

Subfile Answer (“Subfile Answer”).¹ Defendant’s counsel did not respond to Plaintiffs’ consultation attempt and Plaintiffs assume that Defendant opposes this motion.

I. INTRODUCTION

Defendant is the owner of one stockpond and two wells. On August 20, 2007, Defendant was joined to this action with respect to its potential water rights.² Consistent with this Court’s *Procedural and Scheduling Order for the Adjudication of Water Rights Claims (Ramah Sub-Area)*, No. 01CV0072 BB/WDS (ECF No. 954) (D.N.M. Jan. 11, 2007) (“Ramah Sub-Area Order”), Plaintiffs previously prepared and presented Defendant with a settlement offer in the form of a proposed consent order concerning Defendant’s water rights. Defendant did not accept Plaintiffs’ settlement offer.³ The water rights to which Plaintiffs offered and are willing to stipulate are as follows:

POND

Map Label: 3B-5-SP021

Purpose of Use: LIVESTOCK

Priority Date: 10/6/1997

Source of Water: Surface Runoff

Point of Diversion: Not Applicable

Amount of Water:

Depth (ft): 1.0

¹ ECF No. 3383.

² ECF No. 1226 at 29-31.

³ See *Notice that the Consultation Period as Ended* (ECF No. 3379).

Surface Area (sq.ft): 2,055

Storage Impoundment Volume (ac-ft): 0.028

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

S. 2 T. 10N R. 16W 1/4, 1/16, 1/64: SE SW SW

X(ft): 2,525,103 **Y(ft):** 1,499,315

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

Dam height (if greater than 9 ft): 0.0

WELL

Map Label: 3B-5-W064

OSE File No: None

Priority Date: 1/1/1972

Purpose of Use: PUBLIC WATER SUPPLY

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

S. 35 T. 11N R. 16W 1/4, 1/16, 1/64: SW NE NE

X (ft): 2,524,830 **Y (ft):** 1,507,095

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

Amount of Water: 17.0 ac-ft per annum

WELL

Map Label: 3B-5-W066

OSE File No: None

Priority Date: 1/1/1958

Purpose of Use: PUBLIC WATER SUPPLY

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

S. 2 T. 10N .R. 16W 1/4, 1/16, 1/64: NW NE NE

X (ft): 2,524,967 **Y (ft):** 1,504,307

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

Amount of Water: 17.0 ac-ft per annum

On May 30, 2017, counsel for Plaintiffs attempted to consult with Defendant about this subfile action but received no response from Defendant. The United States subsequently filed its *Notice That the Consultation Period Has Ended*.⁴ Defendant then timely filed its Subfile Answer⁵. In its Subfile Answer, Defendant, in relevant part, asserts the following:

1. Defendant Ramah Water and Sanitation District objects to the description of water rights contained in the proposed Consent Order offered by the United States and the State of New Mexico concerning Subfile Number [ZRB-5-0057].
2. The objection to the description of the water rights described by the proposed Consent Order for Subfile Number [ZRB-5-0057] is made because the offers do not accurately reflect either historical beneficial use or future needs.

II. APPLICABLE LEGAL STANDARD

Fed. R. Civ. P. 12(c) provides: “[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” In this subfile action, the Plaintiffs’ proposed Consent Order and Defendant’s Subfile Answer represent the “pleadings” as

⁴ ECF No. 1226 at 29-31.

⁵ See *Notice of Errata Regarding Subfile Nos. ZRB-5-0056 and ZRB-5-0057* (ECF No. 3385) (concerning transposed subfile action numbers associated with ZRB-5-0056 and ZRB-5-0057).

that term is used in Fed. R. Civ. P. 7(a).⁶ “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.”⁷

“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.”⁸ 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.”⁹ 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.”¹⁰

III. ARGUMENT

In the Subfile Answer, Defendant does no more than complain of Plaintiffs’ settlement offer. Even when the Court accepts this assertion as true, Defendant’s dissatisfaction with Plaintiffs’ settlement offer does not form a basis on which the Court can recognize a water right for Defendant. In fact, the Subfile Answer makes no water right claim of any kind. As a result,

⁶ 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 No. 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).

⁷ *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)).

⁸ *Ramirez v. Wal-Mart Stores, Inc.*, 192 F.R.D. 303, 304 (D.N.M. Mar. 22, 2000) (citing Rule 12(c)).

⁹ *Id.* 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)).

¹⁰ *Peña*, 110 F. Supp. 3d at 1112 (citing *Ramirez*, 192 F.R.D. at 304).

this Court is only left with a water right to which Plaintiffs are willing to stipulate and Plaintiffs are now entitled to judgment as a matter of law.

A. The basis for Plaintiffs’ settlement offer presented in the proposed consent order has no bearing on the validity of any water right claim that Defendant might have.

The Defendant contends that Plaintiffs’ settlement offer did “not accurately reflect either historical beneficial use or future needs.”¹¹ But Defendant’s satisfaction with the sufficiency of any settlement offer previously made by Plaintiffs has no bearing on a water right claim that Defendant might have. The Subfile Answer presents no water right claim for this Court to resolve and Plaintiffs are now entitled to judgment on the pleadings.

First, the focus of the Subfile Answer is exclusively on the perceived sufficiency of Plaintiffs’ proposed consent order, which constitutes a settlement offer that Defendant did not accept. It is well established that compromise offers of settlement and conduct and statements made during compromise offers, including the basis for any offer, are inadmissible.¹² Therefore, Defendant’s focus on the sufficiency of Plaintiffs’ proposed consent order is not, and cannot be, the appropriate focus of Defendant’s water right claim in this subfile action.

Second, by focusing on the sufficiency of Plaintiffs’ settlement offer, Defendant suggests that in this subfile action it is Plaintiffs’ responsibility to establish Defendant’s water right. Of course, such a suggestion is not warranted and Plaintiffs cannot establish the water right claims of another water user; only subfile defendants have sufficient knowledge and information to

¹¹ Subfile Answer at 1 ¶ 2.

¹² Fed R. Evid. 408.

establish, if possible, a water right claim. And, the suggestion that Plaintiffs have the responsibility to establish Defendant's water right has been squarely rejected by this Court: "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."¹³ And, in this adjudication, the subfile answer is a claimant's principle basis to establish that it is entitled to a water right.

[The subfile answer] makes no factual statement whatsoever that it has historically used more water than what is offered in the proposed Consent Order. The Plaintiffs are not required to prove that the offered amount is the extent of the historical beneficial use. [Defendant] bears the burden of establishing historical beneficial use greater than that offered by the Plaintiffs.¹⁴

Third, by asserting that the offered quantity of water is insufficient to meet Defendant's "future needs," Defendant suggests that it is entitled to a right to more water than it has historically used or is using now because, at some future date, it may need more than that amount. Defendant's suggestion here is in stark contradiction to the beneficial use standard established under New Mexico law. "New Mexico law is clear on the subject . . . that beneficial use defines the extent of a water right."¹⁵ Indeed, this Court, in response to similar arguments regarding "future need," previously has ruled that "mere intention . . . does not . . . establish

¹³ *Order* (ECF No. 2985) at 4; *see also State v. Aamodt*, No. Civ. 66-6639 MV/WPL, Subfile PM-67833, Doc. 8119 at 6 (D.N.M. Feb. 24, 2014) (unpublished) ("The burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right.") (citing *Pecos Valley Artesian Conservancy Dist. v. Peters*, 193 P.2d 418, 422-23 (N.M. 1948)).

¹⁴ *Proposed Findings and Recommended Disposition, Subfile No. ZRB-5-0014* (ECF No. 3277) at 5; *see also Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, Subfile No. ZRB-5-0014* (ECF No. 3351).

¹⁵ *Memorandum Opinion and Order* at 4 (ECF No. 733).

historic . . . use.”¹⁶

Even accepting Defendant’s broad assertion in its Subfile Answer as true and viewing it in the light most favorable to Defendant, the Subfile Answer presents no legal or factual basis for this Court to issue judgment in its favor. Therefore, with no legal or factual basis for a water right asserted, the only basis on which judgment may enter is that which the Plaintiffs are willing, for whatever reason, to stipulate.

IV. CONCLUSION

Based upon the foregoing argument and authority, Plaintiffs request that the Court enter an order granting judgment on the pleadings in favor of Plaintiffs and against the Defendant consistent with the water rights set forth in Section I above.

Dated: September 18, 2017

Respectfully submitted,

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¹⁶ *Proposed Findings and Recommended Disposition, Subfile No. ZRB-2-0014* (ECF No. 3049) at 8; *see also id.* at 10-11 (“Mere assumption is insufficient to establish a water right.” (citing *Aamodt* at 6)) and at 11 (“a substantial increase in a water right cannot be justified by mere speculation”).

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2017, I filed the foregoing 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.

/s/ Andrew "Guss" Guarino
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