

Attachment B - United States' Response to Defendants' Statement of Undisputed Facts

1. Atarque Lake was built before March 19, 1907. Declaration of Water Rights dated March 31, 2004, accepted 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.)

Response of the United States: Disputed. No evidence exists to support the contents of Defendants' declaration of March 31, 2004 and no evidence exists to establish that the dam impounding Atarque Lake was built before March 19, 1907.

2. Atarque Lake remained in existence until 1971, at which time the dam impounding most of the water of it was destroyed. Report of Joseph Field, Water Resource Specialist, New Mexico Office of the State Engineer dated April 9, 2004, copy attached as Exhibit 3.

Response of the United States: Disputed (not material to any issue in controversy). The dam impounding Atarque Lake was intentionally destroyed in the early 1970s because the lake had become nothing more than a bog in which cows got stuck and mosquitoes bred. *See* Attachment D – Deposition of Joseph H.M. Fields at 40.

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

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #2, above.

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.

Response of the United States: Not Disputed (not material to any issue in controversy).

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.

Response of the United States: Disputed (not material to any issue in controversy). During more than three decades of Atarque Ranch ownership, Defendants have engage in no action evidencing the exercise of the purported Atarque Lake water right. This inaction constitutes the best evidence that no such water right exists or that any such

water right was previously abandoned. The existence of road works and field fencing across the former bed of Atarque Lake is additional evidence that no such water right exists or that any such water right was previously abandoned.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #5, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #5, above.

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).

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #5, above.

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*.

Response of the United States: Disputed (not material to any issue in controversy). The pan evaporation in the vicinity of Atarque Ranch is less than 60 inches per year. *See* Attachment D – Affidavit of Scott Turnbull at ¶ 19.

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.

Response of the United States: Not Disputed (not material to any issue in controversy).

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.)

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #9, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #9, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Attachment D – Affidavit of Scott Turnbull at ¶ 20.

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.

Response of the United States: Not Disputed (not material to any issue in controversy).

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.

Response of the United States: Not Disputed (not material to any issue in controversy).

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.

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.

Response of the United States: Not Disputed (not material to any issue in controversy).

21. Evaporation from the surface of stock watering facilities is not avoidable. Exhibit 7, Affidavit of Darrell J. Brown, ¶ 16.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.

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.

Response of the United States: Not Disputed (not material to any issue in controversy). *See* Resp. to Assertion of Undisputed Fact #13, above.

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.

Response of the United States: Not Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.

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.

Response of the United States: Disputed (not material to any issue in controversy). Mr. Brown's conclusory opinion here is in the form of an expert opinion which has not been previously disclosed and is not admissible evidence. Rule 56(c)(2), Fed. R. Civ. P.

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.

Response of the United States: Disputed (not material to any issue in controversy). *See* Resp. to Statement of Undisputed Fact #13, above.