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' SUPPLEMENTAL BRIEF
ON THE APPLICABILITY OF FORFEITURE

Background

The Court has noted the absence of discussion in the briefs of the doctrine of forfeiture of water rights in Atarque Lake. The doctrine of forfeiture plays no role in the issues before the Court because as a matter of law no forfeiture has taken place nor, as a matter of law, could it take place.

The Court's inquiry here refers to *State ex rel. Reynolds v. South Springs Co., 452 P.2d 478 (N.M. 1969).* The New Mexico Supreme Court there noted the "unfortunate" nature of and rejected the notion of the common interchangeability of the doctrines of abandonment and forfeiture, holding that the former

is a common law principle of property, dependent on the intention of the owner. The latter is a "punishment" imposed by the Courts on those who fail to use their water rights in accordance with statute for a prescribed period of time. 2 Kinney on Irrigation and Water Rights, 2d Ed., 2020-2021, § 1118. As the Court here notes, abandonment is a matter of intention, whereas forfeiture turns on the acts (or more accurately, the failure(s) to act of the water right owner. But there is more to it than that.

Prior to the amendment of the forfeiture statute in 1965, the law was quite straightforward. Where a water user failed to use his water rights for four years without one of the excuses allowed by the forfeiture statute (usually drought or other causes beyond the appropriator's control, etc.) the water right ended as a matter of law. There was no argument, no notice, no defense.

The Court will, we hope, indulge counsel's recollections of the legislative events of the time, since institutional knowledge of them is rapidly disappearing. The Pecos River adjudication (State ex rel. Reynolds, et al., v. L.T. Lewis, et al., Nos. 20294 and 22600, Consolidated) began in 1955. While a few other adjudications had taken place in various parts of the state, none had sought to enforce, in any large scale fashion, the forfeiture law as it then existed. As it then existed, the statute automatically worked a forfeiture of the water right, as a matter

of law for four consecutive years of unexcused non-use.

The impact of the forfeiture law was brought home to farmers on the Pecos River early in that adjudication. Their water rights were, with some regularity, determined to have been forfeited by four years of non-use. Outraged by the determinations of the court in the adjudication, they sought relief from the legislature.

In response, the 1965 Legislature amended what is now Section 72-5-28 (and the corresponding ground water statute) in an attempt to provide some relief to those farmers. The legislative battle was not a friendly one. The long-time State Engineer, S.E. Reynolds, vehemently opposed the amendment. In the end, the farmers prevailed and the amendment was adopted and signed by the Governor.[1] The Courts have now regularly recognized the "new" limits on the forfeiture of water rights:

> After four years of nonuse, the State Engineer provides a party with notice of impending water right forfeiture. Section 72-5-28(A). If nonuse persists for another year, the vested water right reverts to the public. . . .

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[1] 72-5-28. A. When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested for the purpose for which it was appropriated or adjudicated, except the waters for storage reservoirs, for a period of four years, such unused water shall, if the failure to beneficially use the water persists one year after notice and declaration of nonuser given by the state engineer, revert to the public and shall be regarded as unappropriated public water; provided, however, that forfeiture shall not necessarily occur if circumstances beyond the control of the owner have caused nonuse, such that the water could not be placed to beneficial use by diligent efforts of the owner . . . and provided, further, that the condition of notice and declaration of nonuser shall not apply to water that has reverted to the public by operation of law prior to June 1, 1965.

> Montgomery v. Lomos Altos, Inc., 2007-NMSC-002, 141 N.M. 21, 150 P.3d 971.

Following the adoption of the amendment, State Engineer Reynolds viewed the amendment as an expression of the Legislature's intention and instruction to him that forfeiture be a thing of the past, and he never issued any "notice and declaration of nonuser" which could then result in the termination of the water right if an additional year of non-use ensued. As best counsel knows, during the remainder of Mr. Reynolds long tenure as State Engineer, not a single notice of non-use was issued by his office.

The procedural prerequisite for forfeiture of the Atarque Lake water rights has not been met.

If Plaintiffs claim that a notice of non-user has been issued by the State Engineer, they have never mentioned it, and it is up to the Plaintiffs to make the proof. The State Engineer, in particular, has the peculiar knowledge and control of the evidence of any such notices having been issued by him, that the burden is on him to so prove:

> Where the burden of proof of a negative fact normally rests on one party, but the other party has peculiar knowledge or control of the evidence as to such matter, the burden rests on the latter to produce {*406} such evidence, and failing, the negative will be presumed to have been established. Duke City Lumber Co. v. New Mexico Envtl. Imp. Bd., 1980-NMCA-160, 95 N.M. 401, 622 P.2d 709 (Ct. App. 1980), citing Allstate Finance Corporation v. Zimmerman, 330 F.2d 740 (5th Cir. 1964).

Counsel has not heard of any declaration and notice of non-

user being issued since the end of Steve Reynolds' tenure as State Engineer, and in any event, none, as of this writing, has been served in respect to Atarque Lake. See the affidavits of John A. Yates and Scott Yates, submitted together herewith.

Without the prerequisite declaration and notice there can be and has been no forfeiture.

The Forfeiture Statute Does Not Apply to Water Rights for Storage Reservoirs.

In addition to the failure of the State Engineer to properly and procedurally invoke the forfeiture statute, the statute on its face has no applicability to storage reservoirs. Thus, even if notice had been given, the water right would not forfeit, as it is not the sort of water right subject to forfeiture. Atarque Lake is a storage reservoir. The forfeiture statute, NMSA § 72-5-28A (2002) does not apply to water rights for storage reservoirs. That statute applies when:

> . . . the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested for the purpose for which it was appropriated or adjudicated, **except the waters for storage reservoirs** . . . . (Bold added.)

See the uses set forth in these Defendants' declaration of water rights for Atarque Lake, (previously filed herein as Document 3059-2), and compare the definitions in 6 Waters and Water Rights 1288 (glossary):

> [reservoir:] An artificial or natural storage place for water such as a pond, lake, tank, or basin, from which water is periodically withdrawn for domestic or industrial water

> supply, irrigation purposes or flood control. Reservoirs are often constructed by damming across a river.

and:

> [storage:] The natural or artificial impoundment and accumulation of water in surface or underground reservoirs . . .

The words obviously have their ordinary meaning and are not words of art requiring application of legal principals for their use in this context. The use of the word "storage" to define "reservoir" and the use of the word "reservoir" to define "storage" surely exemplify the simplicity of the matter.

CONCLUSION

There has been no forfeiture of the Atarque Lake water rights because no declaration and notice of non-user has been given by the State Engineer with respect to that water right. In addition, there has been no forfeiture because the forfeiture statute does not apply to water rights such as those in Atarque Lake, being expressly excluded by the statute.

Respectfully submitted:

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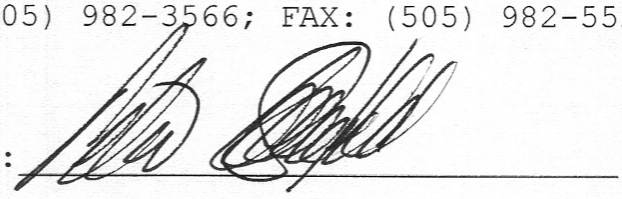
By: 

Attorney for Defendants

CERTIFICATE OF SERVICE

On this February 11, 2016, I served a copy of the foregoing supplemental brief on all parties and counsel served by the Court's digital filing and service system.