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,

-vs-

A & R Productions, et al.,

Defendants.

No. 01cv00072-MV-WPL
Subfile No. ZRB-2-00098
JAY Land Ltd. Co., Yates Ranch Property LLP

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Introduction

Defendants JAY Land Ltd. Co and Yates Ranch Property LLP have moved for partial summary judgment on two subject matters involved in this subfile adjudication, and this memorandum is submitted in support of both of them.

Summary judgment is proper when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. F.R.Civ. P. 56.

The partial summary judgments sought are “partial” because neither will completely dispose of all issues herein, but will terminate substantial legal and factual issues otherwise before the Court.

This motion for partial summary judgment is directed at (1) the issue of the validity and continued existence of the water rights at Atarque Lake (Plaintiffs apparently assert that the water right in Atarque Lake either never existed or has been abandoned, not having included it in their proposed consent order); and (2) the issue of whether evaporation and other losses of water from the various stock watering facilities for which the Movants have a conceded[1] water right must be included in, and as a part of the amount of the Movants' water rights.

Undisputed Facts PART 1 (Atarque Lake)

1. Atarque Lake was built before March 19, 1907. Declaration of Water Rights dated March 31, 2004, accepted[2] for filing by the State Engineer of New Mexico on July 19, 2006 (hereinafter "The Declaration"), copy attached as Exhibit 1; Julyan, The Place Names of New Mexico, revised ed., University of New Mexico Press, 1998, p. 24. (Copy of cover, pertinent portion highlighted and attached as Exhibit 2.)

2. Atarque Lake remained in existence until 1971, at which time the dam impounding most of the water of it was destroyed.

[1]Either because admitted or stipulated following discovery. The amount of water consumed by the feature, however, has neither been agreed, denied, nor stipulated, but instead has remained an unresolved piece of these defendants' water rights which is required by NMSA 72-4-19 (1907) to be determined in adjudication actions such as this.

[2]Grudgingly.

Report of Joseph Field, Water Resource Specialist, New Mexico Office of the State Engineer dated April 9, 2004, copy attached as Exhibit 3.

3. Nothing is known of the intentions of the owner of Atarque Lake from 1971 to 1978;

4. These Movants, and their predecessors in interest John A. Yates, Trust Q Under the Last Will and Testament of Peggy A. Yates, deceased, and Yates Petroleum Corporation, former defendants herein, ("The Yates Defendants") have owned Atarque Ranch, including Atarque Lake, since 1978; see the deed by which the ranch was conveyed to them in 1978, attached as Exhibit 4, and the affidavit of John A. Yates, attached hereto as Exhibit 5;

5. From 1978, when Atarque Ranch was acquired by The Yates Defendants, until it was conveyed to the present Movants, the Yates Defendants never formed or held the intention to abandon or relinquish the water rights in Atarque Lake. See the affidavit of John A. Yates, copy attached as Exhibit 5;

6. From 1978, when Atarque Ranch was acquired by The Yates Defendants, until it was conveyed to the present Movants in 2012, there was no expression of any intention by Yates Petroleum Corporation, one of the owners of it, by way of corporate resolution, or otherwise, to abandon or relinquish any water rights at Atarque Ranch. See the affidavit of Kathy H. Porter, Secretary of Yates Petroleum Corporation, Exhibit 6.

7. There was never an intention on the part of Yates Petroleum Corporation to abandon the water rights in Atarque Lake. See the affidavit of John A. Yates, a copy of which is attached as Exhibit 5;

8. The present Movants never formed or held the intention to abandon or relinquish the water rights in Atarque Lake. See the affidavit of John A. Yates, copy attached as Exhibit 5;

Undisputed Facts PART 2 (Evaporation and Consumptive Use)

9. The pan evaporation in the vicinity of Atarque Ranch is approximately 60 inches per year. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 4. See paragraph 11 of this memo, infra.

10. The stock watering facilities at Atarque Ranch consist of stock tanks, open storage tanks, stock ponds, watering troughs, drinkers and wells. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 5.

11. Each of the stock watering facilities at Atarque Ranch which has any surface open to the air, i.e., all stock tanks, open storage tanks, ponds, watering troughs, and drinkers, incurs evaporation at a rate of approximately 60 inches per year. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 6. New Mexico State Engineer Technical Report 31, “Characteristics of the WATER SUPPLY IN NEW MEXICO” by W.E. Hale, L.J. Reiland, and J.P. Beverage, 1965, pertinent parts of which are attached as Exhibit

8; Technical Report 32, New Mexico State Engineer, "Consumptive Use and Water Requirements in New Mexico" by Harry F. Blaney and Eldon G. Hanson, pertinent parts of which are attached as Exhibit 9; records of Standard Pan Evaporation Stations in New Mexico derived from the following web site are attached as Exhibit 10: http://www.wrcc.dri.edu/htmlfiles/westevap.final.html#NEWMEXICO (http://www.wrcc.dri.edu/htmlfiles/westevap is the internet address of the site but due to insufficient technical skills on the part of counsel, it could not be downloaded for attachment.)

12. The surface area of each of the stock watering facilities at Atarque Ranch multiplied by the annual pan evaporation rate results in the volume of annual consumption of water in connection with that stock watering facility resulting from evaporation. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 7.

13. Water must be and has been kept in each of the stock tanks, open storage tanks, ponds, watering troughs, and drinkers, in order to provide water for the cattle drinking from it, irrespective of the number of cattle watered from each of them. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 8.

14. The source of the water in each of the stock watering features at Atarque Ranch is either surface water resulting from storm events, run-off from snow melt, or discharge from springs; or it is underground water pumped by one or more of the wells on the ranch. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 9.

15. When surface water is not available to fill and maintain stock ponds cattle must be watered from stock watering facilities which are supplied by wells. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 10.

16. Stock watering facilities which are supplied by wells cannot be and have never been capable of being filled only when needed, and as a practical matter they must be kept filled permanently. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 11.

17. There is no means available to turn on water to stock watering facilities only on demand by the cattle. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 12.

18. There is no means available to turn on water to stock watering facilities and to keep it there for consumption only on demand by the cattle. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 13.

19. The amount of evaporation from the stock watering facilities at Atarque Ranch is independent of the number of cattle watering from each of them. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 14.

20. The amount of evaporation from the stock watering facilities at Atarque Ranch is a factor of the surface area of each of them. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 15.

21. Evaporation from the surface of stock watering facilities is not avoidable. Exhibit 7, Affidavit of Darrell J.

Brown, ¶ 16.

22. In most years there is never a time in excess of several hours when there are no cattle in any pasture at Atarque Ranch. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 17.

23. The evaporation of water from the stock watering facilities at Atarque Ranch is a consumptive use in addition to the amount of water from each such stock watering facility consumed by the cattle and wildlife drinking from it. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 18.

24. The evaporation of water from the stock watering facilities at Atarque Ranch is a consumptive use in addition to the amount of water from each such stock watering facility consumed by leakage and seepage from the watering facility. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 19.

25. Evaporation of water from the stock watering facilities at Atarque Ranch, as in all open range cattle operations, is an unavoidable consequence of water use for the purposes of cattle ranching. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 20.

26. It is the general custom in the cattle ranching business to have open watering facilities for cattle which make water available to cattle at all times. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 21.

27. Leakage, seepage and evaporation from the water features at Atarque Ranch are an unavoidable consequence of use

of water in those stock watering facilities. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 22.

ISSUE NO. 1: Do the Movant's Water Rights in Atarque Lake continue to exist as valid water rights?

Movants are entitled to summary judgment with respect to the existence and validity of the water rights in Atarque Lake.

PROCEDURAL CONSIDERATIONS IN RESPECT TO THE MOTION

These Defendants asserted their water right therein in their subfile answer to consent order (Document 2925), p. 73[3]. The Plaintiffs have not denied the claim, nor have they sought to reply to the claim that these Defendants have the water rights asserted for Atarque Lake. Plaintiffs are entitled to seek to reply to the claim under F.R.Civ. P. 7(a)(7), but have not done so. (F.R.Civ. P. 8(b)(6) may be contrary to Movants' position with respect to the state of the pleadings. If so, the Court should require the United States and the State of New Mexico to respond to the allegations respecting Atarque Lake, and set the terms pursuant to which the issues with respect to the lake will

[3]Defendants' paragraph No. 131. (Movants have serially numbered the paragraphs of their answer, with each stock watering facility having a separate number. A copy their answer with the serial numbering will be provided to the Court (but not placed in the record) upon oral argument of this motion.

be properly drawn.[4]

Even if these Defendants' allegations respecting Atarque Lake are deemed denied, they are nonetheless entitled to summary judgment. The Plaintiff is not entitled to rely on the allegations of the complaint (whether actual denials or "deemed" denials) in responding to a motion for summary judgment. Old F.R.Civ. P. 65(e) provided:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Lujan v. National Wildlife Federation, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

Although the text of the rule has changed, its substance remains in effect as to reliance on the allegations of the complaint in summary judgment issues.

> Further [in a summary judgment case], mere allegations are insufficient, and "[o]nly evidence sufficient to convince a reasonable factfinder to find all of the elements of [the] prima facie case merits consideration beyond the Rule 56 stage." Blunt v. Lower Merion Sch. Dist. (3rd Cir., 2014)

All the authorities, including those from the New Mexico courts, have followed and continue adhere to the older formulation. See, e.g., Dow v. Chilili Coop. Ass'n, 105 N.M. 52,

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[4]F.R.Civ.P. 8(c)(2) ". . . . If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.)

728 P.2d 462 (1986), to the effect that a party opposing summary judgment may not rely upon unsworn allegations of the pleadings, but must come forward with evidence indicating the existence of a material disputed fact. If not all, a vast majority of the cases expressly rely on or echo the sense of 6 Moore, Federal Practice (2d ed. 1966) at 2170:

> Stubborn reliance upon allegations and denials in the pleadings will not alone suffice, when faced with affidavits or other materials showing the absence of triable issues of material fact.

An unverified pleading, i.e., the complaint, was held not to raise a factual issue. Rekart v. Safeway Stores, Inc., 1970-NMCA-020, 81 N.M. 491, 468 P.2d 892 (Ct. App. 1970), relying on Moore supra.

The upshot of the summary judgment requirements stated above is that the Plaintiffs could not rely on their pleadings (even if such pleadings existed) to create a genuine issue of material fact with respect to Atarque Lake.

EVIDENTIARY AND SUBSTANTIVE CONSIDERATIONS IN RESPECT TO THE MOTION

The Declaration

This action is brought pursuant to the New Mexico water right adjudication statutes NMSA § 72-4-13, et seq., (1961) and will determine the water rights as set forth in the statute.

NMSA § 72-4-19, (1907) provides, in part:

> . . . . [The final] decree [in a water rights adjudication]

> 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.

As a part of the same water code creating the adjudication process, the legislature created the "declaration" of water rights and declared its effect:

> NMSA § 72-1-3 (1961). Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the source of said water and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. **Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.** (Bold added.)

The effect of the declaration here is to create a prima facie case which, unless rebutted by competent evidence, entitle Movants to summary judgment.

<u>The Unexplained 7 or 8 Years of Non Use</u>

The only "evidence" which the Plaintiffs can point to is the period of time between 1971 and 1978 as to which there is no

explanation of non-use nor are facts presented showing an abandonment or any intent of the owner to abandon.

Hence the question is whether those 7 or 8 years are sufficient, as a matter of law, to create a presumption of abandonment. Movants submit that 7 or 8 years is insufficient to create a presumption of intent to abandon.

The timeline of the events at issue begins in the mists of time around 1885 (see Exhibit 2), and emerges, via the declaration (Exhibit 1), at “before March 19, 1907". There is no issue with respect to that point in time. Thereafter and until 1971, when the State Engineer asserts, via Mr. Field’s report, and Defendants do not deny, the dam was destroyed. There is no denied or controverted fact, and no claim that there was any non-use until 1971. From 1971 to 1978 there is no direct evidence either that abandonment had occurred or had not occurred. In any event, the 7 or 8 years intervening between 1971 and 1978 are not long enough to make any difference in the Court’s determination of the issue. 2 Kinney on Irrigation and Water Rights, 2d Ed., 2012, § 1118 (1912) “abandonment is the relinquishment of the right by the owner with the intention to forsake and desert it”.

The Burden and Standard of Proof

The ordinary rule , even in the absence of the declaration statute, § 72-1-3, supra, is that he who asserts an abandonment of a property right is required to prove the abandonment by clear

and convincing evidence. Joyce Livestock Co. V. U.S., 156 P.3d 502, 516, 144 Idaho 1 (Idaho, 2007).

Sufficient evidence of the owner's intent not to abandon the water right will rebut the presumption of abandonment arising from unreasonably long nonuse. Masters Inv. Co. v. Irrigationists Ass'n, 702 P.2d 268 (Colo.1985).

State ex rel. Reynolds v. South Springs Co., 1969-NMSC-023, 80 N.M. 144, 452 P.2d 478 (S. Ct. 1969) is the principal authority in New Mexico jurisprudence respecting the presumption of intention to abandon. Citing several Colorado and other cases, including Mountain Meadow Ditch & Irrigation Co. v. Park Ditch & Reservoir Co., 130 Colo. 537, 277 P.2d 527 (1954), the New Mexico Supreme Court sets forth the rationale for a presumption of abandonment:

> "After a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for nonuse."

One conceptual problem is, then, defining a "long period of nonuse". The Movants attack the issue on two fronts: (a) that the unexplained period of non-use here is only 7 or 8 years, which is not "long", as that term is reflected in the cases, and fails to create a presumption. In South Springs, supra, the time for which there had been non-use was 32 years. The three Colorado cases cited in South Springs held that 30, 40 and 18 years were sufficient to raise an inference or rebuttable presumption of abandonment. (b) That even if the 7 or 8 year period creates such

a rebuttable presumption, the Movants have established the absence of an intent to abandon the water right:

> A water rights owner can avoid the common law abandonment that arises after a protracted period of nonuse by establishing the absence of intent to abandon the water right. See [South Springs, supra] (stating that "the element of intention is required in the doctrine of abandonment" and stating further that "[a]fter a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for [the] nonuse" and to demonstrate the absence of intent to abandon). State ex rel. Office of State Eng'r v. Elephant Butte Irrigation Dist., 2012-NMCA-090, 287 P.3d 324.

If and to the extent the burden of proof has been shifted, the Movants have satisfied the requirement that they demonstrate the "absence of intent to abandon." Ordinarily this piece of the issue is evidentiarily difficult for the claimant of water rights, since the owner at the time of the claimed abandonment is quite often dead or has otherwise moved on, and his or her heirs or successors make claim to the water rights. Here, quite the opposite is true. The owners at all material times except for the 7 or 8 years are still with us, and their affidavits are before the Court. Theirs is the only admissible evidence, and other than the brief and unexplained 7 or 8 year period of non-use, the Plaintiffs can produce nothing bearing on the owners' intent to abandon or lack thereof.

Moreover the Plaintiffs cannot produce the clear and convincing evidence they must have in order to sustain a claim of abandonment. See State ex rel. Reynolds v. South Springs Co.,

and State ex rel. Office of State Eng'r v. Elephant Butte Irrigation Dist., both supra.

> The abandonment of water rights requires both the intent to abandon and the actual surrender or relinquishment of the water rights. . . . The intent to abandon a water right must be evidenced by clear, unequivocal and decisive acts and mere non-use is not per se abandonment. . . . Joyce Livestock Co. v. U.S., 156 P.3d 502, 516, 144 Idaho 1 (Idaho, 2007)

The abandonment of water rights requires both the intent to abandon and the actual surrender or relinquishment of the water rights."The intent to abandon a water right must be evidenced by clear, unequivocal and decisive acts and mere non-use is not per se abandonment." Sears v. Berryman, 101 Idaho 843, 623 P.2d 455 (1981).

Hence the issue becomes whether there is evidence from which the Court could find an intent to abandon and an actual surrender of the water right. Even if the 7 or 8 years of non use is deemed to fill the requirement of a “long” period of non use, the presumption from the long period has exactly the same characteristics as the declarations of water rights which were under discussion by the Court in State ex rel. Martinez v. Lewis, 118 N.M. 446, 882 P.2d 37 (Ct. App. 1994):

> Admission of the declarations called for by this section would at most satisfy the burden of going forward; it would satisfy the burden of proof only if not rebutted by the state. . . .

“Rebuttal by the state” with respect to the intention of the owner of a water right is something peculiarly not within the

knowledge of anyone but the owner. The owner can, and here does, say what his or its intention was. As a matter of evidence, the owner is capable of so testifying. As a matter of evidence, the Plaintiffs cannot produce any evidence whatever with respect to the inner workings of either the individual defendants or the corporate defendant.

ISSUE No. 2. Is evaporation properly a part of a water right for stock watering? And if so, how is the water right quantified?

As a matter of law, evaporation is part of a water right where the evaporation is reasonable and is a part of the water consumed during the application of water to beneficial use. This rule of law is followed throughout the western states and New Mexico. Perhaps the most succinct expression of the rule is from the Kansas Supreme Court, in Frontier Ditch Co. C. Chief Engineer [etc], 704 P.2d 12, 237 Kan. 857, 865 (1985):

> A vested water right is determined from what the company was actually diverting prior to 1945 [the year the Kansas water statute became effective]. Hence the determination of the amount previously diverted includes waste, seepage and evaporation.

The usual debate respecting water not actually consumed is whether the molecules of water which are not consumed, such as by drinking by cattle, but are nonetheless lost to the hydrological system, such a by evaporation, seepage or leakage, is forbidden waste, or to the contrary, is part of the appropriation of the water user. Not all waste is forbidden, but only that which is unreasonable or avoidable:

> . . . an appropriation of water does not include the right to waste it when waste can be avoided. [fn] It was said by the United States Supreme in an early case, and repeated by other courts . . . .
>
> * * *
>
> The prohibition against unnecessary waste does not mean that an appropriator is required to take extraordinary precautions to prevent waste of water if he is making a reasonable use of the water according to the general custom of the locality [fn], "so long as the custom does not involve unnecessary waste." [fn] It is recognized, furthermore, that in operating an irrigation system - particularly a large one - there is practically always some unpreventable waste **which is to be deemed a part of the appropriation**." 1 Hutchins, Water Rights Laws in the 19 Western States 497, 498 (Bold added.)

It is notable that Mr. Hutchins, supra, is the author of both Plaintiffs' very own work on the law of water rights: see New Mexico State Engineer's Technical Report Number 4, "The New Mexico Law of Water Rights", published by John H. Bliss, State Engineer of New Mexico, In cooperation with Production Economics Research Branch, Agricultural Research Service, UNITED STATES DEPARTMENT OF AGRICULTURE, Santa Fe, New Mexico 1955.

The definition of waste is simple: "Loss of a resource such as water without substantial benefit". 6 Waters and Water Rights 1991 ed., 1312 (2005 repl. vol.) The "substantial benefit" here is quite clear. The evaporation allows Movants to water their cattle, and without the evaporation, which is inherent in placing the water where animals can drink it, the water would not be available for the animals.

There is substantial authority for the proposition that evaporation is included within the dimensions of the water right:

> a reasonable loss of water through evaporation or seepage is allowed.
> * * *
> we do not look exclusively to that part which seeped, but to the use made of the water as a whole. So long as that water which arrived at its destination was put to a beneficial use, and so long as the amount of water lost through seepage during the transportation of that water from its place of origin to its place of use was reasonable, it cannot be said that the mere fact of seepage transformed it into water not beneficially used. Hidden Springs Trout Ranch v. Hagerman Water Users, Inc., 101 Idaho 677, 619 P.2d [106 Idaho 42]

> . . . some loss of water through seepage or evaporation is considered a prerogative of the appropriator, so long as the loss is reasonable. Glenn Dale Ranches v. Schaub, 94 Idaho 585, 494 P.2d 1029 (1972).

There is no meaningful difference in the evaporation or seepage of water from stock watering facilities and in the evaporation or seepage of water in transit, which has been thoroughly recognized as a part of the appropriation:

> In summary, the end use for the water must be a generally recognized and socially accepted use (abstract benefit) and the water must be put to that use and not "let run to waste." However the beneficial end use does include a carriage right from the point of diversion to the point of use. During such carriage there may be leakage, evaporation, and other loss of water. Thus the quantity of water appropriated is going to reflect these losses as well as the actual amount applied to the end use. 2 Waters & Water Rights § 12.02(c)(2), p. 12024 (1991 ed.)

The United States Supreme Court has been heard from on this issue:

> Montana's reading of the [Yellowstone River] Compact . . . would drastically redefine the term "beneficial use" from its longstanding meaning. The amount of water put to "beneficial use" has never been defined by net water consumption. The quantity of water "beneficially used" in irrigation, for example, has always included some measure of

> necessary loss such as runoff, evaporation, deep percolation, leakage, and seepage . . . .So, water put to "[b]eneficial use is not what is actually consumed, but what is actually necessary in good faith." 1 Wiel §481, at 509; see also Trelease, The Concept of Reasonable Beneficial Use in the Law of Surface Streams, 12 Wyo. L. J. 1, 10 (1957) . . . . observing that the amount of water put to beneficial use "is often considerably more than the quantum actually consumed"). Montana v. Wyoming, 131 S.Ct. 1765, 179 L.Ed.2d 799 (2011)

The New Mexico Supreme Court has, from the beginning of the State's water jurisprudence, considered evaporation to be a part of one's appropriation:

> It is clear, we think, the statute [now NMSA § 72-9-1 (1907)] means that, where an appropriation is made by any means, the owner may divert the water into any existing ditch, and can take it out, less loss by seepage and evaporation, either above or below the point of delivery into the existing ditch, to supply his appropriation. Miller v. Hagerman Irrigation Co., 1915-NMSC-069, 20 N.M. 604, 151 P. 763 (S. Ct. 1915)

The owner in Miller, supra, could not divert the water without a right to do so. Hence his entitlement to the water at the downstream end of its travel is reduced by the evaporation of his water in transit. He could not divert the water, including the portion of it destined to evaporate in transit, without a right to do so, and evaporation is obviously a part of his water right.

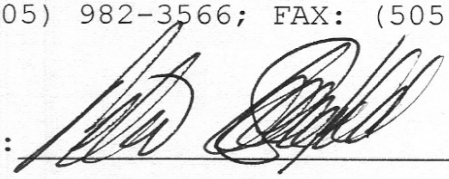
CONCLUSION

ATARQUE LAKE: The Movants have presented prima facie proof, via their declaration, that the water right at Atarque Lake

exists. Unless the Plaintiffs can present some admissible evidence showing the contrary, the Movants should prevail and the present motion should be granted. Even if the Plaintiffs can make a showing of such non-use as might shift the burden of proof from them, the Movants have shown that the water right continues to exist as a matter of law, and has not been abandoned. Abandonment being a matter of the intention of the owner, the owners at all material times have shown that they did not abandon the water right. The Plaintiffs can make no competent and admissible proof that the intentions of the owners were other than as the Movants say. Movants should have summary judgment respecting the water rights at Atarque Lake, to the effect that they exist and have not terminated.

EVAPORATIVE LOSSES CONSTITUTE A PART OF MOVANTS' WATER RIGHTS. There is substantial evaporative loss from the surfaces of Defendants' stock watering facilities, in the amount of approximately 5 feet per year, all of which is necessary in order to keep the water in those facilities available for the animals watering from them. Such evaporation is inherent in the customary use of stock ponds, tanks, troughs, and drinkers used in the cattle business, and is properly a part of the water right to be adjudicated to these Movants. Movants should have partial summary judgment that the water rights for stock watering facilities include all evaporation from the surface of each of those facilities.

PETER B. SHOENFELD, P.A.
P.O. Box 2421
Santa Fe, New Mexico 87504-2421
(505) 982-3566; FAX: (505) 982-5520

By: 

Attorney for Movants

CERTIFICATE OF SERVICE

I served the foregoing motion on all parties and counsel entitled thereto by means of the court's digital filing and service system on June 26, 2015.