

I. INTRODUCTION

At the center of the parties' dispute is a single domestic well serving a house on the Zwigarts' property. Consistent with this Court's *Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 1, 2, and 3 (Excluding Ramah) of the Zuni River Stream System*, No. 01cv0072 BB/WDS-ACE, Doc. 838 (D.N.M. Sept. 28, 2006) ("Sub-Areas 1, 2, and 3 Order"), Plaintiffs prepared and presented the Zwigarts with a proposed Consent Order concerning the water rights associated with their property. The proposed Consent Order (**Attachment A**) constitutes the extent to which Plaintiffs have offered to stipulate. The proposed Consent Order describes the attributes of the proposed water right for the single well as follows:

WELL

Map Label: 3C-5-W044

OSE File No: G 01678

Priority Date: 8/6/1990

Purpose of Use: NON 72-12-1 DOMESTIC

Well Location: As shown on Hydrographic Survey Map 3C-5

S. 29 T. 11N R. 15W 1/4, 1/16, 1/64 NE NW NW

X (ft): 2,541,270 Y (ft): 1,514,645

New Mexico State Plane Coordinate System, West Zone, NAD 1983

Amount of Water: 0.7 ac-ft per annum

On June 25, 2015, counsel for Plaintiffs engaged in a telephonic consultation with the Zwigarts that did not result in a stipulation. The United States subsequently

filed a *Notice That The Consultation Period Has Ended*, Doc. 3078 (Aug. 28, 2015). The Zwigarts then timely filed their *Subfile Answer*, Doc. 3096 (Sept. 18, 2015) (“Subfile Answer”). In their Subfile Answer, the Defendants alleged in relevant part:

I object to the changes you are making to the original State allotment of 3 ac-ft per annum which was more than adequate for family use for inside and outside. You are decreasing to .7 ac-ft which may only be adequate for a small family of 4 or 5 inside only. The ability to raise any livestock or have a garden may be impossible. I feel that this is taking away rights that we have paid and worked for. Definitely Not The American Way. I also do not believe your assessment of usage.

...

We still feel that your proposal is not fair to the public. A 2 – 3 ac-ft [sic] would be more acceptable to most people so they could have their livestock and gardens. Then if a restriction on usage would be necessary, most people would cooperate. When you dictate what we are going to do, cooperation will be much harder to get.

II. APPLICABLE LEGAL STANDARD

Fed. R. Civ. P. 12(c) provides: “After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” In this subfile proceeding, the Plaintiffs’ proposed Consent Order and the Zwigarts’ Subfile Answer represent the “pleadings” as that term is used in Fed. R. Civ. P. 7(a). *See* Sub-Areas 1, 2 and 3 Order at 3-5 (describing the generation and service of Consent Orders); at 5-7 (describing the process and requirements for filing a subfile answer); *Selman v. Delta Airlines*, Civ 07-1059 JB/WDS, 2008 WL 6022017, *7 (D.N.M. Aug. 13, 2008) (describing the distinction made in Rule 7 between pleadings and motions). “A rule 12(c) motion is designed to provide a means of disposing of cases when the material facts are not in dispute between the parties.” *Peña v. Greffet*, — F. Supp. 3d. —, —,

No. CIV 12-0710 JB/KBM, 2015 WL 3860084, *8 (D.N.M. June 17, 2015) (citing *Kruzits v. Okuma Mach. Tool, Inc.*, 40 F.3d 52, 54 (3d Cir. 1994)).

“Any party may move for judgment on the pleadings if no material facts are in dispute and the dispute can be resolved on both the pleadings and any facts of which the Court can take judicial notice.” *Ramirez v. Wal-Mart Stores*, 192 F.R.D. 303, 304 (D.N.M. 2000) (citing Rule 12(c)). Because a motion for judgment on the pleadings “is generally treated in the same manner as a Fed. R. Civ. P. 12(b)(6) Motion to Dismiss, . . . [t]he court accepts all well-pleaded allegations of the non-moving party as true and views all facts in a light most favorable to the non-moving party.” *Ramirez*, 192 F.R.D. at 304 (citing *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 644 (2d Cir. 1998) and *Fajardo v. Cty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999)). The Court should grant a motion for judgment on the pleadings “if the pleadings demonstrate that the [United States] is entitled to judgment as a matter of law.” *Peña*, — F. Supp. 3d. at —, 2015 WL 3860084, *8 (citing *Ramirez*, 192 F.R.D. at 304).

III. ARGUMENT

Plaintiffs and the Zwigarts do not dispute any facts material to the determination of the water right associated with the Zwigarts’ property in the Zuni River Basin. The Zwigarts only dispute the amount of water to which they are entitled for their domestic well. They do not dispute any other elements of the water right as proposed by Plaintiffs in the Consent Order. Even viewed in a light most favorable to the Zwigarts, the Subfile Answer raises no factual or legal issues on the basis of which the Zwigarts could possibly establish an entitlement to a water right greater in quantity than that offered by the Plaintiffs. On the only two legal issues raised in the Subfile Answer, as discussed below, the United States is entitled to judgment as a matter of

law.

A. The Zwigarts' Objection To The Basin-Wide Standard For Domestic Wells Is Without Merit

The Zwigarts first complain that the Plaintiffs have offered a quantity of water for the well—0.7 acre-feet per annum—that represents a significant decrease from “the original State allotment of 3 acre-feet per annum.” Subfile Answer at 1. As the Court is aware, it was long ago established in this adjudication that, for domestic wells in the Zuni River Basin, Plaintiffs would offer water rights claimants “the higher of 0.7 acre-feet per annum, or an amount equivalent to historical beneficial use.” *Memorandum Opinion and Order*, No. 01cv00072-BB-ACE, Doc. 733 at 1-2 (D.N.M. June 15, 2006). The Court endorsed this approach because “New Mexico law is clear on the subject . . . that beneficial use defines the extent of a water right.” *Id.* at 4. Put another way, the Zwigarts, like every other domestic water user in the Basin, are not entitled to a water right of 3 acre-feet per annum for their well simply because the permit they obtained from the New Mexico Office of the State Engineer entitled them to develop a water right up to that amount.

On the contrary, the Zwigarts would have to first allege and then establish that they are entitled to a water right for their well greater than 0.7 acre-feet per annum based exclusively on historic beneficial use. *See Order*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0098, Doc. 2985 at 4 (D.N.M. Aug. 28, 2014) (“to the extent that any water right is disputed, Subfile Defendants generally bear the burden of proof in the first instance with respect to the disputed water right”); *Proposed Findings and Recommended Disposition*, No. 01-cv-0072 MV/WPL, Subfile ZRB-2-0014, Doc. 3049 at 5 (D.N.M. May 27, 2015) (“The burden is on the [Subfile Defendants] to justify a water right above that which was offered by the

Plaintiffs.” (citing Doc. 2985 at 2-3)). In their Subfile Answer, the Zwigarts do not allege that they, or any of their predecessors-in-interest, have used a quantity of water in excess of 0.7 acre-feet per annum at any time in the past. Instead, Defendants merely express their general dissatisfaction with the offer contained in the proposed Consent Order. In New Mexico, only “beneficial use defines the extent of a water right.” Mem. Op. Doc. 733 at 4. Thus, the Zwigarts’ general dissatisfaction with Plaintiffs’ offer does not, and cannot, serve as a lawful basis to establish their water right.

B. The Zwigarts’ Future Needs Are Not Relevant To The Determination Of The Water Right

The Zwigarts also contend that their “ability to raise any livestock or have a garden may be impossible” in the future if their right to use water from their well is limited to 0.7 acre-feet per annum. Subfile Answer at 1. In other words, the Zwigarts anticipate that at some point in the future they may attempt to raise livestock or plant a garden. They are concerned that 0.7 acre-feet of water per annum will be insufficient to meet their possible future water needs. Such a declaration—that, at some future date, they could need more than 0.7 acre-feet per annum to meet their water needs—is antithetical to the beneficial use standard established under New Mexico law. Indeed, this Court, in response to similar arguments regarding “future need,” previously has ruled that “mere intention . . . does not . . . establish historic domestic use.” Proposed Findings, Doc. 3049 at 8. *See id.* at 10-11 (“Mere assumption is insufficient to establish a water right.” (citing *State v. Aamodt*, No. Civ. 66-6639 MV/WPL, Subfile PM-67833, Doc. 8119 at 6 (D.N.M. Feb. 24, 2014))); and at 11 (“a substantial increase in a water right cannot be justified by mere speculation”).

Even accepting all of the statements in the Zwigarts' Subfile Answer as true and viewing them in the most favorable light to them, the Zwigarts state no factual or legal circumstances that can be construed to entitle them to a water right for their domestic well greater than the amount that Plaintiffs have offered in the proposed Consent Order.

IV. CONCLUSION

WHEREFORE, based upon the foregoing argument and authority, Plaintiffs respectfully requests that the Court enter an order granting judgment on the pleadings in favor of the United States and against the Zwigarts consistent with the rights set forth in the proposed Consent Order.

DATED this 14th day of October, 2015.

Electronically Filed

/s/ Andrew "Guss" Guarino
Andrew "Guss" Guarino
U.S. Department of Justice
South Terrace, Suite 370
999 18th St.
Denver, CO 80202
(303) 844-1343

Bradley S. Bridgewater
U.S. Department of Justice
South Terrace, Suite 370
999 18th St.
Denver, CO 80202
(303) 844-1359
COUNSEL FOR THE UNITED STATES

AND

/s/ Edward C. Bagley
Edward C. Bagley
Special Assistant Attorneys General
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150
COUNSEL FOR THE STATE OF NEW
MEXICO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 14, 2015, I filed the foregoing electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing. In addition, I served Defendants Larry and Dianne Zwigart by first class mail at the address below.

Larry and Dianne Zwigart
168 Donaldson Road
Gibsonia, PA 15044

/s/ Andrew "Guss" Guarino