

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

UNITED STATES OF AMERICA	)	
and	)	No. 01cv00072-MV-WPL
STATE OF NEW MEXICO, ex rel.	)	
STATE ENGINEER,	)	ZUNI RIVER BASIN
	)	ADJUDICATION
Plaintiffs,	)	
	)	
v.	)	
	)	<b>Subfile No. ZRB-2-0098</b>
A & R PRODUCTIONS, et al.	)	
	)	
Defendants.	)	
_____	)	

**STATE’S RESPONSE TO THE COURT’S ORDER FOR  
SUPPLEMENTAL BRIEFING (Doc 3190) REGARDING  
THE APPLICABILITY OF FORFEITURE**

At the Court’s direction, the State presents this brief regarding the applicability of forfeiture to the claim of water rights within Atarque Lake.

Since 1907, water right forfeiture in New Mexico has been governed by statute, which has consistently required a four year period of nonuse. Laws 1907, ch. 49; § 42. The original forfeiture statute stated:

When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, except the water for storage reservoirs, for a period of four years, such unused water shall revert to the public and shall be regarded as unappropriated public water.

*Id.*; see also NMSA 1978, § 72-5-28 (2002) (current statute). The water right forfeiture statute was amended in 1965 and thereafter required notice of forfeiture to be issued by the State Engineer before forfeiture could occur. Laws 1965, ch. 250, § 1. (1965). The 1965 amendments stated:

When the party entitled to the use of water fails to beneficially use all or any part of the water claimed by him, for which a right of use has vested, for the purpose for which it was appropriated or adjudicated, except the water for storage reservoirs, for a period of four [4] years, such unused water shall, **if the failure to beneficially use the water persists for one [1] year after notice and declaration of nonuser given by the state engineer**, revert to the public and shall be regarded as unappropriated public water. . . . **Provided further that the condition of notice and the declaration of nonuser shall not apply to water which has reverted to the public by operation of law prior to June 1, 1965 . . .**

*Id.* (emphasis added); *see also*, NMSA 1978, § 72-5-28(A) (same language is in current statute).

However, four years of nonuse prior to 1965 would have caused the water rights to be forfeited as a matter of law, without any notice. Therefore, the question for the court is whether, if a water right ever validly existed, it was forfeited by operation of law by four years of non-use prior to 1965.

Forfeiture is a statutory penalty or punishment for failure to comply with the laws governing water rights. *State of New Mexico ex rel. Reynolds v. South Springs Co.*, 452 P.2d 478, 481 (N.M. 1969); *Erickson v. McLean*, 308 P. 2d 983, 988 (1957) (“Forfeiture is a ‘punishment annexed by law to some illegal act or negligence in the owner of lands . . . whereby he loses all his interests therein.’”) (quoting *Kinney on Irrigation and Water Rights*, Vol 2 (2d Ed.) p. 2020, § 118)). Forfeiture does not present a question of intent; instead, it triggers an involuntary loss of a water right after a 4-year period of non-use. *South Springs*, 452 P.2d at 481 (quoting 2 *Kinney on Irrigation and Water Rights*, 2d ed. 2020-2021 § 1118 (1912)).

The underlying purposes of the forfeiture statute are to prevent waste and the hoarding of water by those who would speculate in the hope of selling water in the future or to create a monopoly. *See, e.g., Yeo v. Tweedy*, 286 P. 970 (N.M. 1929). Forfeiture is consistent with established New Mexico policy to put water to the greatest good for the greatest number of

people. *Id.* at 481.

The law in New Mexico governing water rights is that “[b]eneficial use shall be the basis, the measure[,] and the limit of the right to the use of water.” N.M. Const. art. XVI, § 3; NMSA 1978, § 72-1-2 (1907). “It is the duty of the owner of a water right to comply with the law and the forfeiture of the right occur[s] without regard to the intention” of the owner or his predecessor. *South Springs*, 452 P. 2d at 482 (citing *State ex rel. Reynolds v. Fanning*, 361 P.2d 721 (N.M. 1961)). “Statutory forfeiture follows from and is not inconsistent with prior appropriation doctrine.” *State ex re. Office of State Engineer v. Elephant Butte Irr. Dist.*, 287 P. 3d 324, 329 (N.M. 2012) (holding that early, pre-Constitution water rights were not immune from statutory forfeiture).

Atarque Lake refers to an impoundment of water collected because of a dam built before 1937. Doc 3076 at 5; Doc 3076-3 at ¶¶ 22-26. It is undisputed that the dam was destroyed sometime between 1954 and 1971. Doc 3076-3 at 25. The 2004 Declaration signed by Peter B. Shoenfeld states that the use of the water impounded in Atarque Lake was for recreation, livestock and irrigation, specifically fishing, boating, swimming, stock watering, and irrigation. Doc 3059-2 (filed 6/26/15). The applicability of the forfeiture statute is dependent on the claimed use of the waters of Atarque Lake.

The forfeiture statute excepts “waters for storage reservoirs” from forfeiture actions. NMSA 1978, § 72-5-8. Thus, to the extent that a storage right was established in Atarque Lake to serve beneficial uses outside the lake, the forfeiture statute would not apply to the storage right itself. Storage means that the water is exclusively used for eventual placement to beneficial use outside of the impoundment. However, a storage right is not a water right. Such storage must be closely tied to an underlying water right and beneficial use of water. *Jicarilla Apache Tribe v.*

*United States*, 657 F.2d 1126, 1135 (10th Cir. 1981) (“[For a right to store water], it is essential that there shall have been a beneficial use which is more than speculative.”). A right to store water does not arise simply from the act of impounding water. Thus, any storage right claimed by Defendants would only be tied to beneficial use of irrigation of lands outside of the impoundment area. If the water right that is being served by the storage is forfeited, the storage right does not and cannot stand alone. To the extent that any claimed water right was put to the beneficial use for recreation (boating, swimming, fishing, stock watering), then the absence of water in Atarque Lake would demonstrate no beneficial use, and the forfeiture statute could be applied.

Respectfully submitted this 25th day of February, 2016.

/s/ Edward C. Bagley  
Edward C. Bagley  
Arianne Singer  
Kelly Brooks Smith  
Special Assistant Attorneys General  
P.O. Box 25102  
Santa Fe, NM 87504-5102  
(505) 827-6150  
Attorneys for State of New Mexico

#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 25, 2016, I filed the foregoing 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/ Edward C. Bagley  
Edward C. Bagley