

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

UNITED STATES OF AMERICA and)	
STATE OF NEW MEXICO ex rel. STATE)	
ENGINEER,)	
)	
Plaintiffs,)	
)	
and)	No. 01-cv-0072-MV/WPL
)	
ZUNI INDIAN TRIBE, NAVAJO NATION,)	ZUNI RIVER BASIN
)	ADJUDICATION
Plaintiffs in Intervention,)	
)	
v.)	Subfile No. ZRB-4-0453
)	
A & R PRODUCTIONS, et al.,)	
)	
Defendants.)	
_____)	

**JOINT MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF**

The United States of America and State of New Mexico respectfully move the Court for summary judgment in the above-referenced subfile proceeding. As grounds for relief in support of this Motion, Plaintiffs assert, as more fully set forth below, that the material facts regarding the water rights associated with the real property in the Zuni River Basin owned by Defendant Theodore Broderick are undisputed and Plaintiffs are entitled to judgment as a matter of law declaring that no water rights are associated with the subject property.

Pursuant to D.N.M.LR-Civ. 7.1, counsel for the United States attempted to contact Mr. Broderick to determine his position on this Motion. The United States did not receive a response and assumes that Mr. Broderick opposes the Motion.

I. INTRODUCTION

At the center of the parties' dispute is a single well that Mr. Broderick drilled on his property for the ostensible purpose of serving a house to be constructed for sale. 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 Mr. Broderick with a proposed Consent Order concerning the water rights associated with the well. At the time of presentment, the proposed Consent Order constituted the extent to which Plaintiffs were willing to stipulate. The proposed Consent Order described the attributes of the proposed water right as follows:

WELL

Map Label: 3B-4-W172

OSE File No: G 02744

Priority Date: 9/25/2008

Purpose of Use: DOMESTIC CONSTRUCTION

Well Location: As shown on Hydrographic Survey Map 3B-4

S. 19 T. 11N R. 15W 1/4, 1/16, 1/64 NW NW NW

X (ft): 2,533,589 Y (ft): 1,520,013

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

Amount of Water: Historical beneficial use not to exceed 0.7 ac-ft per annum

Mr. Broderick found the proposed stipulation unappealing and Plaintiffs filed a *Notice That The Consultation Period Has Ended* (Doc. 2780) (May 3,

2012). Mr. Broderick then timely filed an Answer in which he asserted that the proposed stipulation “does not accurately reflect amounts of water that have been placed to beneficial use.” *First Amended Answer and Counterclaim for Declaratory Judgment* (“Subfile Answer”), Doc. 2783 at 2 (May 24, 2012).

Subsequent investigation by Plaintiffs revealed—Mr. Broderick’s objection to the water right offered in the proposed Consent Order notwithstanding—that no water from the well has been put to beneficial use on the subject property. For that reason, the United States and State of New Mexico have withdrawn the proposed stipulation and seek a summary judgment that Mr. Broderick is entitled to “No Right” for the well.

II. APPLICABLE LEGAL STANDARD

Summary judgment is appropriate “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Rule 56(a), Fed. R. Civ. P. The moving party bears the initial burden of “showing ... that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Once the moving party has met this burden, the nonmoving party must identify specific facts that show the existence of a genuine issue of material fact requiring trial on the merits. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The nonmovant must identify these facts by reference to “affidavits, deposition transcripts, or specific exhibits incorporated therein.” *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 671 (10th Cir. 1998). A fact is “material” if, under the governing law, it could have an effect on the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over a material fact is

“genuine” if a rational jury could find in favor of the nonmoving party on the evidence presented. *Id.* Although the record and all reasonable inferences therefrom must be viewed in the light most favorable to the nonmovant, see *Muñoz v. St. Mary-Corwin Hosp.*, 221 F.3d 1160, 1164 (10th Cir. 2000), a mere “scintilla” of evidence is insufficient to successfully oppose a motion for summary judgment. *Anderson*, 477 U.S. at 252.

Even where, as here, the United States and State of New Mexico have moved for summary judgment, “to the extent that any water right is disputed,” the user of the water “generally bear[s] the burden of proof in the first instance with respect to the disputed water right.” *Order*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0098, Doc. 2985 at 4 (D.N.M. Aug. 28, 2014). As a practical matter, then, the burden of persuasion at trial would be on Mr. Broderick. See *Proposed Findings and Recommended Disposition*, No. 01cv00072-MV-WPL, Subfile No. ZRB-2-0014, Doc. 3049 at 3 (D.N.M. May 27, 2015). Accordingly, Plaintiffs carry their summary judgment burden “by either (1) providing affirmative evidence negating an essential element of [Mr. Broderick’s] claim or (2) showing the Court that [Mr. Broderick’s] evidence is insufficient to demonstrate an essential element of [his] claim.” *Id.* (citing *Celotex*, 477 U.S. at 331). In addition, once the United States and State of New Mexico have carried their burden, Mr. Broderick must come forward with sufficient facts to establish that a disputed material fact exists.

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322.

III. STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The real property associated with Subfile No. ZRB-4-0453 is located in the NW¹/₄NW¹/₄NW¹/₄ of Section 19, Township 11 North, Range 15 West, within Sub-areas 1, 2, and 3 (excluding Ramah) of the Zuni River Basin. Declaration of Scott Turnbull (attached hereto as **Exhibit A**), ¶ 3 and Attachment A.

2. In September, 2008, Mr. Broderick submitted to the New Mexico Office of the State Engineer an *Application For Permit to Use Underground Waters In Accordance With Sections 72-12-1.1, 72-12-1.2, or 72-12-1.3 New Mexico Statutes* (“Broderick Application”). Broderick Application (attached hereto as **Exhibit B**) at 1-2.

3. The Broderick Application, which the State Engineer’s Office denominated File Number G02744, sought permission to drill a “[d]omestic well to accompany a house or other dwelling unit constructed for sale” on the real property associated with Subfile No. ZRB-4-0453. Broderick Application at 1, § 3.

4. On September 25, 2008, State Engineer John R. D’Antonio, Jr. approved the Broderick Application, subject to certain “general and specific conditions of approval.” Specific Condition of Approval 06-16 provided: “This permit authorizes the drilling of a well to accompany a house or other dwelling being constructed for sale. Water may only be diverted for activities directly related to the construction of the dwelling that the well will serve.” Broderick Application at 4, ¶ 06-16.

5. Construction of the well authorized by the State Engineer’s approval of the Broderick Application was completed sometime prior to November, 2008. Turnbull Declaration, ¶ 5 and Attachment B.

6. In the *Zuni River Adjudication Hydrographic Survey Report for Sub-areas 1, 2, and 3 (excluding Ramah)*, the well authorized by the State Engineer's conditional approval of the Broderick Application is identified by the hydrographic survey ID number 3B-4-W172 ("Well 3B-4-W172"). Turnbull Declaration, ¶ 4 and Attachment A.

7. Mr. Broderick never constructed a house or other dwelling unit on the real property associated with Subfile No. ZRB-4-0453. Turnbull Declaration, ¶¶ 6-7 and Attachment C.

8. Mr. Broderick has not diverted water from Well 3B-4-W172 for any beneficial use on the real property associated with Subfile No. ZRB-4-0453. Turnbull Declaration, ¶ 7.

IV. ARGUMENT

MR. BRODERICK IS NOT ENTITLED TO A WATER RIGHT FOR WELL 3B-4-W172 BECAUSE HE HAS NOT PUT ANY WATER FROM THE WELL TO BENEFICIAL USE

As this Court has declared repeatedly over the course of this adjudication: "New Mexico state law provides the substantive standards for this adjudication." *Proposed Findings and Recommended Disposition*, No. 01-cv-0072 MV/WPL, Subfile ZRB-5-0014, Doc. 3277 at 3 (D.N.M. June 1, 2016). "The unappropriated water ... is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state." N.M. Const. Art. XVI, § 2. "Beneficial use shall be the basis, the measure and the limit of the right to the use of water." *Id.* § 3. A "beneficial use is determined ... to be the use of such water as may be necessary for some useful and beneficial purpose in connection with the land from which it is taken." *State ex rel. Erickson v. McLean*, 62 N.M. 264, 273, 308 P.2d 983, 988 (1957) (citation omitted). *See also* 19.26.2.7(D) NMAC (defining beneficial use as "[t]he direct use or storage and use of water by man for a beneficial purpose including, but not limited to,

agricultural, municipal, commercial, industrial, domestic, livestock, fish and wildlife, and recreational uses.”). And of particular relevance to the dispute here, the right to develop a water use, embodied in Mr. Broderick’s state well permit, does not itself constitute a beneficial use of water. *See New Mexico v. Trujillo*, 813 F.3d 1308, 1321 (10th Cir. 2016) (a well permit does not create water rights under New Mexico law) (citations omitted).

To sum up, in the words of this Court:

New Mexico law is clear on the subject. The constitutional provision and statutes ... as well as abundant case law clearly state that beneficial use defines the extent of a water right. This fundamental principle is applicable to all appropriations of public waters. Only by applying water to beneficial use can an appropriator acquire a perfected right to that water.

Memorandum Opinion and Order, No. 01cv00072-BB-ACE, Doc. 733 at 4 (D.N.M. June 15, 2006) (citations and quotation marks omitted).

The record before the Court is devoid of any evidence that Mr. Broderick has put water from Well 3B-4-W172 to beneficial use on his property. The undisputed evidence material to the determination of Mr. Broderick’s entitlement to a water right in this subfile proceeding plainly establishes that not a single drop of water from the well has been beneficially used. First, recent aerial imagery reveals that Mr. Broderick never constructed a house on the property, which, according to the Broderick Application and the conditions of its approval, was the sole purpose for drilling Well 3B-4-W172. *See* Turnbull Decl., ¶ 6 and Attachment C. Second, the aerial imagery further reveals no evidence of any water use on the property since the well was drilled. *Id.* And third, in the only pleading that he has filed to date, Mr. Broderick offers only conclusory statements with no factual allegations even suggesting that he has put water to beneficial use on the property. *See* Subfile Answer at 2, ¶ 6(a) (previously proposed Consent

Order “does not accurately reflect amounts of water that have been placed to beneficial use”) and ¶ 6(b) (previously proposed Consent Order “does not reflect the conditions of the well permit”).

In short, the undisputed evidence allows for only one conclusion: Mr. Broderick has put no water from Well 3B-4-W172 to beneficial use. When viewed against the applicable legal backdrop, it thus is clear that Mr. Broderick is not entitled to a water right in any quantity for Well 3B-4-W172.

IV. CONCLUSION

WHEREFORE, based upon the foregoing undisputed material facts, argument, and authority, the United States and State of New Mexico respectfully request that the Court enter an order granting summary judgment in their favor and against Mr. Broderick, declaring that no water rights are associated with the subject property, in the following form:

WELL

Map Label: 3B-4-W172

OSE File No: G 02744

Priority Date: NO RIGHT

Purpose of Use: DOMESTIC CONSTRUCTION

Well Location: As shown on Hydrographic Survey Map 3B-4

S. 19 **T.** 11N **R.** 15W **1/4, 1/16, 1/64** NW NW NW

X (ft): 2,533,589 **Y (ft):** 1,520,013

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

Amount of Water: NO RIGHT

Dated: June 20, 2016

Respectfully submitted,

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 2016, I filed the foregoing JOINT MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF 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. I further certify that on this date I served the foregoing on the following non-CM/ECF Participant via U.S. first class mail, postage prepaid:

Theodore Broderick
P.O. Box 219
Ramah, NM 87321

/s/ Samuel D. Gollis