UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

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-2-0098**

REPLY ON CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff United States of America ("United States") submits this Reply on its Cross-Motion (Doc. 3076) and Defendants' Response (Doc. 3093) thereto.

I. INTRODUCTION

As has been true for every other subfile action, Plaintiffs presented Defendants with a proposed Consent Decree that included water rights corresponding to the historic beneficial uses of water that could be identified for Atarque Ranch. Cross-Motion at 2. Defendants were not bound to accept Plaintiffs' stipulation, but Plaintiffs' stipulation became the starting point for determining Defendants' water rights in this dispute. Indeed, any defendant may try to establish entitlement to additional water rights; however, for any disputed water right, a defendant must prove each element of the water right. *Order* (Aug. 28, 2014) (Doc. 2985) at 4; *Proposed Findings and Recommended Disposition* (May 27, 2015) (Doc. 3049) at 4. Defendants filed their Subfile Answer (Doc. 2925) and specifically defined the dispute between the parties.

Defendants' trial burden is central to the Court's summary judgment analysis. Because Defendants bear the burden of proof, the United States is entitled to judgment if it can "(1) provid[e] affirmative evidence negating an essential element of [Defendants'] claim or (2) show [ ] the Court that [Defendants'] evidence is insufficient to demonstrate an essential element of [Defendants'] claim." Doc. 3049 at 3 (citation omitted). Once the United States carries its burden, summary judgment is proper if Defendants fail to identify sufficient evidence to establish the elements essential to their case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Three areas of dispute exist between the parties. First, Defendants contest the water rights associated with 21 of the 26 wells identified in the Hydrographic Survey. *See* Cross-Motion at 3-4.[1] Second, Defendants assert water rights associated with natural springs and depressions. *See id.* at 4-5. Third, Defendants assert a substantial water right associated with Atarque Lake. *See id.* at 5-6. In its Cross-Motion, the United States explained that Defendants failed to provide evidence of essential elements of each claimed water right in dispute and thus could not meet their burden. In their Response, Defendants continue to insist that their declarations are irrebuttable proof and all the evidence they need to establish all elements of the water right for Atarque Lake, the 21 disputed wells, and Canyon Springs. Response at 14, 17, and 23-24 and Exhibits 1-13, 15-21, and 24. For the remaining disputed natural springs and depressions[2] identified in the Cross-Motion, Defendants claim that their minimal factual assertions are sufficient to establish a water right and defeat summary judgment. *See id.* at 14-16

[1] Defendants claim that the United States has failed to identify the 21 disputed wells, "thus making it impossible" for Defendants "to formulate a meaningful response." Response at 23. Defendants' claim is not credible. *See* Cross-Motion at 3 n.3 (identifying the disputed wells in detail). Defendants' claim is particularly remarkable given that Defendants first specified the disputed wells. Subfile Answer at 2-13 (Doc. 2925).

[2] Defendants concede that 5 springs and 7 depressions identified in the Subfile Answer (at 72-73 ¶¶ II.C.1-3, E.1 and E.2; at 74-76 "Stock Tanks" ¶ 2-6, 10 and 12) are all natural unimproved water features. Response at 14-17 ¶ 8.

and Exhibits 13 and 27.[3]

As explained below, Defendants have failed to identify sufficient admissible evidence to establish essential elements to the few water rights that remain in dispute. Finally, the United States will correct Defendants' substantial mischaracterizations concerning Atarque Lake.

II. DEFENDANTS ARE NOT ENTITLED TO ANY PRESUMPTION.

The only evidence on which Defendants rely for their water right claims to Atarque Lake, the 21 disputed wells, and Canyon Springs are presumptions that purportedly attach by NMSA 1978, § 72-1-3 (Atarque Lake and Canyon Springs) and § 72-12-5 (21 disputed wells). Response at 14 (Canyon Springs), 17 (Atarque Lake), and 23-24 (21 wells). Both statutes permit a water user to make a declaration detailing very specific information. If a water user provides the required information, the contents of the declaration may be used as *prima facie* evidence.

Defendants' argument is captured by their statement: "[t]he declaration itself is the proof." Response at 17. Defendants wrongly assume that they have met the statutes' requirements and misapprehend the legal effect of presumptions. Their argument fails.

As detailed in the Cross-Motion, the Shoenfeld declaration did not provide the information required by § 72-1-3 and no presumption can attach. Cross Motion at 25-27. Defendants give no defense to the United States' argument; Defendants do no more than to parrot "The declaration itself is the proof." Response at 17. Defendants have not met the requirements of §72-1-3 and have not carried their burden to identify sufficient admissible evidence to establish essential elements necessary to establish a water right for Atarque Lake.

[3] In the Response, Defendants erroneously refer to "Exhibit 14" as a declaration for Canyon Springs. The Canyon Springs Declaration referred to in the Response appears to have been attached as "Exhibit 27."

The same is true for the Canyon Springs claim. The Canyon Springs declaration is remarkably similar to the Shoenfeld declaration and does not provide the information required by § 72-1-3. Specifically, Defendants' vague claim of first applying water "before March 19, 1907" (Response Exhibit 27 at 2 ¶6) does not meet the statute's requirement and appears to be little more than a transparent attempt to avoid the need to produce a water right permit. *Cf.* Cross-Motion at 27 n.18. Defendants have not met the statute's requirements and have not carried their burden to identify sufficient admissible evidence to establish essential elements necessary to establish a water right for Canyon Springs.

The same is true for the 21 disputed wells. Again, the 21 well declarations are remarkably similar to the Shoenfeld declaration and do not provide the information required by § 72-12-5. Notably, none of these well declarations specify "the date of first application to beneficial use." Instead, they vaguely assert no more than beneficial use sometime "before 1954." Response, Exhibits 1-13; 15-21; and 24 at 2 ¶ 7. Defendants have not met the statute's requirements and have not carried their burden to identify sufficient admissible evidence to establish essential elements necessary to establish water rights for the 21 disputed wells.

In sum, Defendants fail to meet the requirements of NMSA 1978, § 72-1-3 and § 72-12-5 to trigger any presumption. As such, Defendants present no evidentiary basis for these disputed water right claims, no material facts remain in dispute, and the United States is entitled to judgment as a matter of law.

III. THE DECLARATIONS HAVE BEEN REBUTTED.

Even if the Defendants' declarations satisfy the requirements of the statutes triggering *prima facie* evidence, such evidence has no evidentiary value once rebutted.

> Section 72–1–3 merely provides that the declarations "shall be prima facie evidence of the truth of their contents." A "prima facie" showing merely establishes the fact if not rebutted. . . . At most, admission of such declarations would satisfy Appellants' burden of going forward; it would satisfy Appellants' burden of proof only if not rebutted by the state.

State ex rel. Martinez v. Lewis, 882 P.2d 37, 40 (N.M. Ct. App. 1994) (citations omitted). Once rebutted, such a permissive presumption does not prevent the Court from entering summary judgment. *See Montgomery v. N.M. State Eng'r*, 114 P.3d 339, 347-48 (N.M. Ct. App. 2005) (rebutted declarations "are insufficient to create an issue of fact because they are insufficient to satisfy any burden of proof") (citation omitted), *rev'd in part on other grounds*, 150 P.3d 971 (N.M. 2006). The United States has rebutted any *prima facie* evidence that might arise under statute by establishing that Defendants' declarations were without factual basis. No evidence exist to support any of the critical factual allegations made in the declarations when such allegation must necessarily either be support by such material or have no factual support at all.

In the Cross-Motion, the United States exhaustively addressed the contents of the Shoenfeld declaration, Defendants' exclusive evidentiary basis for their Atarque Lake claim; no documents or evidence exist to support critical elements of that claim. Cross-Motion at 22-27. The United States will not repeat that argument here, but will only add that the Response offers no additional documentation to support the claim, Defendants stand firm on the unsupported "proof" of the declaration alone, and they make no attempt to address the United States' argument in the Cross-Motion. Response at 17. Without evidence to support the factual allegations of the Shoenfeld declaration, the United States has revealed the declaration for what it is: bald, unsupported allegations without factual basis.

Likewise, the United States has established that the 21 declarations that are the

foundation for the 21 disputed wells are also unsupported with documentation or evidence. Cross-Motion at 13-18.[4] Such allegations, made in 2003 and dating back "before 1954," must necessarily either be support by such material or have no factual support at all. In their Response, Defendants do no more than mechanically state that their declarations are their proof, Response at 23-24, and ignore the fact that their allegations and critical elements of their water right claims are wholly unsupported. Without evidence to support the factual allegations of the declarations, the United States has revealed the declarations for what they are: bald, unsupported allegations without factual basis.

The same is true for the claimed Canyon Springs water right. Defendants again rely solely on the "proof" contained in the declaration. The claim lacks any documentary support and Defendants' discovery responses confirm this. During discovery, Plaintiffs specifically inquired:

Interrogatory No. 5 – In their [Subfile Answer], Defendants asserted water rights associated with springs. For each water right associated with a spring and asserted by Defendants, identify all documents that relate to or reflect the beneficial use of water from each spring in dispute.

Interrogatory No. 7 – For each spring for which a water right is claimed by Defendants … , identify all documents that support Defendants' claim to a "priority before March 19, 1907" for each spring and that establish such priority.

Defendants responded:

ANSWER TO INTERROGATORY NO. 5 - Alam report and GoogleEarth photographs contained in it; photographs, which have been temporarily misplaced, and will be provided to you as soon as they are located.[5]

[4] The one notable exception concerns the "Highway Well," designated 10B-2-W04 in the Hydrographic Survey, for which Defendants provided detailed pumping records. *See* Subfile Answer at 6; Cross-Motion at 11.

[5] The "Alam report" refers to the expert report of Donald A. Alam disclosed by Defendants, which principally concerned itself with the location and dimensions of stock ponds. As stated in the Cross-Motion, the parties have resolved their dispute with respect to stock ponds. Cross Motion at 2. The report indicates no more than that two springs exist with identification numbers corresponding to those identified in the Hydrographic Survey: 9C-4-SPR02 (Canyon); 10-A-4SPR01 (Jaralosa). Mr. Alam provides no analysis or opinion for these springs.

ANSWER TO INTERROGATORY NO. 7 - Declarations either filed at or attempted to be filed at the office of the State Engineer of New Mexico, to wit: all documents identified as submitted in response to Request for Production No. 2[6]; in addition the 1934 homestead documents and the 1936 aerial photographs, also submitted herewith.

Again, Defendants' discovery responses establish that the declaration is Defendants' only evidence of a water right for Canyon Springs; Defendants offer no other relevant documentation to establish the priority, water quantity, and beneficial use for the claimed right. Response at 14 ¶ 8. Without evidence to support the factual allegations of the declaration, the United States has revealed the declaration for what it is: bald, unsupported allegations without factual basis.

The United States has squarely rebutted any presumption that might arise from the contents of these declarations and, as such, the declarations cannot create an issue of fact that defeats summary judgment.

IV. NO MATERIAL DISPUTE REMAINS CONCERNING THE SPRINGS AND NATURAL DEPRESSION CLAIMS

The United States established that the 4 disputed springs and the 10 disputed depressions were in fact natural, unimproved water features that did not warrant a water right. Cross-Motion at 22-23 and Attachment C at 2 ¶8. In response, Defendants largely concede this issue. Response at 17. Nevertheless, Defendants contend that several water features identified have been sufficiently improved and are thus entitled to a water right.

The first is Jaralosa Springs, 10A-4-SPR01, which Defendants claim is sufficiently improved with a surplus rocket fuel tank, two watering troughs placed nearby, and piping. *Id.* at 14-15.[7] The second is Los Alamos Springs, where Defendants claim excavation occurred. *Id.* at

[6] In response to Plaintiffs' Request for Production of Documents No. 2, Defendants disclosed the declarations, which Defendants now assert are the only evidence of the existence of each declarations' contents.

[7] Of course, Defendants also contend that they are entitled to a water right associated with Canyon Springs based exclusively upon the declaration prepared by Defendants' counsel in 2004. Response at 14 ¶ 8. This claim has been

15. Third, Defendants assert that three depressions claimed in the Subfile Answer (at 75 ¶ 8 and 76 ¶ 9) are "excavated and bermed tanks." Response at 15-16 and 16-17. When the allegations raised in the Response are examined along with the Subfile Answer and other evidence of record, it becomes clear that Defendants have not met their burden and cannot established the elements of a water right based on historic beneficial use (priority, quantity, use, period of use, and place of use) for these water features.[8]

For both Jaralosa and Los Alamos Springs, Defendants assert a priority of "before March 19, 1907." Subfile Answer at 71 and 72. In addition, for Jaralosa Springs Defendants claimed an indeterminate water right quantity of an "amount required to keep Stock Pond 10A-4-SP01 filled 365 days per year." *Id.* at 71 ¶ B. For Los Alamos Springs Defendants claim a specific quantity of water: ".50 acre feet per annum." *Id.* at 72 ¶ D. Yet, despite Plaintiffs' specific discovery requests, Defendants disclosed not a scintilla of evidence that supports any water use from these springs,[9] much less evidence of beneficial use of the quantities claimed spanning more than a century. Therefore, even if any man-made works are found at or near each spring, Defendants simply cannot establish a water right.

For the three depressions that remain in dispute, it is simply too little, too late for Defendants to do no more than now claim that the depressions were "excavated." First, Defendants' affiant, Darrell Brown, recites that the depressions are "excavated" and "bermed."

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sufficiently addressed in the Cross-Motion at 22-23 and Sections II and III, *supra.*

[8] Remarkably, Defendants also now claim a water right for fourth stock pond, neither previously claimed nor revealed in this proceeding located somewhere "near the ranch headquarters." For this stock pond described for the first time in the Response, Defendants simply cannot assert additional water rights claims at this juncture of the proceedings. The Court should summarily reject out of hand this never-before-revealed water right claim.

[9] The pre-1907 surface water right claims associated with Jaralosa Spring and Los Alamos Spring were not supported by any declaration whatsoever. Therefore, NMSA 1978, § 72-1-3, has no bearing on these springs.

Response at Exhibit 26 ¶¶ 3, 4, and 5. Mr. Brown provides no supporting details about the nature and timing of the work and no image of the purported excavations that would lend support to Mr. Brown's bare allegations. In fact, the only other evidence in the record regarding these depressions contradicts Mr. Brown's statement. That evidence, attached to this Reply as Attachment G, are "GoogleEarth" images of the three depressions disclosed to Plaintiffs in the Alam report. The images reveal no area that could be described as "excavated" and "bermed." Second, although Defendants assert a priority of "before 11/15/1936" for these depressions, Subfile Answer at 75 ¶8 and 76 ¶ 9, Defendants offer not a scintilla of evidence to support any claim of beneficial use, much less one spanning back "before 11/15/1936." Therefore, even if now claim that they have been "excavated" and "bermed", Defendants cannot establish a water right for these depressions.

V. ANY ATARQUE LAKE RIGHT HAS BEEN ABANDONED

The United States established that Defendants have not and cannot prove the existence of a water right associated with Atarque Lake. Cross-Motion at 23-33. Alternatively, the United States established that even if Defendants could establish an Atarque Lake water right, such a right was abandoned long ago. *Id.* at 33-37. Defendants take up abandonment and proceed to rely on a couple of arguments that are either wrong or inaccurate – two issues are below.

A. Defendants Have No Justification for the 43-Year Period of Nonuse.

The initial burden to establish abandonment is on the party that asserts it (here the United States). However, "[a] presumption of an intent to abandon is created by 'evidence of the failure of the party charged to use the right, or the water, or to keep the works necessary for the utilization of the water in repair' for an unreasonable period." *Montgomery v. Lomos Altos, Inc.*,

150 P.3d 971, 980-81 (N.M. 2006) (quoting *State ex rel. Reynolds v. South Springs Co.*, 452 P.2d 478, 480 (N.M. 1969) (in turn quoting 2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights*, § 1116, at 2012 (2d ed.1912)). Once the presumption arises, "the burden of proof shifts to the holder of the right to show the reasons for nonuse." *South Springs*, 452 P.2d at 482. On this points, New Mexico law is crystal clear. Yet, Defendants do not explain nonuse of 43 years; instead, they engage in misdirection.

Defendants argue in their Response:

> In New Mexico the law respecting the intent required to give rise to an inference of abandonment is that:
>
> > ***where by clear and convincing evidence it is shown that for [1] an unreasonable time [2] available water [3] has not been used, an intention to abandon may be inferred [4] in the absence of proof of some fact or condition excusing such nonuse. ***STATE EX REL. REYNOLDS V. SOUTH SPRINGS CO., 1969-NMSC-023, 80 N.M. 144, 452 P.2d 478 (S.Ct. 1969). [Bracketed numbers added.]

Response at 18. On the basis of this quote alone, Defendants claim that "[t]he requirements for an inference of abandonment are not here present" because the United States has not established the four conditions identified by Defendants in the quoted passage. *Id.*

Defendants badly mischaracterize quote from *South Springs* and the case's holding. Defendants present the above-quoted text as an original quote from the New Mexico Supreme Court. In fact, the text originated from a Colorado case (*Commonwealth Irr. Co. v. Rio Grande Canal Water Users' Ass'n*, 45 P.2d 622 (1935)) that was one of a number of cases discussed by the New Mexico Supreme Court as support for the holding. Defendants' claim that *South Springs* imposes a four-element burden of proof to trigger the presumption of abandonment is not credible. The court held: proof of nonuse for an unreasonable period establishes a

presumption of abandonment and is *prima facie* proof thereof. *South Springs*, 452 P.2d at 482.

No dispute exists that water from Atarque Lake has been unused for 43 years - since 1971. This period of time is *per se* unreasonable given the New Mexico Supreme Court's conclusion in *South Springs* that a 32-year period of nonuse gives rise to the presumption of abandonment. *Id.* at 480. The United States having squarely established the presumption, Defendants may only rebut it by establishing "not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse." *Id.* at 482 (quoting *Mason v. Hills Land & Cattle Co.*, 204 P.2d 153 (1949)). Yet, Defendants offers no reason for the nonuse at all and rely instead on bald statements that Defendants never intended to abandon anything since they bought Atarque Ranch. Response at 6.

B. Defendants Disclosed and Relied on Mr. Fields' Testimony.

The evidence in the record establishes that the dam was intentionally destroyed to rid Atarque Ranch of a nuisance. Cross-Motion at 35-37. The source of this evidence is a statement collected by Joseph H.M. Fields in 2004 during his investigation of the Shoenfeld declaration. Mr. Fields reported that he was informed by Defendants' ranch manager that the dam had been intentionally destroyed. *See* Cross-Motion at 35-36. Although Defendants do not deny that Mr. Fields had the reported conversation with the Atarque Ranch manager, Defendants claim that Mr. Fields testimony it is not "in the record" and is inadmissible hearsay. Response at 4–5 ¶ 2.

Defendant's claim is perplexing. During discovery Plaintiffs inquired:

Interrogatory No. 10 – For the [Atarque Lake claim] identify all documents that relate to or reflect the circumstances under which the earthen impoundment or dam creating Atarque Lake was destroyed.

Defendants responded:

ANSWER TO INTERROGATORY No. 10: [….] Defendant identifies the following documents: Deposition of Joey Fields, office of the State Engineer of New Mexico, taken November 14, 2005. [ ]. Beyond whatever is reflected in those documents, Defendants do not know of any such documents.

Further, in response to Plaintiffs' discovery requests to produce records on which their interrogatory responses relied, Defendants provided Plaintiffs with a copy of the deposition to which they referred in their interrogatory answer. Although the Fields testimony is thoroughly damaging to the Atarque Lake claim, it was, in fact, Defendants who took Mr. Fields deposition in 2005, who brought this material into the record of this case, and who identified Mr. Fields' statements as the *only* evidence in their possession concerning the destruction of the dam. In the end, Defendants have no basis for complaint.

The ability of this Court to consider the Fields material is beyond dispute and Defendants' hearsay claims ring hollow. Response at 5 ¶ 2. That the deposition testimony might constitute hearsay does not exclude its consideration at this stage of the proceedings. *See* Doc. 3049 at 3 (evidence supporting a summary judgment motion may "constitute hearsay, provided that the information can be presented in another, admissible form at trial, such as live testimony") (citations omitted). Here, were Mr. Fields' testimony presented at trial, his statements would be admissible under Fed. R. Evid. 801(d)(2) (An Opposing Party's Statement).

VI. CONCLUSION

No material fact remains in dispute and the United States is entitled to judgment as a matter of law. The Court should enter judgment in favor of the Defendants for the water rights described in the Cross-Motion at Attachment A and against Defendants for all other claimed water rights that remain in dispute.

Respectfully submitted this 30th day of September 2015.

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CERTIFICATE OF SERVICE

On September 30, 2015, the foregoing was filed electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.

__/s/ Andrew "Guss" Guarino_____