

**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)	No. 01cv00072-MV/WPL
)	
ZUNI INDIAN TRIBE, NAVAJO NATION,)	ZUNI RIVER BASIN
)	ADJUDICATION
Plaintiffs in Intervention)	
)	
v.)	Subfile No. ZRB-2-0014
)	
A & R PRODUCTIONS, et al.,)	
)	
Defendants)	
_____)	

**EDWARD J. BAWOLEK AND SUZAN J. BAWOLEK MEMORANDUM IN SUPPORT
OF THEIR MOTION REQUESTING PARTIAL SUMMARY JUDGMENT**

I. INTRODUCTION

Edward J. Bawolek and Suzan J. Bawolek (hereinafter the “Bawoleks”), defendants *pro se* in Subfile ZRB-2-0014 of the above-captioned matter, pursuant to Fed. R. Civ. P. 56 respectfully request this Court to grant a partial summary judgment. As grounds, the Bawoleks state that the undisputed material facts associated with Well 10C-4-W14 entitle this well to an annualized water right of no less than 3.188 acre-feet.

II STATEMENT OF UNCONTROVERTED FACTS

For the purposes of this motion only, the Bawoleks accept the following facts as undisputed:

Undisputed Material Fact	Source
1. Well 10C-4-W14 priority date is 12/31/1939	Stipulated by both parties.
2. Well 10C-4-W14 was drilled prior to the declaration of the Zuni River Basin.	Admitted by Plaintiffs.
3. Well 10C-4-W14 was measured by the Bawoleks from 2/25/2007 to 12/30/2007 (309 days), with an indicated production of 1,512,618 gallons.	Water metering records of Edward J. Bawolek provided to Plaintiffs. Plaintiffs admit that the water production presented is a reflection of the well meter records associated with said well that has been provided by Defendants to Plaintiffs.
4. The measurements detailed in undisputed fact number 3 were completed prior to the Court's temporal limit for this adjudication.	This Court's Order, [Doc. 1988], entered 12/04/2008 states "IT IS HEREBY ORDERED that the scope of this adjudication is to determine the elements of surface water and groundwater rights of the Zuni River Stream System having priority dates senior to the date of the entry of this Order."
5. Four residences were simultaneously occupied on the Bawoleks' property during the interval from 1937 to 1951.	Page 6 of expert witness report of Mr. D. Boggess commissioned by the Bawoleks. ¹

¹ Plaintiff United States refuses to stipulate to the material fact as stated. Plaintiffs failed to provide a rebuttal to the Expert Witness Report of Mr. D. Boggess and have not named an expert witness to dispute said report's findings as provided for in the Court's Order Setting Discovery Deadlines filed 4/15/2014 [Doc. 2958].

Undisputed Material Fact	Source
6. "Plaintiffs are willing to presume a water right of 0.7 acre-feet per annum for domestic wells without any proof of actual beneficial use."	Plaintiffs statement to this Court, [Doc. 406]. Plaintiffs admit that the quoted statement was made in the identified document and further state that the document speaks for itself.
7. Plaintiffs have established a precedent for recognizing a domestic beneficial use for wells based upon historical residences.	Consent decree [Doc. 1672] between Plaintiffs and H. C. Johnson (Subfile ZRB-2-0054) recognizes three domestic wells on the Johnson Property. The Bawoleks declare they have personal knowledge of said property as having a single contemporary residence.
8. Plaintiffs have only recognized one residence as being served by Well 10C-4-W14.	Joint Status Report and Proposed Discovery Plan, Attachment A [Doc. 2954-1] and Plaintiffs' Response to Request for Admissions, RFA 9, "With respect to well 10C-4-W14, Plaintiffs have recognized a water right for 0.7 afy for domestic purposes associated with one historic residence."
9. All wells on the Bawoleks' property excepting 10C-4-W14 have priority dates on or after 12/31/1971.	Joint Status Report and Proposed Discovery Plan, Attachment A [Doc. 2954-1]; priority dates are not in dispute.

Undisputed Material Fact	Source
<p>10. Well 10C-4-W14: is a point of diversion (fills) the following stock ponds on the Bawoleks' property:</p> <p style="padding-left: 40px;">10C-4-SP20 10C-4-SP21 10C-4-SP22 10C-4-SP23 10C-4-SP24</p>	<p>Recognized in Plaintiffs' consent decree offer of 11/13/2013.</p>

11. The Plaintiffs have wrongly brought a complaint alleging that that the historical beneficial use of Well 10C-4-W14 by the Bawoleks should be limited to 1.088 acre-feet per annum. As the undisputed facts demonstrate that Plaintiffs cannot prevail on this claim, this Court should grant the requested partial summary judgment to the Bawoleks.

III STANDARD OF REVIEW

12. Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(a). The moving party bears the initial burden of establishing there is no genuine issue of material fact. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). To defeat the motion for summary judgment, the responding party must present admissible evidence sufficient to establish any of the elements that are essential to the moving party's case and for which that party will bear the burden of proof at trial. See *id.*; *Taylor v. List*, 880 F. 2d 1040, 1045(9th Cir. 1989). The Court may grant summary judgment if the motion and supporting materials, including the facts considered undisputed, show the movant is entitled to

summary judgment and if the responding party fails to properly address the moving party's assertion of fact as required by Rule 56(c). *See* Fed. R. Civ. P. 56(e).

13. The responding party cannot point to mere allegations or denials contained in the pleadings. It is not enough for the non-moving party to produce a mere "scintilla" of evidence. *Celotex Corp.*, at 252. Instead, the responding party must set forth, by affidavit or other admissible evidence, specific facts demonstrating the existence of an actual issue for trial. *See KRL v. Moore*, 384 F. 3d 1105, 1110 (9th Cir. 2004).

IV ARGUMENT

14. The New Mexico Administrative Code, as summarized in Rules and Regulations Governing the Appropriation and Use of the Surface Waters of New Mexico, Adopted January 31, 2005, define beneficial use in 19.26.2.7 (D) as "The 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. Beneficial use shall be the basis, the measure, and the limit of a water right." (emphasis added)

15. Defendants have not received any Notices of Forfeiture for any water rights as provided under any of New Mexico Statutes Annotated (NMSA) 72-5-28 and 72-12-8.

16. NMSA 72-12-4: "Existing water rights based upon application to beneficial use are hereby recognized. Nothing herein contained is intended to impair the same or to disturb the priorities thereof." and NMSA 72-12-20: "No permit and license to appropriate underground waters for in-state use shall be required except in basins declared by the state engineer to have reasonably ascertainable boundaries." Defendants assert that NMSA 72-12-20 applies to Well 10C-4-W14 and all stock ponds enumerated in this memorandum as they predate the declaration of the basin.

17. The Bawoleks are entitled to a recognized water right of no less than 3.188 acre-feet per annum for Well 10C-4-W14 for two principal reasons, either of said reasons being sufficient unto itself as establishing the water right: First, Well 10C-4-W14 is entitled to the Bawoleks' claimed right on the basis of its having served four, not one, historical residences. Second, the Bawoleks have independently demonstrated their own historical beneficial use by producing usage measurements prior to the seniority date established by this Court.

IV.1 Four residences, were historically served by Well 10C-4-W14 and said well is entitled to be recognized for 0.7 afy for each residence served.

18. The first argument justifying the Bawoleks' motion is that Well 10C-4-W14, having an uncontested priority date of December 31, 1939 was the only well present on the Bawoleks' property during the interval from 1939 through 1951 and necessarily served the needs of any residences on said property during that interval. Plaintiffs have attempted to sidestep the issue of the existence of four historical residences on the property. Mr. Scott Turnbull, Associate Engineer for Natural Resources Consulting Engineers, Inc. and consultant for Plaintiffs' hydrographic survey, was escorted by Edward J. Bawolek to each of four potential historic homesite locations on the Bawoleks' property. This occurred on July 9, 2013. Excepting an adobe house which Bawoleks continue to maintain and use, the Plaintiffs refused to accept the existence of the other three residences. Consequently the Bawoleks retained Mr. Doug Boggess as an expert witness to research the potential homesite locations and to make a determination as to their actual nature. Mr. Boggess thoroughly researched the potential homesite locations using accepted archeological methods, and concluded that they were indeed actual residence locations. Further, he was able to determine intervals of occupancy, ownership, and patterns of use. Plaintiffs, having been provided with the expert report authored by Mr. Boggess, did not provide

a rebuttal report or disclose an expert witness to be called to refute the findings, an apparent tactic to sidestep the issue of recognizing the historical beneficial water usage by those residences. A true copy of the Boggess Expert Witness Report is being provided as an attachment to this motion. **Attention is directed in particular to page six which enumerates interval of simultaneous occupancy for four historical residence on the Bawolek property; this page is being provided as a separate document, with the relevant information highlighted, per D.N.M.LR-Civ. 10.6.**

19. In a Request for Admissions (RFA 9), the Bawoleks propounded:

"Admit that well 10C-4-W14 was the only well available to service the needs of four separate occupied residences on the Bawolek property from 1939 to 1951."

The Response of Plaintiffs in full was:

"Plaintiffs admit that the Bawoleks were offered a 0.7 acre-foot per year ("afy") water right for each residence that could be identified as have (*sic*) been serviced by a well at any one time. With respect to well 10C-4-W14, Plaintiffs have recognized a water right for 0.7 afy for domestic purposes associated with one historic residence.

Otherwise, Plaintiffs are without sufficient information to admit or deny whether any other wells may have been available on the Bawolek property from 1939 to 1951."

20. Plaintiffs' response supra is disingenuous at best. The Plaintiffs are uniquely qualified, and required, to have the information necessary to make the determination as to what wells were available on the Bawoleks' property from 1939 to 1951. If not, then Plaintiffs' basis for this

initiating and continuing this Action is called into question. The United States announced publication of the Hydrographic Survey Report for Sub-areas 9 and 10 on October 21, 2005 [Doc. 393]. Further, the United States represented to this Court that it had developed a Microsoft Access database to track details and deadlines for each subfile [Doc. 839, Clerk's Minutes Before Special Master Vicki L. Gabin September 21, 2006]. The purpose of a hydrographic survey is to obtain basic data for the "determination, development and adjudication" of water rights, NMSA 1978, § 72-4-13 (1907), and to identify the proper defendants in an adjudication. *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959). It is only "[upon] the completion of a hydrographic survey" that a "suit...for the determination of all rights to the use of...water should be initiated. NMSA 1978, § 72-4-15.

21. Arguably, the Hydrographic survey is the document which best addresses the issue instant, specifically, what well or wells serviced the four historical residences on the Bawoleks' property from 1939 to 1951. The hydrographic survey identifies only one well which meets the temporal requirement and that is Well 10C-4-W14. Plaintiffs would have the Court accept a ludicrous premise, namely, that one residence used water beneficially, while three others known to exist in relative proximity survived in an arid region without any water usage whatsoever, despite the availability of a nearby well.

22. The only issue can be whether each residence present entitles Well 10C-4-W14 to an incremental recognition of 0.7 afy. The Plaintiffs have already addressed this issue with representations and assurances to the Court that the figure of 0.7 afy represents a minimum, and not a downwardly adjustable value for beneficial use which is to be applied uniformly in this Adjudication. The Court clearly shares this interpretation: In the Special Master's Order to Show Cause [Doc. 370] dated July 26, 2005, the Court states on pg. 2: "The State and the United States

have agreed that the amount of water to be offered for each domestic well should be 0.7 acre-feet per annum, or an amount equivalent to claimant's actual beneficial use, *whichever is higher.*" (emphasis added) The Court reiterates this understanding in its Memorandum Opinion and Order of June 15, 2006, stating on pg. 1: "At the July 18, 2005, status conference and working session for Sub-Areas 4 and 8, co-Plaintiffs United States of America('United States') and the State of New Mexico, ex rel. State Engineer ('State') announced that the amount of water to be offered water rights claimants for domestic wells would be the *higher* of 0.7 acre-feet per annum, or an amount equivalent to historical beneficial use." (emphasis added). Clearly the Court did not contemplate any reductions in the offered right, nor did Plaintiffs take any opportunity to correct the Court's interpretation. To now argue that the Bawoleks should be treated differently would be prejudicial to the Bawoleks.

23. The Bawoleks also traverse any arguments that Plaintiffs may intend make to the effect that they are required by statute to reduce their recognized allocation for Well 10C-4-W14 as a matter of law: Plaintiff New Mexico, ex rel. State Engineer, ("State") in its Response to Order to Show Cause [Doc. 380, dated August 10, 2005] states on pg. 3: "Nothing in the New Mexico's domestic well statute is at odds with an initial offer of beneficial use up to 0.7 acre-feet per annum. § 72-12-1.1 NMSA 1978." Immediately following, the State notes: "Additionally, a substantial number of wells in the Zuni River stream system were developed from pre-basin wells, and any rational (sic) regarding quantification relating to the statute would of course be inapposite to these." Plaintiffs have admitted that Well 10C-4-W14 in the matter instant belongs in this latter category.

24. Plaintiffs themselves have established a precedent which support the Bawoleks' position that Well 10C4-W14 should be entitled to a water right of 0.7 afy for each historical

residence served by said well: In reviewing other consent decrees entered in this action, the Bawoleks note that the Consent Decree entered for Subfile ZRB-2-0054 [Doc. 1654] recognizes three domestic wells on the property associated with said subfile. The Bawoleks have personal knowledge of the property and declare that said property has only one contemporary residence. Two wells recognized for domestic use are therefore associated with historical residences. As further support for this interpretation, the Bawoleks declare that the Cibola County Assessor GIS Web Site lists the Johnson property as "Parcel R20945 type Non-Residential."

IV.2 The Bawoleks have independently demonstrated their historical beneficial use.

25. The Bawoleks measured their beneficial use of water provided by Well 10C-4-W14. These measurements spanned an extended time interval (309 days) and were completed on 12/30/2007. During this interval, the Bawoleks' measurements indicate that the well produced 1,512,618 gallons, equivalent to an annualized usage of 5.48 acre-feet per annum. The water was used to fill the five stock ponds which are enumerated as ¶10 in the table of Undisputed Material Facts supra, and was also employed for domestic consumption.

26. The filling of stock ponds is a valid beneficial use of itself. Attention is directed to [Doc. 1125], UNITED STATES' SUBPROCEEDING COMPLAINT AND STATEMENT OF CLAIMS FOR WATER RIGHTS ON BEHALF OF, AND FOR THE BENEFIT OF, THE ZUNI INDIAN TRIBE AND ZUNI ALLOTTEES; in Paragraph 14, the United States claims a right "to fill each impoundment to its full capacity whenever the stated source of supply is available, and to use the impounded water for the identified purposes." This is an explicit recognition that the water right associated with a well must contemplate its use for filling a stock pond or impoundment when said well is a point of diversion supplying the stock pond. The Bawoleks also declare that maintenance of water levels in their stock ponds produces tangible

benefit to wildlife, recreational aesthetics, property value, and income (both directly to the Bawoleks as well as indirectly to other residents of the area).

27. It should also again be noted that Well 10C-4-W14 was drilled prior to the declaration of the basin in which it resides. The fact that this well serves to fill five stock ponds, as an established historical beneficial use, entitles the Bawoleks to a pre-basin water right. Even if actual beneficial use does not take place prior to the declaration, actions that demonstrate an intent to appropriate are sufficient to establish a pre-basin water right. (*State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 475 (1961))

28. The timeframe for the measurements is significant as it establishes the Bawoleks' usage as being historical: The Court's Order of 12/4/2008 [Doc. 1988] established the temporal scope for this adjudication to rights having a priority date senior to the date of the Court's order. The implication for the matter instant is that the Bawoleks' beneficial use, being earlier than the date of the Courts' order, comprises perfection of any water rights that may not have existed on the basis of prior historical use by former owners of the property. This conclusion is further supported by the Court's Memorandum, Opinion, and Order of 5/12/2004 [Doc. 330], in which the Court ruled that it would not give preclusive effect to any decision reached by the State Engineer on the Defendants' declaration. The effect of this is that after 5/12/2004 the Bawoleks were precluded from making any declaration to the State Engineer to establish their beneficial water use.

29. Assuming *arguendo* that the Bawoleks' measurements represented an incremental or new beneficial use beyond that estimated in the Hydrographic survey, the combined effect of both Court's Orders [Docs. 330 and 1988] would be to gridlock the Bawoleks' ability to establish any new water rights within the time window set by those orders: The Bawoleks could not apply

to the State Engineer to recognize their application, yet the Bawoleks' should be entitled to a priority date earlier than the temporal cutoff of 12/4/2008. The obvious resolution to this dilemma is to recognize the Bawoleks' claimed right.

V. CONCLUSION

The Bawoleks are entitled to a recognized water right of at least 3.188 acre-feet per annum for Well 10C-4-W14 for two principal reasons, either of said reasons being sufficient unto itself as establishing the water right: First, Well 10C-4-W14 is entitled to the Bawoleks' claimed right on the basis of its having served four, not one, historical residences. Second, the Bawoleks have independently demonstrated their own historical beneficial use by measurements prior to the seniority date established by this Court. On the basis of arguments presented supra, the Bawoleks respectfully request this Court to grant their motion for partial summary judgment.

VI. DECLARATION OF THE BAWOLEKS

Edward J. Bawolek and Suzan J. Bawolek depose and say:

1. We are Defendants in the instant action.
2. We have personal knowledge of the facts as stated supra and if called as a witness could competently testify thereto.
3. Attached hereto and incorporated herein as Exhibit A is a true and correct copy of the Expert Witness Report of Mr. Doug Boggess, MA, RPA in its entirety.
4. Attached hereto and incorporated herein as Exhibit B is a true and correct copy of page six excerpted from the Expert Witness Report of Mr. Doug Boggess, MA, RPA.

Dated November 10, 2014.

Respectfully submitted,

By: /s/ Edward J. Bawolek and /s/ Suzan J. Bawolek
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