

**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 OBJECTION TO
MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED
DISPOSITION**

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. 72(b) hereby object to the Magistrate Judge's Proposed Findings and Recommended Disposition [Doc. 3049, (hereinafter PF&RD)]. The Magistrate Judge erred in recommending that the Court deny the Bawolek's motion for partial summary judgment [Doc. 3006] and grant Plaintiffs' cross motion for summary judgment [Doc. 3013], by:

- Recommending a finding which is self-contradictory insofar as it asserts that all of the Bawolek stock ponds are filled with surface water only, while both the Bawoleks and Plaintiffs are in agreement as to several of the Bawolek stock ponds having associated wells as points of diversion. Further, the PF&RD recommends granting the Plaintiffs'

cross motion which explicitly recognizes the points of diversion, thus placing the PF&RD in conflict with itself.

- The PF&RD approaches both motions from the standpoint of the United States as the movant, but fails to interpret the record and all reasonable inferences in a light most favorable to the nonmovant (i.e., the Bawoleks). In particular, the PF&RD asserts that the Bawoleks have failed to provide evidence as to their historical beneficial use for Well 10C-4-W14, overlooking the relevancy of multiple evidentiary data provided by the Bawoleks,
- The PF&RD, in drawing its conclusions favorable to the Plaintiffs, fails to appropriately consider the Court's prior rulings in this case (in particular, [Doc. 1988] setting the temporal limits for the adjudication) and fails to address issues of estoppel raised by the Bawoleks.

Accordingly, the Court should decline to adopt the PF&RD. Instead, it should sustain the Bawolek's objections and grant the Bawolek's motion for partial summary judgment.

ARGUMENT

In the analysis to follow *infra*, the Bawoleks will first address an error in factual interpretation respecting the stock ponds. Thereafter, the argument will address legal errors with respect to the Court's interpretation of the evidence presented by the Bawoleks in support of their historical beneficial use.

I. The Magistrate Judge made a factual error in determining that all of the Bawolek's stock ponds are filled by surface water only.

In the PF&RD at II (p.13) the Magistrate Judge rules that the "The historic source of the water for the stock ponds appears to be surface water, based on the lack of piping to most of the stock ponds and the lack of evidence establishing historic filling of those ponds from the well. Therefore, the source of the water for the stock ponds shall be surface water." The PF&RD further recommends (p.2) that the Court "...grant the United States' cross -motion for summary judgment."

The Bawoleks respectfully call the Court's attention to the fact that several stock ponds on the Bawolek property have points of diversion associated with wells, and that these points of diversion are not in dispute, having been established and agreed upon between the litigants after the multiple field surveys conducted at the Bawolek property during the course of this adjudication. Reference to the Plaintiffs' cross-motion [Doc. 3013-2] will show that the Plaintiffs' have moved the Court to recognize the following points of diversion:

Stock Pond	Point of Diversion
10C-4-SP34	10C-4-W16
10C-4-SP14	10C-4-W08
10C-4-SP20	10C-4-W14
10C-4-SP21	
10C-4-SP22	
10C-4-SP23	
10C-4-SP24	

To the extent that the Bawoleks failed to provide adequate evidence for the points of diversion, the Bawoleks reply that since these diversions were not an issue in dispute, the

Bawoleks were unaware of a requirement for evidentiary support. Nonetheless, there is evidence embedded in the record supporting the points of diversion enumerated supra:

A. Stock Pond 10C-4-SP34 / Well 10C-4-W16

The Bawoleks respectfully call attention to the original hydrographic survey: ZUNI RIVER BASIN ADJUDICATION HYDROGRAPHIC SURVEY REPORT FOR SUB AREAS 9 & 10, Appendix 1, at pg. 49 [Doc. 393] published 10/6/2005. This survey, representing the initial findings of Natural Resources Consulting Engineers, Inc., working under contract for the Plaintiffs, enumerates stock pond 10C-4-SP34 as having water sources from both surface runoff as from well 10C-4-W16.

B. Stock Pond 10C-4-SP14 / Well 10C-4-W08

The PF&RD at p.6 states "However, the Bawoleks present no evidence as to when the spigot was installed or how much water was used before 2011." The Bawoleks wish to first address this issue limited to the extent that well 10C-4-W08 is entitled to recognition as a point of diversion for stock pond 10C-4-SP14: Again, this issue is not in dispute between Plaintiffs and the Bawoleks, but has been created by the Court. The Bawoleks attest that the spigot was in place prior to purchase in 2010 of the property having this well. While the Bawoleks cannot specify with certainty the date this spigot was installed, they call the Court's attention to [Doc. 1816] which lists the immediately previous owner, Mr. Woodson Allen, as having become incapacitated as of 8/4/2006. Since the Bawoleks attest that they did not install the spigot, and the property was in trust following Mr. Allen's incapacitation, it is a reasonable inference that the spigot was installed prior to 8/4/2006. This date is quite close to the date at which Mr. Allen was joined in this action, specifically 1/26/2006 [Doc. 470]. A reasonable assumption is that it took some time for Mr. Allen to become incapacitated and therefore the spigot was present prior to

Mr. Allen's joinder. The Bawoleks are not privy to substantive information respecting the spigot from the initial hydrographic survey conducted when Mr. Allen owned the property, but Plaintiffs' recognition of the point of diversion is consistent with the spigot's existence at that time.

C. Stock Ponds 10C-4-SP20-24 / Well 10C-4-W14

With respect to the remaining stock ponds and well 10C-4-W14 as the point of diversion, the Bawoleks restate that the absence of evidence is the result of there being no actual controversy between the Plaintiffs and the Bawoleks, absent the Court's creation of one.

If the Court sustains its finding that the stock ponds enumerated supra are not entitled to their associated wells as points of diversion, the Bawoleks move this Court to re-open Discovery in the interest of justice so that the Bawoleks may appropriately defend their rights, given that the Court will be creating a point of controversy between Plaintiffs and the Bawoleks where none had existed previously.

II. The Magistrate Judge Erred in failing to appropriately interpret the Bawolek's evidence for historical beneficial use.

The PF&RD at p.3 states "I approach these motions from the standpoint of the United States as the movant." and in the paragraph immediately supra noted "The record and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmovant. *See Muñoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1164 (10th Cir. 2000)."

On a motion for summary judgment, a court "cannot try issues of fact; it can only determine whether there are issues to be tried." *Donahue v. Windsor Locks 37*37 Board of Fire Commissioners*, 834 F.2d at 58 (internal quotes omitted); *see also Gallo v. Prudential*

Residential Services Limited Partnership, 22 F.3d 1219, 1224 (2d Cir. 1994). If, as to the issue on which summary judgment is sought, there is **any evidence in the record from any source** from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper. *See, e.g., Brady v. Town of Colchester*, 863 F.2d 205, 211 (2d Cir.1988) (emphasis added).

Returning to the PF&RD, the Magistrate Judge further opines "Evidence provided by either the movant or the nonmovant need not be submitted "in a form that would be admissible at trial." *Id.* at 324. Rather, the content of the evidence presented must be capable of being presented in an admissible form at trial. *Trevizo v. Adams*, 455 F.3d 1155, 1160 (10th Cir.2006). For example, parties may submit affidavits to support or oppose a motion for summary judgment, even though the affidavits constitute hearsay, provided that the information can be presented in another, admissible form at trial, such as live testimony. *See* FED. R. CIV. P.56(c)(4); *Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1209-10 (10th Cir. 2010); *Trevizo*, 455 F.3d at 1160."

A. *Well 10C-4-W14*

In view of the background supra, the Bawoleks contend that the Magistrate Judge erred in finding (PF&RD at 10) that "...there is no evidence - anecdotal or otherwise - to suggest that the other three residences actually relied on 10C-4-W14 for domestic purposes. Mere assumption is insufficient to establish a water right." The Bawoleks contend that the evidence they provided in their partial motion for summary judgment and other filings with this Court far exceeded a "mere 'scintilla' of evidence." Specifically, the Bawolek's expert witness, who established the existence of multiple historical residences on their property, is a recognized expert in his field of historical archeology with credentials far exceeding any of the other parties involved in this action. Further,

the Bawoleks have not merely invoked an assumption favoring their position: Rather, they point out that, after having researched the matter using the Court's records in this action, that the most reasonable and likely source of water for the residences is well 10C-4-W14, said well being significantly closer than any known alternative. This certainly would be a reasonable inference from the record. The PF&RD would have us accept, in the alternative, that the inhabitants of the residences in question would willingly seek water sources at a significantly distance greater than that of the most available source. The Plaintiffs' observation that the residences in question lacked piping to well 10C-4-W14 is either irrelevant or by reasonable inference can be interpreted to further support the Bawolek's contention: Lacking a permanent water source, the inhabitants of the residences in question would be highly motivated to haul water from the nearest available source.

The Bawoleks are willing to testify at trial as to the veracity of their statements, and to the research they conducted in reaching their conclusions. This alone exceeds the threshold for admissibility. However, the Magistrate Judge in the PF&RD rejected the Bawoleks' own data for beneficial water use from well 10C-4-W14, stating in the PF&RD at p.11 "The Plaintiffs respond that simply connecting a stock pond to a well by pipe does not increase the quantity of a water right. I agree. The Bawoleks presented no evidence suggesting that the stock ponds were connected to 10C-4-W14 by pipe before the Bawoleks began measuring or that the well was historically used to fill the stock ponds." To this point, the Bawoleks again refer to the discussion supra that the fact of well 10C-4-W14 as a point of diversion for several stock ponds was not an issue in dispute with Plaintiffs, agreement having been reached as a result of earlier field surveys which identified remnants of the original diversion piping. The Bawoleks do admit that they effected repairs to the piping system to restore the capability of filling the stock ponds associated

with well 10C-4-W14, but content that maintenance and restoration of the historical capability does not constitute "simply connecting a stock pond to a well by a pipe." Rather, by restoring the well and stock ponds system to a configuration analogous to its original condition, the Bawoleks were establishing a means for making meaningful measurements (i.e., a reasonable inference) of its historical beneficial use.

III. The Magistrate Judge fails to consider the Court's prior rulings in this case and fails to address issues of estoppel.

The PF&RD failed to address a relevant¹ issue raised by the Bawoleks in their motion for partial summary judgment [Doc. 3006], specifically relating to the Courts' prior rulings in this action: The Court defined the temporal scope of this action as applying to water rights senior to 12/4/2008 [Doc. 1988]. In [Doc. 3006-1] at pp. 10-11, the Bawoleks outline their argument and will not repeat it here, except to assert that the PF&RD does not address the issues of temporal scope raised in the Bawoleks' motion. The PF&RD appears to have considered the Bawoleks' arguments superficially, finding that the Bawoleks' application of water from well 10C-4-W14 was not beneficial. The PF&RD ignores the Bawoleks' own assertions, which they would be willing to make at trial², that the application of the water from well 10C-4-W14 produced tangible benefit to the Bawoleks (a fact absolutely known to them) as well as a benefit to wildlife (a fact which can be reasonably inferred and is supported in the Bawoleks' amended answer [Doc. 2918-3 at pg. 17, in a communication from Mr. Brian Mason]).

¹"Relevancy" is a broad concept. A fact is "relevant" if it merely provides a single "brick" in the evidentiary "wall." *United States v. Yazzie*, 188 F.3d 1178, 1189 (10th Cir. 1999)

² The Bawoleks' willingness to testify clearly passes the threshold for relevancy and said testimony represents a source from which reasonable inferences could be drawn.

The definition of beneficial use, as cited in the PF&RD is “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.” N.M. CODE R. 19.26.2.7(D) (2014). This definition is broad in scope and does not ascribe strict quantitative limitations on the amount of water required to fulfill each purpose enumerated. The PF&RD erroneously accepts Plaintiffs' arguments purporting to inform the Court as to what does or does not benefit the Bawoleks. In accepting those arguments, the PF&RD defeats the broad nature of the statute, negating the obvious intent of those who drafted it.

Finally, in deciding whether the Bawolek's have proved their claims of historical beneficial use, the Court has failed to appropriately consider the Plaintiffs' representations to the types of data and information which they themselves have proposed as appropriate evidence. The Bawoleks have called attention to Plaintiffs; representations to the Court and the Public (c.f., Bawoleks' Amended Answer to Amended Complaint, Exhibit B at pg. 10 [Doc. 2918-2]). The Bawoleks, in their collection of data, retainer of counsel and an expert witness, and in their investment of time working to document their historical beneficial use, were informed in no small part by the Zuni River Basin Water Rights Adjudication web site, as well as Plaintiffs' representations to the Court. It is significant that the web site was created as a result of the Court's Order [Doc. 147] - as such, the web site has the implied approval from the Court. To any extent that the web site provides inaccurate or misleading information, it not only damages the entities relying on said data, but also compromises the integrity of the Court by association.

CONCLUSION

For the foregoing reasons, the Court should reject the Magistrate Judge's Proposed Findings and Recommended Disposition [Doc. 3049], deny the Plaintiffs' motion for summary judgment, and grant the Bawolek's motion for partial summary judgment.

Dated June 9, 2015.

Respectfully submitted,

By: /s/ Edward J. Bawolek and /s/ Suzan J. Bawolek
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on June 9, 2015, I filed the foregoing EDWARD J. BAWOLEK AND SUZAN J. BAWOLEK OBJECTION TO MAGISTRATE JUDGE'S PROPOSED FINDINGS AND RECOMMENDED DISPOSITION 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.

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