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 DHU/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.	)	

NORMA MEECH'S RESPONSE TO PLAINTIFFS' OBJECTIONS TO PROPOSED FINDINGS AND RECOMMENDED DISPOSITION [ECF 3553]

Norma Meech, by and through her counsel of record, Law & Resource Planning Associates, P.C., hereby responds to Plaintiffs' Objections raised in opposition to the United States Magistrate Judge's Proposed Findings and Recommended Disposition of Plaintiffs' Motion for Summary Judgment. [ECF 3553] As will be discussed, the Magistrate Judge has reached the correct determination regarding the issues that were presented to him by Plaintiffs' summary judgment motion. The Proposed Findings and Recommended Disposition [ECF 3547] should be adopted as the Order of the District Court.

INTRODUCTION

As a preliminary matter, Plaintiffs completely misapply Fed. R. Civ. P. 72(b)(2), which allows the filing of objections to the Magistrate's proposed findings and recommendations. The Rule allows "specific written objections to the proposed findings and recommendations." *Id.*; *Adams v. United States*, 543 F. Supp.3d 1165, 1168 (D.N.M. 2021). The objections must be

sufficiently specific to focus the Court's attention on the facts and law that are at issue. *Id.* ("[O]nly an objection that is sufficiently specific to focus the district court's attention on the factual and legal issues that are truly in dispute will advance the policies behind the Magistrate's Act." (quoting *United States v. One Parcel of Real Property, With Buildings, Appurtenances, Improvements, and Contents, Known As: 2121 East 30th Street, Tulsa Okla.*, 73 F.3d 1057, 1059 (10th Cir. 1996))). The objections must be specific and aimed at particular findings by the Magistrate. *George v. Prof'l Disposables Int'l, Inc.*, 221 F. Supp. 3d 428, 433-34 (S.D.N.Y. 2016) ("[O]bjections to a Report must be specific and clearly aimed at particular findings in the magistrate judge's proposal."). When objections are made, the District Court "must determine de novo any part of the magistrate judge's disposition that has been *properly* objected to." Fed. R. Civ. P. 72(b)(3) (emphasis added).

The Rule, however, does not allow the mere rehashing of the arguments already raised before the Magistrate. *Burns v. Town of Palm Beach*, 343 F. Supp. 3d 1258, 1270 (S.D. Fla. 2018), *aff'd, Burns v. Town of Palm Beach*, 999 F.3d 1317 (11th Cir. 2021) ("It is improper for an objecting party to submit [ ] papers to a district court which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge." (internal citations omitted)). *Accord, Chao v. Int'l Broth. of Indus. Workers Health & Welfare Fund*, 97 F. Supp. 3d 268, 275 (E.D.N.Y. 2015) ("It is improper for an objecting party to attempt to relitigate the entire content of the hearing before the Magistrate Judge by submitting papers to a district court which are nothing more than a rehashing of the same arguments and positions taken in the original papers submitted to the Magistrate Judge."); *George*, 221 F. Supp. 3d at 433-34 (S.D.N.Y. 2016). In such event, the District Court needs only to review the Magistrate Judge's decision for clear error. *Id.* ("[W]hen a party raises arguments that were already addressed by the Magistrate Judge, the District Court need only review the Magistrate Judge's decision for clear

error.").

In their objections in the present case, the Plaintiffs simply reiterate and rehash the arguments made to the Magistrate Judge in their original filings. For example, Plaintiffs chastise the Magistrate Judge for "conspicuously fail[ing] to address the many New Mexico cases defining what the reasonable time limits are under Mendenhall." Plaintiffs' Objections at 5 [ECF 3553]. Plaintiffs then simply repeat the same points and arguments made in their briefing before the Magistrate in their original filings and cite the same cases that the Magistrate did not find persuasive in the first instance. *Compare*, *e.g.*, Plaintiffs' Objections at Points I(A) and I(B) [ECF 3553] with Plaintiffs' Reply Brief in support of Motion for Summary Judgment at Point I(A), Point I(B) and Point I(C) [ECF 3504] and Plaintiffs' objections at Point 4 [ECF 3553] with Plaintiffs' Reply Brief Point 2(A) [ECF 3504]. Under these circumstances, the District Court should only review the Proposed Findings and Recommended Disposition for clear error. *See also Ramirez v. United States*, 898 F. Supp. 2d 659, 663-64 (S.D.N.Y. 2012) ("[W]here objections are 'merely perfunctory responses,' argued in an attempt to 'engage the district court in a rehashing of the same arguments set forth in the original petition,' reviewing courts should review [an R & R] for clear error." (internal citations omitted)); *George*, 221 F. Supp 3d 428, 434 ("When a party makes only conclusory or general objections, or simply reiterates the original arguments, the Court will review the Report strictly for clear error." (internal citations omitted)).

I. THE MAGISTRATE JUDGE WAS NOT IN ERROR IN CONCLUDING THAT GENUINE ISSUES OF MATERIAL FACT PRECLUDE THE GRANTING OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO THE INCHOATE (*MENDENHALL*) RIGHTS.

Repeating their previous arguments that a reasonable time to place an inchoate water right[1]

[1] Known in New Mexico as a *Mendenhall* right. *See State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998.

to beneficial use is a maximum of twenty years, as a matter of law, Plaintiffs urge the District Court to grant their Motion for Summary Judgment, thereby cutting off any future development of inchoate rights at C&E Concrete's Tinaja Mine.[2] Citing the same case law, Plaintiffs argue that New Mexico law supports a maximum period of twenty years for development of *Mendenhall* water rights and that development of a future water right is "antithetical to New Mexico Water Law." *See* Plaintiffs' Objections at Point 1 and Point 2 [ECF 3553].

Ignoring the most recent and comprehensive decision regarding the *Mendenhall* Doctrine in over forty years, Plaintiffs rely upon a lower federal district court opinion in *United States v. Abousleman*, No. 83-1041 JC, 1999WL 35809618, *3 and other New Mexico case law (which has nothing to do with the idiosyncrasies of mining and the use of water in a mining operation) for the proposition that an inchoate water right must be fully vested within twenty years, as a matter of law. The Magistrate, however, relied upon the most recent case law, *State ex rel. Office of the State Eng'r v. Gray*, 2021-NMCA-066, 499 P.3d 690, and rejected Plaintiffs' arguments (and cited case law), concluding that whether "water has been put to beneficial use within a reasonable time given the circumstances at hand is a factual inquiry, and each case must 'stand and be decided on its facts.'" [ECF 3547] at 15.

As Meech extensively argued in her Surreply in Opposition to Plaintiffs' Motion for Summary Judgment [ECF 3528], the *Gray* decision arises specifically out of the mining industry and represents the New Mexico Court of Appeals' determination of the applicability of the *Mendenhall* Doctrine for the appropriation of water for mining purposes that commenced before the declaration of an underground basin and which continues after the declaration. In *Gray*, the owners of a copper mine near Hillsboro, New Mexico started the appropriation of water for mining

[2] C&E Concrete is the family business started by Norma Meech and her now deceased husband.

operations when the mine opened in 1980. The mining and milling operations continued for three months before copper prices collapsed worldwide and the operation had to shut down. The collapse of prices persisted for several years and, despite the best efforts of the original mining company and its successors in interest to restart operations, the mine was not reopened. In 2010, a new company purchased all the assets and commenced efforts to restart the operation, including resurrecting inchoate water rights declared prior to the declaration of the Lower Rio Grande Basin.

While the Court of Appeals ultimately determined that the inchoate water rights could not be brought to life because the previous owners of the rights had twice attempted to move the points of diversion, place, and purposes of use, the opinion nonetheless solidifies the elements necessary to successfully pursue a *Mendenhall* claim in general, and a *Mendenhall* claim for mining purposes specifically.

The *Gray* decision confirms over and over again that a determination of whether a *Mendenhall* claim can move forward to final fruition by placing the water to beneficial use is fact dependent, taking into consideration the particular circumstances confronting the developer of the rights. The Court of Appeals was particularly generous in its willingness to apply the doctrine to new situations and circumstances:

> "Relation back was designed for an era of small ditches. It gave the appropriator time to finance his diversion works, but was relatively unforgiving of excuses. Long delays in putting water to beneficial use suggested speculation and could result in loss of early priority." The treatise suggests that courts have adjusted the doctrine to accommodate more complex projects…. New Mexico has similarly made room in its relation doctrine to accommodate questions of future use by industry and municipalities…. But these iterations of relation have not changed the bedrock requirement of diligently applying water to beneficial use within a reasonable time given the circumstances at hand. *The cases from the beginning understood that each case would have to stand and be decided on its facts.*

Id., ¶¶ 46-47 (emphasis added).

Rather than articulate a finite time period to place water to beneficial use—such as the twenty years demanded by Plaintiffs—the Court of Appeals emphasized that each case will be determined on its own facts.

> In sum, the concept of relation has been applied to determine priority to water since the earliest days of the development of prior appropriation. It has been adapted flexibly to meet new circumstances as cases presenting new issues arose. The core of relation—requiring a lawful commencement of an appropriation with notice to the world of intent, followed by diligence in bringing the planned appropriation to fruition by application of water to beneficial use in a reasonable time—has remained the same. *The question in each case is whether in a given circumstance the would-be appropriator has been diligent.* Our task is to determine whether the adjudication court applied the doctrine correctly to the facts in this case.

Id., ¶ 52 (emphasis added).

The Court of Appeals further reflected that "We see no difficulty with using a totality of the circumstances approach to evaluating a case such as this." *Id.*, ¶ 56. Ultimately, the Court would "agree that the 'unique character of extractive industries and the environment they operate in are part of the calculus courts should take in account when assessing diligence. . . . [T]he doctrine of relation has always recognized that each case should be judged on its own circumstances." *Id.*, ¶ 72.

Plaintiffs concede that Meech has exercised diligence in developing the water rights. They also do not argue that her well development was too slow. *See* Plaintiffs' Reply Brief [ECF 3504] at 7 ("The United States and the State do not assert that Meech was not diligent in developing her water rights in Wells 8B-1-W10 and 8B-1-W11, nor do they argue that Meech's well development was too slow."). They have simply contended that there is a set period under New Mexico law during which water must be put to beneficial use under *Mendenhall*—twenty years—or lose the

right forever. The Court of Appeals has completely dispelled that notion.[3]

It is odd that Plaintiffs do not discuss the *Gray* case in the context of their claim that New Mexico imposes a fixed deadline to place inchoate water rights to beneficial use, particularly since the Magistrate heavily relied upon the opinion in holding that there are genuine issues of material fact that preclude granting of Plaintiffs' summary judgment motion on Meech's *Mendenhall* claims. Plaintiffs certainly have not shown that it was clear error for the Magistrate to rely on a New Mexico appellate court's most recent explication of how to apply the *Mendenhall* Doctrine specifically to mining operations. The District Court should adopt the Magistrate's findings and recommendations on the Motion for Summary Judgment.

II. MEECH HAS NEVER ADVOCATED FOR AN "EVER-EXPANDING WATER RIGHT" AND THE MAGISTRATE DID NOT ENDORSE THE CONCEPT OF AN "EVER-EXPANDING WATER RIGHT."

Relying on a straw man argument that has no basis in reality,[4] Plaintiffs argue that the Magistrate "ignores the fact that the New Mexico Supreme Court has held that an ever-expanding water right is antithetical to New Mexico's scheme of prior appropriation." Meech never urged recognition of any such right and the Magistrate certainly never endorsed such a water right. Instead, the Magistrate recommended that the District Court deny the Motion for Summary Judgment because there are genuine issues of material fact with respect to the recognition of *Mendenhall* rights. As the New Mexico Supreme Court long ago held, the quantification of an inchoate water right is left to the adjudication court considering all the surrounding circumstances.

---

[3] Indeed, if New Mexico had imposed a finite period for placing water to beneficial use, given the idiosyncrasies of the mining industry that often require mines to be shut down when mineral prices fall (*Gray*, 2021-NMCA-066, ¶ 21), mining companies would lose valuable inchoate water rights after twenty years whenever market forces intervened, making mining temporarily unfeasible. That cannot be the rule in a state whose legislature has declared that mining is a valued industry. NMSA 1978, § 69-10-2 ("The legislature finds and declares that A. the exploitation of New Mexico's mineral resources provides an opportunity for highly paid jobs for New Mexicans; B. the successful exploitation of minerals shall be encouraged by the state of New Mexico. . . .").

[4] As the Magistrate acknowledged, "Ms. Meech is not claiming an unlimited right to future use but additional appropriation via 'an ordered process' which permits the Court to 'provide for the continued development of the water right into the future." [ECF 3547 at 5].

State ex rel Reynolds v. Rio Ranch Estates, Inc., 1981-NMSC-017, ¶ 15, 95 N.M. 560 ("What is the limitation on such a right? Normally, it is a matter left up to the courts in adjudication proceedings.").

Meech has always contended that her right to continue to develop a water right once the basin had been declared is limited by:

1. The notice that she gave to the world through filing Declarations reflecting her intent to develop the water right for purposes related to mining operations and the maximum extent of that water right;[5]
2. The parameters of the plan to develop the water rights, including the expectation that the full extent of their declared water right will be reached within the next five to ten years;[6]
3. The diligence that has been exercised in developing the right;[7]
4. The mine's anticipated yearly water usage as the Tinaja pit is enlarged through removal of the minerals.[8]

To suggest that either Meech or the Magistrate has endorsed an "ever expanding water right" is simply not supported by the record. Because this concept was never urged by Meech and certainly not adopted by the Magistrate, there is no clear error in the Magistrate recommending that Meech's claim for a *Mendenhall* right be established, not through summary judgment, but after full hearing to allow development of the unique facts of the case.

---

[5] In this case, notice was provided by the Declaration filed of the intent to develop the water right. *See* Meech's Response to Motion for Summary Judgment at 13n.5 [ECF 3496].

[6] The plan of development is described by Walter Meech in multiple Affidavits [ECF 3528-1; ECF 3488-1; ECF 3496-1] that detail, *inter alia*, the extent of the mineral deposit, his family's ownership of the mineral rights, their continued business operations for many years, and how pit mining proceeds in an orderly fashion by overburden removal, followed by mining and crushing operations.

[7] As previously noted, Plaintiffs have conceded that Meech and her family business have been diligent in development of the water right. [ECF 3504 at 7].

[8] Meech anticipates that water usage at the Tinaja Pit will average about 92 acre-feet per year for the next fifty years, a figure remarkably consistent with their declared rights. [ECF 3488-1, ¶¶ 24, 25, and 27]

III. THE MAGISTRATE MADE NO ASSUMPTIONS ABOUT MEECH'S PLAN FOR THE ORDERLY DEVELOPMENT OF HER WATER RIGHTS. EVEN THOUGH PLAINTIFFS NEVER MET THEIR SUMMARY JUDGMENT BURDEN OF SHOWING NO GENUINE ISSUES OF MATERIAL FACT REGARDING THE DEVELOPMENT PLAN, MEECH NEVERTHELESS PROVIDED EVIDENCE OF THEIR PLAN FOR THE DEVELOPMENT OF THE WATER RIGHTS.

In their final point regarding the *Mendenhall* water rights, the Plaintiffs mistakenly conclude that Meech has provided no evidence of an "orderly process" for the development of the water rights associated with the two industrial water rights. Their erroneous conclusion arises in large part due to their persistent failure to appreciate that, as the movants, Plaintiffs are the parties with the burden of demonstrating that there are no genuine issues of material fact such that they are entitled to judgment as a matter of law. Because Plaintiffs never met this initial burden, the burden never shifted to Meech to establish genuine issues of material fact with respect to the water development plan at La Tinaja. Nevertheless, her son Walter Meech provides extensive additional information on their plan for water development, thereby establishing issues of fact and precluding summary judgment.

The movant bears the responsibility of demonstrating that there are no genuine issues of material fact. *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) ("[T]he movant bears the initial burden of 'show[ing] that there is an absence of evidence to support the nonmoving party's case.'"). The burden for demonstrating that there are genuine issues of material fact does not shift to Meech until *after* 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))). As the moving party without the ultimate

burden of proof on the claims, the Plaintiffs' summary judgment burden is satisfied in one of two ways: 1) putting evidence into the record that affirmatively disproves an element of the nonmoving party's case; or 2) directing the court's attention to the fact that the non-moving party lacks evidence on an element of its claim. *O'Farrell*, 455 F. Supp. 3d at 1194 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548). Never have the Plaintiffs even attempted to meet their initial burden of putting evidence in the record disproving an element of Meech's *Mendenhall* claim or directing the Magistrate's attention to the fact that Meech lacks evidence on an element of her claim.[9] If the moving party does not meet this initial burden, the summary judgment motion must fail. *Celotex*, 477 U.S. at 339 ("If the moving party has not fully discharged this initial burden of production, its motion for summary judgment must be denied. . . .").

Plaintiffs never demonstrated to the Magistrate that there are no genuine issues of material fact regarding Meech's plan of development. Nor did Plaintiffs address this element of Meech's *Mendenhall* claim in their motion, brief, or reply brief. Instead, Plaintiffs frame the entire *Mendenhall* issue thus:

> At issue in Plaintiffs' Motion is Mendenhall's reasonable-time element; Plaintiffs argue, based on Mendenhall and its progeny, that Meech's opportunity to continue to develop the wells and have her priority date relate back to the dates upon which the wells were drilled has, as a matter of law, long passed and Mendenhall no longer applies.

[ECF 3504 at 10]. The Magistrate made no assumptions whatsoever regarding whether or not Meech had a water development plan, orderly or not.[10] He never got to that point because Plaintiffs

[9] Indeed, the only "undisputed fact" asserted by the Plaintiffs in their Motion for Summary Judgment [ECF 3491] relating to Meech's *Mendenhall* claims is Fact # 15 stating 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.'" This "undisputed fact" hardly disproves an element of Meech's *Mendenhall* claims. Nor does it demonstrate that Meech lacks evidence on an element of her claim.

[10] Plaintiffs seem fixated on the Magistrate's description of Meech's future use of water as "an ordered process," [ECF 3553 at 12, 13] which term itself stems from Meech's description of mining as a pursuit that must go forward in an orderly fashion, including overburden material removal before mineral removal can take place. [ECF 3528-1, ¶ 18]. The *Mendenhall* elements, of course, do not require that the water development plan be an "ordered process". The

never met their burden. Rather, the Magistrate Judge only determined that there are genuine issues of material fact regarding the reasonable time element of Meech's Mendenhall claims. For Plaintiffs to now assert that the Magistrate Judge made unsupported assumptions about Meech's claims is disingenuous at best.

IV. THE MAGISTRATE JUDGE CORRECTLY DETERMINED THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING PAST WATER USAGE FROM WELL 8B-1-10 THAT PRECLUDE THE GRANTING OF SUMMARY JUDGMENT.

Notwithstanding Walter Meech's multiple page Affidavit containing an extensive discussion of why the meter readings submitted to the State Engineer are wrong [ECF3496-1], Plaintiffs urge the District Court to disregard the Magistrate's conclusion that genuine issues of material fact preclude the granting of summary judgment for Well 8B-1-10. Plaintiffs are clearly mistaken. Instead of demonstrating that there are no genuine issues of material fact regarding water usage from this well, Plaintiffs seem to want the District Court to assess Walter Meech's credibility by demanding an explanation of how he knows the meter records are wrong and what he did to correct them with the State Engineer.[11] While these might be great questions on cross examination, they do nothing to undermine the Magistrate's assessment that genuine issues of material fact preclude summary judgment.

The Magistrate's job was not to weigh the evidence or assess the credibility of the Affiant. *O'Farrell*, 455 F. Supp. 3d at 1196. His job was to determine whether there were any factual issues that must be resolved by the fact finder, resolving "all reasonable inferences and doubts in the nonmoving party's favor and constru[ing] all evidence in the light most favorable to the

requirement is only that the appropriator "proceed diligently to develop the water pursuant to a plan." *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, ¶ 13, 95 N.M. 560.

[11] Oddly, by challenging Walter Meech's conclusion that the meter readings for Well 8B-1-10 are incorrect, Plaintiffs undermine their own expert's assessment that "Significant discrepancies were found in the recorded meter readings in terms of the number of digits recorded and submitted as the meter reading records to the NMOSE." [ECF 3504-1, ¶ 12].

nonmoving party." *Id.* He correctly performed these functions, finding that there are genuine issues of material fact regarding past water usage from Well 8B-1-10 that cannot be resolved in a summary fashion.

V. THE MAGISTRATE JUDGE DID NOT ERR IN DETERMINING THAT EVAPORATIVE LOSSES FROM LIVESTOCK PONDS ARE POTENTIALLY A PART OF MEECH'S WATER RIGHTS. [12]

In their Motion for Summary Judgment, Plaintiffs relied exclusively on the lack of law in New Mexico supporting Meech's entitlement to evaporative losses from her livestock ponds as part of her water right in the livestock ponds, arguing that evaporative losses are wasteful and New Mexico law does not recognize a water right for waste. The only "undisputed fact" asserted by Plaintiffs with respect to evaporative losses from ponds in their Motion for Summary Judgment is at ¶ 21 [ECF 3491] where Plaintiffs state:

> Meech does not dispute the amount of water that the United States determined during the Hydrographic Survey can be impounded and stored in each of the ponds. Meech contends, however, that the United States' quantification should "account for evaporative losses from the ponds, which is also a beneficial use of water."

[ECF 3491] (citations to the record omitted).

Plaintiffs then argued, in support of their entitlement to summary judgment, that "[i]t is important to note that, throughout the Hydrographic Survey and adjudication process and in the absence of information from a water user to the contrary, the experts considered evaporation losses from ponds filled from surface runoff, wells, or springs an incidental use of water 'too wasteful and speculative to constitute a beneficial use' under New Mexico law. [ECF at 16-17] Thus, all

[12] The Magistrate determined that only Meech's stock ponds were entitled to include evaporative losses as an element of the water right because evaporation from the industrial ponds was covered by additional diversions from the wells, and part of the measured diversions. Meech has no quarrel with this determination as she only urged the Court to allow an additional allowance for evaporation from the stock ponds. [ECF 3496 at 16] (arguing that the amount advocated by Plaintiffs as the water right for the livestock ponds "does not account for the fact that water in excess of that consumed by livestock will evaporate from the ponds").

of Plaintiffs' arguments focused upon the lack of *legal* support in New Mexico for the recognition of evaporative losses as part of an adjudicated water right.

Having failed to convince the Magistrate of the validity of their position in their summary judgment briefing, Plaintiffs vainly attempt to distinguish the multiple cases he cites in support of including evaporative losses as part of the water right in a storage pond, "because in none of them was surface runoff the source of the water right or livestock watering the purpose of use."

In their initial briefing, however Plaintiffs never attempted to draw a distinction between storage facilities that receive water from surface runoff for livestock purposes and those that receive water from any other source, including perennial streams, springs, rainfall, wells, or any other source. They certainly did not try to distinguish the cases cited by Plaintiff (including a case cited with approval by the Magistrate in the Report and Recommendation) on the basis that Meech's livestock ponds are filled solely with surface runoff. They asserted only that New Mexico law does not allow recognition of such a water right because it is wasteful and speculative.

Plaintiffs cannot now simply alter the substance of their previous argument having never presented this theory to the Magistrate. *See, e.g., Dune v. G4s Regulated Security Solutions, Inc.*, 2015 WL 799523, at *2 (D.S.C. Feb. 25, 2015) ("The Court is not obligated to consider new arguments raised by a party for the first time in objections to the Magistrate's Report."); *Hemingway v. Speights*, 2009 WL 302319, at *2 (D.S.C. Feb. 6, 2009), wherein the Court stated:

> The plaintiff also raises new issues in page four of his objections to the Report and Recommendation. The court will not consider the new arguments. One purpose of the Magistrates Act is to allow magistrates to assume some of the burden imposed on the district courts to relieve these courts of unnecessary work. Allowing Plaintiffs to present one version of their case to the Magistrate, and then, because they were unsuccessful, present a new version and new argument to this Court frustrates this very purpose. The Magistrates Act was not intended to "give litigants an opportunity to run one version of their case past the magistrate, then another past the district court." Allowing parties, including pro se litigants, to

> raise new issues or arguments at any point in the life of a case will simply result in a needless multiplication of litigation. Parties should properly plead their claims and fully advance their arguments, at all stages of litigation, unless they are prepared to waive them.

(internal citations omitted). *Accord*, *Borden v. Sec'y of Health & Human Services*, 836 F.2d 4, 6 (1st Cir. 1987) ("Appellant was entitled to a de novo review by the district court of the *recommendations to which he objected*, however he was not entitled to a de novo review of an argument never raised." (emphasis in original) (internal citations omitted)).

Even though Plaintiffs never raised this argument before the Magistrate, should the District Court in its discretion consider it, Plaintiffs make no case as to why ponds filled from surface runoff should be distinguished from any other open water storage facility. There are still evaporative losses from these ponds. The Magistrate concluded, correctly, that evaporative losses are potentially a part of Meech's water rights in the livestock ponds. What remains is a determination of the scope of that evaporative right during the trial of this matter. The Magistrate's legal conclusion should not be disturbed by the District Court.

Finally, Plaintiffs speciously argue that Meech has not met her burden of establishing, as a factual matter, the full extent of her evaporative loss water right and that, therefore, the Magistrate should have entered summary judgment against her. Plaintiffs correctly argue that the ultimate burden is upon Meech to establish the nature and extent of her water right. Because Meech has the ultimate burden of proof and persuasion on her claims, Plaintiffs also correctly assess their own burden on summary judgment and how they can carry that burden as the moving party. [ECF 3553 at 19]. Plaintiffs wildly miss the mark, however, in their unfounded assertion that "the PFRD shifted the burden entirely onto Plaintiffs and ignored Meech's obligation 'to establish the existence of an element essential' to her case." *Id.*

Plaintiffs contend that having asserted in their "undisputed fact" that Meech claims an

entitlement to evaporative losses as part of her water right, the burden then switched to Meech to "come forward with sufficient facts to establish that a disputed material fact exists." [ECF 3553 at 19] This argument is utter nonsense. Plaintiffs never established any "undisputed fact" other than that Meech "claims" evaporative losses from her livestock ponds. Plaintiffs relied solely on their legal argument that evaporative losses are not legally cognizable in the state. Plaintiffs never established any facts with respect to the elements of Meech's evaporative loss right and therefore never shifted the burden to Meech to show that there are disputed *factual* disputes, as opposed to disputed *legal* disputes.

As a final aspect of this flawed argument, Plaintiffs also completely misconstrue the holding in *Gray*, 2021-NMCA-066, regarding evaporative losses from open storage facilities. Plaintiffs characterize the holding in *Gray* as "while the decision in Elephant Butte implies it would quantify a water right based in some part on evaporation loss, it nevertheless remained the claimant's burden to provide its entitlement to such a right with evidence." [ECF 3553 at 20]. In reality, the Court of Appeals' holding in *Gray* with respect to the water right associated with the open pit at the Copper Flat Mine is that the trial court's quantification of water used from the pit for dust control purposes was quantified by the evaporative losses from the pit.[13] Thus, the quantification of beneficial use for dust control purposes was not supported by substantial evidence.[14] They are two different aspects of the same water right. One is the consumptive use of the water stored in the open pit. The other is the evaporative loss from the pit itself.

The same can be said of this case before the District Court. One aspect of the water right

[13] Interestingly, the evidence regarding evaporative losses from the open pit at the Copper Flat Mine came from the Office of the State Engineer's ("OSE") Offer of Judgment to the Copper Flat mine's current owners. The OSE quantified the water right in the pit as the evaporative losses. This is the same OSE that, in this case, contends that evaporative losses from open storage facilities are not part of a water right.

[14] The Court of Appeals remanded the issue to the trial court to clarify his holding. The hearing before the trial court is set for June 16, 2022.

is the consumptive use made of the water by livestock and other animals. The other aspect is the evaporative losses from the storage facility itself. They are quantified differently. And, as *Gray* recognizes, the quantification of one is not the quantification of the other.

Meech does not disagree that she, ultimately, bears the burden of introducing evidence at trial regarding the extent of her water rights in these ponds. During the summary judgment proceeding, however, no burden to show disputed issues of fact on the specifics of her pond water rights was ever shifted to her. Rather, Plaintiffs made only *legal* arguments (that were refuted by Meech) regarding her entitlement to evaporative losses from the ponds. Plaintiffs never even attempted to demonstrate the lack of genuine issues of material *fact* with respect to the evaporative loss element of her water right in the livestock ponds. Plaintiffs are not entitled to summary judgment on this aspect of Meech's claims.

CONCLUSION

For the reasons cited herein, as well as in the original briefs filed in this matter, the Proposed Findings and Recommended Disposition should be adopted by the District Court and Plaintiffs' Joint Motion for Summary Judgment should be denied.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

By: Tanya L. Scott

Tanya L. Scott
Attorney at Law
Albuquerque Plaza, 201 3rd Street NW, Ste. 1750
Albuquerque, NM 87102
(505) 346-0998 / FAX: (505) 346-0997

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2022, 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