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 01-0072 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.	)	

REPLY BRIEF IN SUPPORT OF OBJECTIONS TO INCLUSION OF NEW MATERIAL IN REPLY BRIEF, OR, IN THE ALTERNATIVE, MOTION TO FILE SURREPLY [ECF 3507]

Claimant Norma Meech, individually and as successor in interest to her deceased husband Walter V. Meech, by and through her attorneys of record, Law & Resource Planning Associates, P.C., hereby files this Reply Brief in support of her pending Objections to Inclusion of New Material in Reply Brief, or, in the Alternative, Motion to File Surreply [ECF 3507].

Plaintiffs do not disagree that they have attached new evidence to their Reply Brief [ECF 3504] that the Court should either ignore or allow a response by Meech under Fed. R. Civ. P. 56(C). *Green v. New Mexico*, 420 F.3d 1189 (10th Cir. 2005); *Beaird v. Seagate Tech., Inc.*, 145 F.3d 1159 (10th Cir. 1998). It is within the Court's discretion as to whether she will consider the newly attached evidence or allow a response. *Id.* at 1164 ("Appellants contend that the district

court had no 'permissible choice' but to allow a surreply once it had accepted the materials in Seagate's reply. That contention is incorrect."). If the Court wishes to consider the new evidence, a Surreply is the proper remedy for Meech.

Even though Plaintiffs concede that Meech is entitled to a Surreply, they attempt to constrain the response that Meech may file, arguing that she cannot present any evidence that has not already been produced or disclosed in discovery and that she should be limited to responding to the new evidentiary material and not the new arguments raised in Plaintiffs' Reply Brief.[1] However, Fed. R. Civ. P. 56 contains no restrictions on using materials not yet disclosed in discovery in response to a pending motion for summary judgment. Rather, the Rule assumes that there may be additional information that is not already in the record or in discovery responses because it allows the use of Affidavits and other materials to demonstrate that genuine issues of material fact exist. *See* Federal Rule 56, which states:

> (c) Procedures.
>
> (1) Supporting Factual Positions. 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*; or
>
> (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(Emphasis added). In filing her original response to the summary judgment motion, Meech certainly was not prohibited from relying upon any admissible evidence to show the existence of genuine issues of fact. Plaintiffs give no explanation of why she should be so limited now because

[1] Meech's response to this second contention is *infra* at page 5.

they chose to improperly attach new evidence to their Answer Brief. Meech does not anticipate that a Surreply will include any information that has not already been disclosed to Plaintiffs. However, she should not be precluded from relying on additional evidence should the need arise. Plaintiffs' failures should not result in a penalty to Meech that limits how she may respond to their new evidence.

In a footnote to their main arguments, Plaintiffs assert that the hearsay documents attached to their expert's Affidavit should nevertheless be considered by the Court, citing cases related to the *form* of evidence used to support Summary Judgment motions. *See Lee v. Offshore Logistical & Transp., L.L.C.*, 859 F.3d 353, 355 (5th Cir. 2017), as revised (July 5, 2017) (regarding a signed but unsworn report); *LSR Consulting, LLC v. Wells Fargo Bank, N.A.*, 835 F.3d 530, 533 (5th Cir. 2016) (regarding Notices of Default that were not self-authenticating); *Maurer v. Indep. Town*, 870 F.3d 380, 384 (5th Cir. 2017) (regarding a contract that was unexecuted, unauthenticated, and did not include a separate agreement). In each case, the issue before the Court was whether the evidence could be put into a form that would be admissible at trial. If so, it could be used in the summary judgment proceeding. In this case, at this juncture, Meech does not challenge the authenticity of the documents attached to the expert's Affidavit. Rather, Meech asserts that some documents attached to the Affidavit are hearsay and can *never* be put into an admissible form. Most importantly, the fundamental foundational requirement to admit these documents into evidence—that the meter to which the instructions pertain was installed on Well 8B-1-W10 in the relevant time period—can never be met because there are no records that would show the inclusive dates of installation, and no witness can establish the dates during which the meter was on the well. In other words, no foundation for the admission of these materials can ever be laid.

As Rule 56 further provides, a party opposing summary judgment may object to the motion on the basis that the material cited by the moving party cannot be presented in a form admissible

at trial. Fed. R. Civ. P. 56(c)(2) ("Objection That a Fact is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence."). Hearsay can never be admitted into evidence unless it meets an exception to the Hearsay Rule. Fed. R. Evid. 802 ("Hearsay is not admissible unless any of the following provides otherwise: a federal statute; these rules; or other rules prescribed by the Supreme Court."). Plaintiffs have made no effort to show that there is a hearsay exception that would allow the introduction into evidence of the information attached to their expert's Affidavit. While it may be permissible at the summary judgment stage to submit evidence that is not in a form that would be admissible at trial, the content or substance of the evidence must be admissible. *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1199 (10th Cir. 2006). In *Argo v. Blue Cross & Blue Shield of Kansas*, the Tenth Circuit Court of Appeals stated:

> At the summary judgment stage, evidence need not be submitted "in a form that would be admissible at trial." Parties may, for example, submit affidavits in support of summary judgment, despite the fact that affidavits are often inadmissible at trial as hearsay, on the theory that the evidence may ultimately be presented at trial in an admissible form. Nonetheless, "the content or substance of the evidence must be admissible." Thus, for example, at summary judgment courts should disregard inadmissible hearsay statements *contained* in affidavits, as those statements could not be presented at trial in any form. The requirement that the substance of the evidence must be admissible is not only explicit in Rule 56, which provides that "[s]upporting and opposing affidavits shall . . . set forth such facts as would be admissible in evidence," Fed. R. Civ. P. 56(e), but also implicit in the court's role at the summary judgment stage. To determine whether genuine issues of material fact make a jury trial necessary, a court necessarily may consider only the evidence that would be available to the jury.

Id. (emphasis in original) (internal citations omitted). The Committee Notes on the 2010 Amendments to Rule 56 observe as follows:

> Subdivision (c)(2) provides that a party may object that material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence. The objection functions much as an objection at trial, adjusted for the pretrial setting. *The burden is on the proponent to show that the material is admissible as presented or to explain the admissible form that is anticipated.*

Fed. R. Civ. P. 56 (Committee Notes on Rules – 2010 Amendment) (emphasis added). Plaintiffs make not the slightest effort to show that this information attached to their expert's Affidavit is either admissible as is or explain the admissible form that is anticipated. This objection would have been raised and discussed in Meech's response to the Motion for Summary Judgment had Plaintiffs used the Affidavit to meet their burden of establishing a *prima facia* entitlement to judgment because there are no genuine issues of material fact. Meech will again raise this objection in any Surreply the Court allows.

Plaintiffs next argue that Meech should be prevented from responding to their new argument that twenty years is the outside maximum that the Meech family had to place water from their wells to beneficial use. As previously noted in Meech's objections and motion to file a surreply, the Plaintiffs added a new argument to their reply brief—that *Mendenhall* has a fourth element requiring water to be put to beneficial use within a reasonable time period and the reasonable time period does not extend beyond twenty years as a matter of law.[2] *See* Plaintiffs United States of America's and State of New Mexico's Reply in Support of Motion for Summary Judgment [ECF 3504] at 4 ("A Reasonable Time Under Mendenhall is Less Than 20 Years") (citing *United States v. Abousleman*, No. 83-1041 JC, 1999 WL 35809618, at *4 (D.N.M., May 4, 1999) as the controlling precedent in this case (*see* ECF 3510 at 6)). Plaintiffs claim that there is an additional element for application of the *Mendenhall* principle that Meech did not address, while neglecting to acknowledge that this fourth element has never been adopted by any New Mexico appellate court.[3] As Plaintiffs acknowledge, state law governs this proceeding. *See* Plaintiffs' Motion for Summary Judgment [ECF 3491] at 8. Thus, it is a mystery as to why a lower federal

[2] *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467.
[3] Indeed, no other Court has ever cited *Abousleman* for the proposition urged by Plaintiffs.

district court opinion that conflicts with the holding of the New Mexico Supreme Court[4] should establish, as a matter of law, that the reasonable period for water use at a mine where it will take decades to extract the deposited mineral must be limited to twenty years.[5]

Regardless of whether a requirement that water be placed to beneficial use within a reasonable time is a fourth element of the application of the *Mendenhall* doctrine or not, to qualify for summary judgment on this point, Plaintiffs were required to make a *prima facie* showing of the lack of genuine issues of material fact on a "reasonable time" element. They utterly failed to do so. This failure is discussed at length in Meech's response to Plaintiffs' Motion for Summary Judgment. *See* Meech's Response to Motion for Summary Judgment [ECF 3496] at 12 ("Plaintiffs have not met their initial burden of proof of establishing the lack of disputed facts with respect to the *Mendenhall* elements."). When, as in a general stream adjudication, the defendant bears the ultimate burden of proof on his or her claim, the plaintiffs, as the moving parties, may meet their summary judgment burden by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case'." *In re EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, 2020 WL 8374137, at *33-34 (D. Kan. Dec. 17, 2020) (quoting *Conoshenti v. Pub. Serv. Elec. & Gas Co.*, 364 F.3d 135, 140 (3d Cir. 2004)). It is only after this burden is met by the moving party that the burden shifts to the non-moving party to demonstrate genuine issues of material fact on the points argued by the moving party. *Id.* at *34; *see also* Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."). In their Motion, Plaintiffs claim only that they have considered

[4] *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, 95 N.M. 560, enumerating the requisite three elements under the *Mendenhall* doctrine.

[5] This argument underscores the need for these questions to be certified to the New Mexico Supreme Court for a definitive statement of how *Mendenhall* applies to water used in mining enterprises. *See* Meech's Corrected Motion to Certify Questions to the New Mexico Supreme Court. [ECF 3488].

all aspects of *Mendenhall* and correctly applied them in their proposed Consent Orders. Nowhere do Plaintiffs raise the argument that a "reasonable time" under *Mendenhall* cannot exceed twenty years regardless of the circumstances of water use. No burden shifted to Meech on this point. Plaintiffs now attempt to meet that initial burden through their Reply Brief. Meech should have the opportunity to rebut that argument in a Surreply or the Court must ignore that argument in its discretion.

Plaintiffs further argue to the Court that the issue in *Mendenhall* "is not whether Meech can develop her water rights, but rather whether that development relates back in time for purposes of determining the appropriate priority date." *See* ECF 3510 at 7. This statement completely ignores Meech's persistent assertion that she is able to continue development of the water rights up to the declared amounts of the well. *See* Response to Plaintiff's Motion for Summary Judgment [ECF 3496]. More importantly, it ignores the New Mexico Supreme Court's specific holding in *State ex rel. State Eng'r v. Crider* that *Mendenhall* also applies to the expansion of water rights. *See State ex rel. State Eng'r v. Crider*, 1967-NMSC-133, ¶ 26, 78 N.M. 312 ("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."). This issue is front and center in this litigation and is the focus of Meech's Motion to Certify Questions to the Supreme Court of New Mexico. [ECF 3488] ("May an adjudication court, pursuant to NMSA 1978, §§ 72-4-13 through 20, adjudicate a water right in an amount that accounts for the reasonable, continuous expansion of beneficial use of water pursuant to a plan put in place prior to the declaration of an underground water basin?).[6]

[6] Plaintiffs' argument again underscores the need for a definitive resolution of this question from the highest court in New Mexico.

Finally, Plaintiffs dispute that there are issues of fact that must be resolved by the fact finder as to whether Meech has placed water to beneficial use within a "reasonable time" and whether continued develop of the mine with the concomitant requirement for additional water will be achieved within a "reasonable time." Plaintiffs claim they met their burden of showing no genuine issues of material fact on this point when they stated as an undisputed fact that "all water Meech has pumped from the wells has been put to beneficial use in the limestone mining and processing operation at the Tinaja Quarry." Of course, nothing in this "undisputed fact" addresses any issue of "reasonable time," *i.e.*, whether the Meech family has progressed in developing their mine property and applying water to beneficial use in a reasonable time period; or whether mineral deposits are capable of being removed at any greater speed than that exercised by the Meech family. There is simply nothing in the Motion for Summary Judgment that addresses any "reasonable time" period. There is certainly nothing that addresses whether twenty years is the cut-off date to meet a "reasonable time" requirement.

As Meech pointed out in her briefing, whether due diligence has been applied in beneficially using water is dependent upon the circumstances. *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 30, 143 N.M. 142. These are generally factual questions. *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, ¶ 14, 95 N.M. 560 ("Compliance with these requirements involves questions of fact."). Indeed, determining whether behavior is reasonable, is generally a jury question. *Vaccaro v. Am. Family Ins. Group*, 275 P.3d 750, 759, ¶ 42 (Colo. Ct. App. 2012), *as modified on denial of reh'g* (Mar. 15, 2012) ("What constitutes reasonableness under the circumstances is ordinarily a question of fact for the jury. However, in appropriate circumstances, as when there are no genuine issues of material fact, reasonableness may be decided as a matter of law."). If the Plaintiffs had made a *prima facie* case of no genuine issues of material fact on the issue of whether the time necessary to apply water to beneficial use in mining is

unreasonable, Meech would have responded with her own expert opinion about the reasonable time it takes to develop a mine and its requisite water rights.[7] Having failed to do so in their Motion for Summary Judgment, Plaintiffs tried to cover their failure in their Reply Brief. Meech must now be allowed to file a Surreply or the Court must ignore this argument.

CONCLUSION

Plaintiffs concede that they attached new evidence to their Reply Brief. If the Court determines to consider this new evidence, Meech must be allowed to respond in a Surreply. Meech's Surreply should not be limited to evidence previously disclosed in discovery or otherwise if she finds it necessary to rely on other evidence. Similarly, she should be able to respond to the new argument raised in Plaintiffs' Reply Brief that twenty years is the maximum time available to place water to beneficial use because any additional time is unreasonable as a matter of law.

Respectfully submitted,

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[7] Even though Plaintiffs never met their initial burden in establishing a *prima facie* case on any issue of reasonable time, Walter Meech, son of Norma Meech, nonetheless addressed the matter when he stated in his Affidavit that "The Meech family and C&E Concrete, Inc. have used reasonable diligence to mine the Tinaja pit and place water from G-336 and G-337 to beneficial use for the declared purposes since the wells were drilled." *See* Affidavit of Walter Meech [ECF 3488-1] ¶ 20, attached in support of Meech's Motion to Certify Questions to the New Mexico Supreme Court. [ECF 3488]. This evidence alone establishes a question of fact as to whether use of water at the mine has been accomplished within a reasonable time.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 16, 2021, 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

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