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

DEFENDANTS' REPLY TO UNITED STATES' RESPONSE (Doc. 3076) TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. 3059)
and
DEFENDANTS' RESPONSE TO UNITED STATES CROSS- MOTION FOR SUMMARY JUDGMENT (also Doc. 3076)

Introduction

This is the reply of Yates Ranch Property LLP ande JAY Land Ltd. Co. ("Defendants") to the United States Response to Defendants' motion for partial summary judgment combined with Defendants' response to the United States' Cross Motion for Summary Judgment.

There have been raised by the United States' cross-motion for summary judgment several issues respecting multiple water features at Atarque Ranch. Those issues involve stock ponds which the United States claims there are no water rights because

those water features are simply natural features in which water naturally accumulates and which do not involve man-made works. Defendants agree with the legal position of the United States that in order to perfect water rights there must be some man-made works for the diversion or storage of the water, They disagree with the United States that some of the water features - in particular several stock ponds and springs - have no man-made components and therefore, those springs and stock ponds indeed give rise to water rights to be adjudicated herein. In addition, there are several stock ponds which are natural depressions but the water in those depressions is diverted and provided by wells.

Preliminary Matter

The United States requested, and the Court granted with Defendants' consent, an enlargement of the page limits for its response and cross motion. The United States asked for an enlargement of its document to 45 pages (Doc. 3074), and the Court granted the enlargement (Doc. 3075), allowing "45 double spaced pages" for the United States' document. While the United States' response and cross motion appears to be 39 pages, it does not contain two matters required to be included by the local rules: a response to the movants' statement of uncontroverted facts and its own statement of facts pertinent to the motion for

summary judgment. LR-CV56.1[1] Instead the United States has attached two separate documents, Attachments B and C, "B" for its response to the Defendants' statement of uncontroverted facts, and "C" being its own statement of claimed uncontroverted facts. Both are single spaced, and, if they had been properly included in the body of the United States' instrument, would have been double spaced and would have brought the United States Response and Cross Motion to about 53 pages, well in excess of the 45 page limitation set by the Court.

The Yates Defendants have not moved to strike because they would rather conclude this matter than expend time and money arguing about the length of briefs, and they grudgingly respond to it as if the factual statements were not excessive.

FACTUAL ASSERTIONS

Controverted assertions of fact contained in attachments to United States' response to Defendants' motion for summary judgment and in the United States' cross-motion for summary judgment.

United States Attachment B

[1]LR-CV56.1: * * *
(b) . . . .• The Response must contain a concise statement of the material facts cited by the movant as to which the non-movant contends a genuine issue does exist. Each fact in dispute must be numbered, must refer with particularity to those portions of the record upon which the non-movant relies, and must state the number of the movant's fact that is disputed. All material facts set forth in the Memorandum will be deemed undisputed unless specifically controverted. . . .

1. Controverted Fact No. 1: The United States response to Yates Undisputed Fact No. 1 ignores local rule 56.1. The requirement is that the response "must refer with particularity to those portions of the record upon which the non-movant relies". While the Movants have pointed out the facts, with references to the record, the US has made no attempt in either statement of fact, Attachment B or C, to refer to Defendants' statement of fact No. 1 in its response other than to say

> "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."

The provisions of the statute pursuant to which declarations are filed, NMSA § 72-1-3 (1961), makes the declarations themselves the evidence: ". . . .Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents." No other evidence is necessary.

2. Controverted Fact No. 2. The US attacks Defendants' fact No. 2 by reference to an exhibit which does not exist: "*See* Attachment D - Deposition of Joseph H.M. Fields at 40." United States' Attachment D does not contain the deposition of Mr. Fields, but instead is a verified statement of Mr. Turnbull and various maps and photographs. Mr. Field's deposition appears nowhere in the record of this case. Eight pages of it are attached to Plaintiff's motion as Attachment E. They show that Mr. Field's testimony has no admissible information in support of

a motion for summary judgment: F.R.Civ.P. 56(C)(2) provides that the material proffered in support or opposition to a motion for summary judgment must be admissible in evidence. "A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." (Mr. Field's report of an field inspection he made in 2004 was attached to Defendants' motion as Exhibit 3, but his deposition was never taken in this case, but only in another case, a State Engineer administrative matter.)

The statement of the United States (Doc. 3076, p. 35) with respect to the intentions of the owner of the dam, as reported by Mr. Fields, are double and triple hearsay respecting the owners' intention as reported by Mr. Field. It was hearsay to the extent he reported the owners' intention which was in turn reported to him, by an unidentified ranch manager, speaking some forty years after the fact, which in turn was also hearsay and lacked foundation, respecting a time 20 years before he became manager. Even if the triple hearsay could be overlooked, the hearsay says nothing of the intentions of the owner with respect to the water rights. If it were admissible, it goes only to the intentions of an unidentified person with respect to the dam, a completely separate property interest from the water rights. See Wilson v. Denver, 1998 NMSC 016, 125 NM 308, in which the New Mexico Supreme Court rejects the proposition that the works and the

water rights are concomitant parts of the same property right. The Supreme Court rejected the theory posited by the State Engineer that the relationship between the ditch and the water right made them part and parcel of the same. See also Turley v. Furman, 1911 NMSC 030, 16 NM 253, citing Wiel on Water Rights p. 126, Sec. 64:

> The water right is entirely distinct from the right to the ditch in which the water is conveyed. The latter is an easement, the latter may be conveyed separately, or the one may exist without the other.

3. Controverted Facts Nos. 3, 4. The United States' controversion is ambiguous: Defendants assert nothing is known of the owner's intention in the period from 1971 to 1978, the United States says that fact is irrelevant. Yet the United States' case with respect to Atarque Lake is built (defectively) on the intentions of the owner. It can hardly assert that its and Defendants' lack of knowledge about those intentions from 1971 to 1978 is irrelevant yet in the next breath claim that the owner in 1971 intended to abandon (as it does by the reference back to the US response to Defendants' fact No. 2.)

Controverted Facts Nos. 5, 6, 7, 8. The Defendants presented by affidavits (their Exhibits 5 and 6) direct evidence of the intention of the owners of the ranch with respect to non-abandonment for all but the first 6 years after the destruction of the dam. The United States says that evidence is irrelevant. Yet it provides not a single reference to any admissible fact in

the record to support its position that the water right had already been abandoned by the time these Defendants acquired the ranch.

Controverted Fact No. 9. The United States says the amount of evaporation is irrelevant, yet contests the amount set forth in Mr. Brown's affidavit as being too high. Which is it? Defendants assert that the fact is relevant because it is, as a matter of law, an integral part of the water rights of the Defendants. In addition, because the position of the United States does not account for measured evaporation (such as pan evaporation), but only assumes a poorly conceived rate of evaporation per head of cattle, the precise amount of evaporation (whether 60 inches as asserted in Mr. Brown's affidavit (Exhibit 7, p. 6) or 70 inches or 50 inches, the United States and Mr. Turnbull give no information respecting the amount they claim to be the proper amount of pan evaporation. They obviously admit that there is a substantial amount of evaporation.

Controverted Facts Nos. 10, 11, 12. Contrary to the assertion of the United States, the open nature of the stock watering facilities is clearly relevant to the amount of evaporation from those facilities. Evaporation, as a matter of law, is a major part of the Defendants' water rights.

Controverted Fact No. 13. The Defendants' reply to the relevancy portion of the United States is the same as their reply

to Controverted Facts Nos. 10, 11, 12. The United States' reliance on Mr. Turnbull's deposition which asserts that

> However, evaporation, leaks, and losses can be reduced and controlled by taking such practical steps as scheduled maintenance, trough covers, and flow control floats, valves, and mechanisms. Further, through manual means or automatic devices that control or limit water supply, livestock can be watered based on livestock needs.

is itself irrelevant, since it asserts that water rights should be based on what the Defendants could do, rather than what they have done. The question before the Court is beneficial use, which is the basis, measure and limit of the Defendants' water rights, not whether something different might be done in watering cattle.

Controverted Fact No. 14. The United States takes the position that the source of water used in the stock watering facilities is irrelevant. It is clearly not. The stock watering facilities are open, and the water in them, whether consumed by cattle, leakage or evaporation, must be replaced in order to water cattle (See Darrell Brown Affidavit, Exhibit 7, p. 8). That amount of water used to do so comprises a major part of the Defendants' water right, and goes directly to the United States' misplaced assertions that Defendants' stock watering water rights should be based solely on the numbers of cattle watered and that the Defendants' well rights are likewise based on the number of cattle watered. The United States presents no facts or argument to support its position that the source of water is irrelevant.

Controverted Fact No. 15. While the United States asserts this fact is not disputed, it claims it is not relevant. It is clearly relevant to the Defendants' claim, denied by the United States, that it is entitled to the water from each of its wells based on the beneficial use of that water, and not on the calculated needs of each cow, divided among the various wells on the ranch, as asserted by the United States.

Controverted Facts Nos. 16, 17, 18, 19, 20, 21, 21, 22, 23, 24, 25, 27 . The United States says Defendants' facts No. 16 - 25, and 27, based on ¶ 11 of Mr. Brown's affidavit, Exhibit 7, are irrelevant, but does not object to them otherwise. It is clearly relevant because it completely defeats the United States' claim that the amount of water to be adjudicated to Defendants should be based exclusively on the number of cattle the ranch can support. As a matter of law, the rights are not based on the number of cattle, but on beneficial use of water, which includes keeping water available for cattle at all times. See Darrell Brown affidavit, Exhibit 7, ¶ 8. The United States, by its limited objection to each of the listed facts, apparently admits the latter. See the argument portion of the Defendants' memorandum in support of its motion for partial summary judgment.

Controverted Fact No. 26. The United States objects based on relevancy, and adds that the subject of Mr. Brown's opinion respecting general custom of the ranching business has not been

previously disclosed and is therefore not admissible. It is admissible under F.R.Evid. 705, In addition, it was previously disclosed, both in Mr. Brown's report and in his deposition. See Mr. Brown's deposition, Exhibit 15, at pp. 41 - 43, his initial affidavit, Exhibit 7, ¶ 21, and, his report at pp 10, 11:

> It is impossible to meet the exact individual water needs of a cattle herd under free-ranging, pasture conditions on ranches in any of the western states. While watering systems near urban areas and on some farms may be adaptable to changing levels of demand, ranch water systems are not capable of meeting these daily (or in some cases, hourly) changes in demand. Some of the water delivered across the ranch is from a pressurized system but most is "powered" by gravity. Well water is pumped to storage tanks that are elevated above any drinking troughs. It is important to understand that, in order to meet the total daily water requirements of cattle, the supply of water at any given drinking trough must be enough to match the peak requirement level of the portion of the cow herd that arrives at the drinking trough. Since that level will vary from day to day or even from hour to hour within a day, more than enough water must be available.
>
> Evaporative losses from the storage tanks and even the drinking troughs are inevitable and, in most adjudication and allocation proceedings in New Mexico, considered part of the duty of water; a reasonable value of conveyance and storage needed to satisfy the peak needs when considering the beneficial use of water.

United States' Attachment C

1. The facts stated in paragraph 1 are correct, but the source of those facts - the "Turnbull Affidavit" - contains no admissible evidence such as is necessary to support a motion for summary judgment, or the opposition to a motion for summary judgment. Mr. Turnbull has no personal knowledge of the matters

stated in his affidavit. See Turnbull deposition excerpts (pp. 10, 11, 12,) attached hereto as Exhibit 11. With respect to paragraph 7 his information comes from the Cibola County Assessor. The records of the assessor are hearsay and are not the record of ownership of lands. Hence they are irrelevant, having no tendency to make the facts stated therein any more or less probable than they would be without the evidence, and the fact is of no consequence and immaterial to the issues before the Court. F. R. Evid., Rule 401

2. The facts stated in paragraph 2 refer to Turnbull affidavit ¶ 6, which are not based on the personal knowledge of Mr. Turnbull, F.R.Evid. 602 and are inadmissible; See Turnbull deposition, pp. 10-12, Exhibit 11.

3. The facts stated in paragraph 3 in turn refer to Turnbull affidavit ¶ 10. Mr. Turnbull has no personal knowledge of the facts stated therein, as he was not making the estimates referred to therein and was not even an employee of NRCE, the corporation performing the services referred to therein, at the time referred to. See Turnbull Deposition p. 10,11,12, Exhibit 11. That paragraph is directly contradicted by the Darrell Brown affidavit previously filed with Defendants' motion for partial summary judgment, Defendants' Exhibit 7, ¶¶ 5, 6, 7, 8, which shows that the depletion from the stock watering facilities includes evaporation from those facilities. As a matter of law estimates

of "consumption or depletion" per head of cattle is not the measure of the water right. That measure is beneficial use. NM Constitution Art XVI, § 3.

4. The facts stated in paragraph 4 reflect an incorrect calculation of the amount of water necessary to supply the cattle population of the ranch. The carrying capacity and forage production of the ranch is not the legal basis, the measure or the limit of the water right for cattle watering, which is exclusively based on beneficial use. NM Constitution Art XVI, § 3. In addition, the United States' repeated reference to "historic, beneficial use" in this paragraph and throughout is a misstatement of law. The word "historic" has no usage or meaning in the determination of water rights and as a matter of law, it plays no role in the adjudication or determination of non-Indian water rights in New Mexico. The authority cited by the United States for the proposition of "historic" beneficial use, *Carangelo*, 320 P.3d at 503, cited by the United States at page 14 of its motion, does not even contain the word "historic" or "historical". Both the cattle population and "historic" use are irrelevant.

5. The facts, methods and conclusions reflected in paragraph 5 are not accurate nor are they relevant to the issues before the Court. The proper method of determining the extent of a water right is a matter of law, and is not based on the overall

combined necessities of the ranch, but the beneficial use which has been made from each well or other water feature. Thus the amount of beneficial use made from one well is not reduced because of beneficial use from another well. The following definitions from the New Mexico Administrative Code. 19.26.2.7 are informative:

> X. Point of diversion: The location of constructed works where water is diverted from a stream, watercourse, or well.
>
> * * *
>
> EE. Water right: The legal right to appropriate water for a specific beneficial use. The elements of a water right generally include . . . **point of diversion** . . . and any other element necessary to describe the right. . . . (Bold added; note that the regulation does not refer to "points" of diversion, but only a "point of diversion".)

Because each of the Defendants' water rights have but one point of diversion, the converse is also true - that a single point of diversion gives rise to the water right. A package of rights attaches to a single point of diversion. Those rights would be thwarted if the whole ranch had but one water right with multiple points of diversion. Further, calculating the effects of any change in a 93,000+ acre point of diversion is likely impossible. ". . . the right to change a point of diversion [is] not a statutory right, but rather an inherent part of a water right." HERRINGTON V. STATE EX REL. STATE ENG'R, 2004-NMCA-062, 135 N.M. 585, 92 P.3d 31 (reversed on unrelated grounds, 2006-NMSC-014, 139 N.M. 368, 133 P.3d 258). The United

States overlooks the declarations of the underground water rights, some of which have varying priorities, and all of which have different points of diversion and places of use. They do not as a matter of law constitute but one water right. See Defendants' Exhibits 12-1 through 12-24.

6. Paragraph 6 is irrelevant to the issues before the Court and hence not admissible and not germane to a motion for summary judgment. F.R. Evid. 402.

7. The facts set forth in paragraph 7 omit the overflow ponds served by the Defendants' wells, which vastly increase the square feet of exposed water surface in addition to the exposed water surface of the drinking troughs, as reflected in Mr. Turnbull's affidavit. Those overflow ponds result in additional evaporation of large amounts of water per year. See Darrell Brown additional affidavit, ¶ 1.

8. Some of the springs referred to in United States' paragraph 8 have been improved as indicated, and are not "unimproved". Canyon Springs, 9C-4-SPR02, and Jaralosa Springs, 10A-4-SPR01, have been improved and as a result have water rights. See State Engineer Declaration No. SD-06503, for Canyon Springs, attached as Exhibit 14. That declaration is prima facie proof of the facts stated in it. 10A-4-SPR01, Jaralosa Springs, is the source of water for a storage tank, consisting of a surplus rocket fuel tank, two watering troughs, located at the

site of the springs, and as an additional source of water supply for stock watering facilities also served by the Jaralosa Well (9C-5-W01) by means of a pipeline approximately 2 miles long, and Rock House well, (9C-4-W04), by means of an additional pipeline approximately 1/4 mile long, and by another short pipeline to a separate drinking trough. See Darrell Brown Additional Affidavit, Exhibit 13, ¶ 2.

Further response to Plaintiff's Paragraph 8. Los Alamos Springs, subfile answer p. 72, Defendants' No. 128, consist of an excavated area at the location of the springs and an additional excavated watering tank located close to it. The springs were damaged by a flash flood in about 2012, and have not yet been repaired. See Additional Affidavit of Darrell Brown, Exhibit 13, ¶ 3.

Further response to Plaintiff's Paragraph 8. There are two unnumbered and undescribed stock tanks in the NE 1/4 NE 1/4 SW 1/4 Section 6, Township 6 North, Range 18 West, NMPM, located southeast of the main house at Atarque Ranch Headquarters, one with a surface area of 9,000 square feet and a storage impoundment of .525 acre feet, purpose of use: stock watering, and the other with a surface area of 2912 square feet and a storage impoundment of .27 acre feet, purpose of use: stock watering, fire protection. Both are man-made, excavated and bermed tanks. See Darrell Brown Additional Affidavit, Exhibit 13,

¶ 4. Both have Defendant's Nos. 139, and appear at paragraph 8 of Defendants' subfile answer page 75.

Further response to Plaintiff's Paragraph 8. In addition to the two tanks described in the preceding paragraph, there is a third tank in approximately the same location as those in the preceding paragraph, near the ranch headquarters. This tank was not revealed by the Plaintiffs' hydrographic survey, and was not included in the Defendants' subfile answer. This tank is man-made, consisting of an excavated and bermed tank. Defendants do not have dimensions for this tank, as that is the function of the hydrographic survey which omitted the same. See Darrell Brown Additional Affidavit, Exhibit 13, ¶ 5.

The three tanks described in the foregoing paragraphs are readily visible on the ground. See Darrell Brown's additional affidavit, Exhibit 13 ¶ 6.

Further response to Plaintiff's Paragraph 8: Paragraph 9, p. 76 of the subfile answer, (Defendants' No. 140) identifies an unnumbered and undescribed stock tank in the NW 1/4 SW 1/4 SE 1/4 Section 6, Township 6 North, Range 18 West, NMPM, located southeast of the main house at Atarque Ranch Headquarters, with a surface area of 18,800 square feet and a storage impoundment of 1.08 acre feet, priority (based on information and belief) before 11/15/1936; purpose of use: stock watering. The United States asserts this is a natural depression and should not result in a

water right. This is a man-made, excavated and bermed tank. See the additional affidavit of Darrell Brown, Exhibit 13, ¶ 7.

(Defendants concede there are no man-made works in connection with the springs shown at p. 72 subfile answer, Paragraph C, items 1, 2 and 3, Defendants' paragraphs Nos. 125, 126, 127; p. 72 subfile answer, paragraph E, items 1 and 2, Defendants' paragraphs Nos. 129 and 130.)

LEGAL ARGUMENT

Atarque Lake

The essence of the United States motion for summary judgment is twofold: that the Defendants have not shown the existence of a water right for Atarque Lake, and that the water right in it has been abandoned. It is wrong on both accounts.

Existence of the Water Right in Atarque Lake

The Defendants filed their declaration of water rights for Atarque Lake. The effect of doing so is governed by NMSA § 72-1-3 (1961):

> . . . .**Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents**. (Bold added.)

The United States' contention (p. 28, cross-motion) that the Defendants have failed to provide proof to substantiate their declaration is wrong. The declaration itself is the proof.

Abandonment of the Water Right in Atarque Lake

The basic definition of abandonment is "Abandonment is a

common law doctrine involving the occurrence of (1) an intent to abandon and (2) an actual relinquishment or surrender of the water right. . . . Crow v. Carlson, 107 Idaho 461, 690 P.2d 916 (Idaho, 1984). To prove abandonment the State Engineer must show that the owner relinquished the water right with the intention to forsake such rights. State ex rel., Martinez v. McDermett, 1995 NMCA 060, 120 NM 327, citing South Springs, infra.

In New Mexico the law respecting the intent required to give rise to an inference of abandonment is that:

> * * * where by clear and convincing evidence it is shown that for [1] an unreasonable time [2] available water [3] has not been used, an intention to abandon may be inferred [4] in the absence of proof of some fact or condition excusing such nonuse. * * * STATE EX REL. REYNOLDS V. SOUTH SPRINGS CO., 1969-NMSC-023, 80 N.M. 144, 452 P.2d 478 (S. Ct. 1969). [Bracketed numbers added.]

The requirements for an inference of abandonment are not here present. Once the four showings have been made by clear and convincing evidence by a party asserting abandonment, then and only then can there arise the rebuttable inference of intent to abandon. Whether the time under South Springs ("[1]") is the nonuse period from 1972 to 1978, as Movants claim, or the nonuse time from 1972 to 2001, when this case was filed, which is presumably the United States' claim, makes no difference in light of the failure of the United States even to assert that water was available under item "[2]", because all of those elements must be present to create the inference of abandonment.

At bottom, the United States presents no admissible evidence respecting the intention of the owner, nor could it. The opposition to a motion for summary judgment must rely on admissible evidence. F.R.Civ.P. 56(c)(2). The United States only presents inadmissible facts from which it claims there might be inferred an intention to abandon the water right. The United States' position fails because the US fails to show there was available water. It fails in addition because the facts it abortively relies on to create the inference of abandonment are themselves only inferences from other facts, which is impermissible.

Even if water is shown or claimed to have been available, the second part of the inquiry is whether an "unreasonable time" has been shown. There is no real issue respecting the beginning of the time. If an unreasonable time elapsed after 1971 or 1972, when the dam was destroyed. If water was available, and if the owner has not presented proof of some fact or condition excusing the nonuse, then the inference arises. The problem for the litigants and the Court is to determine when that time period morphed from merely time to an unreasonable time, and if and when it did so, what happened? The United States has made no showing with respect to any of these questions and its motion for summary judgment should be denied

Even if the US had pointed out all the necessary elements

required to create the inference of abandonment under South Springs, then the inference and the Defendants' affidavits would create a fact issue, requiring a denial of the United States' motion.

What happens when the burden of proof changes? Because abandonment is the intentional relinquishment or forsaking of a property right, to the extent the owner can present proof of his intentions (in this case the owners have presented uncontradicted proof of their intentions) then there will have been no abandonment. Fed. Rules Evidence 301 provides:

> In a civil case . . . the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

That burden, in the case of a claimed abandonment of water rights is on the Plaintiff:

> Because the State Engineer claims abandonment or forfeiture of the water rights, it bore the burden of proof as to that issue. STATE EX REL. MARTINEZ V. MCDERMETT, 1995-NMCA-060, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).

The United States has the burden to prove its case, irrespective of whether summary judgment is granted.

Because there is no admissible direct evidence showing the owner's intention in destroying the dam, or even that it was the owner who did so, his intentions in doing so can only themselves be inferred. For there to be an abandonment of the water right based on the destruction of the dam, it must first be inferred

from the evidence that the owner actually destroyed the dam. Then it must be inferred from his inferred action that he also intended the destruction of the dam to extend to the water right. Then it must be inferred from the long period of non-use of the dam that the owner intended to forsake a different property right, the water right.

Because the destruction of the dam was not and could not be construed to work the destruction of the water right (see the Wilson, Furman cases, supra), all that might be inferred from the destruction is that the owners did not want and were forsaking the dam.

To the extent the destruction of the dam gives rise to any inference at all, it is the inference that the dam was no longer capable of holding water for which the Defendants' had a water right. Even if it can be inferred that the destruction of the dam was committed by the owner, the inference of the then-owner's desire to no longer have the dam (arising from the destruction of the dam, as Plaintiff asserts) cannot be extended to make an inference that he abandoned of the water right. The inability of the dam to hold water does not itself give rise to an inference that the water right itself had been abandoned. The inference of abandonment, like other inferences, cannot be based on another inference:

> [While] plaintiff is entitled to all inferences in his favor . . . such inferences must be reasonably based on facts

> established by the evidence, not upon conjecture **or other inferences**. Kitts v. Shop Rite Foods, 64 N.M. 24, 323 P.2d 282; Gonzales v. Shoprite Foods, 69 N.M. 95, 364 P.2d 352. HISEY V. CASHWAY SUPERMARKETS, INC., 1967-NMSC-081, 77 N.M. 638, 426 P.2d 784 (S. Ct. 1967). (Bold added.).

Too many inferences must be stacked on one another, and the Court may not find an abandonment of the water right based thereon.

The dam is not the water right. Even its destruction is not itself evidence of the abandonment of the water right. The possible inferences from its unexplained destruction include dam safety, structural failure, washout.

Evaporation From Exposed Water Surfaces in Stock Ponds and Watering Devices as Part of the Water Right

See these Defendants' Memorandum in Support (Doc. 3059-1) of their Motion for Partial Summary Judgment (Doc. 3059), June 26, 2015, pp. 16 - 19, which they incorporate here by reference. In the Turnbull Affidavit, Exhibit D to the United States' motion, Mr. Turnbull asserts at paragraph 21, that

> 21. I have reviewed the 21 livestock wells that remain in dispute between Plaintiffs and Defendants on 2005 DOQQ aerial imagery. Of these 21 wells, 19 appear to be operated by a windmill pump; these pumps typically operated whenever the wind blows with sufficient force. Each of the 21 contested wells appears to have an uncovered circular drinking trough made of metal and/or concrete in close proximity to the well. Using the measuring tool in ArcGIS software package, I estimate the diameter of each of these troughs at approximately 35 feet. Also, seven of these 21 contested wells also appear to have an additional smaller drinking trough of approximately 15 feet diameter. I compute the combined surface area of all 28 troughs as 21,441 ft2. Even using the "5 feet per year" pan evaporation asserted by Mr. Brown, I compute the total annual volume of evaporated water from these troughs as 2.461 AFY.

Neither Mr. Turnbull nor the United States' motion or response identifies the 21 wells, thus making it impossible to formulate a meaningful response. We refer the Court to the discussion in this pleading, in which the inappropriate grouping of Defendants' wells as if they gave rise to a single water right is discussed.

Evaporation is not only from the uncovered circular drinking troughs or the additional smaller drinking troughs, but includes the evaporation from the overflow tanks or ponds which are supplied by those wells.

Because the Court should reject the method used by the United States to determine the amount of water from the wells, i.e., multiplying the number of cattle by the amount of water the United States believes they consume and evaporate per head, the Court should not accept the United States consolidated well water amount. Those wells do not comprise but one water right. See the additional affidavit of Darrell Brown, which sets forth the importance of the size of the overflow ponds. In the absence of specification by the United States, we cannot apply those numbers to any particular well. Those overflow ponds are used for cattle watering, and give rise to evaporation, which must be calculated as a part of the Defendants' water rights.

All of the Defendants' well water rights are the subject of declarations of underground water rights on file at the State Engineer. They are prima facie proof of their contents under

NMSA § 72-12-5 (1931), which is essential identical to the like provision respecting surface water declarations.

Man-Made Impoundments vs. Natural Depressions

These are matters of fact and are addressed in the factual statements of controverted/uncontroverted acts at the beginning of this reply/response.

Man-Made Works Capturing Spring Water

These are matters of fact and are addressed in the factual statements of controverted/uncontroverted acts at the beginning of this reply/response.

CONCLUSION

The Defendants have presented proof that the water right in Atarque Lake existed. No admissible evidence respecting the abandonment of that water right has been presented, and the inference of abandonment of the rights is not present here.

The water rights of Defendants must be measured by beneficial use, and not by the method used by the United States, which improperly relies on per head consumption of water and not on the beneficial use of water required to provide water to cattle. Beneficial use includes evaporation.

The Court should grant Defendants' partial summary judgment motion and deny the United States' motion for summary judgment.

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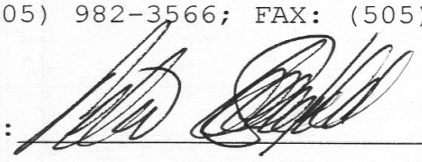
By: 

CERTIFICATE OF SERVICE

I served a copy of the foregoing on all counsel and parties served by the Court's digital filing and service system this September 14, 2015, by means of that system.