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, v. A & R PRODUCTIONS, et al. Defendants.	)	No. 01cv00072-MV-WPL ZUNI RIVER BASIN ADJUDICATION **Subfile No. ZRB-2-0014**

UNITED STATES' CROSS-MOTION FOR SUMMARY JUDGMENT

Pursuant to the *Order Setting Discovery Deadlines and Adopting Joint Status Report* (April 15, 2014) at 2 (Doc. 2958) and Fed. R. Civ. P. 56, Plaintiff the United States of America ("United States") move this Court for summary judgment on those water rights in the Zuni River Basin ("Basin") associated with the real property owned by Defendants' Edward J. Bawolek and Suzan J. Bawolek (hereafter the "Bawoleks").[1] No disputed issue of material fact exists concerning the priority, amount, purpose and place of use, and point of diversion associated with the water rights now held by the Bawoleks and the United States is entitled to judgment as to all water rights associated with the Bawoleks' property as a matter of law.

The paragraphs below constitute the United States' Memorandum in support of its Cross-Motion for Summary Judgment ("Cross Motion"). D.N.M.LR-Civ. 56.1(b).

[1] This motion is brought by the United States. Both the United States and the State of New Mexico are considered plaintiffs associated with this general stream adjudication. In this Cross-Motion, when referring to past action of both the United States and the State of New Mexico, reference will be made to "Plaintiffs."

I. INTRODUCTION

In connection with this subfile action, Plaintiffs, acting through its experts and consultants, have performed a Hydrographic Survey of the Zuni River Basin ("Basin") and examined the property owned by the Bawoleks in the Basin for evidence of historic, beneficial water use. *See Notice of Filing the Zuni River Basin Hydrographic Survey for SubAreas 9 and 10* (October 24, 2005) (Doc. 393).[2] Based on information gathered and consistent with practices followed for every other non-Indian water right owner in the Basin, Plaintiffs determined the state-law based water rights associated with the Bawoleks' property that should be recognized by this Court. Plaintiffs presented the proposed determination of their water rights to the Bawoleks in the form of a proposed Consent Order. *Joint Status Report and Proposed Discovery Plan* April 9, 2014) (Doc. 2954-1) ("Joint Status Report – Attachment A").

Generally speaking, with respect to the water rights associated with their property, the Bawoleks disagree with Plaintiffs on two important points. First, the Bawoleks claim that an additional quantity of water for the water rights from four wells. *Joint Status Report and Proposed Discovery Plan* at 2-3. With respect to this claim for a greater amount of water, the Bawoleks assert that they are entitled to additional water for domestic purposes for each standing or ruined structure that exists on their property. *See Motion Requesting Partial Summary Judgment* (Doc. 3006) and *Memorandum in Support of Their Motion Requesting Partial Summary Judgment* (Doc. 3006-1). The Bawoleks also assert that they have additional water for irrigation purposes in the quantity of a maximum amount of water that might be pumped through a now-disused and non-functioning drip-irrigation system found on their property. *See*

[2] The Hydrographic Survey has been filed with the Court (see Doc. 393) and posted to the Zuni Basin Adjudication website found at www.zunibasin.com.

Attachment A - Affidavit of Scott Turnbull (hereafter "Attachment A – Turnbull Affidavit") at ¶ 13. Finally, the Bawoleks assert that they have a water right in the amount of however much water they have pumped from their wells to fill and refill any earthen impoundment[3] that they have on their property. *Id.*

With respect to the Bawoleks' second major point of contention with Plaintiffs, the Bawoleks assert that for every water feature found on their property, namely wells and stock ponds, the water right associated with that feature should be recognized with a "wildlife use" as a historic, beneficial use for such water right. Joint Status Report – Attachment A.[4] The Bawoleks appear to seek recognition of such use dating back decades in priority to the origin of each water feature in question. Joint Status Report at 2-3.

Despite the assertions made by the Bawoleks, they are not entitled to any additional amount or purpose of water in addition to or different from those which Plaintiffs have offered. The Bawoleks are not entitled to the relief they seek because the law does not support the assertions that they make and/or no facts exist which would entitle the Bawoleks to such relief. With respect to a water right claim for an increased quantity associated with every standing or ruined structure that may have existed on the Bawoleks' property in the past, Plaintiffs have addressed this assertion in the *United States' and State of New Mexico's Response to Edward J. Bawolek and Suzan J. Bawolek Motion Requesting Partial Summary Judgment* (December 15, 2014) filed simultaneously with this Cross-Motion. With respect to a water right claim based on the theoretical capacity of an irrigation system now in disuse, such capacity is not a reflection of

[3] "Earthen impoundments" are otherwise known as "stock ponds" and will be referred to as such throughout the remainder of this Response. Stock ponds are constructed by creating an earthen berm across any surface water drainage such as a wash or an arroyo.

[4] The Bawoleks' assertion here appears closely tied to their assertion for a quantity of water to pump groundwater into stock ponds.

historic, beneficial use or an appropriate basis to quantify a water right. With respect to a water right claim based on water pumped into any stock pond, such water pumping does not constitute a beneficial use. Instead, pumping groundwater so that such water simply evaporates constitutes groundwater waste for which no water right can be recognized. Finally, with respect to assigning a "wildlife use" to every water feature found on the Bawoleks' property, such was not a historic, beneficial use of water on the Bawoleks' property and even if it were, no basis exists to quantify the water right based on such wildlife use.

The only basis to recognize any aspect of a water right associated with the Bawoleks' property is historic, beneficial use, for which Plaintiffs are willing to stipulate. *See* Joint Status Report – Attachment A. No dispute of material fact exists with respect to the amount and purpose of the actual historic, beneficial use of water determined by the Hydrographic Survey, and an absence of both facts and law exists to support the Bawoleks' claims for additional water rights. The United States is entitled to summary judgment as a matter of law. Submitted with this Cross-Motion, is Attachment B which reflects a thorough summary of the findings of the Hydrographic Survey with respect to the Bawoleks' property.

II. STANDARD OF REVIEW

Whether asserted by Plaintiffs or the Bawoleks, the standard of review for a motion for summary judgment is the same and well established. As articulated by the Supreme Court:

> a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (internal quotations of Fed. R. Civ. P 56 omitted). Following *Celotex* and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the

Tenth Circuit has said that, when reviewing a motion for summary judgment under Fed. R. Civ. P. 56, the district court must "view the evidence and draw any inferences in a light most favorable to the party opposing summary judgment." *Thomas v. Wichita Coca-Cola Bottling Co.*, 968 F.2d 1022, 1024 (10th Cir. 1992). Movants for summary judgment may establish that no dispute of material fact exists by establishing the absence of evidence to support a factual component of a claim. *Celotex*, 477 U.S. at 325. Once movants have carried their burden and established that the summary judgment motion is supported by both law and fact, the respondent must come forward with sufficient facts to establish that disputed material fact exists. *Id.* at 323. Absent an actual dispute of material fact, the movant is entitle to judgment as a matter of law. Fed. R. Civ. P. 56.

III. UNDISPUTED ISSUES OF MATERIAL FACT

The United States presents the undisputed, material facts of the water right claims associated with the Bawoleks' property in the Basin.

PLAINTIFFS' ASSERTION OF UNDISPUTED MATERIAL FACTS	
Factual Assertions	**Basis for the Factual Assertion**
1. Based upon plausible evidence of historic, beneficial use, Plaintiffs have stipulated to the recognition of water rights associated with the historic, beneficial use of water on the Bawoleks' property.	*Joint Status Report - Attachment* (April 9, 2014) (Doc. 2954-1) and Attachment B to this Cross-Motion.
2. The Bawoleks' estimate of water capacity associated with non-functioning drip irrigation system is not based upon evidence of irrigation of a specific crop.	Attachment A – Turnbull Affidavit at ¶¶ 5, 12, and 13.

3. Similar to other open land in the Basin, the Bawoleks' property appears to have been historically used to raise livestock and water features found on their property (wells and stock ponds) were used to supply water to livestock.	Attachment A – Turnbull Affidavit at ¶ 7.
4. The water pumped by the Bawoleks from wells 10C-4-W08; 10C-4-W13; 10C-4-W14; and 10C-4-W16 between 2007 and 2013 are greatly in excess of any known estimate of wildlife water needs.	Attachment A – Turnbull Affidavit at ¶¶ 14 - 16.

IV. ARGUMENT

A. The water rights Plaintiffs have been willing to recognize associated with the Bawoleks' property are based upon evidence of historic, beneficial use identified through the Hydrographic Survey.

The best starting point for considering the substance of this Cross-Motion is to examine how the Bawoleks' water rights claims differ from the rights that Plaintiffs are willing to recognize.

The legal basis for establishing a water right is well settled in New Mexico: "The unappropriated water . . . is hereby declared to belong to the public." Article XVI § 2, NMSA 1978, § 72-1-2 (1907). In other words, fundamentally water within New Mexico belongs to the state. *State ex rel. Erickson v. McLean*, 1957–NMSC–012, ¶ 23, 308 P.2d 983, 987; *Carangelo v. Albuquerque-Bernalillo County Water Utility*, 2014 – NMCA – 032, ¶ 35, 320 P.3d 492, 503. A water user in New Mexico may secure the right to use water through beneficial use and, like

many other western states, when necessary the state will administer the water right consistent with the doctrine of prior appropriation. N.M. Const. Article XVI, § 2, NMSA 1978, § 72-1-2. Of central importance, "beneficial use shall be the basis, the measure[,] and the limit of the right to use the water." N.M. Const. Article XVI, Section 3. "Put another way, 'the amount of water which has been applied to a beneficial use is … a measure of the quantity of the appropriation.'" *Carangelo*, 320 P.3d at 503 (quoting *Erickson* 308 P.2d at 987). As such, the amount of water, along with priority, purpose, and periods and place of use, is a fundamental element of a water right that must be proven by a water right claimant, in this case the Bawoleks.

> Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

NMSA 1978 Section 72-4-19, (emphasis added).

In this general stream adjudication, the Court has previously embraced the principles articulated above and found them equally applicable to domestic and non-domestic uses of groundwater. *Memorandum Opinion and Order* (June 5, 2006) at 5 (Doc. 733) ("Neither the WNMWPA nor Davis cite any authority which supports the proposition that domestic uses are exempt from the beneficial use requirement which exists under state law, nor do they cite support for their suggestion that domestic uses should enjoy special treatment in this water rights adjudication.").

Here, the focus of inquiry is on the water rights associated with the Bawoleks' property in the Basin. Ultimately, to the extent that the Bawoleks seek to establish a water right under state law in excess or different from that which Plaintiffs are willing to recognize, the Bawoleks have the burden to establish such additional right. *Joint Status Report and Proposed Discovery Plan*

(April 9, 2014) (Doc. 2954); *see also* August 28, 2014 *Order* (Doc. 2985) at 2-3 ("[A]s a general rule the burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right" (citations omitted)).

The United States recognizes that the historic use of the land was principally to raise livestock, and more specifically cattle.[5] The Bawoleks' property appears to have no other particular historic use. Attachment A – Turnbull Affidavit at ¶ 7. Therefore, for the Bawoleks, as for all other Basin land owners, the United States believes there to be sufficient plausible evidence to support water rights that were associated with raising livestock, specifically the consumptive water needed to raise cattle. In addition, for any other likely water use from an identifiable water source, Plaintiffs have also been willing to recognize additional water rights such as identifiable domestic and irrigation water uses.

The Hydrographic Survey Report for Sub Areas 9 and 10, at page 3-1, describes how the Plaintiff determined the water right associated with livestock wells:

> Livestock – The duty of water for stock wells is the estimated water use of livestock that could be or is actually sustained by the area served by the well. The water use of cattle was calculated based on the information prepared by State of New Mexico. The area of land in which the well is located was determined from property ownership maps and database obtained from Cibola Assessors office. Carrying capacity is based on the number of "animal units" that can be sustained on an area of land, with one cow or five sheep equivalent to one unit. The land carrying capacity, which is the number of animals that a habitat maintains in a healthy, vigorous condition, was assumed to be 15 animal units per section, or the count provided by the owner, whenever applicable. The 15 animal units per section estimate is based on information from the New Mexico Department of Agriculture. The water consumption of an animal unit is estimated at an average of 10 gallons/day (488 feet^3 per year or 0.0112 acre-feet per year) (Wilson and Lucero, 1997). An efficiency factor of 0.5 was assumed to account for consumptive and other losses.

The "efficiency factor of 0.5" effectively doubled the quantity expected to have been

[5] All facts asserted in the remainder of this section are made part of this Court's record and supported by Attachment A – Turnbull Affidavit.

consumed by the livestock (to 20 gallons/day) to account for incidental losses such as evaporation, spillage, and, importantly, wildlife. Once the livestock carrying-capacity and annual water needs were determined for the Bawoleks' property, Plaintiffs divided the water quantity equally by the number of wells found on the Bawoleks' property. For this subfile, Plaintiffs identified six wells and assigned 0.168 acre-feet per year ("AFY") to each well for the historic, beneficial use associated with raising livestock on the Bawoleks' property. Attachment A – Turnbull Affidavit at ¶ 9.

The Hydrographic Survey also identified 22 stock ponds that were constructed by creating earthen berms across surface water drainages such as washes or arroyos. Plaintiffs believe that such stock ponds are sufficient evidence of the beneficial use of surface water for livestock watering. As such, Plaintiffs were willing to recognize the Bawoleks' right to impound surface water as it had been in past. For this subfile case, Plaintiffs assigned to each stock pond the right to impound surface water up to the capacity of the stock ponds for the historic, beneficial use associated with raising livestock.[6] Further, as a result of the Hydrographic Survey, Plaintiffs identified piping that had been installed between some wells located on the Bawoleks' Property and several stock ponds. *Id.* at ¶ 6. For such stock ponds, Plaintiff recognized the connected well as a diversion point for the stock pond; however, such connection added no additional beneficial use of water above that which was calculated for animal consumption. The fact that a well had been connected to a stock pond did not and does not result in an increased water right quantity.

In addition, as a result of their investigation of the Bawoleks' property, the hydrographic survey consultants identified three dwellings in close proximity to two wells (designated 10C-4-

[6] Of course, the ability to impound any surface water is ultimately limited to its availability.

W08 and 10C-4-W14). Where dwellings have been reasonably determined to be supplied by an identifiable well, Plaintiffs have long been willing to accept that such association is plausible evidence of historic, beneficial use of up to 0.7 AFY (or 625 gallons per day) of water. *See State of New Mexico's Response to the Western New Mexico Water Preservation Association's Motion to Certify Questions to the New Mexico Supreme Court* (November 30, 2005) at 9-10 (Doc. 406). Fundamentally, Plaintiffs' willingness to recognize a specific quantity of water for historic domestic use is a substantial benefit to the Bawoleks as they are not otherwise required to prove historic, beneficial use. *Id.* Plaintiffs have offered a 0.7 AFY water right for domestic purposes from well 10C-4-W14 to serve the nearby but currently unoccupied dwelling and two 0.7 AFY water rights for domestic purposes from well 10C-4-W08 to serve two other dwellings. Attachment A – Turnbull Affidavit at ¶ 10.

Finally, as mentioned above, hydrographic survey consultants observed the remnants of a no longer functional, drip irrigation system apparently leading to specific, single-plant locations broadly scattered on the Bawoleks' property. Plaintiff has already described the basis for a water right associated with this system. *See United States' and State of New Mexico's Response to Edward J. Bawolek and Suzan J. Bawolek Motion Requesting Partial Summary Judgment* (December 15, 2014) at 11 subsection IV.A.1. For the historic, beneficial use of water by this drip irrigation system, Plaintiff has offered to stipulate to a 0.22 AFY water right from well 10C-4-W14. Attachment A – Turnbull Affidavit at ¶ 11.

Ultimately, the water right quantities and attributes that this Court should recognize associated with the Bawoleks' property should be based on the evidence of historic, beneficial use as identified by the Hydrographic Survey. As mentioned above and as calculated by Plaintiff's consultants, all water rights associated with the Bawoleks' property are presented in

Attachment B to this Cross-Motion. The law and facts supporting the rights outlined are not in dispute. The United States is entitled to summary judgment as a matter of law and summary judgment should enter quantifying the Bawoleks' water rights consistent with the quantities and attributes presented in Attachment B to this Cross-Motion.

B. The Bawoleks are not entitled to a water right based on the potential carrying capacity of their non-functioning drip irrigation system.

The Bawoleks disagree with the quantity of water that Plaintiffs are willing to recognize for a water right associated with well 10C-4-W14 ("well W14"). Joint Status Report – Attachment A. Instead of the 1.088 AFY that Plaintiffs are willing to recognize, the Bawoleks assert they are entitled to 4.8 AFY from well W14. *Id.* The Bawoleks appear to assert that they are entitle to a larger quantity water right, at least in part, because of the non-functioning drip irrigation system that can be found on their property. Attachment A – Turnbull Affidavit at ¶¶ 12-13. Through discovery, the Bawoleks presented a report prepared by Dr. Bawolek in which he calculates a theoretical flow rate through the irrigation system to be between 6.45 and 8.06 AFY. *Id.* at ¶ 12. However, the theoretical flow rate through a non-functioning irrigation system does not establish beneficial use of water to quantify a water right.

As described above, the right to use water in New Mexico is quantified by the beneficial use of water. *Carangelo*, 320 P.3d at 503 ("Put another way, 'the amount of water which has been applied to a beneficial use is … a measure of the quantity of the appropriation.'" (quoting *Erickson* 308 P.2d at 987)). For irrigation, the water beneficially used is that water actually needed to raise crops during their growing season. Here, Plaintiffs recognize that non-functioning drip irrigation system is plausible evidence to establish a prior use of water to irrigate plants at the end of drip-emitters. Plaintiffs have calculated the water-needs of likely similar plants and determined that such plants would need no more than 0.22 AFY of irrigation

water during the growing season. Dr. Bawolek's capacity calculations (6.45 – 8.06 AFY) are a year-round pumping calculation and simply unmoored from any actual crop or irrigation water needs or beneficial use. *See* Attachment A – Turnbull Affidavit at ¶ 13

The Bawoleks' attempt to calculate a year-round pumping capacity for the non-functional drip irrigation system is not an estimate or measure of beneficial use upon which to increase the amount of water from well W14.

C. The Bawoleks are not entitled to an additional amount of water based upon alleged wildlife watering from stock ponds found on their property.

A principle point of contention between Plaintiffs and the Bawoleks concerns the Bawoleks' claim for a water right associated with a "wildlife benefit." The Bawoleks claim that quantities of water for water rights from four wells (designated by the Plaintiffs as 10C-4-W08; 10C-4-W13; 10C-4-W14; and 10C-4-W16) should be increased based upon wildlife watering purposes. Joint Status Report – Attachment A. In his report, Dr. Bawolek describes that between 2007 and 2013 the Bawoleks pumped almost 4 million gallons of groundwater from the four wells. *See* Attachment A – Turnbull Affidavit at ¶ 14. Because the pumping only occurred at some fraction of each year, Dr. Bawolek "annualized" the water quantity to almost 10 AFY and appears to assert a water right for the "annualized" quantity distributed across the four wells. *Id.* at ¶ 15. The Bawoleks state that the diverted water is pumped water to four stock ponds (designated by Plaintiffs 10C-4-SP21, 10C-4-SP22, 10C-4-SP23, and 10C-4-SP24). *Id.*

As an initial matter, the Bawoleks' relatively recent water pumping cannot create a water right that dates back decades to the establishment of a water use feature. Assuming *arguendo* that a water right can be created by a private land owner for the benefit of unconfined wildlife, such a new water right is unrelated to the historic, beneficial use of water on the Bawoleks' property, namely raising livestock. Therefore, at best the Bawoleks' assertions are an attempt to

establish a new water right that possibly began in 2007. For the purpose of developing such a new water right, the Bawoleks would have needed to apply for, and been granted, a permit by the State Engineer for any new appropriation of water. NMSA 1978 Section 72-12-3 ("Any person, firm or corporation or any other entity desiring to appropriate for beneficial use any of the waters described in Chapter 72, Article 12 NMSA 1978 shall apply to the state engineer in a form prescribed by him."). This the Bawoleks did not do. Moreover, the Bawoleks' complete lack of evidence to prove any specific quantity of water actually consumed or used by the claimed wildlife thoroughly defeats their attempt to establish a wildlife benefit water right.

Further, the Bawoleks' attempt to "annualize" a water quantity reveals the Bawoleks' attempt to claim a future water right for water which they have never pumped or appropriated. *See* Attachment A – Turnbull Affidavit at ¶ 15. Just as a water right cannot be created or quantified without beneficial use, on the most fundamental level a water right in New Mexico can only be created only after water has been appropriated. *State of New Mexico ex re. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, ¶ 41, 182 P.2d 421, 431 ("waters are not appropriated until application to use has been effected."); *see also* N.M. Const. Article XVI, Section 2 ("Priority of appropriation shall give the better right."). The Bawoleks' attempt to increase their water rights by claiming water that they "could" have pumped from their wells in no way supports a water right that can be recognized by the Court.

Next, were the Court to turn more substantively to the Bawoleks' wildlife right assertion, it becomes quickly apparent that it fails. The water pumped over the last several years is purported to be for the benefit of elk. *See* Attachment A – Turnbull Affidavit at ¶ 17. In discovery material provided by the Bawoleks, they describe that over the last several years they have leased their property to elk hunters and allowed these hunters to come onto the Bawoleks'

property so that the elk could be hunted. *See id.* It appears that the Bawoleks claim their stock ponds and the groundwater pumped into the stock ponds increase the occurrence of elk on their property for the benefit of hunters. *See id.* at ¶ 17.

As described above, a water right is quantified based upon that amount which is put to beneficial use. *Carangelo*, 320 P.3d at 503. At its core, the Bawoleks would have this Court quantify their wildlife water right simply based upon the quantity of water pumped over time. Yet, pumping water is not by itself a beneficial use; without a proven beneficial use and a proven quantity of water associated with that use, simply pumping water constitutes waste. *Cf. Erickson*, 308 P.2d at 987 (continuous pumping from a well for the professed purpose to grow native grasses constituted waste); *see also Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1134 (10th Cir. 1981) (stored water that is predominately lost to evaporation was not beneficial use of water, constitutes waste, and cannot result in a water right, *citing Erickson* at 987-988). Assuming for the sake of the Bawoleks' argument that watering wildlife is a beneficial use of water in New Mexico, it is the established water needs of elk that would be the beneficial use and the basis to quantify a wildlife benefit water right. Yet, the Bawoleks have presented absolutely no evidence to support their contention that such a large quantity of water is necessary to support passing elk or has any connection to elk needs whatsoever. *Cf. Erickson* ("Waste of water must not be practiced. Wasteful methods, so common among the early settlers do not establish a vested right to their continuance. Such methods were only deemed a privilege, permitted merely because it could be exercised without substantial injury to anyone. The use must not only be beneficial to the lands of the appropriator, but it must also be reasonable in relation." *Id.* at 987(citation and internal quotation omitted)). It appears, therefore, that the only result of pumping more than 4 million gallons of groundwater has been to evaporate that water to

the atmosphere. In the extremely arid environment of the Basin, such activity cannot be embraced through the recognition of a water right. *Cf. id.* ("An excessive diversion of water, through waste, cannot be regarded as a diversion to beneficial use, within the meaning of the Constitution. Water, in this state, is too scarce, and consequently too precious, to admit waste." (citations omitted)).

In fact, the only undisputed evidence concerning the needs of elk was developed by Plaintiffs. This evidence establishes that to the extent that the water needs of elk can be identified, they are a mere fraction of the quantity claimed by the Bawoleks. *See* Attachment A – Turnbull Affidavit at ¶ 19. Further, the water right associated with grazing livestock on the Bawoleks' property already factors in the maximum grazing potential of the land - whether that grazing occurs by cattle or elk. *Id.* at ¶ 18. Therefore, an additional water right for additional elk consumption above the carrying capacity of the Bawoleks' property is wholly unjustified.

As described above, to calculate the water right associated with grazing livestock on the Bawoleks' property, Plaintiffs calculated the maximum forage made available for grazing. *Id*. In other words, whether grazed by cattle, horses, sheep, or elk, the amount of forage available with the Bawoleks' property is fixed and can only support a limited number of grazing animals. *Id*. Plaintiffs' calculations to determine a livestock water right was based upon identifying the maximum number of grazing animals that might be reasonably grazed on the Bawoleks' property. *Id*.

The focus of Plaintiffs' inquiry was on livestock because that was the historic, beneficial use of the land and its water. However, Plaintiffs' consultant also identified that elk was a range animal similar to cattle in that elk grazed and ranged the Basin. *Id.* at ¶ 19. Plaintiffs' consultant determined that the average water consumption needs for elk are slightly lower than for cattle by

approximately 30%. *Id*. Finally, in calculating the water consumption needs of cattle (10 gallons per day per animal unit[7]), Plaintiffs' hydrographic survey, as discussed above *supra* at subsection IV.A, also factored in water losses that might occur when delivering water to livestock, including spillage, evaporation, and, most importantly, wildlife consumption. *Id.* at ¶ 9 and 19. Ultimately, to account for losses Plaintiffs doubled the consumption estimates for livestock watering and applied 20 gallons per day per AU in their calculations. *Id*. Therefore, the undisputed evidence establishes that to the extent that elk might require water on the Bawoleks' property, the water Plaintiffs have offered for livestock use already and completely incorporates such use.

No evidence supports the Bawoleks' claim that groundwater pumping since 2007 forms the basis for an additional amount of water for wildlife watering purposes. Instead, the vast majority of water pumped to five stock ponds simply evaporated and served no quantified, beneficial use. Therefore, contrary to the Bawoleks' assertions, groundwater pumping cannot form the basis to increase the quantity of the water rights associated with four wells.

D. The Bawoleks are not entitled to a "wildlife benefit" purpose of use for every water feature on their property.

For every water feature located on the Bawoleks' property, the Bawoleks insist that "wildlife benefit" should be listed as a historic, beneficial use. Joint Status Report – Attachment A. For reasons virtually identical to the Bawoleks' argument concerning virtually unlimited groundwater pumping for wildlife purposes, articulated immediately above, the Bawoleks' assertion is unsupported by any evidence of actual historic, beneficial use.

[7] An "animal unit" or AU is a unit of measure by which the forage needs of any range animal might be equated. For example, a mature cow represents 1.0 AU whereas a mature elk represents 0.7 AU. Therefore, Plaintiffs have calculated that the daily water consumption quantity for a mature cow is 10 gallons and the daily water consumption quantity for a mature elk is 7 gallons. *Id.* at ¶ 19.

Any water right requires proof of historic use for a specific quantity of water. As described in subsection IV.A, above, the Bawoleks have the burden to establish such proof. *Joint Status Report and Proposed Discovery Plan* (April 9, 2014) (Doc. 2954); *see also* August 28, 2014 *Order* (Doc. 2985) at 2-3 ("[A]s a general rule the burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right" (citations omitted)). Yet, the Bawoleks have no evidence of the quantity of water necessary to support wildlife in any capacity. Further, aside from the pumping from the four wells into the five stock ponds described above, the Bawoleks present no evidence that any water in any amount was ever historically diverted from or to any of the remaining water features for wildlife purposes.

The United States does not contend that wildlife do not need water; nor does it contend that wildlife do not exist or consume water on the Bawoleks' property. However, the Bawoleks' liberal application of a "wildlife benefit" to every water feature on their property and corresponding water right appears to be little more than a veiled attempt to simply broaden, without justification, their water rights to the greatest conceivable extent. The Bawoleks have either not fully grasped or ignored the need both to establish a beneficial use and to quantify the specific, limited amount of water necessary to serve that use. This is the bedrock on which any water right is formed in New Mexico.

Ultimately, the Bawoleks have no evidentiary or legal basis to establish a beneficial use of water for wildlife purposes. Therefore, contrary to the Bawoleks' assertions, they are not entitled to a "wildlife benefit" designation for every water feature found on their property.

V. CONCLUSION

No material fact remains in dispute concerning the water rights on the Bawoleks' property and United States is entitled to judgment as a matter of law. The Bawoleks are entitled to those water rights based on the Hydrographic Survey and as offered by Plaintiffs. These water rights are based upon a reasonable estimation of the actual historic, beneficial uses of water and are supported by evidence. The increased water right quantities and purposes of use claimed by the Bawoleks are not supported by the law or by evidence of beneficial use. The Court should enter judgment in favor of the Bawoleks for the water rights described in Attachment B.

Respectfully submitted this 15th day of December, 2014.

/s/ Andrew "Guss" Guarino
Andrew "Guss" Guarino

Bradley S. Bridgewater
U.S. Department of Justice
South Terrace, Suite 370
999 18th St.
Denver, CO 80202
(303) 844-1343
(303) 844-1359

COUNSEL FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 15, 2014, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.

__/s/ Andrew "Guss" Guarino_____