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, v. A & R PRODUCTIONS, et al. Defendants.	)	No. 01cv00072-MV-WPL ZUNI RIVER BASIN ADJUDICATION **Subfile No. ZRB-2-0038**

JOINT REPLY ON PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT AND ON THE UNITED STATES' MOTION TO EXCLUDE EXPERT OPINION TESTIMONY

Plaintiffs United States of America (United States) and the State of New Mexico (New Mexico) (collectively Plaintiffs) jointly reply to *Defendants*' (Craig and Regina Fredrickson – collectively Defendants) *Response to Plaintiffs' Corrected Joint Cross-Motion for Summary Judgment and Motion to Exclude Expert Opinion Testimony* (ECF No. 3320) (Response).

I. INTRODUCTION

The dispute between Defendants and Plaintiffs centers on Defendants' claimed livestock use water right from a single well in the Zuni River Basin designated 10A-5-W06. In Plaintiffs' Joint Cross-Motion for Summary Judgment (ECF No. 3317-1) (Cross-Motion), [1] Plaintiffs

[1] Plaintiffs originally submitted its Cross-Motion with supporting exhibits associated with ECF document number 3315. Soon after filing, Plaintiffs identified an unintended error associated with the Cross-Motion brief submitted and submitted a corrected brief that was assigned ECF document number 3317-1. The exhibits in support of the Cross-Motion remain with ECF document number 3315.

moved for summary judgment on two grounds. First, Plaintiffs established that Defendants' claimed livestock use water right, if it ever existed, has been abandoned. Plaintiffs established that any right had gone unused for no less than seventeen years, that such a long period of nonuse was unreasonable, that a presumption of abandonment had arisen, and that no reasonable justification existed for such nonuse. Cross-Motion at 11 – 14, § V.A. Second, and in the alternative, Plaintiffs established that even if a livestock use right existed, Defendants' exclusive basis to establish a necessary element of their claimed livestock use water right (water quantity) was Defendant Craig Fredrickson's (Mr. Fredrickson) purported expert opinion. Cross-Motion at 14 § V.B.[2] But Mr. Fredrickson's opinion is not admissible evidence under Fed. R. Evid. 702 as he is not an expert who can opine on cattle operations (*Motion to Exclude Expert Opinion Testimony*, ECF No. 3316 at 5 – 12 § III.A (Motion to Exclude) and, even if he could be qualified as an expert, his opinion is not reliable (*id*. at 12 – 24 § III.B). Cross-Motion at 13 (incorporating Motion to Exclude).

In response, Defendants do not dispute the material facts or law as presented in the Cross-Motion and the Motion to Exclude; instead, Defendants argue that the conclusions drawn by Plaintiffs from the undisputed facts and law are unjustified or unsupported. First, Defendants claim that the livestock water right, although not used for more than seventeen years, was not abandoned. Defendants contend that at no time during the period of their ownership of well 10A-5-W06 (from 2006 – present) did they intend to abandon any water right. Response at 4 – 7.

[2] Based on innumerable assumptions, circumstances, conclusions, and calculations, Mr. Fredrickson's ultimate opinion was that at some unidentified time(s) before 1999, management of a 200-head cattle herd consumed 3.779 acre-feet of water from well 10A-5-W06 in the course of a year. *Defendants' Motion for Summary Judgment* (ECF No. 3305) Attachment G at 69.

Defendants also give two reasons as cause for the long period of nonuse: the unresolved nature of the water right because of this adjudication and an ongoing regional drought. Response at 5 - 6. Second, Defendants claim that the Motion to Exclude has no basis because Mr. Fredrickson's opinion is offered not as expert opinion but as lay opinion admissible under Fed. R. Evid. 701. Response at 7 – 12.

Defendants' arguments against the Cross-Motion neither raise a disputed issue of material fact nor prevent judgment from entering in favor of Plaintiffs. With respect to abandonment, more than seventeen years of non-use raises the presumption of abandonment. Defendants fail to meet their burden and offer no valid basis for the unreasonable period of nonuse. The ongoing nature of this adjudication and any uncertainty that might be tied to litigation simply has no bearing on the ability to use water from well 10A-5-W06 over the course of more than seventeen years. Further, Defendants' claim of "drought" constitutes nothing more than a post-hoc justification for approximately 20 years of nonuse and is revealed as such by the ongoing, undisputed livestock activity that has continued throughout the region and throughout the entire period of nonuse. In the end, Defendants' claims are nothing more than mere expressions of desire, hope, and intent and are insufficient to rebut the presumption of abandonment.

With respect to the assertion that Mr. Fredrickson's opinion is admissible testimony under Fed R. Evid. 701, Defendants admit that Mr. Fredrickson is not qualified to testify as an expert on cattle operations and thus concede the Motion to Exclude. But even addressing Defendants' Rule 701 argument, Defendants reveal a fundamental misunderstanding of the

admissibility of evidence.[3] Opinions offered by non-experts are admissible only if they are reasonably based on perceptions (sight, sound, taste, etc.) and if they are not based on scientific, technical, or other specialized knowledge. Despite Defendants' claim now that they offer only lay opinion, the numerous, scientific, technical and detailed opinions that Mr. Fredrickson developed are only admissible, if at all, under Fed. R. Evid. 702. But Defendants now candidly concede that Mr. Fredrickson is not an expert in livestock operations.[4] As such, his opinion is not admissible and Defendants are without admissible evidence to establish a necessary element of their claimed water right.

In the end, the Motion to Exclude has been conceded by Defendants and should be granted. Further, the Cross-Motion is well founded and Plaintiffs are entitled to judgment as a matter of law. The Court should enter judgment against Defendants' livestock water right claim for well 10A-5-W06 and enter judgment recognizing no more than the domestic use water right

[3] The Court previously cautioned Defendants on the pit-falls of representing themselves and of the requirement that they follow all applicable court rules. (Initial Scheduling Conference Hearing, 2/16/16 audio recording minutes at 5:30 – 7:12 and 8:50 – 9:20). As the Court has previously pointed out, the fact that Defendants proceed without the assistance of a lawyer may permit the Court to construe their pleadings liberally; however, pro se litigants are required to follow the same rules of procedure that govern all litigants. *Proposed Findings and Recommended Disposition* (ECF No. 3049) at 2; *see also Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005). In other words, evidence does not become admissible simply because a pro se litigant desires that the evidence be admitted.

[4] Remarkably, from the beginning of litigation on this subfile action, Defendants have insisted that Mr. Fredrickson was an expert and qualified to testify as an expert. *See e.g.*, Initial Scheduling Conference Hearing, 2/16/16 audio recording minutes at 7:12 – 8:50). Further, Defendants presented Mr. Fredrickson's report labeled "Expert Witness Report" issued pursuant to the civil procedure rule linked to expert reports, Fed R. Civ. P. 26(a)(2)(B). Finally, throughout his deposition Mr. Fredrickson repeatedly referred to himself as an expert in this case, held himself out as an expert with specific expertise applicable to this case, and described formulating expert opinion. *See e.g.*, Motion to Exclude Exhibit B (ECF No. 3316-2) 47:8 – 22. Up until this point, Plaintiffs have only treated Mr. Fredrickson as he was presented.

in the amount of 0.7 AFY as previously agreed to by the Parties.

II. ANY LIVESTOCK USE RIGHT HAS BEEN ABANDONED

In the Cross-Motion, Plaintiffs established that at least since April 29, 1999 any livestock use water right from well 10A-5-W06 had gone unused. Cross-Motion at 5, § II.A. Under New Mexico law, a water right can be lost by abandonment. *State of New Mexico ex rel. Reynolds v. S. Springs Co.*, 452 P.2d 478, 480-81 (N.M. 1969). A "protracted period of nonuse" creates a presumption that a water right holder intended to abandon the water right. *State of New Mexico ex rel. Office of State Engineer v. Elephant Butte Irr. Dist.*, 287 P.3d 324, 331 (N.M. Ct. App. 2012) (citing *South Springs*, 452 P.2d at 481-82). As recently expressed by this Court, "[c]ontinual use is not required to establish a water right, but an unreasonable period of nonuse may give rise to abandonment, and loss, of the water right." *Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition* (ECF No. 3325) at 8. And once an unreasonable period of nonuse and the presumption of abandonment has been established, the burden shifts to the claimed water right holder. *Elephant Butte Irr. Dist.*, 287 P.3d at 331. On this shift, the claimant bears "the burden of establishing a genuine issue of fact: merely asserting that there were valid reasons to not exercise a water right . . . does not create a genuine issue of material fact." *Order* (ECF No. 3325) at 9; *see also South Springs*, 452 P.2d at 482 ("mere[ly] . . . expressions of desire or hope or intent" are insufficient to rebut the presumption.").

The Parties do not dispute that water from well 10A-5-W06 has not been used for livestock uses since before April 29, 1999. *See* Response at 3-4 ¶ 2. Thus, to the extent that a livestock use water right was created by previous well owners, it has gone unused for at least seventeen years. New Mexico state law has unquestionably established that nonuse for a period

of at least eighteen years is unreasonable as a matter of law. *South Springs*, 452 P.2d at 483; *see also Order* (ECF No. 3325) at 8. And this Court has previously determined in the Rio Jemez Adjudication that nonuse of at least 16 years was also unreasonable and raised the presumption of abandonment. *See* Cross Motion (ECF No. 3315) Attachment B at 9. Thus, Plaintiffs have rightfully and squarely raised the presumption that the right Defendants claim, to the extent that it ever existed, has been abandoned.

In response, Defendants spend the bulk of their effort presenting argument inapplicable to overcoming the presumption of abandonment. Defendants contend that since 2006, they have been actively involved in this adjudication and they have never intended to abandon any water right. *See* Response at 4 – 7. Defendants' contention here is that the uncertainty associated with this litigation prevents them from starting an unspecified and undocumented livestock operation on their property. *See id.* at 5 – 6. But Defendants' argument does no more than to "merely assert[] that there were valid reasons to not exercise a water right." This conclusory allegation does not rebut the presumption against them or create a genuine issue of material fact. *See Order* (ECF No. 3325) at 9. Further, the excuse offered by Defendants is not a reasonable one nor does it constitute a valid rebuttal of the presumption of abandonment. Despite any unfounded belief that Defendants might firmly hold, no aspect of this adjudication prevents Defendants or any potential water user from using water for any purpose or at any time whether for historic uses or for uses yet to be developed. Since Defendants purchased their property in 2006 they have been free and without restriction to use water for livestock purposes; they have simply chosen not to.

In addition, Defendants assert that the Zuni River Basin suffers a regional drought and "drought alone excuses nonuse." Response at 7. This assertion is nothing more than Defendants'

ipse dixit. Again, Defendants "merely asserting that there were valid reasons to not exercise a water right;" does not create a genuine issue of material fact. *See Order* (ECF No. 3325) at 9. Defendants cite no authority whatsoever in support of their claim that "drought alone excuses nonuse."

Further, even if Defendants could establish a factual link between drought and nonuse of water from well 10A-5-W06, the excuse offered here is not a reasonable one nor does it constitute a valid basis to rebut the presumption of abandonment. Defendants have disclosed no evidence indicating that the existence of drought restricted Defendants' use of water from well 10A-5-W06. To the contrary, Mr. Fredrickson's own opinions reveal Defendants' claim that "drought alone excuses nonuse" is mere pretext. In his report, Mr. Fredrickson opined extensively about how well 10A-5-W06 could support a large theoretical cattle herd and wildlife for an entire year with 3.779 acre-feet of water. *See* Defendants' Motion for Summary Judgment (ECF No. 3305), Exhibit G at 24 – 34 § 5.3 (Carrying Capacity); at 65 – 66 (wildlife consumption; and at 69 § 5.7 (total quantity summary). Throughout his report, Mr. Fredrickson suggests that water production from well 10A-5-W06 has been unaffected by drought. *See e.g.*, *id.* at 27-28 (forage production estimated for "unfavorable" years and precipitation considered during drought years). Also, Mr. Fredrickson opines that his property produces a prodigious amount of forage suitable for livestock. *See id.* at 29 Table 3. Thus, Defendants' well and property have <u>always</u> been capable of supporting livestock. Defendants, for whatever reason, have simply chosen not to use their claimed water right.[5] Finally, Defendants' claim that

[5] Notably, Defendants are retired since 2000, live in Albuquerque, and since 2006 visit their property in the Zuni Basin periodically as a second home. Motion to Exclude, Exhibit B at 11:24 – 12:5; 28:21 – 29:4.

"drought alone excuses nonuse" is revealed to be without substance by the undeniable and active cattle industry engaged in by Defendants' regional neighbors.[6]

In the end, Plaintiffs' Cross-Motion precisely and accurately captured the essence of Defendants' claim that they have been prevented from exercising a livestock use water right: it amounts to nothing more than a subjective expression of a non-specific desire, hope, or intent to raise an unknowable number of livestock one day in the distant, unspecified, and unforeseeable future. *See* Cross-Motion at 14. Such an expression does not justify the long period of nonuse and it does not overcome the presumption of abandonment. The Court must conclude that Defendants' claimed livestock use water right, to the extent that it ever existed, has been abandoned and grant Plaintiffs' Cross-Motion.

III. MR. FREDRICKSON'S OPINIONS ARE NOT ADMISSIBLE EVIDENCE

In the Motion to Exclude, the United States established that the opinions expressed by Mr. Fredrickson are the province of expert testimony and admissible, if at all, under Fed. R. Evid. 702. Motion to Exclude at 3 § I. The United States also established that Mr. Fredrickson was not an expert qualified to testify under the rule and that Mr. Fredrickson's opinions were not sufficiently reliable to be admissible under the rule. *Id.* at 5 - 12 § III.A and 12 – 24 § III.B, respectively.

In response, Defendants offer no defense to Plaintiffs' claim and, in fact, admit that Mr.

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[6] The USDA census for Cibola and McKinley Counties reveals cattle raised and sold throughout the period that Defendants claimed drought. *See* Exhibit D (supplemental affidavit of Scott Turnbull summarizing census numbers and cattle sales in Cibola and McKinley Counties from 1997 through 2012) (attached hereto).

Fredrickson is not a qualified expert capable of presenting testimony under Fed. R. Evid. 702.[7] Response 7 – 12, § III.1. However, Defendants go on to argue that although his opinions will not be presented as expert testimony, Mr. Fredrickson's opinions are admissible as lay testimony under Fed. R. Evid. 701 and "not subject to exclusion under Fed. R. Evid. 702." *Id.* at 9. Defendants' claim here constitutes nothing more than denial of the nature of Mr. Fredrickson's opinions: his opinions purport to express scientific, technical, or other specialized knowledge that may only be introduced pursuant to Fed. R. Evid. 702, if at all.

If a witness intends to testify as to his opinions, his testimony is admissible under either Rule 701 or Rule 702. As an initial matter, plain language largely controls the question; the rule provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
>
> a) rationally based on the witness's perception;
> b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701. Thus, Rule 701 specifies that lay opinion testimony must be based on the witness's perception and cannot convey the scientific, technical or specialized knowledge that falls within the scope of expert testimony governed by Rule702. "A person may testify as a lay witness [under Rule 701] only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person." *LifeWise Master Funding v. Telebank,*

[7] Defendants' admission here should be dispositive of the Motion to Exclude and the Cross Motion in Plaintiffs' favor.

374 F.3d 917, 929 (10th Cir. 2004) (quoting *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996)).

The Tenth Circuit has considered the line between opinion evidence governed by Rules 701 and 702. Rule 701 "does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness." *James River Ins. Co. v. Rapid Funding, Inc.*, 658 F.3d 1207, 1214, (10th Cir. 2011) (quoting *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979)). The Tenth Circuit has identified four non-exclusive considerations to determine whether proffered opinion is based upon common experience of an ordinary person or instead on scientific, technical or specialized knowledge:

a) whether the opinion was based on common sensory observations such as "appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences;"

b) whether the opinion was based on professional experience;

c) whether the opinion was based on technical reports or publications; and

d) whether the rules of evidence generally consider the opinion evidence to be expert opinion.

James River, 658 F.3d at 1214 (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng.*, 57 F.3d 1190, 1196 (3d Cir.1995)). These relevant considerations, as well as the rule's plain language, establish that Mr. Fredrickson's opinions are not the province of lay opinion. [8]

[8] Throughout their brief, Defendants include large, unquoted blocks of text verbatim from the

Defendants admit that Mr. Fredrickson's opinions are based on evidence developed during discovery (e.g., Mr. Tom Cox's deposition testimony), Mr. Fredrickson's skills as a nuclear engineer, and application of equations for "fluid flow," "population decay," and "interpolation." Response at 8 – 10. Thus, these opinions are far beyond the common sensory observations of an ordinary person. Indeed, Mr. Fredrickson's opinions of cattle operations that occurred more than two decades ago are disconnected from his common sensory observations today.

With respect to whether the opinion was based on technical reports or publications, Defendants readily admit that the technical basis for Mr. Fredrickson's opinion is his review of scores of technical publications. *Id.* at 8. They contend that "[t]he most important attributes of the individual evaluating the various elements of livestock water use are the ability to read, to comprehend and to apply common sense." *Id.* (emphasis added). However, information drawn from the publications Mr. Fredrickson cites would necessarily be inadmissible hearsay under Fed. R. Evid. 802 unless it were associated with an expert opinion admissible under Rule 702. Despite Defendants' assertions to the contrary, no lay witness may read a publication, comprehend what he has read, formulate an opinion based upon the material read, and testify as to the content of the publication or the opinions drawn. Such testimony from a lay witness is no more than inadmissible hearsay.

With respect to whether the opinion was based on professional experience and whether

committee comments to Rule 701. *See* Response at 9 (last incomplete paragraph) through 10; at 10 (last incomplete paragraph) through 11; and at 11 (last incomplete paragraph) through 12. But as explained above, the authority to which Defendants cite does not support Defendants' argument; instead this authority simply confirms that Mr. Fredrickson's testimony is not admissible under Rule 701.

the rules of evidence generally consider the opinion evidence to be expert opinion, again, Defendants readily admit that Mr. Fredrickson's opinions could only be rendered based on his training as a nuclear engineer. *See* Response at 10 ("Defendants do not represent Mr. Fredrickson as having any expertise outside his actual experience in conducting technical analysis as an engineer."). But undeniably the opinions of engineers as it pertains to their relevant fields and specific areas of expertise are only admissible through Rule 702. In the end, Defendants' contentions that the science upon which Mr. Fredrickson relies is "basic," "non-controversial," and "not [] complex or theoretical" and that the opinions he rendered "could be reached by any ordinary person" with "the ability to read, to comprehend and to apply common sense," are all simply and facially wrong.[9] *See* Response at 8. Thus, for the purposes of the Rule 701/702 analysis that the Response raises, Mr. Fredrickson's proposed testimony can only be characterized as expert testimony.[10]

If permitted to testify, Mr. Fredrickson intends to opine about the amount of water that was theoretically consumed by a cattle herd that was managed throughout the region surrounding

[9] For example, page 47 of Mr. Fredrickson's report reveals a graphic illustration that purportedly summarizes his analysis concerning herd water intake - a component of his overall quantification theory. This figure incorporates all aspects considered to calculate the theoretical herd's consumption (purportedly 812,802 gallons). *See* Defendants' Motion for Summary Judgment (ECF. 3305) Attachment G at 47; *see also* Exhibit E at 123:14 – 124:5. This graphic display and the principles it purports to capture are facially complex, theoretical, controversial, and could not be reached by an ordinary person with the ability to read, to comprehend and to apply common sense.

[10] Nevertheless, Plaintiffs have established previously that a retired nuclear engineer may not testify as to any technical topic that he chooses to become versed. Motion to Exclude at 5 – 12. Despite the fact that Mr. Fredrickson might be qualified as an expert associated with his education, training, and experience as a nuclear engineer, his background does not permit him to testify as a cattle operations expert. *Id*.

Defendants' property by the Cox family more than two decades ago. Such testimony is admissible, if at all, through Rule 702 not Rule 701.

For the reasons articulated in the Motion to Exclude and Cross-Motion, this Court should conclude that Mr. Fredrickson is not a qualified expert and/or that his opinions are not reliable. As such, Mr. Fredrickson's opinions are not admissible under Rule 702, Defendants have no other admissible evidence to support a necessary element of their livestock water right claim, and Plaintiffs are entitled to judgment as a matter of law.

IV. DEFENDANTS' REQUEST FOR SANCTIONS ARE UNFOUNDED

Defendants contend next that Plaintiffs have violated a discovery order and that the sanction for Plaintiffs' purported violation should be that Defendants be "granted default judgment on their *Motion for Summary Judgment.*" Response at 12 – 15. Defendants' contentions are without merit and can be briefly addressed.

At the initiation of active litigation on this subfile action, the Parties agreed:

> As contemplated under Fed. R. Civ. P. 26(a)(2), Plaintiffs will prepare and produce a written expert report from Mr. Turnbull (or another appropriate expert identified by Plaintiffs) to rebut the opinion of any expert witness retained by Defendants. *If Defendants do not produce a written expert report*, Plaintiffs will nevertheless prepare a written expert report from Mr. Trumbull that established the factual basis for the livestock use component water right described in Attachment 1.

Joint Status Report and Proposed Discovery Plan (ECF No. 3167-1) (Joint Status Report or Report) at 6 ¶ 5.f (emphasis added). The Joint Status Report was adopted by the Court in the *Order Setting Discovery Deadlines and Adopting Joint Status Report* (ECF No. 3201).

Again, plain language controls the outcome of Defendants' contention here. The Joint Status Report provides that "Plaintiffs will . . . prepare a written expert report from Mr. Trumbull that established the factual basis for the livestock use component water right described in

Attachment 1" only if "Defendants do not produce a written expert report." Defendants prepared Mr. Fredrickson's report and unquestionably presented it as an "expert" report. Plaintiffs treated Mr. Fredrickson's report as it was presented and "prepare[d] and produce[d] a written expert report from Mr. Turnbull [ ] to rebut the opinion of any expert witness . . . ." Defendants acknowledge that Plaintiffs properly presented Mr. Trunbull's expert report in rebuttal to Mr. Fredrickson's Report. Response at 13.[11] In the end, Defendants have no basis for their contention and Plaintiffs' actions are in no way in violation of any Court order.[12] Defendants have no basis to claim that Plaintiffs should be sanctioned for relying on the representations of Defendants and, accordingly, following requirements of the Joint Status Report.

V. PLAINTIFFS' CHALLENGE TO MR. FREDRICKSON'S EXPERTISE WAS TIMELY PRESENTED

Next, Defendants contend that Plaintiffs' challenge to Mr. Fredrickson's expertise was untimely. Again, their contention is without merit.

[11] Defendants also complain that Plaintiffs failed to attach Mr. Turnbull's rebuttal expert report to the Cross-Motion. Response at 13. However, Plaintiffs have no burden to prove Defendants' claimed livestock use water right and were under no requirement to attach Mr. Turnbull's report to Plaintiffs' response. In addition, Mr. Turnbull's expert report is not necessary to support the underlying grounds for Plaintiffs' Cross-Motion (i.e., abandonment and exclusion of expert testimony). Finally, in the end, Defendants' complaint that Mr. Turnbull's affidavit conflicts with his expert report rings hollow as Defendants identify no conflict between the documents. *See id.*

[12] Defendants' claim for relief under Fed. R. Civ. P. 37(b)(2)(A)(vi) is unfounded as Plaintiffs have, in fact, provided the discovery that was required by the Joint Status Report, to wit, Mr. Turnbull's rebuttal expert report. Further, even if Plaintiffs were somehow found to be in violation of a discovery order, Defendants present no basis for this Court to impose the sanction of default. *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920 (10th Cir. 1992) ("Determination of the correct sanction for a discovery violation is a fact-specific inquiry . . . dismissal [or default] represents an extreme sanction appropriate only in cases of willful misconduct."). (Citations omitted).

Consideration of the litigation requirements imposed by the Scheduling Order and the undisputed circumstances of this subfile action, reveal that Plaintiffs' challenge to Mr. Fredrickson's expertise came at the earliest opportunity.[13] Since February 16, 2016, the Parties have litigated Defendants' contested livestock use water right claim in an active discovery and briefing process. *See* Scheduling Order. The Parties were engaged in discovery from February 16th until July 15th. *Id.* at 1 – 2. During that time Defendants disclosed no less than three versions of Mr. Fredrickson's expert report; the first submitted on April 12th and the last submitted on June 27th. Less than ten days after the last version, Plaintiffs deposed Mr. Fredrickson but not until July 11th did any party have a copy of the transcript from Mr. Fredrickson's deposition. Discovery closed in this subfile action on July 15th.

Pursuant to the Scheduling Order, Defendants presented their motion for summary judgment on August 15, 2016 in which they relied exhaustively on Mr. Fredrickson's purported expert opinion. *Id.* at 2. Also pursuant to the Scheduling Order, Plaintiffs timely responded to Defendants' Summary Judgment Motion and took their opportunity to present a cross-motion for summary judgment. *Id*. In response to Defendants' Summary Judgment Motion and in support of Plaintiffs' Cross-Motion, Plaintiffs simultaneously filed their Motion to Exclude. This was the first opportunity for Plaintiffs to present the issue to the Court for resolution.

[13]Examination of those cases cited by Plaintiffs in the Motion to Exclude reveal that challenges to the admissibility of expert testimony understandably come just as an opposing party seeks to rely on the purported expert testimony – whenever that might be. For example, in *City of Hobbs v. Hartford Fire Ins. Co.*, 162 F.3d 576, 586 (10th Cir. 1998) (*see* Motion to Exclude at 6) the challenge to expert testimony was presented during trial and well after discovery closed and dispositive motions were resolved. Also, in *LifeWise Master Funding,* 374 F.3d at 921 (*see* Motion to Exclude at 6) the challenge to plaintiff's expert testimony came in a motion for summary judgment just before trial.

It is impossible for any party to determine with any certainty whether challenge to a purported expert is appropriate until after discovery has been completed and after deposition transcripts have been obtained. Only then might a party sufficiently understand and establish how and on what basis expert testimony is presented. Only after Mr. Fredrickson's deposition transcript was obtained did Plaintiffs have sufficient basis on which to challenge Mr. Fredrickson's expertise. Only on September 14th when the Scheduling Order authorized response and cross-motions did Plaintiffs have the opportunity to challenge Mr. Fredrickson's expertise. In the end, Defendants' contention that Plaintiffs' challenge to Mr. Fredrickson's expertise is untimely falls flat.

VI. MR. FREDRICKSON CHERRY-PICKED DATA TO SUPPORT HIS CONCLUSIONS

In the Motion to Exclude, the United States established that, even assuming Mr. Fredrickson a qualified expert, his expert opinion was inadmissible as it lacked the reliability required of expert testimony under Fed. R. Evid. 702. *Id.* at 12 – 24 § III.B. In the course of establishing the unreliability of Mr. Frederickson's opinion, the United States discussed cherry-picking – one of seven considerations that a court should consider when evaluating reliability.[14] *See* Motion to Exclude at 13 – 14. Defendants complain that Plaintiffs wrongly allege that Mr. Fredrickson "cherry-picked" information. Response at 17 – 19.[15] However for each example that Defendants complain about, they simply fail to address the information that goes to the heart of Plaintiffs'

[14] "Cherry-picking" is a common phrase referring to the act of selecting information without addressing or considering contrary or conflicting information. *See* Motion to Exclude at 16 (quoting *Barber v. United Airlines, Inc.*, 17 Fed. Appx. 433, 437 (7th Cir. 2001)).

[15] Notably, Defendants raise no complaint concerning the remaining six considerations examined in the Motion to Exclude.

cherry-picking claim – information ignored by Mr. Fredrickson. Each example can be quickly addressed.

Plaintiffs established that Mr. Fredrickson's analysis ignored Mr. Cox's testimony that established that when Mr. Cox managed a cattle herd, his cattle herd historically relied on several water sources, not just well 10A-5-W06. Motion to Exclude at 17 – 18. In response, Defendants continue to ignore Mr. Cox's testimony and argue as though Mr. Cox's herd historically watered exclusively from well 10A-5-W06 year-round. Response at 17 – 18. For example, Defendants simply argue that these other water sources are not assigned (or were not properly assigned) water rights in this adjudication. *Id.* at 17. The fact remains, Mr. Fredrickson was cherry-picking information he considered beneficial to his opinion.

Plaintiffs established that Mr. Fredrickson's analysis ignored Mr. Cox's testimony that Mr. Cox did not recall leaks from well 10A-5-W06's storage tanks. Motion to Exclude at 18. In response, Defendants appear to intentionally misconstrue Mr. Cox's testimony as a failure of memory thereby giving Mr. Fredrickson remarkable license to impose a 7% loss rate derived not from historical practice but from unrelated, purported industry standards at feedlots. *See* Response at 18. The fact remains, Mr. Fredrickson cherry-picked his information to arrive at the results he sought.

Plaintiffs established that Mr. Fredrickson's analysis imposed large water losses to the practice of trough cleaning when Mr. Cox's testimony established that Mr. Cox did not engage in the practice of trough cleaning. Motion to Exclude at 18. In response, Defendants doggedly cling to the belief that a good practice that might be considered "common in the clean cattle industry" is a proper basis to quantify a water right. Response 18 – 19. Defendants' frank admission here

reveals that Mr. Fredrickson's opinion not only relied on cherry-picked information but also reveals that the opinion is disconnected from historic beneficial use and is thus irrelevant.

Plaintiffs established that Mr. Fredrickson's analysis presumed that the Cox herd grazed in a 2-mile radius from well 10A-5-W06 but that Mr. Cox's testimony did not establish this historic grazing practice and that Mr. Cox's testimony established that much of the pasture around well 10A-5-W06 would be fenced off from grazing. Motion to Exclude at 21 - 23. In response, Defendants appear to accept that Mr. Fredrickson's analysis was not dependent on Mr. Cox's historic grazing practices (or historic beneficial use) but was a purely theoretical analysis. Response at 19. Again, Defendants reveal that Mr. Fredrickson's opinion is disconnected from historic beneficial use and is thus irrelevant.

Finally, Plaintiffs established that Mr. Fredrickson's analysis lacked factual support, and for example, speculated about the distance a cow would wander between two wells when no cow had wandered the region for more than seventeen years. Motion to Exclude at 24. In response, Defendants assert the path that a cow might take between two wells is irrelevant if that distance is more than two miles. Response at 19. This apparent recognition of the speculation imbedded in Mr. Fredrickson's analysis renders his analysis irrelevant.[16]

In the end, the considerations that the United States raised to challenge the reliability of Mr. Fredrickson's purported expert testimony remain valid and compelling. As argued in the

[16] The last two examples identified by Defendants as examples of Plaintiffs wrongfully alleging that Mr. Fredrickson cherry-picked information (discussed immediately above) were not in fact identified by the United States as examples of cherry-picking. *See* Motion to Exclude at 21 – 22 § III.B.2.a ("Some opinions are supported only by impermissible speculation") and 23, § III.B.2.b ("Other opinions lack support"). Instead these two examples were additional examples of unreliability under different parts of the Rule 702 reliability analysis. Nevertheless, Plaintiffs treat these examples as presented by Defendants in their Response.

Motion to Exclude, Mr. Fredrickson's purported expert testimony is not sufficiently reliable to permit its introduction into evidence under Fed. R. Evid. 702.

VII. CONCLUSION

With respect to the Cross-Motion, no genuine dispute as to any material fact exists between the Parties. The record establishes that Defendants' claimed livestock use water right, if it ever existed, has gone unused for at least 17 years and has been abandoned. In the alternative, the record also establishes that Defendants do not have admissible evidence to establish the necessary elements of their livestock-use water right claim. As a result and on either ground, the contested livestock use water right claim for well 10A-5-W06 must be denied and Plaintiffs are entitled to summary judgment.

The Court should enter judgment in Plaintiffs' favor. A water right associated with well 10A-5-W06 for domestic use in the amount of 0.7 AFY should be recognized for Defendants as the Parties have previously agreed.

Respectfully submitted this 14th day of October, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 14, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.

__/s/ Andrew "Guss" Guarino_____