

# **Attachment 1**

after an unreasonable period of non-use. *Montgomery*, 2007-NMSC-002, ¶ 32, 141 N.M. 21, 150 P.3d 971, 980-981 (N.M. 2006). In *South Springs*, the presumption was held to arise after a 32-year period of non-use. *South Springs*, 452 P.2d at 480. And once the presumption arises, “the burden shifts to the holder of the right to show the reasons for nonuse.” *Id.*, at 482.

Here, Defendants readily admit that Atarque Lake and any related historic, beneficial use of water ended no later than 1972 with the destruction of the dam. Defs.’ Motion at 2, Undisputed Fact #2.<sup>24</sup> That means the period of non-use for any presumed Atarque Lake water right has run for not less than 43 years, 11 years beyond the period of non-use held in *South Springs* to establish a rebuttable presumption of abandonment. The 43-year period of non-use operates to place upon the Defendants the burden “to show the reasons for nonuse.”

Despite this burden, Defendants give no reasons for nonuse. Defendants expend considerable effort in their Motion attempting to establish that the operative period of non-use extended for only the “7 or 8 year” period between 1971 and 1978 after the dam’s destruction but prior to Defendants’ acquisition of Atarque Ranch. Defs.’ Motion at 11-16. It is for this period of time only that Defendants contend “there is no explanation of non-use,” *id.* at 11-12. For the period of their own ownership, Defendants claim an intention never to abandon or relinquish any water rights from Atarque Lake. Defs.’ Motion at 2, Undisputed Facts #4 through 8. In two affidavits, Defendants baldly assert this lack of intentionality. *See* Defs.’ Motion - Exhibits 5 and 6. Indeed, the affidavits lack any facts buttressing the claimed intention. For

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<sup>24</sup> The United States has been unable to pinpoint precisely when the dam impounding Atarque Lake was destroyed. The 1972 USGS map “Atarque Lake, N. Mex.” attached to the Shoenfeld declaration reveals that the Atarque Lake area labeled “Dry Lake” under the map’s symbols and the dashed blue lines around the lake indicate indefinite or unsurveyed boundary. Attachment D – Turnbull Affidavit at ¶ 24 and Exhibit 2. As stated on the map itself, the topography of the lake was done by photogrammetric methods from 1971 aerial photography and field checked in 1972. Therefore, the dam was destroyed sometime before 1971 when photographs were taken. Nevertheless, for purposes of this Cross-Motion, the United States does not dispute the assertion first made in the Shoenfeld declaration that the dam was destroyed by 1972.