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' RESPONSE IN OPPOSITION TO OBJECTIONS TO INCLUSION OF NEW MATERIAL IN REPLY BRIEF, OR, IN THE ALTERNATIVE, MOTION TO FILE SURREPLY (DOC. 3507)

INTRODUCTION

Having failed adequately to rebut Plaintiffs United States of America's ("United States") and the State of New Mexico ex rel. State Engineer's ("State") (together, "Plaintiffs") summary judgment case in her Response to Plaintiffs' Motion for Summary Judgment (Doc. 3496) ("Resp. Br."), Subfile Defendant Norma M. Meech ("Meech") now seeks to attack the substance of Plaintiffs United States of America's and State of New Mexico's Reply in Support of Motion for Summary Judgment (May 10, 2021) (Doc. 3504) ("Reply Brief") in two ways. First, Meech objects to what she characterizes as "the inclusion of new material" in the Reply Brief—specifically, "expert material from [the United States'] expert witness." Objections to Inclusion

of New Material in Reply Brief, Or, In the Alternative, Motion to File Surreply (Doc. 3507)[1] ("Surreply Mot."), at 1. Second, Meech contends that Plaintiffs "raise a new argument" regarding application of the *Mendenhall* doctrine's reasonable-time element.[2] *Id.* As explained below, to the extent the Plaintiffs submitted new material specifically to rebut Meech's opposition to the summary judgment motion, Meech should be given a limited opportunity to respond to that material. But because the United States and the State did not raise a new legal argument regarding the *Mendenhall* doctrine's application to this case, Meech should not be permitted an additional opportunity to brief that issue.

APPLICABLE LEGAL STANDARD

In this judicial district, the party moving for summary judgment is generally given the final word in seeking to establish entitlement to judgment as a matter of law. D.N.M.LR-Civ. 56.1(b) ("The moving party may file a written reply with authorities."). Most federal district courts construe this right of reply to permit not only legal argument, but the presentation of additional facts, so long as those facts challenge matters raised by the nonmoving party in its opposition papers. *See*, *e.g.*, *Torre v. Federated Mut. Ins. Co.*, 854 F. Supp. 790, 833 (D. Kan. 1994) ("a movant is justified in presenting additional facts challenging those presented by the nonmovant"), *abrogated on other grounds by*, *Chambers v. Fam. Health Plan Corp.*, 100 F.3d 818 (10th Cir. 1996); *Baugh v. City of Milwaukee*, 823 F. Supp. 1452, 1456 and n.4 (E.D. Wis.

[1] Although she does not invoke the operative rule, D.N.M.LR-Civ. 7.4(b) governs Meech's request.

[2] *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998, is the source of New Mexico water law's relation-back doctrine. *See* State of New Mexico's Resp. in Opp'n to Norma M. Meech's Corrected Mot. to Certify (Doc. 3489), at 4-11, for a discussion of the doctrine's development.

1993) ("It seems absurd to say that reply briefs are allowed but that a party is proscribed from backing up its argument in reply with the necessary evidentiary material."). Given the moving party's burden at this stage of the proceedings, this procedural regime makes perfect sense. Unless a moving party in this district "specifically controvert[s]" the "material facts set forth in the response," those facts "will be deemed undisputed." D.N.M.LR-Civ. 56.1(b). The Ninth Circuit has described the process this way:

> The gist of a summary judgment motion is to require the adverse party to show that it has a claim or defense, and has evidence sufficient to allow a jury to find in its favor on that claim or defense. The opposition sets it out, *and then the movant has a fair chance in its reply papers to show why the respondent's evidence fails to establish a genuine issue of material fact*.

Carmen v. San Francisco Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001) (emphasis added).

When a moving party submits new materials in reply to contravene the nonmoving party's argument and evidence in opposition, the law in this circuit directs that "the nonmoving party should be given an opportunity to respond to new material raised for the first time in the movant's reply." *Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005) (citing *Beaird v. Seagate Tech. Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998)). But "[i]f the district court does not rely on the new material in reaching its decision, … it does not abuse its discretion by precluding a surreply." *Id.* (quoting *Beaird*, 145 F.3d at 1164-65) (internal quotations omitted).[3] Finally, "[m]aterial, for purposes of this framework, includes both new evidence and new legal

[3] District courts in this circuit have broad discretion to determine the propriety of permitting a nonmoving party "an opportunity to respond to a moving party's reply brief at the summary judgment stage." *Pippin v. Burlington Res. Oil and Gas Co.*, 440 F.3d 1186, 1191-92 (10th Cir. 2006) (determination is a "supervision of litigation" question reviewed for abuse of discretion).

arguments." *Green*, 420 F.3d at 1196 (citing *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d. 1117, 1139 n.13 (10th Cir. 2003)).

ARGUMENT

POINT 1: TO THE EXTENT PLAINTIFFS SUBMITTED NEW MATERIAL IN REPLY, THE COURT SHOULD GIVE MEECH A LIMITED OPPORTUNITY TO REPLY SPECIFICALLY TO THE NEW MATERIAL

To support their argument in reply and specifically challenge Meech's claims in response, the United States and the State submitted new materials as part of their reply. These materials included an affidavit from Thomas W. Ley, the United States' expert witness, various written discovery and disclosure materials, and additional portions of deposition testimony.[4] Under the law of this circuit, Meech should be given a limited opportunity to file a written surreply to address these new materials. But the Court should circumscribe this opportunity as follows.

First, the Court should only grant Meech leave to file a surreply if the Court will rely on Plaintiffs' new material in reaching its summary judgment decision. *See Beaird*, 145 F.3d at 1164 ("Having accepted the reply brief, the district court in fact had two permissible courses of action. It could either have permitted a surreply or, in granting summary judgment for the movant, it could have refrained from relying on any new material contained in the reply brief."). Second, because discovery in this case has long been completed, Meech should not be permitted to introduce as part of any surreply materials that she previously has not disclosed or provided in

[4] *See* Docs. 3504-1 (Second Decl. of Thomas W. Ley), 3504-2 (Alan Kuhn Expert Report), 3504-3 (Alan Kuhn Dep. Excerpts), 3504-4 (Meech Disc. Excerpts), 3504-5 (Meech Initial Disclosure Excerpts), 3504-6 (Second Walter Meech Dep. Excerpts), and 3504-7 (Second Edward Morlan Dep. Excerpts).

response to Plaintiffs' discovery requests. *See* Fed. R. Civ. P. 56(c)(1)(A). And third, as explained below, Meech's surreply should be limited to the new material; Meech should not be entitled to reargue the *Mendenhall* doctrine's application to this case.[5]

POINT 2: PLAINTIFFS' REPLY BRIEF RAISES NO NEW ARGUMENTS ABOUT *MENDENHALL* AND MEECH IS NOT ENTITLED TO FILE A WRITTEN SURREPLY ON THIS ISSUE

Meech contends that the United States and the State raise for the first time in their Reply Brief the *Mendenhall* doctrine's reasonable-time element and that this "new material" should be stricken, or Meech should be given an opportunity to respond to the argument. *See* Surreply Mot.

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[5] In her Surreply Motion, Meech argues that certain publicly-available documents upon which Dr. Ley relies in his Second Declaration (Attachments C and D to the Second Declaration) to reach an opinion about the proper manner in which the meter attached to Well 8B-1-W10 should have been read are not "part of the record and all of it is hearsay." Surreply Mot. (Doc. 3507), at 2. Meech is wrong on both counts. First, the documents in question were all incorporated by reference in Dr. Ley's Rebuttal Expert Report (Attachment A to the Second Declaration), which was disclosed to Meech on December 23, 2020. *See* Certificate of Service (Doc. 3485). Second, the standard against which Meech seeks to measure the admissibility of Plaintiffs' summary judgment materials is incorrect.

> At the summary judgment stage, evidence need not be authenticated or otherwise presented in an admissible form. *See* FED. R. CIV. P. 56(c); *Lee v. Offshore Logistical & Transp., LLC*, 859 F.3d 353, 355 (5th Cir. 2017); *LSR Consulting, LLC v. Wells Fargo Bank, N.A.*, 835 F.3d 530, 534 (5th Cir. 2016). After a 2010 revision to Rule 56, 'materials cited to support or dispute a fact need only be *capable* of being presented in a form that would be admissible in evidence.'" *LSR Consulting, LLC*, 835 F.3d at 534 (quoting FED. R. CIV. P. 56(c)(2)). This flexibility allows the court to consider the evidence that would likely be admitted at trial—as summary judgment is trying to determine if the evidence admitted at trial would allow a jury to find in favor of the nonmovant—without imposing on parties the time and expense it takes to authenticate everything in the record. *See* FED. R. CIV. P. 56(c)(1)(A).

Maurer v. Independence Town, 870 F.3d 380, 384 (5th Cir. 2017) (internal citation and quotations omitted). When measured against this correct standard, the evidence in question, which can easily be authenticated and made admissible for trial, may be considered at the summary judgment stage of this proceeding.

(Doc. 3507), at 4-6. Meech's claim is without merit. Nothing Plaintiffs asserted in their Reply Brief about *Mendenhall*'s application to the undisputed facts of this case constitutes a new argument. And Meech's mischaracterization of Plaintiffs' *Mendenhall* argument does not change that fact.

The United States and the State consistently have argued in support of their request for summary judgment that, to whatever extent *Mendenhall*'s relation-back doctrine applies to the quantification of Wells 8B-1-W10 and 8B-1-W11, Plaintiffs have accounted for *Mendenhall*'s application. *See* Mot. for Summ. J. (Doc. 3491), at 10-13. And Plaintiffs, from the outset, have anchored their argument to the test set forth in *Mendenhall* and its progeny. *Id.* at 10-12. In particular, Plaintiffs have asserted that this Court's decision in *United States v. Abousleman*, No. 83-1041 JC, 1999 WL 35809618 (D.N.M., May 4, 1999) (Mem. Op. and Order), controls the issue of the *Mendenhall* doctrine's application in this proceeding.[6]

Against that backdrop, Plaintiffs' discussion of *Mendenhall* in their Reply Brief simply cannot be construed as a new legal argument. Indeed, the "main purpose" of Plaintiffs' discussion—and the discussion itself amply makes this clear—was "to point out the defects in [Meech's] response and why she had failed to establish a genuine issue of material fact" regarding the application of *Mendenhall*. *Green*, 420 F.3d at 1196-97. *See also Flowers v. Matheson Tri-Gas, Inc.*, No. CIV 1:19-000148 RB/SCY, 2021 WL 184462, at *7 (D.N.M., Jan.

[6] As Plaintiffs pointed out in their Motion for Summary Judgment, the *Abousleman* decision "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*." *Abousleman*, 1999 WL 35809618, at *3. "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). *See* Mot. for Summ. J. (Doc. 3491) at 12.

19, 2021) (Mem. Op. and Order) (same), *denying motion to amend*, 2021 WL 1923599, No. CIV 1:19-00148 RB/SCY (D.N.M. May 13, 2021). Plaintiffs' focus in their Reply Brief on *Mendenhall*'s reasonable-time element thus was simply a function of the fact that Meech completely ignored that element of the test in her Response Brief. It should come as no surprise that Plaintiffs seized upon that omission "to point out the defects" in the response and satisfy their own summary judgment burden. *Compare* Resp. Br. (Doc. 3496) at 8-15 *with* Reply Br. (Doc. 3504) at 2-10.

To correct the fatal omission in her response, Meech now tries to characterize Plaintiffs' argument as something it plainly is not. Specifically, Meech asserts that the United States and the State argue

> for the first time in their Reply Brief, that there is a hard date, separate and apart from the three *Mendenhall* elements announced in *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, 95 N.M. 560, beyond which a mining operation cannot further develop its water rights because the time frame is "unreasonable" as a matter of law.

Surreply Mot. (Doc. 3507), at 4. Meech's effort to construct a controversy where none exists fails for at least a couple of reasons.

First, Meech's argument ignores the fundamental issue embraced by *Mendenhall*: whether, and for how long, a water right claimant may develop her water right *and* have the priority date relate back to the date on which commencement of the development began. *See* Mot. for Summ. J. (Doc. 3491), at 10. The question at issue here is not whether Meech can develop her water rights, but rather whether that development relates back in time for purposes of determining the appropriate priority date.

Second, Meech alleges the existence of a factual dispute precluding the *Mendenhall* doctrine's application at the summary judgment stage where there simply is not one. Surreply Mot. (Doc. 3507), at 4-5. Meech tethers her argument to the New Mexico Supreme Court's "admonition" in *Rio Rancho Estates, Inc.* that, based on the disputed facts at issue there, "[c]ompliance with [*Mendenhall*] involves questions of fact." *Id. See Rio Rancho Estates, Inc.*, 1981-NMSC-017, ¶ 14, 95 N.M. at 564, 624 P.2d at 505. But, to make that precedent seem pertinent, Meech mischaracterizes Plaintiffs' *Mendenhall* argument and obscures the undisputed fact that distinguishes this case from *Rio Rancho Estates*. *See* Surreply Mot. (Doc. 3507), at 5 ("As noted above, *not a single fact related to the Meech's application of water to beneficial use is included in the Summary Judgment Motion*.") (emphasis added). *But see* Mot. for Summ. J. (Doc. 3491), at 5, ¶ 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.") (emphasis added). Meech even agrees that this properly asserted material fact about beneficial use is undisputed: "Meech agrees the allegations stated in ¶ 14 of the Motion for Summary Judgment are undisputed, but states affirmatively that water has also been used for dust control on roads, in addition to mining and processing." Resp. Br. (Doc. 3496), at 4, ¶ 14. There thus is neither a new legal argument nor a factual dispute regarding *Mendenhall*'s application, and the Court should deny Meech's request for leave to file a surreply on this issue.[7]

[7] The United States' and State's willingness to quantify the water right for Well 8B-1-W11 based on the well's production in 2019 is not at odds with their argument regarding the temporal limits of the *Mendenhall* doctrine. *See* Surreply Mot. at 4 n.2. Under *Mendenhall*, Plaintiffs would have been legally justified in restricting any relation back of the water right's priority date to a shorter period of development, but, consistent with their approach in resolving the approximately nine hundred non-

CONCLUSION

For all of the reasons stated above, the Court should grant Meech leave to file a surreply to address only the new factual material—identified in note 4, *supra*—upon which the United States and the State rely in their Reply Brief, and only if the Court will consider that material in reaching a decision on Plaintiffs' Motion for Summary Judgment. Because Plaintiffs did not raise a new legal argument regarding application of the *Mendenhall* doctrine to the undisputed facts of this case, but simply responded to the arguments Meech advanced on that issue in her Response Brief, the Court should deny Meech's request for leave to file a surreply on that issue.

DATED: June 2, 2021

Respectfully submitted,

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Indian claim files in this adjudication, opted to recognize Meech's efforts in developing Well 8B-1-W11 throughout the pendency of the adjudication. Meech's efforts with respect to the well are undisputed. *See* Mot. for Summ. J. (Doc. 3491), at 5, ¶ 11 ("During 2016 and 2017, Meech undertook extensive repairs on Well 8B-1-W11 to improve the well's production capacity and reliability."); Resp. Br. (Doc. 3496), at 4, ¶ 11 ("Meech agrees the allegations stated in ¶ 11 of the Motion for Summary Judgment are undisputed.").

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2021, I filed the foregoing *Plaintiffs' Response in Opposition to Objections to Inclusion of New Material in Reply Brief, Or, In the Alternative, Motion to File Surreply (Doc. 3507)* 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