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,	)	**No. CV 01-00072 MV/JHR**
Plaintiffs,	)	**ZUNI RIVER BASIN ADJUDICATION**
and	)	
ZUNI INDIAN TRIBE, NAVAJO NATION,	)	**Subfile No. ZRB-1-0148**
Plaintiffs in Intervention,	)	
v.	)	
A & R PRODUCTIONS, *et al*.	)	
Defendants.	)	

OBJECTIONS TO INCLUSION OF NEW MATERIAL IN REPLY BRIEF, OR, IN THE ALTERNATIVE, MOTION TO FILE SURREPLY

COMES NOW, Norma M. Meech, individually and as successor-in-interest to her deceased husband Walter V. Meech ("Meech"), by and through her counsel of record, Law & Resource Planning Associates, P.C., and hereby objects to the Plaintiffs' inclusion of new material in their Reply Brief, or, in the alternative, requests leave of the Court to file a Surreply. As grounds for this Motion, Meech states that the Plaintiffs included extensive material from its expert witness Dr. Tom Ley in their Reply Brief that Meech cannot respond to without a Reply Brief. In addition, Plaintiffs raise a new argument that a reasonable time to develop a water right for mining and related activities has expired, as a matter of law. The remedy for the improper raising of additional matters in a Reply Brief in support of a Motion for Summary Judgment is for the Court to disregard

the new materials and/or arguments, or to allow the nonmoving party to file a Surreply. Meech has sought the position of Plaintiffs to these Objections or Motion to File a Surreply and Plaintiffs do/do not object.

In this case, in their Reply Brief, Plaintiffs attached their expert report from Natural Resources Consulting Engineers ("NRCE") purporting to render an expert opinion about how meter records have been misread by personnel employed by Meech's company C&E Concrete and what the correct interpretation of the raw data should be. The Affidavit containing this additional information was not attached to the Plaintiffs' Motion for Summary Judgment, but is new information attached to the Reply Brief. Not only does the subsequent Affidavit with its attachments present new material that was not part of the opening brief, it suffers significant deficiencies that render it inappropriate for consideration by the Court in a Summary Judgment proceeding.

In attempting to establish opinion evidence about the bases for misreading the meters, NRCE engineer Tom Ley attaches flyers and other hearsay documents to his Affidavit that purport to be the instructions for how a certain type of meter should be read. None of the purported instructions form a part of the record and all of it is hearsay. *See* Fed. R. Civ. P. 56(C)(1) ("A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials . . . ."); *see also* Fed. R. Evid. 802. Hearsay evidence is not properly considered in a Motion for Summary Judgment. *Whitaker v. Becerra*, 2021 WL 1821350 at *6 (D.N.M. May 6, 2021) (quoting *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1541 (10th Cir. 1995) ("Hearsay testimony cannot be considered

because '[a] third party's description of [a witness'] supposed testimony is not suitable grist for the summary judgment mill.'")). While an expert can certainly render opinions based on material that is not in evidence, a proper foundation must be laid that the facts or data on which the expert relies is of a type that "experts in the particular field would reasonably rely on those kinds of facts and data in forming an opinion on the subject." *See* Fed. R. Evid. 703. No effort is made to lay a foundation for this information so that it can properly be the basis for an expert opinion.

Plaintiffs have had this information and its expert report for months, yet they made no effort to include this information in their statement of undisputed facts or argue the opinions in their opening brief. Instead, they only chose to state as an undisputed fact that "During the period from 2001 to 2020, the maximum annual pumping rate for Well 8B-1-W10 occurred in 2006 and amounted to 2.04 ac-ft." Plaintiffs United States of America's and State of New Mexico's Motion for Summary Judgment and Memorandum of Law in Support Thereof at 4, ¶ 8 [ECF 3491] ("Plaintiffs' Summary Judgment Motion"). This fact was disputed by Meech in her response, relying upon the Affidavit of her son Walter Meech, who describes in detail why this statement is not true. *See* Norma M. Meech's Response to Plaintiff's Motion for Summary Judgment at 4, ¶ 8 [ECF 3496]. Apparently trying to bolster their claim concerning the amount of water that has been historically beneficially used from Well 8B-1-W10, Plaintiffs attach their expert's Affidavit and report to their Reply Brief when Meech cannot respond and dispute the factual accuracy of the Affidavit.[1] With the opportunity to respond, Meech can counter the NRCE Affidavit and conclusions reached therein.

[1] For example, Plaintiffs have not and cannot establish any timeline for when the Recordall 55 meter was installed on well 8B-1-W10 because there are no records, and no one knows at this point. *See, e.g.*, Plaintiffs United States of America's and State of New Mexico's Reply in Support of Motion for Summary Judgment (Doc. 3491), Exhibit 4 at 2 [ECF 3504-4] (Defendants' Answer to Interrogatory # 14 ("C&E does not have records of the dates of use of each water meter.")) and Exhibit 6 at 3 [ECF 3504-6] (Deposition of Walter Meech at 3, beginning at 30:13 ("Q: Okay. Do you know if that – that meter is – is currently attached to 336? A: I do not. Q:. Do you know if that's the only meter since that well was drilled and installed that's been attached to 336? A: It is not.")).

In addition, Plaintiffs argue, for the first time in their Reply Brief, that there is a hard date, separate and apart from the three *Mendenhall* elements announced in *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, 95 N.M. 560, beyond which a mining operation cannot further develop its water rights because the time frame is "unreasonable" as a matter of law. At no time in their Motion for Summary Judgment or supporting arguments do Plaintiffs make such a claim, choosing instead to assert that there is a sole "Undisputed Fact" relating to the Meech's *Mendenhall* claim, *see* ECF 3491 at 5, ¶ 15, wherein Plaintiffs state that "Meech contends that she is entitled "to continue to develop her pre-basin water rights from [Wells 8B-1-W10 and 8B-1-W11] pursuant to the long-held plan to continue limestone mining activities." Based on this sole "Undisputed Fact", Plaintiffs argued in their Motion that "Plaintiffs' Quantification of the Water Right for Wells 8B-1-W10 and 8B-1-W11 Accounts for the Application of *Mendenhall* and the Relation-Back Doctrine." ECF 3491 at 10, Pt. 2. Plaintiffs concluded that "The United States and the State determined the water rights based on undisputed evidence of historic beneficial use and, in doing so, have accounted for all relevant legal precedent, including the *Mendenhall* doctrine." *Id.* at 13. In their Reply Brief, however, they develop a new argument that, as a matter of law, Meech cannot develop her water rights in mining operations beyond twenty years because other cases, unrelated to mining, found that various periods of time were unreasonable in completing an appropriation of water.[2] This new argument also deserves a Surreply, especially given the New Mexico Supreme Court's admonition in *State ex rel. Reynolds v. Rio Rancho Estates, Inc.* that compliance with the requirements of a *Mendenhall* claim involves issues of fact. *State ex rel.*

[2] Plaintiffs are not even internally consistent in their arguments. They state in their opening brief that Meech, who utilized the greatest amount of water for mining and related activities in 2019, or almost thirty years after drilling the first well, has already been afforded the benefits available under the *Mendenhall* doctrine. Plaintiffs' Summary Judgment Motion at 13 [ECF 3491]. In their Reply Brief, they take the opposite view: that, as a matter of law, the magical end date beyond which placing water to beneficial use in mining is unreasonable, is pegged at twenty years. *Id*. at 4. Both propositions cannot be true.

Reynolds v. Rio Rancho Estates, Inc., 1981-NMSC-017, ¶ 14 ("Compliance with these requirements involves questions of fact."). As noted above, not a single fact related to the Meech's application of water to beneficial use is included in the Summary Judgment Motion.

When new evidence and/or legal arguments are presented in Reply Briefs, the nonmoving party is entitled to respond. If the Court does not allow a response, it should ignore the new material and/or arguments. This rule is discussed in *Green v. New Mexico*, wherein the Court stated as follows:

> Generally, the nonmoving party should be given an opportunity to respond to new material raised for the first time in the movant's reply. If the district court does not rely on the new material in reaching its decision, however, "it does not abuse its discretion by precluding a surreply." "Material," for purposes of this framework, includes both new evidence and new legal arguments.

Green v. New Mexico, 420 F.3d 1189, 1196 (10th Cir. 2005) (citing *Doebele v. Sprint/United Mgmt. Co.*, 342 F.3d 1117, 1139 n.13 (10th Cir.2003)); *see also Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159, 1164-65 (10th Cir. 1998) ("Thus, when a moving party advances in a reply new reasons and evidence in support of its motion for summary judgment, the nonmoving party should be granted an opportunity to respond."). If the Court were to rely upon the new material and deny the nonmoving the ability to respond, it would be a violation of Fed. R. Civ. P. 56(C), which provides that the nonmoving party is entitled to notice and a reasonable opportunity to respond to the movant's summary judgment materials. *See Beaird*, 145 F.3d 1159, 1163. It is an abuse of discretion for the Court to both rely on the materials and deny the opportunity to respond. *Pippin v. Burlington Res. Oil and Gas Co.*, 440 F.3d 1186, 1192 (10th Cir. 2006) ("[I]f the district court does preclude a surreply, then the court can avoid error only by not relying on the new materials and arguments in the movant's reply brief.").

Plaintiffs undoubtedly chose as a tactical matter not to submit their expert's report in their

Motion for Summary Judgment and supporting argument because analysis in the report does not withstand scrutiny, including the threshold question of whether the meter on which their expert relies was even installed on the well during the year when the most water was produced from the well. *See* footnote 1, *supra*. When questions of fact were raised through Walter Meech's Affidavit and then were well explained in Meech's Answer Brief, Plaintiffs chose to attach their expert's Affidavit in the misplaced belief that Meech would be precluded from responding.

Similarly, Plaintiffs raised no issue of fact or law in their Motion for Summary Judgment regarding whether the time during which Meech, through C&E Concrete, has been putting water to beneficial use in mining and processing operations is unreasonable as a matter of law. Indeed, they conceded that Meech was entitled to application of the relation-back or *Mendenhall* doctrine even though some thirty-three years had elapsed since the drilling of her first well. Suddenly, however, in their Reply Brief, they seek to impose an arbitrary twenty-year period during which a water right can be developed under *Mendenhall* before the door slams shut, because any additional time is unreasonable as a matter of law.

Because Plaintiffs have inserted both new evidence and new legal arguments in their Reply Brief, the Court should ignore this additional information in rendering a decision on the pending Motion for Summary Judgment. If the Court considers the additional information and/or argument, Meech must be allowed the opportunity to file a Surreply.

CONCLUSION

WHEREFORE, for the foregoing reasons, Meech objects to the Court considering the new evidence and argument presented in Plaintiffs' Reply Brief. If the Court wishes to consider the additional evidence and argument, Meech should be granted leave to respond to the new material in a Surreply.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 19, 2020, I filed the foregoing pleading 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
Tanya L. Scott