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,** **v.** **A & R PRODUCTIONS, et al.** **Defendants.**	**No. CV 01-0072 MV/JHR** **ZUNI RIVER BASIN ADJUDICATION** **Subfile No. ZRB-1-0148**

NORMA M. MEECH'S RESPONSE TO PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT

Defendant Norma M. Meech ("Meech"), individually and as successor in interest to her deceased husband Walter V. Meech, by and through her counsel of record, Law & Resource Planning Associates. P.C., hereby submits this Response to the Plaintiffs United States of America's and State of New Mexico's Motion for Summary Judgment and Memorandum of Law in Support Thereof filed (March 15, 2021) [ECF 3491]. As will be discussed, Meech agrees that summary judgment is appropriate for some of the water features on lands she owns, but disagrees that there is an absence of material facts regarding the water rights associated with other features. Finally, Meech disputes that Plaintiffs have correctly applied the law of relation back to the facts of this case.[1]

[1] Nowhere does the United States disclose how it has standing to challenge Meech's water rights. In this action, Meech's water rights from her wells have a priority date of 1988 or are junior to any water right claimed by the United States either on its own behalf or as Trustee of the Tribal parties in this adjudication. *See* Amended Complaint [ECF 222] (priorities asserted therein). Because it asserts senior water rights, the United States cannot have an injury in fact

INTRODUCTION

Meech generally has no quarrel with the Plaintiffs' recitation of the appropriate standard to be followed by the Court in determining a motion for summary judgment. In addition to Plaintiffs' discussion, however, the Court should also be cognizant that "the movant bears the initial burden of 'show[ing] that there is an absence of evidence to support the nonmoving party's case.'" *O'Farrell v. Bd. of Commissioners for County of Bernalillo*, 455 F. Supp. 3d 1172, 1194 (D.N.M. 2020), *appeal dismissed*, *O'Farrell v. Bd. of Commissioners for County of Bernalillo*, 2020 WL 6885585 (10th Cir. June 11, 2020). The Court may not weigh evidence. *Hinkle v. Beckham County Bd. of County Commissioners*, 962 F.3d 1204, 1219 (10th Cir. 2020) ("And as always, when deciding whether summary judgment is proper, we "may not weigh evidence and must resolve genuine disputes of material fact in favor of the nonmoving party."). All reasonable inferences and doubts are resolved in favor of the non-moving party. *Id*. All evidence is construed in the light most favorable to the nonmoving party. *Id*. The Court may not assess the credibility of the witnesses. *McGuire v. Nielsen*, 448 F. Supp. 3d 1213, 1239 (D.N.M. 2020).

As will be discussed, Meech has no quarrel that summary judgment is appropriate to settle the amount of water rights associated with Well 8B-1-W11 *for past beneficial use only.* For Well 8B-1-W10, there are genuine issues of material fact regarding past beneficial use. For both wells, Plaintiffs fail to accurately apply the law to undisputed facts previously established by the Affidavit of Walter L. Meech (February 24, 2021) [ECF 3488 at ECF 3488-1 (Exhibit A attached

from any water right claimed by Meech. *State of N.M. ex rel. State Eng'r v. Comm'r of Pub. Lands*, 2009-NMCA-004, ¶15, 145 N.M. 433 ("The appropriation of water for beneficial use establishes the priority date of a water right in relation to other water rights, and the full right of an earlier appropriator will be protected, to the extent of that appropriator's use, against a later appropriator."). To achieve standing, a litigant must allege a direct injury to himself or that he is imminently threatened with injury. *ACLU of New Mexico v. City of Albuquerque*, 2008-NMSC-045, ¶11, 144 N.M. 471. Because a senior water right holder may exercise his full water rights to the exclusion of any junior water rights holder, the United States cannot be harmed by any water right recognized by this Court for Meech, and thus, has no standing to challenge Meech's water rights.

to Meech Corrected Motion to Certify Questions to the New Mexico Supreme Court) (hereinafter "ECF 3488-1")] and currently established by his new Affidavit, attached to this Response as Exhibit A. Finally, Plaintiffs fail to accurately apply the law to undisputed facts regarding the inclusion of evaporative losses as part of the storage water rights on the Meech property.

RESPONSE TO STATEMENT OF MATERIAL FACTS

1. Meech agrees the allegations stated in ¶ 1 of the Motion for Summary Judgment are undisputed.

2. Meech agrees the allegations stated in ¶ 2 of the Motion for Summary Judgment are undisputed.

3. Meech agrees the allegations stated in ¶ 3 of the Motion for Summary Judgment are undisputed.

4. Meech agrees the allegations stated in ¶ 4 of the Motion for Summary Judgment are undisputed.

5. Meech agrees that the pumping capacity of Well 8B-1-W10 was estimated to be seven (7) gallons per minute based upon a visual inspection of the pumping well. However, the metered capacity of the well exceeded that amount in 2002 when over fifteen acre-feet were produced from the well during that year. *See* Exhibit A (04/12/21 Affidavit of Walter L. Meech) at ¶¶ 4-5; ¶ 14, ¶ 21.

6. Meech agrees the allegations stated in ¶ 6 of the Motion for Summary Judgment are undisputed.

7. Meech agrees the allegations stated in ¶ 7 of the Motion for Summary Judgment are undisputed, but affirmatively states that the well has not been abandoned, but has technical problems that currently prevent the production of water. Meech intends to continue production

from the well upon resolution of the technical matters. *See* Exhibit A, ¶ 22.

8. Meech disputes that the factual allegations stated in ¶ 8 are undisputed and affirmatively states that the most water produced from well 8B-1-W10 (OSE File No. G-336) occurred in 2002 when the well produced 15.46 acre-feet during the year for mining, processing, manufactured sand, and dust control purposes. *See* Exhibit A, ¶ 14, ¶ 21.

9. Meech agrees the allegations stated in ¶ 9 are undisputed, except that after repairs to 8B-1-W11 (OSE File No. G-337), the pumping capacity of the well is now about 65 gallons per minute. *See* Exhibit A, ¶ 24; *see also* ECF 3491 at 3941-2, 55:19-21 (Exhibit 2 to Plaintiffs' Motion for Summary Judgment).

10. Meech agrees the allegations stated in ¶ 10 of the Motion for Summary Judgment are undisputed.

11. Meech agrees the allegations stated in ¶ 11 of the Motion for Summary Judgment are undisputed.

12. Meech agrees the allegations stated in ¶ 12 of the Motion for Summary Judgment are undisputed.

13. Meech agrees the allegations stated in ¶ 13 of the Motion for Summary Judgment are undisputed.

14. Meech agrees the allegations stated in ¶ 14 of the Motion for Summary Judgment are undisputed, but states affirmatively that water has also been used for dust control or roads, in addition to mining and processing. *See* ECF 3488-1, ¶ 10.

15. Meech agrees the allegations stated in ¶ 15 of the Motion for Summary Judgment are undisputed.

16. Meech agrees the allegations stated in ¶ 16 of the Motion for Summary Judgment

are undisputed, but states affirmatively that 8B-1-SP69B represents only a portion of the pond, the other portion being adjudicated under Sub-file ZRB 1-0196.

17. Meech agrees the allegations stated in ¶ 17 of the Motion for Summary Judgment are undisputed.

18. Meech agrees the allegations stated in ¶ 18 of the Motion for Summary Judgment are undisputed.

19. Meech agrees the allegations stated in ¶ 19 of the Motion for Summary Judgment are undisputed, but states affirmatively that 8B-1-SP69B represents only a portion of the pond, the other portion being adjudicated under Sub-file ZRB 1-0196.

20. Meech agrees that the allegations stated in ¶ 20 of the Motion for Summary Judgment are undisputed.

21. Meech agrees that the allegations stated in ¶ 21 of the Motion for Summary Judgment are undisputed.

ARGUMENT

I. THERE ARE NO GENUINE ISSUES OF FACT REGARDING PAST BENEFICIAL USE OF WATER FROM WELL 8B-1-W11 (G-337) AND SUMMARY JUDGMENT IS APPROPRIATE ONLY FOR BENEFICIAL USE TO DATE. THERE ARE ISSUES OF FACT REGARDING PAST BENEFICIAL USE OF WATER FROM WELL SB-1-W10 (G-336), PRECLUDING SUMMARY JUDGMENT.

Meech does not disagree that the past beneficial use of water from Well 8B-1-W11 has been 67.93 acre-feet of water per annum through the end of 2020 and that entry of a Partial Judgment in that amount is appropriate for past beneficial use of water from that specific well. However, past beneficial use is not the appropriate measure for the totality of Meech's water rights from Well 8B-1-W11 because it does not account for the "relation-back" doctrine as adopted by the New Mexico Supreme Court in *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68

N.M. 467. The application of the relation-back or *Mendenhall* Doctrine will be discussed in Point II, *infra*.

There are genuine issues of material fact with respect to past beneficial use of water from 8B-1-W10, precluding the entry of summary judgment for past water usage from the well. As described in the Affidavit of Walter L. Meech, President of C&E Concrete, C&E Concrete has metered water usage from Well 8B-1-W10 since it was drilled, reporting meter readings to the Office of the State Engineer since 2001. *See* Exhibit A, ¶ 6. Unfortunately, the meter records reflect a misinterpretation of the data from the meter and were recorded in C&E's files and reported to the State Engineer's Office with the decimal point in the wrong location. *See* Exhibit A, ¶¶ 8-11. The erroneous recordation and reporting of the meter readings has led to a gross under-determination of actual use of water diverted from Well 8B-1-W10.

Walter L. Meech has knowledge of the performance and use of Well 8B-1-W10 since it was first drilled in 1988. *See* Exhibit A, ¶ 4. For two years, Well 8B-1-W10 was the sole on-sight source of water for mining, processing, and dust abatement at the Tinaja pit. Exhibit A, ¶ 23. When declared, the well was equipped with a three-horsepower submersible pump. *See* Exhibit A, ¶ 5. When Karl Hoffman, the Meech's electrician (who has worked on both wells), became familiar with Well 8B-1-W10, it had a two-horsepower pump capable of producing between five and ten gallons of water per minute. *See* Exhibit B (Hoffman Depo.) at 19:24 to 20:5, attached hereto. In 2002, the well actually produced 15.46 acre-feet in one year. *See* Exhibit A, ¶¶ 14, 21.

As noted, the meter readings for Well 8B-1-W10 were erroneously recorded and reported to the State Engineer. *See* Exhibit A, ¶¶ 6-10. Plaintiffs' assertion that past beneficial use of water from this well totals 2.04 acre-feet is based upon Plaintiffs' expert, Natural Resources Consulting Engineers, Inc.'s ("NRCE"), attempts to unravel the erroneous meter readings. His conclusion

that a maximum of 2.04 acre-feet of water was ever produced from the well is his best guess based upon his assessment of how the mistakes were made. As the meter records disclose, the mistakes are in the placement of the decimal point for the record. The numbers themselves are correct; only the order of magnitude is in error. *See* Exhibit A, ¶¶ 10-11. Plaintiffs' Motion and attached exhibits do not explain why their expert is any more adept at analyzing how the mistakes occurred than is Meech or her son. In Walter L. Meech's estimation, the order of magnitude that he believes is correct is consistent with the overall water production historically required for mining, processing, and dust control. Using the numbers that Plaintiffs' expert believes are correct would mean that water production from *both* wells was appreciably lower for years when both wells were producing than for years where 8B-1-W11 was the dominant or only producing well. *See* Exhibit A, ¶¶ 15-20. In other words, it would make no sense that both wells together produced less water than the single well produced by itself after the smaller well lost its capacity.

C&E Concrete needs a certain level of water production to maintain its mining production, its manufactured sand production, and the overall dust control requirements for the business. Both wells were used in the early 2000s and together consistently produced at least thirty acre-feet.[2] As production from Well 8B-1-W10 gradually diminished, production from Well 8B-1-W11 increased until 2012 when its capacity also began to decline. In 2017, after extensive repairs to Well 8B-1-W11, its production capacity has been reclaimed and it is capable of producing sixty-five gallons per minute.[3]

If NRCE's interpretation of how mistakes were made and what quantities of water were produced are used, then the thirty acre-foot minimum level of production was reached only once

[2] The one exception in that time period is 2005, when both wells experienced technical difficulties at the same time and C&E Concrete was forced to haul water for operations from third-party sources. *See* Exhibit A, ¶ 18.

[3] Its current production is choked back to about fifty gallons per minute for reasons unrelated to the capacity of the well. *See* Exhibit A, 24.

between 2001 and 2005. If this were true, C&E Concrete would have increased pumping from Well 8B-1-W11 to make up for the lost production from Well 8B-1-W10. It is evident that production from the larger well increased beginning in 2006 as Well 8B-1-W10 lost more and more capacity.

NRCE's opinion on the amount of water from the smaller well simply is not consistent with the water needs of C&E Concrete. Documented meter readings reflect that C&E Concrete increased production from the larger well when the smaller well was not producing sufficient water. When 8B-1-W10 was producing, C&E pumped from both wells. *See* Exhibit A, ¶ 20. C&E's interpretation of its own meter readings is much more consistent with conditions on the ground. In any event, there are genuine issues of material fact regarding production from this well that precludes entry of summary judgment for that well.

II. PLAINTIFF'S QUANTIFICATION OF THE WATER RIGHTS FOR WELLS 8B-1-W10 AND 8B-1-W11 DOES NOT ALLOW FOR THE CONTINUED DEVELOPMENT OF THE WATER RIGHT UNDER THE *MENDENHALL* DOCTRINE.

As noted in the Introduction above, Meech makes a further claim for recognition of water rights pursuant to the *Mendenhall* Doctrine that allows the continued development of a water right pursuant to a plan so long as the claimant exercises due diligence in placing water to beneficial use. In crafting their argument against Meech's *Mendenhall* claim, Plaintiffs raise a straw man argument that bears no resemblance to Meech's assertions in this litigation. That is, "Meech claims that *Mendenhall* entitles her to a continually expanding water right unmoored from the beneficial-use requirement." ECF 3491 at 10. The relation-back doctrine certainly does not provide for a never-ending water right; nor does it divorce the development of a water right from the requirement of beneficial use. And most certainly, Meech makes neither of these claims.

In New Mexico water law, as is generally true in the West, the relation-back or *Mendenhall*

Doctrine holds that water rights that are initiated prior to the declaration of a basin but not fully developed until later, relate back in priority to the beginning of the work, "provided they are developed pursuant to the original plan and with reasonable diligence under the circumstances." *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 30, 143 N.M. 142; *see Mendenhall*, 1961-NMSC-083, 68 N.M. 467. The relation-back doctrine was established to avoid the injustice of "years of effort and many dollars being lost by one who commenced an appropriation," but whose beneficial commercial use of the water required time to develop. *Id.*, ¶ 22. It was further developed as an equitable and flexible doctrine to allow enterprises that require substantial initial investment, such as a limestone mining operation, the time necessary to develop water rights without losing their capital investment. *See, e.g., In re Gen. Adjudication of All Rights to Use Water in Big Horn River Sys.*, 48 P.3d 1040, 1049 (Wyo. 2002), wherein the Court stated as follows:

> Relation back has always been a flexible doctrine generally used to protect the parties' expectations when an unexpected event occurs. Its application in water law has been necessary to stimulate investment in water development. As it was initially developed, relation back was applied to small ditches and less complex means of water development. Considerable delays in putting water to use suggested speculation and could result in loss of early priority. However, contemporary water projects often entail extended planning, financing, and construction lead times, and, without application of the relation back doctrine, the security of the project's water right could be undermined.
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> Relation back encourages the development of water resources by allowing prospective appropriators to initiate appropriation and then complete financing, engineering, and construction aspects of their projects with the understanding that, with diligent pursuit and development, their rights will become absolute upon beneficial use with a priority date of the initial action.

(internal citations omitted).

The relation back doctrine has been described as the "right of gradual development." *Id.*

(quoting *Campbell v. Wyoming Dev. Co.*, 100 P.2d 124, 142 (Wy. 1940)). While the water must be put to beneficial use within a reasonable period of time, what is reasonable time depends upon the circumstances. *Id*. ("The water must be used for a beneficial purpose within a reasonable time. But what is such time depends upon the circumstances in each case, and particularly upon the magnitude of the enterprise and the difficulties encountered."). As the *Campbell* court further noted, "courts ought not, we think, take it upon themselves to declare that the right of gradual development was taken away from the defendant company as a matter of law by the mere fact that the development was slow." *Id.* at 144; *see also Application for Water Rights of City of Aurora*, 731 P.2d 665, 670 (Colo. 1987) ("Diligence must be determined in light of all relevant factors, including the size and complexity of the project, the extent of the construction season, the availability of labor and materials, the financial capacity of the applicant and the intervention of outside delaying factors.").

Not only does a *Mendenhall* claim relate back the priority date to the date on which the appropriation was commenced, it allows the claimant time to continue the development of the water right even when a general stream adjudication intervenes to legally adjudicate the right. In *State ex rel. State Eng'r v. Crider*, the New Mexico Supreme Court expanded upon the *Mendenhall* Doctrine when it determined, in the context of the Roswell Artesian Basin stream adjudication, that water rights adjudicated for the cities of Artesia and Roswell did not have to be limited to the amount of water that had historically been placed to beneficial use. *State ex rel. State Eng'r v. Crider*, 1967-NMSC-133, 78 N.M. 312. Recognizing that cities normally grow, the appellate court sanctioned a final judgment based upon the pumping capacities of the cities' wells, not the amount of water already beneficially used. *Id.* at ¶ 26 ("We see no reason why the rule stated should not apply to the future use of water by cities intended to satisfy needs resulting from normal increase

in population within a reasonable period of time."). Thus, an adjudication court is well within established authority to recognize the continuing development of a water right and enter an appropriate order.[4]

The most thorough discussion of the application of *Mendenhall* principles is in the New Mexico Supreme Court's opinion in *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, 95 N.M. 560. In that case, prior to the declaration of the underground basin, a developer had drilled a well, tested it, cased it with a seven-inch casing, and then capped it. Around the same time that the basin was declared, the developer filed a Declaration for the well and sought a permit to repair it from the State Engineer. When the repairs proved to be unfeasible, Rio Rancho Estates filed an application to move the location of the well and drill a new well using a much larger diameter casing. The State Engineer issued a permit for the relocation, but limited the size of the well to the original seven-inch casing thereby placing a limit on the amount of water that could be pumped from the well. Rio Rancho Estates appealed, arguing that, under the *Mendenhall* Doctrine, a water appropriation lawfully begun prior to the declaration of the basin could not be limited by the State Engineer in granting the transfer request.

On appeal, the Supreme Court agreed, holding that so long as the appropriator met the requirements of the *Mendenhall* Doctrine, the amount of the appropriation could be expanded. Those requirements are that the appropriator: (1) legally commence drilling the well prior to declaration of the basin; (2) proceed diligently to develop the water pursuant to a plan; and (3) apply the water to beneficial use. Any limitation on the right would be determined during a general

[4] In the Lower Rio Grande adjudication, for example, New Mexico State University received a final order adjudicating its water rights based both on its declared or permitted rights and its demonstrated past beneficial use of water. The Court allowed a vested right based on past beneficial use, but also allowed NMSU an additional fifteen years to continue vesting its declared/permitted rights up to the full extent of the claimed right. Once the fifteen years expire, NMSU's water right will be capped at the amount actually placed to beneficial use as shown by its Proofs of Beneficial Use. *See* Exhibit C, attached hereto.

adjudication where the planned future use of the water would also be taken into consideration. *Rio Rancho Estates*, 1981-NMSC-017, ¶ 15 ("What is the limitation on such a right? Normally, it is a matter left up to the courts in adjudication proceedings. When determining the extent of a municipal water right, it is appropriate for the court to look to a city's planned future use of water from the well caused by an increasing population." (citing *State ex rel. Reynolds v. Lewis*, 1973-NMSC-035, 84 N.M. 768, and *Crider*, 1967-NMSC-133)).

Thus, contrary to the arguments of Plaintiffs herein, Meech is not requesting an ever expanding right untethered to the need to place it to beneficial use. Rather, in assessing and applying the elements of a *Mendenhall* claim, the right is limited to the original plan of development and reasonable diligence must be exercised to put the water to beneficial use. That reasonable diligence is determined by the extant circumstances and involves resolution of factual matters. *Rio Rancho Estates*, 1981-NMSC-017, ¶ 14 ("Compliance with these requirements involves questions of fact.").

Plaintiffs have not met their initial burden of proof of establishing the lack of disputed facts with respect to the *Mendenhall* elements. The burden does not shift to Meech to show genuine issues of material fact until Plaintiffs make a *prima facie* case. *Doe v. WTMJ, Inc.*, 927 F. Supp. 1428, 1432 (D. Kan. 1996) ("Once the movant meets these requirements, the burden shifts to the party resisting the motion to 'set forth specific facts showing that there is a genuine issue for trial.'" (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 256 (1986)). Even if they had made such an attempt, Meech has previously filed an Affidavit with the Court establishing all aspects of her *Mendenhall* claim. *See* ECF 3488-1. In his previous Affidavit, Walter L. Meech establishes that C&E Concrete, the family business, owns a very valuable limestone quarry that contains a mineral deposit that will be mined over the next one hundred years. *See* ECF 3488-1 ¶ 5. It has

been the family's plan since before declaration of the basin to continue mining of this asset over time, utilizing the two wells that were drilled on the property in 1988 and 1990 to provide the water source for the mining and processing activities. *See* ECF 3488-1 ¶ 12. The limitation of the development of the water right is stated in the two Declarations filed for the rights: 10.16 and 87.10 acre-feet respectively for Wells 8B-1-010W and 8B-1-011W.[5] *See* ECF 3491 at ECF 3491-3 and ECF 3491-4 (Amended Declarations). The expected time frame for full development of the mine is over the next one hundred years.[6]

Meech, through her family's company, has exercised reasonable diligence as to placing water to beneficial use. The meter records reflect actual usage of water that has gradually been increasing over time as the Tinaja pit grows larger and sales increase. *See* Exhibit A, ¶¶ 8-9. Mining limestone is not like digging irrigation ditches and establishing crop furrows. It is an ordered process where areas are mapped for mining, the mineral in uncovered through removal of the overburden, and the mineral face is removed, crushed, and processed. It takes years to accomplish and cannot simply happen on a whim. *See* ECF 3488-1, ¶¶ 8, 19-22. As New Mexico courts have recognized, due diligence depends upon the circumstances. *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 30. It does not require the applicant to do the impossible or the useless. *Big Horn*, 48 P.3d at 1042 ("The law . . . does not require impossibilities of the appropriator; neither does it require him to do vain or useless things . . . .").

Plaintiffs have not met their burden of showing no genuine issues of material fact with

[5] The filing of Amended Declarations for both wells serves as notice to the world of the intention to develop the water rights up to the declared amounts. NMSA 1978, § 72-1-5 (1931). This notice, in turn, assures that any junior water right holder will not be confronted with an unexpected water right that had not been fully developed when the junior holder began his or her own appropriation. *See* 2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights and the Arid Region Doctrine of Appropriation*, 1230 (Bender Moss Co. 1912); Samuel C. Wiel, *Water Rights in the Western States*, 3rd Ed. (Bancroft Whitney Co., 1911).

[6] Because Meech, through C&E Concrete, has already placed over 84 acre-feet to beneficial use, full development of the full approximate 102 acre-foot water right will likely occur in the next few years. *See* Exhibit A, ¶¶ 8-9, 12.

respect to the due diligence employed by Meech and her family's company in placing water to beneficial use. The burden has, therefore, not shifted to Meech to show genuine issues of material fact on that point. *Doe v. WTMJ, Inc.*, 927 F. Supp. 1428 (D. Kan. 1996). Nonetheless, through the Affidavit of her son, Walter L. Meech, she has shown that there are facts that will need determined by the Court regarding the water development plan and due diligence in executing that plan. Because those facts must be determined, summary judgment is not appropriate.

Plaintiffs acknowledge the propriety of applying *Mendenhall* in this case to relate the priority date of Meech's water rights in the two wells to the date(s) of drilling. ECF 3491 at Point 2. Plaintiffs are mistaken, however, when they fail to acknowledge that in the context of a general adjudication, the Court can provide for the continued development of the water right into the future. *Crider*, 1967-NMSC-133. To do otherwise perpetrates an injustice that the *Mendenhall* court decried: "years of effort and many dollars being lost by one who commenced an appropriation" that required years to develop. *Mendenhall*, 1961-NMSC-083, ¶ 22. Meech and her deceased husband had a vision that is being carried forward by her son and now her grandson: to establish a water supply to mine and process valuable limestone products from their land. The family has continued to pursue that vision since the drilling of their wells and plan to increase their beneficial use of water up to their declared amount. It is only the intervention of the general stream adjudication that is posing an obstacle to the continued development of these water rights. Placing a cap on the development of the water at this juncture places Meech and her family in the untenable position of: 1) capping the business at its present size and foregoing growth at the expense of additional employment in an economically depressed area; 2) hauling massive quantities of water at great expense, threatening their competitive position in the market; 3) seeking a new appropriation of water, which will likely garner protests and require years of litigation before

resolution, which may or may not allow a new appropriation; or 4) transferring other water rights into their wells (if such water rights can be located), which will also likely garner protests and years of litigation and may or may not be successful.

This issue is not ripe for summary judgment, but must be resolved through a trial on the merits during which the court will render decisions on factual issues related to the application of the *Mendenhall* Doctrine. It is appropriate to deny a summary judgment motion when genuine issues of fact exist that can only be resolved by the fact finder. *O'Farrell*, 455 F. Supp. 3d at 1196 ("To deny a motion for summary judgment, genuine factual issues must exist that 'can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.'" (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986)). There is only an issue for trial if the non-moving party has sufficient evidence for a jury to return a verdict its favor. *Id*. Meech has certainly demonstrated that a jury could return a verdict in her favor based upon the evidence she has presented.

III. EVAPORATIVE LOSS IS AN ACCEPTED PART OF A WATER STORAGE RIGHT.

Surprisingly, the State of New Mexico, through its State Engineer, argues that evaporative losses from stored water is not a legitimate part of a water right because it is not beneficially used. Not only is this legally incorrect, but it also does not reflect the State Engineer's own practices.

Other jurisdictions have recognized that evaporative losses from stored water are part of a water right. *See, e.g., R.T. Nahas Co. v. Hulet*, 674 P.2d 1036, 1040-41 (Id. Ct. App. 1983) ("Hulet also asserts that the court should not have added the amount of water necessary to compensate Nahas for water lost through evaporation from his lake, because evaporation is not a beneficial use. However, a reasonable loss of water through evaporation or seepage is allowed." (citing *Hidden Springs Trout Ranch v. Hagerman Water Users, Inc.*, 619 P.2d 1130 (Id. 1980)).

While New Mexico does not have case law on the subject, New Mexico adjudication courts have included evaporative losses from stored waters as part of the water right. For example, in the Pecos River adjudication, Storrie Lake, located in northeastern New Mexico, was allowed both the amount of stored water and the evaporative losses as part of its adjudicated water right. *See* Exhibit D (Storrie's Final Decree), attached hereto (Storrie's Final Decree includes 17,568.77 acre-feet of water beneficially stored for irrigation purposes, plus evaporative losses from the stored water computed at 34 inches per surface acre of water.). The Storrie Final Decree was approved by the State Engineer's then General Counsel.

Recently, in the Lower Rio Grande adjudication, the Court entered a decree for stored water seeping into an open pit copper mine. The Court calculated the water right based on the evaporative losses from the surface. *See* Exhibit E, attached hereto.

In this case, Plaintiffs want the water rights for the stock ponds to include only the volume of the water in the pond. Clearly, the volume of the water represents the amount consumed by livestock. It does not account for the fact that water in excess of that consumed by livestock will evaporate from the ponds. This evaporative loss is also a legitimate aspect of Meech's water right and must be included in any decree. There are, at a minimum, genuine issues of material fact regarding consumptive uses for livestock and the appropriate amount of evaporative losses that must be resolved by the fact finder making summary judgment inappropriate.

CONCLUSION

For the above cited reasons, it is appropriate for the Court to enter a Partial Judgment on the past water usage from Well 8B-1-Wll in the amount of 67.93 acre-feet. All other aspects of Plaintiffs' Motion for Summary Judgment should be denied as there are genuine issues of material fact to be determined by the fact finder and/or the Plaintiffs have incorrectly applied the law to

undisputed facts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 12, 2021, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Filing to be served by electronic means.

Tanya L. Scott