCA-060, ¶¶ 14-15, 120 N.M. 327, 331-32, 901 P.2d 745, 749-50 (40 years of non-use unreasonable); *Hagerman Irr. Co. v. McMurry*, 1911-NMSC-021, ¶ 4, 16 N.M. 172, 179-180, 113 P. 823, 824 (refusing to apply relation-back doctrine where appropriation not completed for 20 years).

In 1999, in the Jemez River water rights adjudication, this Court held that "[t]he notion that a pre-basin right must be put to beneficial use within a reasonable time is consistent with *Mendenhall* and its progeny", and that "a reasonable time element under *Mendenhall* separate from the diligence element is entirely consistent with the New Mexico Constitution, statutes, and case law." *United States v. Abousleman*, No. 83-1041 JC, 1999 WL 35809618, at *4 (D.N.M., May 4, 1999) (Mem. Op. and Order). "New Mexico water laws," the Court said, "are designed to encourage use and to discourage waste and non-use." *Id.* In surveying New Mexico law on the subject of the reasonable-time requirement, the *Abousleman* Court found that a "reasonable time" under *Mendenhall* must necessarily be a shorter period of time than that necessary to lose a water right to non-use under the doctrines of forfeiture or abandonment: "In other words, it is entirely

rational to more easily lose a right that has never become vested than to have one taken away that was once owned." *Id.* at *7. Ultimately, the *Abouselman* Court held that 17 years was not a reasonable time, and ruled against the claimant on its *Mendenhall*-based claim. *Id.* at *9.[2]

Despite plentiful New Mexico legal authority, Meech's Response is silent on *Mendenhall*'s reasonable-time requirement. Meech relies instead on law alien to New Mexico's legal scheme, specifically cases from Colorado and Wyoming.

C. Wyoming And Colorado Law Find A Reasonable Time To Be 10 To 20 Years

Meech cites *In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 2002 WY 89, 48 P.3d 1040, for the proposition that a reasonable time under Wyoming's relation-back doctrine "depends upon the circumstances." Meech Resp. at 10. She characterizes Wyoming relation-back law as an "equitable and flexible doctrine to allow enterprises that require substantial initial investment, such as a limestone mining operation, the time necessary to develop water rights without losing their capital investment." *Id.* at 9. *Big Horn*, however, does not deal with "a limestone mining operation." 2002 WY 89, ¶¶ 1-2, 48 P.3d at 1042-43.

Indeed, the defendants in *Big Horn* could not be more different than Meech. Those defendants claimed federal reserved rights, which by their nature contemplate future uses, not state-based rights, which expressly do not. *See*, *e.g.*, *City of Las Vegas*, 2004-NMSC-009, ¶ 33, 135 N.M. at 386, 89 P.3d at 58 (An expanding right "conflicts with the fundamental principle of beneficial use that lies at the heart of New Mexico water law."). The *Big Horn* defendants based

[2] The Special Master in *Abousleman* previously had also ruled that 26 and 19 years of non-use, each period contemplated under different scenarios presented by the claimant, were, as a matter of New Mexico law, also unreasonable spans of time. *Id.* at *3.

their claim of diligence on the development of a federal irrigation project—an irrigation project that was founded on Wyoming State permits which had been issued by the Wyoming State Engineer, and then granted numerous lawful extensions of time pursuant to State law for "good cause shown". In the instant case, Meech has no permit and has received no extensions of time.

But assuming *arguendo* that the claims at issue in *Big Horn* were analogous to the Meech claims (which they were not), the Wyoming Supreme Court nonetheless found that the "reasonable time" for the "relation back doctrine" to apply in that State was still only 10 to 20 years:

> Because of the early transfer from allotment status, the period between the transfer and actual use of the project waters by the unsuccessful claimants was *ten to twenty years* as compared to a shorter period for the successful claimants who obtained title to the Indian lands much closer in time to the federal projects completion.

Id., 2002 WY 89, ¶7, 48 P.3d at 1044 (emphasis added).[3]

Meech cites another Wyoming case, *Campbell v. Wyoming Dev. Co.*, 100 P.2d 124 (Wyo. 1940) for the proposition that the right of gradual development cannot be taken away because development was slow. Meech Resp. at 10 (citing *Campbell*, 100 P.2d at 142). The United States and the State do not assert that Meech was not diligent in developing her water rights in Wells 8B-1-W10 and 8B-1-W11, nor do they argue that Meech's well development was too slow. Plaintiffs simply argue that, as a matter of New Mexico law, a reasonable time under *Mendenhall* has long passed.

[3] In the Colorado case Meech cites, reasonable time is similarly fractional in comparison to the time frame Meech seeks: "In 1982, the Cities filed an application for a quadrennial finding of reasonable diligence in the development of their Homestake Project conditional rights *for the period beginning June 1, 1978, and ending May 31, 1982*." *Application for Water Rights of City of Aurora*, 731 P.2d 665, 667-68 (1987) (emphasis added). Plaintiffs do not challenge Meech's diligence in developing her water rights in their Motion for Summary Judgment, but, diligence aside, 4 years—1978 to 1982—is the time frame discussed in *City of Aurora*.

In sum, the Wyoming relation-back period of up to 20 years is not much different from the less than 17 years this Court found in *Abouselman*, or the less than 20 years found in the other New Mexico cases cited above. Indeed, both *Big Horn* and *City of Aurora* actually support the proposition that Meech's claims are already objectively far beyond any reasonable time frame under the *Mendenhall* doctrine.

D. It Is For The State Legislature, Not This Court, To Add A Mining Exception To *Mendenhall*'s Application

Mining is not new to New Mexico. The industry has existed throughout the history of this State, and the pit mining practiced by Meech has existed since well before the groundwater code was adopted in 1936. There is nothing new about mining, and the New Mexico State Legislature has had ample time to carve out exceptions to accommodate the industry's needs with regard to water use. The Legislature has chosen not to do so. Nonetheless, Meech impliedly argues that mining should be allowed a reasonable time period under *Mendenhall* orders of magnitude greater than any other industry, stating that "[m]ining limestone is not like digging irrigation ditches and establishing crop furrows." Meech Resp. at 13. Mining should be treated differently, Meech argues, because "[i]t takes years to accomplish and cannot simply happen on a whim." *Id.*

The New Mexico Supreme Court has ruled that it is not the role of the courts to carve out exceptions to New Mexico's statutory water law scheme for particular industries. *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749. In *Hydro Resources*, where the claimant also was a mining operation, the issue was the severability of a water right. There, the Supreme Court observed that "[t]he legislature has decreed, as an exception to the general rule, that water rights are appurtenant to irrigated land, and follow a conveyance of that land unless specified differently." 2007-NMSC-061, ¶ 18, 143 N.M at 148 173 P.3d at 755. "Obviously," the

Court in *Hydro Resources* held, "mining is not irrigation." *Id.* The Court then concluded that "[i]t would be for the legislature, not this Court, to add mining as an additional exception to this rule." *Id.* (Citation omitted).

Meech observes that, in 1967, the New Mexico Supreme Court allowed the adjudication of a future use right exception for municipalities. Meech Resp. at 10. And indeed, in *Crider*, the court—just a few years after the 1961 decision in *Mendenhall*—determined that it would allow two municipalities' claims to future uses "to meet requirements resulting from the increase in population." *Id.*, 1967-NMSC-133, ¶ 25, 78 N.M. at 315, 431 P.2d at 48. However, the *Crider* Court expressly noted that such an exception was not indicated for the mining industry.[4] *Id.* The Court also recognized that even for municipalities, development must be limited to a reasonable time:

> We add, however, that the cities' rights to the appropriation of water for future use is subject to the condition that the needed water be applied to beneficial use *within a reasonable time*. If not so applied such right may be lost.

Id., 1967-NMSC-133, ¶ 30, 78 N.M. at 316, 431 P.2d at 49 (emphasis added).

The Legislature saw wisdom in the Court's decision in *Crider*, and subsequently amended the State statutory scheme to allow municipalities and certain other similar entities "a water use planning period not to exceed forty years." NMSA 1978, § 72-1-9(B). But 60 years have passed since *Mendenhall* was decided, and a half-century since *Crider*, and the Legislature has not made an exception for the mining industry. That Meech applies water to beneficial use for a mining

[4] "But while in mining a fixed amount may usually be sufficient from the start for all purposes, in irrigation of newly settled lands it will not." *Id.*

operation neither changes the analysis under *Mendenhall*, nor compels application of a different analysis.

E. Meech Has No Permit Entitling Her To An Expanding Water Right

Meech persists in arguing that "an adjudication court is well within established authority to recognize the continuing development of a water right." Meech Resp. at 11. However, as the NMSU Subfile Order relied upon by Meech in support of that proposition makes clear, the State district court was adjudicating water rights to NMSU under a permit—State Engineer Permit No. LRG-00035. *See* Meech Resp., Ex. C (Doc. 3496-3), at 1-3. The Subfile Order entered by the court simply adopted the "existing conditions set forth in State Engineer Permit No. LRG-00035" and further reiterated the Permit's requirement that "Proof of beneficial use must be submitted to the State Engineer no later than September 11, 2020". *Id.* at 2. In other words, it is the permit that allows both the future expansion and subsequent proof of beneficial use. The NMSU Subfile Order merely reflects what the New Mexico law had already allowed in the granting of NMSU's permit.

This is exactly the type of expanding right that the New Mexico Legislature provided for in NMSA 1978, § 72-1-9, the 40-year municipal planning statute. Indeed, the purpose of use identified in the relevant portion of the NMSU Subfile Order falls squarely within the provisions of § 72-1-9:

> Purpose of Use: University purposes and related, consistent with the teaching, research and public service mission and historic uses of NMSU, *including supply of the City of Las Cruces*.

Meech Resp., Ex. C (Doc. 3496-3), at 1 (emphasis added). The Legislature included state universities, like NMSU, and municipalities, like the City of Las Cruces, within the law's purview. *See id.,* § 72-1-9(A) ("It is recognized by the state that it promotes the public welfare and the

conservation of water within the state for municipalities, counties, school districts, state universities, member-owned community water systems, special water users' associations and public utilities supplying water to municipalities or counties to plan for the reasonable development and use of water resources."). The statutory exception thus permits state universities like NMSU to develop water rights into the future. The Subfile Order simply follows State water law, the 40-year planning statute, and the NMSU permit terms.[5] No statute or permit supports Meech's claim here.

F. No Fact Question Regarding *Mendenhall*'s Application Remains

Meech argues that "there are facts that will need [to be] determined by the Court regarding the water development plan and due diligence in executing that plan" and that "[b]ecause those facts must be determined, summary judgment is not appropriate." Meech Resp. at 14. Meech's reliance on the reasonable-diligence element of *Mendenhall* to create a disputed issue of material fact falls short of the mark. The United States and State do not argue that Meech has not been diligent over the last 30 years in developing Wells 8B-1-W10 and 8B-1-W11 and the Motion for Summary Judgment does not depend upon such an argument. At issue in Plaintiffs' Motion is *Mendenhall*'s reasonable-time element; Plaintiffs argue, based on *Mendenhall* and its progeny, that Meech's opportunity to continue to develop the wells and have her priority date relate back to the dates upon which the wells were drilled has, as a matter of law, long passed, and *Mendenhall* no longer applies.

[5] The Subfile Order provides further guidance on what constitutes a reasonable time. The Order was entered on November 9, 2007, and the deadline for NMSU to prove additional beneficial use was September 11, 2020—a 13-year period to expand the water right and apply the water to beneficial use.

POINT 2: MEECH'S CLAIM THAT WELL 8B-1-W10 PRODUCED 15.46 ACRE-FEET OF WATER IN 2002 IS IMPLAUSIBLE AND UNSUPPORTED BY THE UNDISPUTED MATERIAL FACTS IN THE RECORD

Meech relies on the Affidavit of Walter L. Meech (Doc. 3496-1) ("Meech Affidavit"), a photograph of the meter historically connected to Well 8B-1-W10 (*Id.*, Ex. 1), and meter readings for the well (*Id.*, Exs. 2 and 4) in her effort to rebut Plaintiffs' contention that the maximum annual pumping rate for Well 8B-1-W10 occurred in 2006 and amounted to 2.04 acre-feet. Mot. for Summ. J. at 4 (SOF No. 8), and 8-9. In a case like this one, where Meech bears the ultimate burden of proof, she must identify specific evidence in the record and articulate the precise manner in which that evidence supports her claim to rebut the summary judgment motion. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256–57 (1986). Unsubstantiated assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence and insufficient to meet this burden. *See*, *e.g.*, *Turner v. Baylor Richardson Med. Ctr.,* 476 F.3d 337, 343 (5th Cir. 2007). As explained below and in the *Second Declaration of Thomas W. Ley* ("Second Ley Decl.") (attached hereto as **Exhibit 1** and incorporated herein by reference), Meech has failed to satisfy her burden. First, Meech fails to provide plausible evidence to support her reading of the meter attached to Well 8B-1-W10. And second, she fails to provide any evidence that some other meter was attached to the well during the relevant time period.

A. Meech Offers No Plausible Alternative To Plaintiffs' Interpretation Of The Meter Readings For Well 8B-1-W10

To rebut Plaintiffs' position, Walter L. Meech avers that Well 8B-1-W10 produced 15.46 acre-feet of water in 2002. Meech Resp. at 6; Meech Aff. at 3, ¶ 14 and 4, ¶ 21. Mr. Meech's statement purports to be based upon the undisputed meter readings for the well submitted to the

OSE. Meech Aff., Ex. 2. According to Meech,

> the meter readings for Well 8B-1-W10 were erroneously recorded and reported to the State Engineer. Plaintiffs' assertion that past beneficial use of water from this well totals 2.04 acre-feet is based upon Plaintiffs' expert, Natural Resources Consulting Engineer, Inc.'s ("NRCE"), attempts to unravel the erroneous meter readings. His conclusion that a maximum of 2.04 acre-feet of water was ever produced from the well is his best guess based upon his assessment of how the mistakes were made. As the meter records disclose, the mistakes are in the placement of the decimal point for the record. The numbers are correct; only the order of magnitude is in error.

Meech Resp. at 6-7 (citations omitted). For a number of reasons, Meech's interpretation of the meter readings is insufficiently supported and implausible and thus fails to adequately rebut Plaintiffs' conclusion that Well 8B-1-W10's maximum annual output was 2.04 acre-feet.[6]

1. Mr. Meech and Dr. Kuhn applied multipliers to the meter readings despite the fact that the meter does not use a multiplier. Walter Meech baldly asserts that "[a] review of the meter readings discloses discrepancies in how the readings were recorded and how they were reported to the [OSE]. The discrepancies appear to be in the placement of the decimal point." Meech Aff. at 2, ¶ 10. Mr. Meech does not explain how the readings were incorrectly recorded and reported, stating only that the "numbers reported" to OSE from the meter readings for Well 8B-1-W10 "are correct," but that "[t]he decimal placement is not correct." *Id.* at 2, ¶ 11. Putting aside the internal illogic of that statement, the important point is that Mr. Meech does not explain in his Affidavit which misplaced decimal points were incorrect and how they were corrected, only—as an article of faith—that they were.

[6] Curiously, Meech does not mention that the conclusions Walter Meech reaches in his Affidavit appear to be based largely on the opinions of the Meech's expert, Alan Kuhn. *See* Suppl. Disclosures Pursuant to Fed. R. Civ. P. 26(a)(2)(B) and Ex. A thereto ("Kuhn Expert Report") (attached hereto as **Exhibit 2** and incorporated herein by reference).

What Mr. Meech omits is that Dr. Kuhn applied multipliers to try and "correct" the meter readings. Kuhn Expert Report at 3 and 5 (Table 1); Second Ley Decl. at 8, ¶ 15. For some of the monthly readings, Kuhn multiplied the reported values times 100 and for others he multiplied the values by 1000. *See* Alan Kuhn Dep. Excerpts (attached hereto as **Exhibit 3** and incorporated herein by reference), at 49:21-50:2. Notably, Dr. Kuhn acknowledged at his deposition that he applied the multipliers despite not knowing how the meter on Well 8B-1-W10 should have been read. *Id.*at 42:18-45:14. In short, the use of multipliers was arbitrary and incorrect because the meter does not have or use a multiplier and is not intended to be read as if it does. Second Ley Decl. at 5-6, ¶ 7.

2. The Model 55 Recordall meter is incapable of producing numbers on the order of magnitude Mr. Meech and Dr. Kuhn claim. As Dr. Ley explains, the meter reads the cumulative volume of Well 8B-1-W10's volume in gallons, and "[t]he ***maximum*** valid meter reading that can be observed on this meter is 9,999,999.9 gallons (after which the odometer on the meter rolls over to all zeros)." *Id.* at 4-5, ¶ 6 (emphasis in original). Yet, the "corrected" readings for the time period beginning January 1, 2001, and ending November 1, 2004, "ranged from 10,468,000 to 22,309,000 gallons." *Id.* at 7, ¶ 13. In other words, the meter was "not physically capable of containing the number of digits in the "corrected" readings" and thus could not have recorded an annual pumping volume of 15.46 acre-feet in 2002. *Id. See Scott v. Harris*, 550 U.S. 372, 380 (2007) ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.")

3. The majority of Mr. Meech's and Dr. Kuhn's "corrected" meter readings match

NRCE's analysis. For the twelve years—2001 to 2012—of meter readings at issue, Mr. Meech's "corrected" readings resulted in annual pumping volumes that match NRCE's analysis for 2006-2012. *See* Second Ley Decl. at 8, ¶ 17 and Attachment B at 4 (Table 1). In addition, Dr. Kuhn's readings resulted in annual pumping volumes that match NRCE's analysis for 2005-2012. *See id.* In attempting to create a factual dispute about the meter readings, Meech never mentions that the parties agree about the majority of them.

4. Well 8B-1-W10 would not have been capable of producing the quantity of water alleged by Mr. Meech and Meech's expert. The only documentary evidence of Well 8B-1-W10's pumping capacity is the amended well declaration Mr. Meech filed in 2003 with the OSE. *See* Doc. 3491-3; Meech Aff. at 2, ¶ 5. Under the conditions described in the declaration, the well was capable of producing 10.16 acre-feet annually. Second Ley Decl. at 8, ¶ 16. But Mr. Meech and Dr. Kuhn now estimate that the well produced "150% of the annual rate computed from the amended well declaration." *Id.* Absent evidence that the well could have produced significantly more water than the quantity to which Mr. Meech attested in the declaration, this claim is "implausible." *Id.*

B. Meech Offers No Evidence That Another Meter Was Attached To Well 8B-1-W10 During the Relevant Time Period

Finally, Meech has produced no evidence that a meter other than the Badger Meter Model 55 Recordall was used to measure Well 8B-1-W10's pumping output between 2001 and 2012. Indeed, he acknowledges the use of this meter, Meech Aff. at 2, ¶ 7, but leaves open the possibility that some other meter was in use on the well during the relevant time period. *Id.* However, Meech identifies no plausible alternative.

During discovery, in response to a request for specific information about "each and every

water meter used in the operation of Well 8B-1-W10 (NMOSE File No. G 00336) since the well's completion," Meech produced four photographs of well meters. *See* Meech Disc. Excerpts (attached hereto as **Exhibit 4** and incorporated herein by reference), at 2-3; Meech Initial Disclosure Excerpts (attached hereto as **Exhibit 5** and incorporated herein by reference), at 3 and Ex. O (Photos of Meters on Wells). Deposition testimony further established that only one of the four meters—the Badger Meter Model 55 Recordall shown in the first photograph of Exhibit O and Exhibit 1 of the Meech Affidavit—could have been used to measure Well 8B-1-W10's pumping output. *See* Second Walter Meech Dep. Excerpts (attached hereto as **Exhibit 6** and incorporated herein by reference), at 28:18-33:20; Second Edward Morlan Dep. Excerpts (attached hereto as **Exhibit 7** and incorporated herein by reference), at 17:2-21:25. Because Meech produced no evidence documenting the use of any other meter to measure the well's output, the meter readings submitted to the OSE for Well 8B-1-W10 could not have come from a meter other than the Model 55 Recordall.

POINT 3.A: MEECH HAS PRODUCED NO EVIDENCE TO SUPPORT THE INCLUSION OF AN EVAPORATION-LOSS COMPONENT IN THE CALCULATION OF THE WATER RIGHT FOR PONDS 8B-1-SP34, 8B-1-SP66, AND 8B-1-SP69B

Meech complains that United States and the State are "legally incorrect" not to include an evaporative-loss component in the quantification for 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. Meech Resp. at 15. But, as we explained in the Motion for Summary Judgment, whether a water right is entitled to an evaporative-loss component under New Mexico law is not determined in a vacuum. Rather, the answer to that question is manifestly dependent upon the factual circumstances of the water use in light of the principle of maximum utilization.

Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1133-34 (10th Cir. 1981); *Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, ¶ 15, 81 N.M. 414, 417, 467 P.2d 986, 989. And it is Meech's burden in this proceeding to establish an entitlement for evaporative loss.

Meech has made no effort—neither in consultations with the Plaintiffs between 2006 and 2019, nor before this Court—to meet her burden. Indeed, in response to the Motion for Summary Judgment, Meech offers no factual support for her claim. Instead, she simply asserts that other New Mexico courts have included an evaporative-loss component as part of water rights. Meech Resp. at 16. The point here is not whether New Mexico law recognizes that a water right may contain an evaporative-loss component, but whether Meech has satisfied her burden in this proceeding to prove entitlement to such a beneficial use. And on the unambiguous record before the Court, it is clear that Meech has not.

POINT 3.B: PLAINTIFFS' QUANTIFICATION FOR WELLS 8B-1-W10 AND 8B-1-W11 ACCOUNTS FOR EVAPORATION LOSSES FROM POND 8B-1-SP69B

Meech is not entitled to an evaporative-loss component for Pond 8B-1-SP69B for an additional reason—because the United States and the State took evaporative losses related to the pond into account in quantifying the water rights for Wells 8B-1-W10 and 8B-1-W11.

The parties agree that Pond 8B-1-SP69B historically has been filled by water pumped directly and continuously from Wells 8B-1-W10 and 8B-1-W11. Mot. for Summ. J. at 6 (SOF No. 18); Meech Resp. at 5, ¶ 18; Edward Morlan Dep. Excerpts (Doc. 3491-5), at 25:25-26:14. The parties further agree that, 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. Mot. for Summ. J. at 5 (SOF No. 14); Meech Resp. at 4, ¶ 14. Plaintiffs' quantification of historic beneficial use from the two

wells thus includes the water used to keep the pond filled to its storage impoundment capacity despite any water losses attributable to the production of sand and gravel, evaporation, and seepage.

CONCLUSION

For all of the reasons stated above, as well as those stated in the Motion for Summary Judgment, the Court should grant the United States' and the State's Motion for Summary Judgment.

DATED: May 10, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 10, 2021, I filed the foregoing *Plaintiffs United States of America's and State of New Mexico's Reply in Support of Motion for Summary Judgment (Doc. 3491)* 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.

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