

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

FILED  
UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO

15 DEC 21 PM 2: 07



CLERK ALBUQUERQUE

UNITED STATES OF AMERICA, and  
STATE OF NEW MEXICO, ex rel. STATE  
ENGINEER,

Plaintiffs,

v.

A & R PRODUCTIONS, et. al.,

Defendants.

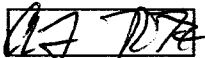
No. 01cv00072-MV/WPL

ZUNI RIVER BASIN  
ADJUDICATION

Subfile No: ZRB-2-0038

SUBFILE ANSWER

COME(S) NOW CRAIG FREDRICKSON & REGINA FREDRICKSON  
and answer(s) the complaint as follows:

<u>Subfile No:</u>	<u>Object</u>	<u>Claim No Right</u>
ZRB-2-0038		<input type="checkbox"/>

(Instructions: **Initial** in one of the two boxes to indicate whether you object to the description of water right(s) contained in the proposed Consent Order offered by the United States and the State, or whether you make no claim as to the water right(s) described in the proposed Consent Order. Provide the appropriate explanation below, and indicate what you have done to resolve your disagreement with the United States and the State, in the spaces provided below.)

I (We) object to the description of the water right(s) described by the proposed Consent Order for Subfile Number ZRB-2-0038 because:

(explain) SEE ATTACHMENT  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(Attach additional pages if necessary)

I (We) made a good faith effort to resolve my (our) disagreement with the Consent Order

proposed by the United States and the State by:

(describe) SEE ATTACHMENT

(Attach additional pages if necessary)

I (We) claim no right for the water right(s) described by the proposed Consent Order for Subfile Number ZRB-2-0038 because:

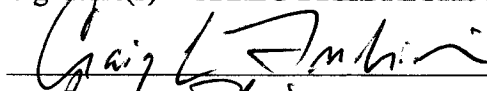
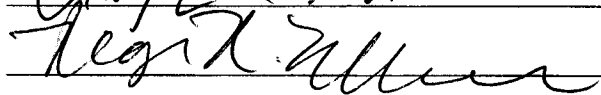
(explain)

(Attach additional pages if necessary)

I (We) understand that by making this claim and filing this document I (we) am (are) not waiving my (our) rights to later raise, in an Amended Answer, any jurisdictional or affirmative defenses I (we) may have.

**(Instructions: Each named defendant, or the defendant's attorney, must sign and date this Answer. If you are represented in this case by an attorney, your Answer must be filed by your attorney. If multiple defendants are named and you have separate addresses or telephone numbers, please attach an additional page providing address information for each defendant. If you are signing on behalf of a named defendant, you must indicate the source of your legal authority to do so and provide both your address and the address of the named defendant.)**

Signature(s) – **CRAIG FREDRICKSON & REGINA FREDRICKSON**

2742 VERANDA RD NW

ALBUQUERQUE, NM 87107  
(Address: Print Clearly)

505-344-1048  
(Phone Number: Print Clearly)

**IMPORTANT: Within 20 days of December 7, 2015, you must EITHER accept the last Consent Order offered by the United States and the State for Subfile ZRB-2-0038 OR file an answer in this Subfile with the United States District Court for the District of New Mexico. Any right you may have to use waters of the stream system may be adjudicated by default judgment in conformity with the Consent Order proposed by the United States and the State if you fail to accept the proposed Consent Order or file an answer within 20 days of December 7, 2015. Answers may be mailed to the Clerk of Court at 333 Lomas Blvd NW, Ste. 270, Albuquerque, NM 87102.**

## Attachment to Subfile Answer: Subfile No. ZRB-2-0038

### Objection to the Last-Offered Consent Order

On October 10, 2006, Craig and Regina Fredrickson (Defendants) were presented with a proposed Consent Order describing water rights pursuant to *United States v. A&R Productions*, No. 01cv00072-MV/WPL (D.N.M) (Zuni River Basin Adjudication); Subfile No. ZRB-2-0038. Subsequently, on July 17, 2007, said Defendants met in consultation with representatives of the U.S. Department of Justice (United States) and the New Mexico Office of the State Engineer (State) to address disagreements with the proposal. A revised Consent Order was then produced on June 2, 2015 and was the subject of discussion at a meeting held on June 23, 2015.

Defendants have made a good faith effort to consult and to resolve disagreements with the water rights associated with Subfile No. ZRB-2-0038, in particular, Well No. 10A-5-W06. In fact, Defendants were prepared to make significant compromises in order to reach a settlement. However, the parties are not in agreement over the terms of the last-offered Consent Order due, in part, to the failure of the Plaintiffs to correct errors in the Zuni River Basin Hydrographic Survey Report for Sub Areas 9 and 10. These same errors exist in the hydrographic survey reports for all other sub areas within the basin. As such, Defendants have no recourse except to request that the subject water rights be decided and settled in a court of law.

### Background

Well No. 10A-5-W06 was drilled and placed into service for livestock watering in 1955; it is also currently used for domestic purposes and for the benefit of wildlife. Declaration and ownership of underground water rights were accepted for filing by the State on March 14, 1990 in accordance with New Mexico Law (Cibola County Basin, Declaration 33-8). The well was declared as having a capacity of greater than 18 gallons per minute, i.e. greater than 29 acre feet per year. On March 1, 2006 the use of this well was expanded to include domestic use of up to 3.0 acre-feet per year under permit (File No. G 02469). It should be noted that disposition of a separate, hand-dug well that has existed on the property since at least the 1930s has yet to be addressed.

### Livestock Watering

Defendants have provided information to the United States and State that supports historic beneficial usage for livestock that far exceeds that of the last-offered Consent Order. In 2008, Defendants provided information to the Plaintiffs that justified a larger herd count historically watered at Well 10A-5-W06. In fairness, Plaintiffs have been willing to increase the herd count but are still less than half the historic figures for cattle watered at this source.

In addition, significant differences exist over the assumed water consumption rate for rangeland cattle. Plaintiffs' Hydrographic Survey Report contains an estimated water

consumption rate for an animal unit that is not supported by their cited reference (Wilson, B. C. and Lucero, A.A. *“Water Use by Categories in New Mexico Counties and River Basins, and Irrigated Acreage in 1995.”* New Mexico State Engineer Office. Technical Report 49. 1997).

Although the Hydrographic Survey Report suggests otherwise, the cited reference makes no mention of the term “animal unit” and the estimate of water consumption was for an 800-pound animal whose characteristics are not the equivalent of one animal unit. In fact, the water consumption rate suggested in the actual source document for this technical report was based solely on personal communication and was not supported by any study of this topic whatsoever (Sweeten, John M., O’Neal, Henry P. and Withers, Richard F. *“Feedyard Energy Guidelines.”* Texas A & M University, Agricultural Extension Service, College Station, TX. 1990). Rather, this source document was intended to develop guidelines on energy management at cattle feedlots in Texas, such as the electricity consumed in the pumping of water at such feedlots, and not to determine how much water was required to sustain cattle on the range. The preface of this report clearly states that “the information presented can be used to guide feedlot operating personnel on the selection, operation, and maintenance of the wide array of feedlot systems and equipment that utilize, or affect the use of, energy.” Defendants note that there is not a single cattle feedlot anywhere in the Zuni River Basin.

It is inexplicable why the Plaintiffs chose to use such an obscure and inappropriate source as the basis for their estimate of water consumption by cattle within the Zuni River Basin. It is patently obvious that an animal that is provided shelter in a feedlot, and that is brought its food and water in a feedlot, will not consume as much water as an animal that must make its life on the arid rangeland of the Zuni Plateau. Finally, Plaintiffs’ water consumption estimate is contradicted by authoritative studies including that of the Subcommittee on Beef Cattle Nutrition, Committee on Animal Nutrition, National Research Council, which is a part of the National Academies of Sciences, Engineering, and Medicine. These are private, nonprofit institutions that provide expert advice on some of the most pressing challenges facing the nation and the world and whose work helps shape sound policies, inform public opinion, and advance the pursuit of science, engineering, and medicine. In a letter dated July 8, 2008, Defendants made Plaintiffs aware that the 10 gallon per day average consumption rate for an animal unit was a gross underestimate yet no action was taken in the interim to correct this critical error.

Defendants do agree that an efficiency factor of 0.5 is appropriate and should be applied to the consumption rate “to account for consumptive and other losses” as stated in their Hydrographic Survey Report. Consumptive losses incurred in livestock watering are significant and can result from a variety of factors including, but not limited to: spillage during drinking; evaporation and soil infiltration; intentional drinker overflow to maintain water quality and/or to prevent freezing; unintentional overflow during freezing; trough cleaning and maintenance; water distribution system failures and leaks; and wildlife consumption. This efficiency factor was not intended to compensate for mistakes, errors and/or underestimates of actual water consumption by cattle, and nor should it be.

Defendants are prepared to accept an estimate of historic livestock water usage at Well No. 10A-5-W06 that is based upon best available knowledge and defensible assumptions. Specifically, Defendants have sought to use the water consumption rates for cattle of different classes and sizes as outlined by the National Research Council. Heretofore, the Plaintiffs have resisted this approach and, should they prevail, may set an unjustifiable precedent for the adjudication of water rights throughout the State of New Mexico. It is unfair that any user in the Zuni River Basin be denied their due measure of water rights simply because it is now inconvenient for the Plaintiffs to correct errors in their methodology.

#### Domestic Usage

With respect to domestic use, and in the interest of reaching a settlement with the Plaintiffs, Defendants have been prepared to accept an offer of beneficial use of 0.7 acre-feet per year from Well No. 10A-5-W06 for domestic purposes.

During the July 17, 2007 consultation meeting, Defendants provided information justifying beneficial domestic use of up to 3.0 acre-feet per year. In fact, during the years 2007 through 2009, Defendants did use quantities of water exceeding 0.7 acre-feet per year. This was largely a result of irrigating a Western Wheatgrass seed production field planted in consultation with the U.S. Department of Agriculture, Natural Resources Conservation Service; the harvested seed could then be employed in rehabilitating the land. Irrigation usage was gauged by tracking the bulk volume and frequency of watering from a 15,000 gallon water storage tank; no water meter exists on Well 10A-5-W06 and, thus, precise usage data is not available for audit.

Several factors have resulted in a curtailment of irrigation of this field in recent years. Foremost has been the threat of wildland fire. The 15,000-gallon bulk storage tank represents a source of water that can be used for initial fire-fighting response. In the interest of protection of private property and life safety, Defendants have been reluctant to significantly draw down this reservoir, even briefly, while this fire threat persists. Smoke alarms at Defendant's residence have actuated several times during periods of heavy smoke from regional wildland fires and their actuation has been a periodic reminder of this risk.

Defendants understand that the 0.7 acre-feet per year allocation for domestic purposes is not an absolute limit but could be raised, with justification, if future use requires such. This would be accomplished through the existing permit process. Defendants request that any such future increase in permitted use carry the same priority date as the point of diversion, in this case 1955.