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' REPLY TO THE 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") replies to *Bawoleks' Combined Reply to Plaintiffs' Response Re Bawoleks' Motion Requesting Partial Summary Judgment and Response to the United States' Cross-Motion for Summary Judgment* (Doc. 3016) ("Response").

I. INTRODUCTION

Though the parties appear to disagree about whether a fact is relevant, all the potentially admissible, relevant, material facts are now before the Court and no factual dispute exists between the parties. Therefore, this subfile action is ripe for summary judgment on the water rights that are tied to the real property owned by Defendants' Edward J. Bawolek and Suzan J. Bawolek (hereafter the "Bawoleks") in the Zuni River Basin of New Mexico ("Basin").

In the *United States' Cross-Motion for Summary Judgment* (Doc. 3013) ("Cross-Motion"), the United States moved for summary judgment on the water rights associated with

this subfile action. In the Cross-Motion, the United States established that no basis exists to recognize water rights in the Bawoleks' name that are greater than or different from the water rights that Plaintiffs United States and the State of New Mexico (collectively "Plaintiffs") are willing to recognize.[1] In their Response, the Bawoleks do not present any additional, admissible facts that establish that a dispute of material fact exists between the parties. Instead, the Bawoleks present argument that the conclusions drawn by the United States' from those facts before the Court are wrong. In effect, the Bawoleks argue that the same facts that United States points to in fact establish the water rights to which the Bawoleks' believe they are entitled. Trial is unnecessary to resolve this legal dispute and all material is before the Court to enable it to resolve this subfile action.

The critical, fundamental flaws in the arguments presented in the Response are two-fold. First, the Bawoleks fail to recognize that the burden is on the Bawoleks to prove the existence of every aspect of a water right not stipulated to by Plaintiffs. *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)). Further, once the United States carried its initial summary judgment burden, the burden shifted to the Bawoleks to establish that a genuine dispute of material fact exists for the Court to resolve at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of [Fed R. Civ. P.] 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to

[1] The extent of those water rights that Plaintiffs are willing to recognize in this subfile action are found in Attachment B to the Cross-Motion. The Court can find the asserted water rights claims of the Bawoleks that are in excess of or different from Plaintiffs' position in Attachment A to the *Joint Status Report and Proposed Discovery Plan* (April 9, 2014) (Doc. 2954-1).

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."). Contrary to the Bawoleks' repeated assertions, the burden is not on Plaintiffs at any time to disprove any aspect of the Bawoleks' asserted claims. *Cf., e.g.,* Response at 19 ("Plaintiffs have failed to . . . provide any plausible explanation for the plethora of water features on the Bawolek property . . . ."); *see Celotex*, 477 U.S. at 323 ("we find no express or implied requirement in [Fed. R. Civ. P.] 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.").

Here, the United States carried its initial burden associated with its Cross-Motion and established that no evidence or insufficient evidence existed to support the Bawoleks' claims for additional water rights. In their Response, the Bawoleks do not point to or present additional, admissible evidence to support their claims; instead they simply argue that the United States was wrong in its conclusion about whether the evidence establishes water rights in excess of what Plaintiffs are willing to recognize.

Second, the Bawoleks have lost sight of their ultimate goal in this subfile action – they must establish every aspect of the water rights they claim by a preponderance of the evidence. *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 1985-NMSC-090, 14, 709 P.2d 649, 654 ("[i]t is the general rule, not only in New Mexico but elsewhere, that issues of fact in civil cases are to be determined according to the preponderance of the evidence."). Here, confronted with the very limited nature of their evidence concerning the water rights they claim, the Bawoleks simply continue to speculate about the possible nature and extent of historic water use on their property. Speculation about the possible nature and extent of historic water use is simply insufficient to establish those facts by a preponderance and the Bawoleks are not entitled to an evidentiary trial to simply present their speculation. Base on the limited evidence they have mustered and

disclosed through discovery, the Bawoleks cannot prove the water rights they assert.

In the end, the United States has carried its burden on its Cross-Motion and has "demonstrate[d] an absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. The Bawoleks have in their turn failed to "designate specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal quotations to Fed. R. Civ. P. 56(e) omitted). The United States is entitled to summary judgment as described in its Cross-Motion.

In the paragraphs below, the United States specifically addresses the two substantive aspects of the Response.

II. ARGUMENT

A. The Bawoleks are not entitled to a water right for domestic use associated with three ruins found on their property.

In the Cross-Motion, the United States identified and established the basis on which the historic beneficial uses of water on the Bawoleks' property could be identified and quantified. These uses included raising livestock, meeting domestic needs, and irrigating vegetation. Cross-Motion at 6–11. In their Response, the Bawoleks incorporated the arguments made in reply to *Edward J. Bawolek and Suzan J. Bawolek Motion Requesting Partial Summary Judgment* (Doc. 3006) and assert that a significant additional water right quantity (2.1 acre-feet per year ("AFY")) should be recognized for the well designated 10C-4-W14 ("well W14") because the ruins of three structures found on their property. Response at 8–10. No dispute of material fact exists with respect to the ruins, but the United States contends the mere existence of these ruins is not evidence of and cannot establish historical beneficial use of water from the well in question.[2]

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[2] The three ruins to which the Bawoleks refer were examined by Douglas H.M. Boggess. Mr. Boggess prepared an expert report which the Bawoleks attached in its entirety to their *Motion Requesting Partial Summary Judgment* (Doc. 3006) as Exhibit 2–7.

First, the Bawoleks insist that the ruins were simultaneously occupied. However, far from establishing this fact, the evidentiary record on which the Bawoleks rely establishes no more than the possibility that the ruins were occupied at the same time. In their Response, the Bawoleks give no description of what their expert, Mr. Boggess, determined with respect to each ruin but simply quote the summary conclusion from Mr. Boggess' report: "The archeological and historical data, therefore, shows as many as four homes [three ruins and one habitable structure] in use concurrently between 1937 and potentially as late as 1951 . . . ." Response at 8 (emphasis added). The very words of Mr. Boggess ("as many as" and "potentially as late as") reflect nothing different from what Plaintiffs previously pointed out – namely that no more than a potential range of overlapping occupancy dates exist for the ruins: 1931 – 1951 (Ruin 1); 1933 – 1953 (Ruin 2); 1933 – 1953 (Ruin 3) and 1937 – present (House 1).[3] *See United States' and State of New Mexico's Response to Edward J. Bawolek and Suzan J. Bawolek Motion Requesting Partial Summary Judgment* (Doc. 3012) at 13–15. Although it is not entirely clear how simultaneous occupation gives greater support for a claimed water right associated with the three ruins, in the end the Bawoleks have established nothing more than the mere possibility of the simultaneous occupancy that they assert. This mere possibility is not evidence of an actual simultaneous occupancy of the structures, must less of any beneficial use of water from well W14 that would support the Bawoleks' claimed water right.

Second, the Bawoleks assert that because well W14 is in closest proximity to the ruins, any residents of these ruins must have used well W14. Response at 9–10. Tellingly, even the Bawoleks make this dubious assertion as nothing more than a "reasonable presumption"

[3] "House 1" refers to the unoccupied house that lies in very close proximity (160 feet) to well W14 and for which Plaintiffs are willing to recognize a water right (0.7 AFY) from well W14.

supported by an "implicit[e]" "premise." *See id.* at 10. Further, the Bawoleks' assertion here simply ignores the findings of their expert, Mr. Boggess, that during the critical two decades the Bawoleks argue for simultaneous occupancy the parcels on which each of the ruins are located were all separately owned by different individuals. These many individuals had no known, lawful ability or right to go onto the property of others to take water from well W14. *See United States' and State of New Mexico's Response to Edward J. Bawolek and Suzan J. Bawolek Motion Requesting Partial Summary Judgment* (Doc. 3012) at 16–17.[4] The Bawoleks' presumption that occupants of the Basin between 1931 and 1951 simply went to and continuously depended on the closest well for domestic water use, whether or not they owned the property on which the well was located, neither comports with common sense nor is supported by any evidence. The Bawoleks are simply not entitled to a water right based upon nothing more than pure speculation.

B. The Bawoleks are not entitled to a water right for wildlife purposes.

In their Response, the Bawoleks also argue that they are entitled to an annualized water right for all water pumped to fill and refill any stock pond found on their property for wildlife-uses. Further, the Bawoleks assert that all water ever stored in stock ponds was done so to benefit wildlife and they are also entitled to a wildlife-use water right for each stock pond. Response at 10–16. More specifically, the Bawoleks assert that wildlife needs go far beyond the consumptive needs of wildlife, and include that water necessary "to provide habitat considered essential by those who lease the Bawolek property for hunting purposes." *Id.* at 12. The Bawoleks' assertions here are again simply the result of a series of unfounded assumptions and

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[4] In their Response, the Bawoleks assert that Plaintiffs somehow attempt to "discredit[] Mr. Boggess, his expertise and his science." Response at 9. In fact, Plaintiffs do nothing of the kind. For purpose of presenting both the *United States' and State of New Mexico's Response to Edward J. Bawolek and Suzan J. Bawolek Motion Requesting Partial Summary Judgment* (Doc. 3012) and the Cross Motion, Plaintiffs strictly assume that Mr. Boggess is a qualified expert and take everything presented in Mr. Boggess' report as true.

speculations, none of which is supported by any admissible evidence.

As stated in the Cross-Motion, United States does not deny that wildlife needs water; nor does it contend that wildlife do not exist or consume water on the Bawoleks' property. However, the question before this Court is whether the Bawoleks can establish water rights under New Mexico law in this subproceeding – they have presented no admissible evidence to establish such rights nor does such admissible evidence exist.

As stated in the Cross-Motion, to establish a water right under New Mexico law, the claimant must establish that water has been put to beneficial use. N.M. Const. Article XVI, § 2, NMSA 1978, § 72-1-2. Further, "[b]eneficial use shall be the basis, the measure[,] and the limit of the right to the use of water." N.M. Const. Article XVI, § 3 (emphasis added); *Carangelo v. Albuquerque-Bernalillo County Water Utility*, 2014–NMCA–032, ¶ 35, 320 P.3d 492, 503, *cert. denied* ("'the amount of water which has been applied to a beneficial use is . . . a measure of the quantity of the appropriation.'" (quoting *State ex rel. Erickson v. McLean*, 1957–NMSC–012, ¶ 22, 308 P.2d 983, 987)). The burden falls squarely on the claimant of a water right to establish the parameters of a water right: priority, amount, purpose, periods and place of use. NMSA 1978 § 72-4-19; *see also* August 28, 2014 *Order* (Doc. 2985) at 2-3. In their Response, the Bawoleks take no issue with the United States' characterization of the law that applies to establishing a water right. Nevertheless, the Bawoleks argue as though such law does not apply.

At its core, the Bawoleks' wildlife-use argument amounts to this: the Bawoleks are entitled to be decreed a water right with a priority stretching back decades for however much water they might have recently pumped (groundwater) or captured (surface water) so long as they sincerely believe it is being put to good use.[5] Were it possible for water rights to be

[5] In fact, the Bawoleks' argument goes further claiming that they are entitle to the potential water that might be pumped (groundwater) or captured (surface water). Response at 10–11 ("The Bawoleks, in assessing their

established like this, there would be virtually no limit (in quantity or priority) to a water right; whether for wildlife, agriculture, domestic, or industrial purposes water rights would be established on claim alone and possibly limited only by pumping (groundwater) or capture (surface water) capacity. Essentially, were it allowed, the Bawoleks' argument would eliminate the state constitutional requirement that "beneficial use shall be the basis, the measure[,] and the limit of the right to the use of water." *See* N.M. Const. Article XVI, § 3 (emphasis added).

In its Cross-Motion, the United States assumes, *arguendo*, that a water right can be created by a private land owner for the benefit of unconfined wildlife and that the Bawoleks have diverted water for the benefit of wildlife consumption and habitat. *See, e.g.,* Cross-Motion at 12. Therefore, it is not necessary to reply to the Bawoleks' assertions that they or their predecessors have historically used water on their property for wildlife purposes. *See* Response at 12–16. Nevertheless, as established in the Cross-Motion, no basis exists to quantify any water right for wildlife-use purposes whether for consumption or habitat uses.

In their Response, the Bawoleks identify no evidence that can support a finding by the Court of beneficial use in the quantity claimed. As stated in the Cross-Motion, the Bawoleks merely argue that the annualized amount of water pumped into stock ponds is the quantity of water that should be recognized for a wildlife-use water right. *Id.* at 9-11. Yet, the Bawoleks make a speculative leap that the Court cannot; the Bawoleks identify no admissible evidence that establishes the water quantity needs of wildlife, specifically elk, for either consumption or habitat purposes. Instead, they simply ask this Court to presume, without evidentiary basis, that all the water that has ever been pumped or diverted to stock ponds at any time is necessary for elk and their habitat. Further, the Bawoleks ask this Court to award a water right greater than

measurements, have extrapolated to annualized amounts . . .").

anything actually pumped based on a calculated, annualized quantity of water that the Bawoleks claim they could have pumped.

The quantity of water tied to a water right is limited to that amount of water necessary for the use. *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 987-88).

III. CONCLUSION

No material fact remains in dispute that necessitates a trial in this subfile action. The United States is entitled to judgment as a matter of law concerning the water rights associated with the Bawoleks' property in the Basin. 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 on their property 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 to the Cross-Motion.

Respectfully submitted this 14th day of January, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 14, 2015, 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________