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. 6:01-cv-00072-DHU-JHR **ZUNI RIVER BASIN ADJUDICATION** **Subfile No. ZRB-1-0148**

PLAINTIFFS UNITED STATES OF AMERICA'S AND STATE OF NEW MEXICO'S OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION (DOC. 3547)

Pursuant to 28 U.S.C. § 636(b)(1) and Docs. 3545 and 3550, Plaintiffs United States of America ("United States") and the State of New Mexico ex rel. State Engineer ("State") (together, "Plaintiffs") respectfully submit their written objections to the *Proposed Findings and Recommended Disposition* ("PFRD") (Doc. 3547) filed on March 31, 2022, in this proceeding. The PFRD resolved *Plaintiffs' Motion for Summary Judgment and Memorandum of Law in Support Thereof* ("Motion for Summary Judgment") (Doc. 3491). Plaintiffs request that the Court overrule the PFRD and grant summary judgment in Plaintiffs' favor regarding the historic beneficial use of Wells 8B-1-W10 and 8B-1-W11 and Ponds 8B-1-SP34 and 8B-1-SP66.

INTRODUCTION

At issue is whether Defendant Norma M. Meech ("Meech") has established a genuine issue of material fact concerning whether she is entitled to an expanding water right projected well into the twenty-second century under New Mexico's "relation back" doctrine for the two wells and an evaporative-loss component for the water right for the two livestock ponds. In anticipation of commercial mining activity, Meech drilled two wells on her property, in October 1988 and October 1990. She has now already been applying water to beneficial use for more than thirty years, and still seeks to continually increase her water right at least through the next century, although nothing suggests 100 more years would necessarily be the limit to that expansion. *See Norma Meech's Corrected Motion to Certify Questions to the New Mexico Supreme Court* ("Motion to Certify") (Doc. 3488 at 3, ¶ 5) ("Tinaja mine has about 100 million tons of limestone accessible for mining. Mined at a rate of 1,000,000 tons per year, the mine has an active life expectancy of at least 100 years."). [1]

The New Mexico Supreme Court first addressed relation-back in the groundwater context in *State ex rel. Reynolds v. Mendenhall*, holding that a claimant can "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 the water put to beneficial use on the ground." 1961-NMSC-083, ¶ 1, 68 N.M. 467, 468, 362 P.2d 998, 999. As such—and as the name suggests—it is a backward-looking doctrine. It provides for an existing water right based on beneficial use to "relate back" to a priority that dates from the

[1] Although these Objections are directed specifically to the PFRD, these same "relation-back" issues have been briefed and discussed throughout this proceeding. *See* PFRD at 1-2.

commencement of the construction of the works which allowed the water to ultimately be applied to beneficial use.

In *Mendenhall*, the New Mexico Supreme Court held that the water right in that matter related back to the date of a pre-basin well because the user had proceeded diligently, within less than two years, to complete his use of the water. *Mendenhall*, 1961- NMSC-083 ¶ 29, 68 N.M. at 475, 362 P.2d at 1001. The PFRD misunderstands and misapplies New Mexico's relation-back doctrine, allowing Meech to create a question of fact regarding a facially unreasonable time period of more than 130 years to develop her water right under *Mendenhall*. This turns the *Mendenhall* doctrine on its head and would undermine the principles of prior appropriation as implemented by New Mexico's courts. The PFRD's interpretation of the doctrine, rather than allowing Meech to simply "relate back" and claim a priority date as of the date work on the wells began, instead creates an opportunity for any New Mexico water user "who wants to claim *a greater future quantity* because of an expected expansion of [their] same use over time." PFRD at 15 (emphasis added). This interpretation of relation-back would work a profound change upon New Mexico water law. The PFRD accomplishes this change by erring in three respects: it reads the "reasonable time" element out of *Mendenhall*; it ignores the fact that the New Mexico Supreme Court has held that an ever-expanding water right is antithetical to New Mexico's scheme of prior appropriation and thus impermissible; and it assumes Meech had a plan for the orderly development of her water rights from the two wells, despite the absence of any evidence of any such plan in the record.

The PFRD also errs in its conclusion that Meech has created a genuine issue of material fact regarding the inclusion of an evaporative-loss component in the water right for the two

livestock ponds. PFRD at 2, 11-12, 18. First, the PFRD concludes, on a strained interpretation of the pertinent law, that New Mexico provides for a water right for evaporation for livestock ponds filled entirely by surface runoff. The PFRD then compounds this error by erroneously shifting the burden applicable at the summary judgment stage of this proceeding from Meech to the Plaintiffs.

STANDARD OF REVIEW

Plaintiffs' Objections are to the PFRD. A district judge may "designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court" of a motion for summary judgment. 28 U.S.C. § 636(b)(1)(B). In the event timely written objections are filed by any party, the Court is required to conduct a de novo review. *See*, *e.g.*, *Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition*, December 28, 2021, Doc. 3535, at 1(Subfile ZRB-1-0148). "A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1)(C). The district judge "may accept, reject, or modify, in whole or in part, the findings or recommendations" made therein. *Id.* It thus follows that the PFRD, issued pursuant to 28 U.S.C. § 636(b), carries no presumptive weight. *Mathews v. Weber*, 423 U.S. 261, 270-71 (1976).

ARGUMENT

POINT 1: UNDER *MENDENHALL*, A REASONABLE TIME TO DEVELOP A WATER RIGHT HAS ALREADY PASSED

The PFRD urges that a "reasonable time" under *Mendenhall* is a sliding scale that can continually expand in direct relation to the claimant's diligence. PFRD at 11. At the same time, the PFRD also acknowledges the obvious need for some objective boundaries to an ever-expanding *Mendenhall* right, observing as it must that it is "ultimately limited."[2] Unfortunately, beyond that perfunctory acknowledgment, the PFRD does not elaborate further on what those limitations as a matter of law might be. Indeed, the PFRD conspicuously fails to address the many New Mexico cases defining what the reasonable time limits are under *Mendenhall*. Effectively, the PFRD reads the "reasonable time" element of the doctrine out of its analysis.

Nonetheless, there is substantial guidance in New Mexico law about what constitutes a "reasonable time" under *Mendenhall*. That "reasonable time" is not remotely close to the 130 years Meech is claiming as a practical matter. Indeed, the case law tells us that it is far, far less. This very Court's previous survey of relation-back cases tells us a reasonable time to develop a water right under New Mexico's *Mendenhall* doctrine—as a matter of law—is approximately two decades.

A. This Court Has Already Found That A Reasonable Time Is Less Than 17 Years

Though unmentioned by the PFRD, in 1999, in the *Abouselman* water rights adjudication, the United States District Court for the District of New Mexico referred to State law to identify the four elements of *Mendenhall*: "(1) pre-basin initiation of groundwater rights; (2) due diligence; (3) completion of the appropriation; and (4) the application of those right to actual beneficial use *within a reasonable time*." *United States v. Abousleman*, No. 83-1041 JC, 1999

[2] In the same vein, the PFRD at page 4-5 observes that "Ms. Meech is not claiming an unlimited right to future use," though it fails to identify those limits.

WL 35809618, at *3 (D.N.M., May 4, 1999) (Mem. Op. and Order) (emphasis added). The court found 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." *Id.*, at *4. "New Mexico's water laws, are designed to encourage use and to discourage waste and non-use." *Id.*

The *Abouselman* court then discussed what constituted a "reasonable time" for relation-back under New Mexico law:

- Four years not too long when steps taken to complete the well. *State ex rel. Reynolds v. Rio Rancho Estates Inc*., 1981-NMSC-017, ¶ 12, 95. N.M. 560, 563, 624 P.2d 502, 505;
- Forty years of non-use unreasonable. *State ex rel. Martinez v. McDermett*, 1995-NMCA-060, 120 N.M. 327, 901 P.2d 745.
- Twenty years without completing the appropriation not eligible for relation-back of a water right. *Hagerman Irr. Co. v. McMurry*, 1911-NMSC-021, ¶ 4, 16 N.M. 172, 179-80, 113 P. 823, 825.

Abouselman at *4. In surveying New Mexico law, the *Abousleman* court also opined that a "reasonable time" under *Mendehall* was necessarily 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 once was owned." *Id.* at *7.

Ultimately, the *Abouselman* court held that 17 years was not a reasonable time under the facts of that case, and ruled against the claimant on its *Mendenhall*-based claim. *Id.* at *6.[3] The court found that the claimant in that case had not put the water to actual beneficial use within a reasonable time, and ruled against its *Mendenhall* claim despite the fact that the claimant had a plan in place to develop the water, as Meech claims to have in the present case. The *Abouselman* court agreed with the Special Master that the claimant's "future planned uses for its water are of no import in a water rights adjudication", and held that:

> [I]n this case, having failed to develop the water within a reasonable time, Chaparral's rights to future development have been lost, at least with the benefit of the relation-back doctrine.

Id. at *6. The *Abouselman* court then concluded with an analysis that is equally applicable to the present case, stating this result was "not akin to [the claimant's] losing something it owned, but rather to losing the hope of gaining something it never owned." *Id.* at *9. The court continued:

> If [the claimant] develops more water in the future, it must do so on [sic] accordance with the statutory scheme imposed when the basin was declared in 1973, with priority according to that scheme. It can no longer stretch its pre-basin rights into the future.

Id. That precise statement applies here with equal force, and the Plaintiffs object to the PFRD for failing to acknowledge this "reasonable time" limitation on the *Mendenhall* relation-back doctrine, and to factor it in to the analysis of the water right for Meech's wells.

B. Even Meech's Wyoming and Colorado Cases Find A Reasonable Time To Be 10 to 20 Years

[3] Prior to the district court's finding that 17 years was not a reasonable time, the Special Master in that case had ruled that 26 and 19 years of non-use, each contemplated under different scenarios presented by the claimant there, were, as a matter of New Mexico law, unreasonable spans of time. *Id.* at *3.

In her *Response* to the Motion for Summary Judgment, Meech cited *In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys.*, 2002 WY 89, 48 P.3d 1040 (Wyo. 2002), for the proposition that a reasonable time under Wyoming's relation-back doctrine "depends upon the circumstances." *Norma M. Meech's Response to Plaintiffs' Motion for Summary Judgment* ("Meech Response") (Doc. 3496), at 10. Meech characterizes Wyoming's 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. The defendants in *Big Horn* are distinguishable from Meech for a variety of reasons. However, even assuming *arguendo* that the claims at issue in *Big Horn* were analogous to the Meech claims (which they are 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 project's completion.

Big Horn, at 1044 (emphasis added).

In the Colorado case cited in the Meech Response, a 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 (Colo. 1987) (footnote omitted and emphasis added). Four 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.

POINT 2: A CONTINUALLY EXPANDING WATER RIGHT IS ANTITHETICAL TO NEW MEXICO WATER LAW

The PFRD also fails to acknowledge that an ever-expanding water right simply does not work within New Mexico water law's prior appropriation scheme. The legal question of whether such an ever-expanding water right claim can be recognized is not novel, and applicable New Mexico State law is well settled—it cannot be. *See*, *e.g.*, *State ex rel. Martinez v. City of Las Vegas* ("*Martinez*"), 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47.

In *Martinez*, the New Mexico Supreme Court expressly and unambiguously ruled against the notion of an ever-expanding water right claim as being obnoxious to the State's statutory scheme. In that case, it was with regard to a non-Indian pueblo (the City of Las Vegas) which attempted to claim the right to continually expand its use of water under what is called the "pueblo rights doctrine":[4]

> [T]he pueblo rights doctrine recognizes the right of the inhabitants of Mexican or Spanish colonization pueblos to use as much of an adjoining river or stream as is necessary for municipal purposes. The doctrine contemplates the expansion of the pueblo's right to use water in response to increases in size and population, and if necessary, the right can encompass the entire flow of the adjoining water course.

[4] To be abundantly clear, the "pueblo rights doctrine" discussed above refers to pueblos in the sense of non-Indian communities established during the Spanish or Mexican periods, and is unrelated to Indian Pueblos.

2004-NMSC-009, ¶ 8 135 N.M. at 378, 89 P.3d at 50. (Citations omitted). The Supreme Court held that the pueblo rights doctrine is inconsistent with the principle of beneficial use that lies at the heart of New Mexico water law, finding that the doctrine "unduly interferes with the State's regulation of water rights," represents "a 'positive detriment to coherence and consistency in the law,'" and "poses a direct obstacle to the realization of important objectives embodied in New Mexico water law." 2004-NMSC-009, ¶ 41, 43, 135 N.M. at 389-90, 89 P.3d at 61-62 (citations and quotations omitted). Such an expanding water right "intolerably interferes with the goals of definiteness and certainty contemplated by prior appropriation." 2004-NMSC-009, ¶ 36, 135 N.M. at 387, 89 P.3d at 59. That uncertainty "could potentially paralyze others from legitimately making beneficial use of unappropriated waters on the same stream as a [non-Indian] pueblo out of fear of potential future interference with the pueblo's expansion." *Id.*

The Supreme Court expressly distinguished *Mendenhall* and the relation-back doctrine, finding that *Mendenhall* was a different matter entirely, for the sole reason that *Mendenhall* in fact *did not* contemplate an ever-expanding right. The court found that *Mendenhall* works within the State's statutory scheme for water rights administration specifically because it does not contemplate an ever-expanding right as was claimed by the City of Las Vegas, but rather because it reasonably limits a claimant's right to develop their water use to a finite period. The court stated: "In applying these principles, we have recognized that water users have *a reasonable time* after an initial appropriation to put water to beneficial use, known as the doctrine of relation." 2004-NMSC-009, ¶ 35, 135 N.M. at 387, 89 P.3d at 59. (Citations omitted and emphasis added). *Mendenhall* works because under "the doctrine of relation, [aka *Mendenhall*] other water users 'are on notice that the law is granting them water rights that are temporary

only' pending *a reasonable time* for the senior appropriator to complete the initial appropriation." 2004-NMSC-009, ¶ 36, 135 N.M. at 387, 89 P.3d at 59 (emphasis added). *Mendenhall* does not fail under the analysis in *Martinez* specifically because it is not an ever-expanding right.

Unfortunately, despite the fact it is assessing a *Mendenhall* relation-back claim, the PFRD in the instant matter undertakes no discussion of the problematic nature of Meech's ever-expanding claim under that doctrine. With an ever-expanding right there is no reasonable notice to other water users of a user's potential water needs in the future because there is no limit to the quantity of water available to the user, nor to the amount of time available to complete its initial appropriation. *Martinez*, 2004-NMSC-009, ¶ 35-36, 135 N.M. at 387, 89 P.3d at 59. That is not the case with *Mendenhall*. Under *Mendenhall*, "water users have *a reasonable time* after an initial appropriation to put water to beneficial use." *id*; *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*") (emphasis added and citations omitted); *Rio Puerco Irr. Co. v. Jastro*, 1914-NMSC-041, ¶ 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).

POINT 3: MEECH PRESENTS NO EVIDENCE THAT AN "ORDERED PROCESS" OR "LONG HELD PLAN" WAS IN PLACE IN 1988 AND 1990 WHEN THE WELLS WERE DRILLED

Reading the "reasonable time" element out of its analysis, the PFRD then urges approval of Meech's continual expansion of her water right under *Mendenhall* because it is "an ordered process" based on a "long-held plan", despite the fact that Defendant has presented no evidence of any such thing. PFRD at 5, 7. Nonetheless, the PFRD notes that Meech objected to the Plaintiffs' proposed consent order in part because Plaintiffs' offer did not accurately reflect "planned future beneficial use." *Id.* at 3. The PFRD further observes that Meech is claiming an "additional appropriation via 'an ordered process' which permits the Court to 'provide for the continued development of the water right into the future.'" *Id.* at 5 (citation omitted). And in what it characterizes incorrectly as an "Undisputed Material Fact", the PFRD goes on to recite that "[i]n order to fulfill her long-held plan to develop her mine, Meech contends that she is entitled to continue to develop her water rights from the wells."[5] *Id.* at 7 (citation omitted).

Meech in fact presents *no* evidence that either "an ordered process" or "long-held plan" was in place at the time the wells were drilled in 1988 and 1990. Indeed, the only evidence of an actual long term development plan of any kind comes attached to Defendant's *Surreply* in the form of the Affidavit of Walter Meech—testimony which amounts to nothing more than a post hoc rationalization of Defendant's claims. The October 19, 2021 *Affidavit of Walter Meech* ("Second Meech Affidavit") (Doc. 3528-1) fails to describe a 1988 or 1990 plan to expand and develop water use. To the extent Walter Meech describes a plan, he testifies to an entirely

[5] The PFRD has rewritten the wording of this "fact." The Undisputed Material Fact as actually stated in the Motion for Summary Judgment was "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.'" Doc. 3491, at 5, ¶ 15. (Citation omitted). It is not undisputed that there is a long-held plan; it is undisputed that Meech contends there is one.

prospective one dating only from the previous year, stating "C&E Concrete intends to continue placing water to beneficial use", "I anticipate that water use will continue to expand", and that "C&E Concrete has recently formulated a mining plan." Doc. 3528-1, at 2-3, ¶¶ 8, 9, 16. And the recently formulated "mining plan" attached to the Affidavit is indeed very clearly "recently formulated", as it is dated February 3, 2021, and contains what appears to be relatively recent aerial photography showing substantial portions of the pit already excavated. The convenient timing of this "plan" for development of the water rights under the two wells demonstrates it is entirely post hoc. Meech has presented no evidence at all that a plan existed for the development of the water right when Meech first developed water by drilling wells in 1988 and 1990.

As the PFRD itself notes, "[T]he core of relation—requiring a lawful commencement of an appropriation *with notice to the world of intent* … has remained the same. PFRD at 11, n.5 (citing *State ex rel. State Eng'r v. Elephant Butte Irr. Dist.*, 2021-NMCA-066, ¶52, 499 P.3d 690, 703) ("*Elephant Butte*") (emphasis added). This language echoes that of *Martinez*, cited above, which concludes that despite the fact that an expanding water right is antithetical to New Mexico water law, *Mendenhall* nonetheless works in part because under the doctrine of relation "*other water users are on notice*" of the *Mendenhall* party's planned appropriation. 2004-NMSC-009, ¶ 36, 135 N.M. at 387, 89 P.3d at 59. That necessary notice to all the world of a plan for an ordered process of appropriation is completely missing here. Meech's wells were dug in 1988 and 1990 with no discernable contemporaneous plan – much less notice to other water users of any such plan – for ordered development of the mine or of the water right.

The PFRD incorrectly assumes an "ordered process" and "long-held plan" were in place to develop water rights from Meech's wells as a predicate to her *Mendenhall* claims, despite the

fact no evidence has been presented that any such plan existed. This foundational element of a *Mendenhall* relation-back claim is missing, and the United States and State correspondingly should be granted summary judgment on the past beneficial use of both wells.

POINT 4: THE PFRD ERRONEOUSLY DENIED SUMMARY JUDGMENT IN PLAINTIFFS' FAVOR AS TO PAST BENEFICIAL USE FROM BOTH WELLS

The PFRD finds that "Summary judgment could … be granted as to the beneficial past use of Well 8B-1-W11." PFRD at 15. It notes that Meech does not dispute Plaintiffs' calculations of the beneficial past use of Well 8B-1-W11. Yet the PFRD declines to grant summary judgment because "the parties do not quantify Meech's expanding water rights." *Id.* But, as explained above, New Mexico water law does not contemplate an endlessly expanding water right. There is thus no reason that summary judgment should not be granted in the Plaintiffs' favor on the beneficial past use of Well 8B-1-W11 in the undisputed amount of 67.93 acre-feet per year.[6]

Similarly, summary judgment should be granted on the beneficial past use of Well 8B-1-W10 in the amount of 2.04 acre-feet per year.[7] The PRFD mistakenly notes a dispute of material fact:

> Plaintiffs assert that 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 acre feet. Meech contends that the most water produced from well 8B-1-W10 occurred in 2002 when the well

[6] "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." Motion for Summary Judgment, at 5, ¶ 13 (citations omitted).

[7] "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." Motion for Summary Judgment, at 4, ¶ 8 (citations omitted).

> produced 15.46 acre-feet used for mining, processing, manufactured sand, and dust control purposes.

Id. at 7-8 (citations omitted). Meech's contentions that the past beneficial use of water from well 8B-1-W10 is something other than 2.04 acre-feet per year are conclusory and without foundation. Meech states that readings of the meter for the well "were recorded since 2001 with the results reported monthly to the Office of the State Engineer." April 12, 2021 *Affidavit of Walter L. Meech* ("First Meech Affidavit) (Doc. 3496-1), at ¶ 6. These "results" were the readings upon which the Plaintiffs based their offer of 2.04 acre-feet per year. Walter Meech now notes there were "discrepancies in how the readings were recorded" and "[t]he discrepancies appear to be in the placement of the decimal point." *Id.* at ¶ 10. Mr. Meech does not explain how he concluded there were discrepancies, or how he determined they were due to the "placement of the decimal point." Nor does he explain how and which records reported to the Office of the State Engineer were corrected. "The burden is on Meech, as the water user, to quantify the amount of her water right." PFRD at 10 (citing *Pecos Valley Artesian Conservancy Dist. v. Peters*, 193 P.2d 418, 421-22 (N.M. 1948)). Walter Meech's conclusory testimony does not meet that burden, and summary judgment should be granted in Plaintiffs' favor on the beneficial past use of Well WB-1-W10 in the amount of 2.04 acre-feet per year.

POINT 5: THE PFRD ERRONEOUSLY DETERMINED THAT MEECH IS ENTITLED TO AN EVAPORATIVE-LOSS COMPONENT IN THE QUANTIFICATION OF HER LIVESTOCK PONDS

The United States and State also moved for summary judgment to quantify the water right of two livestock ponds—Ponds 8B-1-SP34 and 8B-1-SP66—historically filled only by

surface runoff.[8] The United States' expert quantified the water right for each pond utilizing standardized calculations described in the Hydrographic Survey Report for the sub-areas of the basin in which the ponds are situated.[9] *See* Doc. 3491, at 14-17; Doc. 3491-1, at 10-11, ¶¶ 23, 25. Those standardized calculations do not include "evaporation losses from ponds filled from surface runoff," which losses are "incidental and not considered a beneficial consumptive use." Doc. 3491-1, at 11, ¶ 25.

Meech objected to the methodology utilized to quantify the two livestock ponds, claiming that evaporative losses constitute a beneficial use of water for which she is entitled recognition as a valid part of the water rights. *Joint Status Report* (Doc. 3453), at 7. The PFRD acknowledges, as it must, that, "[a]s for the issue of evaporative loss from impounded water, … there is no New Mexico case law definitively stating an entitlement to additional compensatory water rights." PFRD at 11. The PFRD nevertheless concludes that Meech "has created a genuine issue of material fact as to the evaporative losses resulting from her livestock ponds" and recommends that the Court deny summary judgment on that issue. *Id.* at 2.

As explained below, the PFRD's conclusion and recommendation are wrong on two counts. First, neither New Mexico law nor that of any other jurisdiction supports the proposition that the quantification of water rights for a livestock pond filled entirely from surface runoff

[8] "Surface runoff (also known as overland flow) is the flow of water occurring on the ground surface when excess rainwater, stormwater, meltwater, or other sources, can no longer sufficiently rapidly infiltrate the soil." *See* https://en.wikipedia.org/wiki/Surface_runoff#:~:text=Surface%20runoff%20(also%20known%20as,rapidly%20infiltrate%20in%20the%20soil. (last visited April 28, 2022).

[9] *Zuni River Adjudication Hydrographic Survey Report for Sub-areas 4 and 8.* Prepared by Natural Resources Consulting Engineers, Inc., Fort Collins, CO. July 14, 2004.

should include an evaporative-loss component. And second, assuming the existence of legal support for the proposition, Meech "bear[s]"—both on summary judgment and in this adjudication—"the burden of proof in the first instance with respect to the disputed water right." *Order*, Aug. 28, 2014, Doc. 2985, at 4, (Subfile ZRB-2-0098). *See also* Doc. 3491, at 6-8 (discussing the standard of review).

A. Evaporative Loss From A Livestock Pond Filled By Surface Runoff Is Not A Beneficial Use Of Water Under New Mexico Law

As the United States and the State explained in their Motion for Summary Judgment, the notion of an evaporative-loss component for a water right for a livestock pond filled exclusively from surface runoff "contravenes the constitutional beneficial-use requirement," Doc. 3491, at 14, and the well-established maximum-utilization requirement. *See Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, ¶ 15, 81 N.M. 414, 417, 467 P.2d 986, 989. The PFRD does not discuss the legal impact of either requirement on the evaporative-loss question. Rather, the PFRD attempts to fashion a legal justification for evaporation as part of the water right for Meech's two livestock wells where none exists.

To do this, the PFRD relies upon the "shared legal culture" of which New Mexico water law is a part and states that "several western jurisdictions recognize evaporative losses as incidental to beneficial use." PFRD at 11-12. In a lengthy footnote, the PFRD cites six cases recognizing evaporation as a valid basis for a water right. *See id.* at 12, n.8. The cases are not particularly persuasive because in none of them was surface runoff the source of the water right or livestock watering the purpose of use.[10] *See Zigan Sand & Gravel, Inc. v. Cache La Poudre*

[10] The ephemeral nature of surface runoff makes it unique and distinguishes it from water sources subject to controlled diversion. If sufficient rain or snow falls, a livestock pond, be it a

Water Users Ass'n, 758 P.2d 175, 177 (Colo. 1988) (groundwater used for mining); *Cent. Colorado Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 338-39 (Colo. 1994) (same); *R.T. Nahas Co. v. Hulet*, 106 Idaho 37, 39, 674 P.2d 1036, 1038 (Ct. App. 1983) (creek water diverted into offstream lake for agricultural use); *City of Los Angeles v. City of San Fernando*, 14 Cal. 3d 199, 207-10, 537 P.2d 1250, 1258-60 (1975) (groundwater and imported surface water for municipal use); *City of Barstow v. Mojave Water Agency*, 23 Cal. 4th 1224, 1254-55, 5 P.3d 853, 872-73 (2000) (groundwater and diverted surface water for aquaculture and agricultural uses); *State Dept. of Ecology v. Grimes*, 121 Wash. 2d 459, 463-64, 852 P.2d 1044, 1047 (1993) (groundwater and diverted surface water for agriculture).

Whether evaporative loss can in some circumstances constitute a beneficial use under New Mexico law may very well be an open question, as the PFRD concludes. But none of the cases on which the PFRD relies even comes close to establishing the existence of such a right in New Mexico incidental to a livestock pond filled exclusively by surface runoff. Moreover, if evaporative loss is validly "incidental to beneficial use" specifically with respect to Meech's livestock ponds, New Mexico law is unambiguously clear that it is Meech's burden—as the claimant here—to prove an entitlement to a water right for the livestock ponds on that basis.

B. Meech Has Failed To Meet Her Burden To Prove An Entitlement To Evaporative Loss For The Livestock Ponds

The United States and State have many times restated the allocation of burdens in this adjudication, particularly on summary judgement, but it cannot be repeated enough. In this

---

natural depression or manmade, will fill. But in the absence of sufficient precipitation, the pond will be empty and there will consequently be no evaporation. Thus, even if an evaporative-loss component were recognized as part of a surface-runoff water right, it would be unenforceable given the unpredictability of the water source.

adjudication, "[t]he burden is on Meech, as the water user, to quantify the amount of her water right." PFRD at 10 (citations omitted). 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." Doc. 2985, at 4, (Subfile ZRB-2-0098). As a practical matter, then, the burden of persuasion at trial on the evaporation-loss issue would be on Meech. *See Proposed Findings and Recommended Disposition,* May 27, 2015, Doc. 3049 at 3 (Subfile ZRB-2-0014). 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 Corp. v. Catrett*, 477 U.S. 317, 331 (1986). 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.

In denying the Motion for Summary Judgment regarding the quantification of the water right for the livestock ponds, the PFRD shifted the burden entirely onto Plaintiffs and ignored Meech's obligation "to establish the existence of an element essential" to her case. The PFRD's reliance on the New Mexico Court of Appeals' *Elephant Butte* decision most clearly illustrates the nature of the error.

The PFRD relies on *Elephant Butte* to support its conclusion "that there may be circumstances where evaporative loss is correctly quantified in a water right." PFRD at 11 (citing *Elephant Butte*, 2021-NMCA-066, ¶¶ 118-120, 499 P.3d at 716). But the court of appeals in *Elephant Butte* in fact reversed the adjudication court's award of a water right based upon the evaporation rate of an open pit supplied by groundwater. 2021-NMCA-066, ¶¶ 118-120, 499 P.3d at 716. In doing so, the appeals court concluded "that there is no substantial evidence supporting the finding of 34.45 acre-feet per year for dust control as measured by evaporative loss." 2021-NMCA-066, ¶ 120, 499 P.3d at 716. In other words, while the decision in *Elephant Butte* implies that it would quantify a water right based in some part on evaporation loss, it nevertheless remained the claimant's burden to prove its entitlement to such a right with evidence.

Here, the United States and the State submitted undisputed facts to establish the manner in which the United States' experts quantified the water rights for Meech's livestock ponds. *See* Doc. 3491, at 5-6. Those facts make clear that, in the absence of any evidence of actual historic use supplied by Meech for her ponds, evaporative losses were determined not to be a recognized component of the water right for ponds filled only by surface runoff. [11] *See* Doc. 3491-1, at 10-11. At that point, the burden should have shifted to Meech to provide facts justifying a water-right quantification for the ponds greater than that offered by the Plaintiffs. But Meech offered

[11] To date in this adjudication, with only this and two other subfiles remaining unresolved, the Court has quantified the water rights of 1,595 livestock ponds filled exclusively by surface runoff pursuant to the methodology employed by the United States' experts. Whether quantified by consent of the parties or in litigation, not one of those ponds includes an evaporative-loss component. This is true because, like Meech here, no claimant has met her burden to establish that evaporation loss from such a pond constitutes historic beneficial use of water.

no factual support for her claim. Instead, she simply asserted that other New Mexico courts have included an evaporative-loss component in the quantification of water rights. *See* Norma M. Meech's Response to Plaintiffs' Motion for Summary Judgment (Doc. 3496) ("Meech Response"), at 16. At this point, Plaintiffs can only surmise that claimants before those other courts must have had provided actual evidence on which to base an evaporation-loss water right.

As the United States and the State emphasized in their *Reply in Support of Motion for Summary Judgment* ("Reply Brief") (Doc. 3504), whether New Mexico law recognizes that a water right may contain an evaporative-loss component does not constitute sufficient evidence to rebut the undisputed facts in the Motion for Summary Judgment. Meech was required to proffer sufficient facts to prove an entitlement to such a beneficial use to satisfy her burden in this proceeding at the summary-judgment stage. And it is clear on the unambiguous record before the Court that Meech proffered no such facts. *See* Doc. 3504, at 16. This Court should accordingly overrule the PFRD on this point and grant summary judgment in the Plaintiffs' favor on the beneficial past use of Ponds 8B-1-SP34 and 8B-1-SP66 in the undisputed amounts of 0.167 acre-feet per year and 1.933 acre-feet per year, respectively.

CONCLUSION

For all of the reasons stated above, as well as those reasons stated in the Motion for Summary Judgment (Doc. 3941), the Reply Brief (Doc. 3504), and the Response to Notice of Supplemental Authority (Doc. 3524), the United States and the State hereby object to the PFRD and respectfully request that the Court grant summary judgment in Plaintiffs' favor regarding the historic beneficial use of (i) Well 8B-1-W10 in the amount of 2.04 acre-feet per year; (ii) Well

8B-1-W11 in the amount of 67.93 acre-feet per year; (iii) Pond 8B-1-SP34 in the amount of 0.167 acre-feet per year; and Pond 8B-1-SP66 in the amount of 1.933 acre-feet per year.

DATED: April 28, 2022

Respectfully submitted,

TODD KIM, Assistant Attorney General
Environment & Natural Resources Division

SAMUEL D. GOLLIS, Trial Attorney
ANDREW "GUSS" GUARINO, Trial Attorney
BRADLEY S. BRIDGEWATER, Trial Attorney
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Telephone: (303) 844-1351 (Gollis)
Telephone: (303) 844-1343 (Guarino)
Telephone: (303) 844-1359 (Bridgewater)
Email: samuel.gollis@usdoj.gov
Email: guss.guarino@usdoj.gov
Email: bradley.s.bridgewater@usdoj.gov

Attorneys for Plaintiff United States of America

Email approval granted Apr. 28, 2022

EDWARD C. BAGLEY
Special Assistant Attorneys General
Office of the New Mexico State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
Telephone: (505) 827-6150
Email: edward.bagley@state.nm.us
Email: julie.park@state.nm.us

Attorneys for Plaintiff State of New Mexico

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 28, 2022, I filed the foregoing *Plaintiffs United States of America's and State of New Mexico's Objections to Proposed Findings and Recommended Disposition (Doc. 3547)* 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