

**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. 01-cv-0072-MV/WPL
)	
ZUNI INDIAN TRIBE, NAVAJO NATION,)	ZUNI RIVER BASIN
)	ADJUDICATION
Plaintiffs in Intervention,)	
)	
v.)	Subfile No. ZRB-5-0014
)	
A & R PRODUCTIONS, et al.,)	
)	
Defendants.)	
_____)	

**JOINT MOTION FOR JUDGMENT ON THE PLEADINGS AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

Pursuant to Rule 12(c), Fed. R. Civ. P., the United States of America and State of New Mexico respectfully move the Court for judgment on the pleadings in the above-entitled subfile proceeding. As grounds for relief in support of this Motion, Plaintiffs assert, as more fully set forth below, that the material facts regarding the water rights associated with the real property in the Zuni River Basin owned by Defendant The Clawson Farm & Ranch LLC d/b/a The Quarter Circle Ranch are undisputed and Plaintiffs are entitled to judgment as a matter of law concerning the water rights associated with the subject property set forth in Section I below.

Pursuant to D.N.M.LR-Civ. 7.1, counsel for the United States attempted to contact the Defendant to determine its position on this Motion. The United States did not receive a response and assumes that Defendant opposes the Motion.

I. INTRODUCTION

Defendant is an agricultural and ranching operation in the Ramah Valley. At the center of the parties' dispute are the six wells and one stock pond serving the Defendant's operation. Consistent with this Court's *Procedural and Scheduling Order for the Adjudication of Water Rights Claims (Ramah Sub-Area)*, No. 01cv0072 BB/WDS-ACE, Doc. 954 (D.N.M. Jan. 11, 2007) ("Ramah Sub-Area Order"), Plaintiffs prepared and presented Defendant with a proposed Consent Order concerning the water rights associated with the subject property. The water rights contained in that proposed Consent Order constitute the extent to which Plaintiffs have offered to stipulate. The attributes of the proposed water rights are as follows:

STOCK POND

Map Label: 3B-5-SP056
Purpose of Use: LIVESTOCK
Priority Date: 12/31/1971
Source of Water: Surface Runoff
Point of Diversion: Not Applicable

Amount of Water:

Depth (ft): 3.0
Surface Area (sq.ft): 19,143
Storage Impoundment Volume (ac-ft): 0.791

Pond Location: As shown on Hydrographic Survey Map 3B-5D

S. 3 T. 10N R. 16W 1/4, 1/16, 1/64: NW SW NE

X(ft): 2,518,020 **Y(ft):** 1,502,941

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Dam height (if greater than 9 ft)

WELL

Map Label: 3B-5-W047

OSE File No: G 02002

Priority Date: 12/31/1940

Purpose of Use: NON 72-12-1 DOMESTIC & LIVESTOCK

Well Location: As shown on Hydrographic Survey Map 3B-5B

S. 9 T. 10N R. 16W 1/4, 1/16, 1/64: NE NE SE

X (ft): 2,516,550 **Y (ft):** 1,498,679

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Amount of Water: 1.839 ac-ft per annum

WELL

Map Label: 3B-5-W052

OSE File No: G 01998

Priority Date: 12/31/1964

Purpose of Use: NON 72-12-1 LIVESTOCK WATERING

Well Location: As shown on Hydrographic Survey Map 3B-5D

S. 3 T. 10N R. 16W 1/4, 1/16, 1/64: NW NE NE

X (ft): 2,519,309 **Y (ft):** 1,504,214

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Amount of Water: 1.139 ac-ft per annum

WELL

Map Label: 3B-5-W053

OSE File No: G 02004

Priority Date: 12/31/1932

Purpose of Use: NON 72-12-1 DOMESTIC & LIVESTOCK

Well Location: As shown on Hydrographic Survey Map 3B-5D

S. 3 T. 10N R. 16W 1/4, 1/16, 1/64: NW NE NE

X (ft): 2,519,349 **Y (ft):** 1,504,469

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Amount of Water: 1.839 ac-ft per annum

WELL

Map Label: 3B-5-W054

OSE File No: G 02001

Priority Date: 12/31/1987

Purpose of Use: NON 72-12-1 LIVESTOCK WATERING; COMMERCIAL

Well Location: As shown on Hydrographic Survey Map 3B-5D

S. 3 T. 10N R. 16W 1/4, 1/16, 1/64: NW NW NE

X (ft): 2,518,251 **Y (ft):** 1,504,106

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Amount of Water: 1.839 ac-ft per annum

WELL

Map Label: 3B-5-W055

OSE File No: G 02005

Priority Date: 12/31/1948

Purpose of Use: NON 72-12-1 DOMESTIC & LIVESTOCK

Well Location: As shown on Hydrographic Survey Map 3B-5D

S. 3 T. 10N R. 16W 1/4, 1/16, 1/64: NW SW NE

X (ft): 2,517,870 **Y (ft):** 1,502,703

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Amount of Water: 1.839 ac-ft per annum

WELL

Map Label: 3B-5-W112

OSE File No: G 02003

Priority Date: 12/31/1910

Purpose of Use: NON 72-12-1 DOMESTIC & LIVESTOCK

Well Location: As shown on Hydrographic Survey Map 3B-5B

S. 9 T. 10N R. 16W 1/4, 1/16, 1/64: NW NW NW

X (ft): 2,512,185 **Y (ft):** 1,499,220

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Amount of Water: 1.839 ac-ft per annum

On September 25, 2007, counsel for the United States consulted with Grant Clawson, a representative of Defendant. The consultation did not result in a stipulation. The United States subsequently filed a *Notice That The Consultation Period Has Ended*, Doc. 1277 (Sept. 26, 2007). Mr. Clawson, on behalf of the Defendant, then timely filed a *Subfile Answer*, Doc. 1314 (Oct. 17, 2007) (“Subfile Answer”). In its Subfile Answer, Defendant states in relevant part:

We object to the proposed Consent Order, in that the amount of water offered is insufficient to operate and sustain the current property and its operations, including the Commercial, Farming and Cattle productions that are ongoing. Furthermore, it does not consider, offer, or make available, room for growth, development and full use of that properties [sic] potential. The property includes six (6) wells, dating back to as early as the turn of the century, of which four (4) were for households, including domestic, livestock and farming. One well (10" casing) was drilled to assist with farming and one for commercial use (of which we were told that we could not expand to future use, only claiming what has been used historically. If one has a commercial well, it would seem that it would be available for "commercial use" including future expansion of commercial enterprises.

...

The 1st consent order offered us an amount that was insignificant, and we felt, inappropriate, for the amount of property and what we are doing with it (total amount offered was less than 3-acre feet, of which is allowable with one well permit). I felt that the second offer was an attempt to "show their generosity"; the 2nd offer being so much more than the first, that I (we) would be foolish to refuse such kindness.

Subfile Answer at 2.

II. APPLICABLE LEGAL STANDARD

Fed. R. Civ. P. 12(c) provides: "After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." In this subfile proceeding, the Plaintiffs' proposed Consent Order and Defendant's Subfile Answer represent the "pleadings" as that term is used in Fed. R. Civ. P. 7(a). *See* Ramah Sub-Area Order at 2-4 (describing the generation and service of Consent Orders); at 5-6 (describing the process and requirements for filing a subfile answer); *Selman v. Delta Airlines*, Civ 07-1059 JB/WDS, 2008 WL 6022017, at *7 (D.N.M. Aug. 13, 2008) (describing the distinction made in Rule 7 between pleadings and

motions). “A rule 12(c) motion is designed to provide a means of disposing of cases when the material facts are not in dispute between the parties.” *Peña v. Greffet*, 110 F. Supp. 3d 1103, 1112 (D.N.M. 2015) (citing *Kruzits v. Okuma Mach. Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994)).

“Any party may move for judgment on the pleadings if no material facts are in dispute and the dispute can be resolved on both the pleadings and any facts of which the Court can take judicial notice.” *Ramirez v. Wal-Mart Stores, Inc.*, 192 F.R.D. 303, 304 (D.N.M. Mar. 22, 2000) (citing Rule 12(c)). Because a motion for judgment on the pleadings “is generally treated in the same manner as a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, ... [t]he court accepts all well-pleaded allegations of the non-moving party as true and views all facts in a light most favorable to the non-moving party.” *Ramirez*, 192 F.R.D. at 304 (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998) and *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)). The Court should grant a motion for judgment on the pleadings “if the pleadings demonstrate that the moving party is entitled to judgment as a matter of law.” *Peña*, 110 F. Supp. 3d at 1112 (citing *Ramirez*, 192 F.R.D. at 304).

III. ARGUMENT

Plaintiffs and the Defendant do not dispute any facts material to the determination of the water rights associated with Defendant’s property in the Zuni River Basin. The Defendant only disputes the amount of water to which it is entitled for its six wells. It does not dispute any other elements of the water rights offered by Plaintiffs. Even viewed in a light most favorable to the Defendant, the Subfile Answer raises no factual or legal issues on the basis of which the Defendant could possibly establish an entitlement to a water right greater in quantity than that offered by the Plaintiffs. On the only two legal issues raised in the Subfile Answer, as discussed below, Plaintiffs are entitled to judgment as a matter of law.

A. Defendant's Future Needs Are Not Relevant to the Determination of Its Water Right

The Defendant contends that Plaintiffs' offer failed to include sufficient water to "sustain" Defendant's operations in the future, "including future expansion of commercial enterprises," and to "consider, offer, or make available, room for growth, development and full use of that properties [sic] potential." Subfile Answer at 2. In other words, the Defendant suggests that the offered quantity of water will be insufficient to meet its future water needs. Defendant's contention—that it is entitled to a right to more water than it has used or is using now because, at some future date, it may need more than that amount—is antithetical to the beneficial use standard established under New Mexico law. *See Memorandum Opinion and Order*, No. 01cv00072-BB-ACE, Doc. 733 at 4 (D.N.M. June 15, 2006) ("New Mexico law is clear on the subject ... that beneficial use defines the extent of a water right."). Indeed, this Court, in response to similar arguments regarding "future need," previously has ruled that "mere intention ... does not ... establish historic ... use." *Proposed Findings and Recommended Disposition*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0014, Doc. 3049 at 8 (D.N.M. May 27, 2015). *See id.* at 10-11 ("Mere assumption is insufficient to establish a water right." (citing *State v. Aamodt*, No. Civ. 66-6639 MV/WPL, Subfile PM-67833, Doc. 8119 at 6 (D.N.M. Feb. 24, 2014))); and at 11 ("a substantial increase in a water right cannot be justified by mere speculation"). Even accepting all of the statements in the Defendant's Subfile Answer as true and viewing them in the light most favorable to Defendant, Defendant states no factual or legal circumstances that can be construed to entitle it to a domestic, commercial, or livestock water right for its wells greater than the amounts for each that Plaintiffs have offered.

B. A Well Permit Does Not Per Se Entitle Defendant to a Water Right in the Amount of Three Acre-Feet per Year for Each of Its Wells

Defendant also suggests that the quantity of water Plaintiffs have offered for each of Defendant's wells is legally insufficient because that amount is "less than 3-acre feet, ... which is allowable with one well permit." Defendant, as have many claimants in the Zuni River Basin Adjudication, misapprehends the legal effect of a well permit in New Mexico. Defendant's well permits do not establish a legal right to any amount of water from each of its wells, but merely authorize Defendant to develop a water right up to three acre-feet from each well. Put another way, Defendant's "argument that a permit alone creates water rights contradicts New Mexico law." *New Mexico v. Trujillo*, 813 F.3d 1308, 1321 (10th Cir. 2016) (citing N.M. Const. art. XVI, § 3 and *Hanson v. Turney*, 136 N.M. 1, 94 P.3d 1, 4-5 (N.M. Ct. App. 2004)).

In New Mexico, to the contrary, only "beneficial use defines the extent of a water right." Doc. 733 at 4. The Defendant thus must establish, based exclusively on historic beneficial use, that it is entitled to a water right for each of its wells greater than the rights offered by Plaintiffs. *See Order*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0098, Doc. 2985 at 4 (D.N.M. Aug. 28, 2014) ("to the extent that any water right is disputed, Subfile Defendants generally bear the burden of proof in the first instance with respect to the disputed water right"); *Proposed Findings and Recommended Disposition*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0014, Doc. 3049 at 5 (D.N.M. May 27, 2015) ("The burden is on the [Subfile Defendants] to justify a water right above that which was offered by the Plaintiffs." (citing Doc. 2985 at 2-3)). In its Subfile Answer, the Defendant does not allege that it or any previous owner of its property has used a quantity of water from any of its wells at any time in the past greater than the amounts Plaintiffs have offered. Instead, Defendant merely expresses its general dissatisfaction with Plaintiffs' offer. The Defendant's

general dissatisfaction does not, and cannot, serve as a lawful basis to establish a right to water greater than the quantity of water offered by the Plaintiffs.

IV. CONCLUSION

WHEREFORE, based upon the foregoing argument and authority, Plaintiffs respectfully request that the Court enter an order granting judgment on the pleadings in favor of the United States and State of New Mexico and against the Defendant consistent with the water rights set forth in Section I above.

Dated: May 12, 2016

Respectfully submitted,

e-mail approval granted on 5/9/16

Edward C. Bagley
Office of the New Mexico State Engineer
Special Assistant Attorney General
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150

ATTORNEY FOR THE STATE OF
NEW MEXICO

/s/

Samuel D. Gollis
U.S. Department of Justice
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
(303) 844-1351

ATTORNEY FOR THE UNITED STATES

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of May, 2016, I filed the foregoing JOINT MOTION FOR JUDGMENT ON THE PLEADINGS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF 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.

I further certify that this date I served the foregoing on the following non-CM/ECF Participants via U.S. first class mail, postage prepaid:

The Clawson Farm & Ranch LLC
D/B/A The Quarter Circle Ranch
P.O. Box 453
Ramah, NM 87321

/s/
Samuel D. Gollis