

FILE

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

FILED  
U.S. DISTRICT COURT  
DISTRICT OF NEW MEXICO

98 JAN 23 PM 12: 52

*Robert [unclear]*  
[unclear]

90-6-7-341  
C: Jeany Lynn  
Fronne

NO. CV 83-1041JC  
RIO JEMEZ ADJUDICATION

UNITED STATES OF AMERICA, on its  
own behalf and on behalf of the  
PUEBLOS OF JEMEZ, SANTA ANA, and ZIA,

and

STATE OF NEW MEXICO, ex rel.,  
State Engineer,  
Plaintiffs,

and

THE PUEBLOS OF JEMEZ, SANTA ANA, and ZIA,  
Plaintiffs-in-Intervention,

v.

TOM ABOUSLEMAN, et al.,  
Defendants.

U.S. DEPT. OF JUSTICE  
ENV. & NAT. RES. DIV.  
DENVER, CO  
98 JAN 25 AM 10: 46

MEMORANDUM OPINION

THIS MATTER concerns issues of common law abandonment of non-Pueblo water rights raised by Pueblo *inter se* challenges to claims<sup>1</sup> made in a general stream adjudication of all water rights in the Rio Jemez stream system. It is presently before the Court on motions for action on the Special Master's April 24, 1995 Report ("Report") (Docket No. 3357) by the Pueblos of Jemez, Santa Ana and Zia ("Pueblos") on May 30, 1997 (3556), by James E. and Glenda Trehern on May 5, 1995 (3358), by certain defendants ("Certain Defendants") on June 6, 1997 (3561), and by Gilbert Gallegos on July 16, 1997 (3580). Fed. R. Civ. Proc. 53(e)(2). The Report contains the Special Master's findings and recommendations for disposal of the Pueblos' *inter se* challenges to certain non-Pueblo defendants' water rights. No party requested a hearing before the Court. Having

<sup>1</sup> Each claim is described in a subfile and referred to by a subfile number.

considered the Report, the parties' objections to it, and the motions; having reviewed relevant pleadings, evidence, testimony, and legal authority; and being otherwise fully advised in the premises. I FIND AND CONCLUDE that the Special Master's ultimate recommendations for a) three challenged subfiles are clearly erroneous and should be rejected and b) 22 challenged subfiles are not clearly erroneous and should be adopted.

**A. BACKGROUND:** The elements of common law abandonment of a water right include a) nonuse and b) an intent to abandon. Memorandum Opinion and Order ("1994 Opinion") at 5 entered herein on February 7, 1994 (3248). No party objects to the Special Master's finding of nonuse. Only the element of intent is at issue. Intent to abandon, if any, is implied and is a question of fact to be determined from the acts or failure to act of the claimant. Knapp v. Colo. River Water Cons. Distr., 279 P.2d 420, 426 (Colo. 1955) ("**Knapp**").

On April 3, 1989, the Pueblos filed *inter se* challenges to non-Pueblo water rights claims. (2054). The procedural history of this matter prior to February 7, 1994 appears in the 1994 Opinion at 2-3 and is incorporated herein by reference. The 1994 Opinion addresses, in pertinent part, the element of intent to abandon a water right and provides some direction on raising a presumption of an implied intent. It also granted in part, and denied in part, the defendants' motion for summary judgment on the issue of whether the Pueblos had made a sufficient showing of abandonment in specific instances.

In November 1994, the Special Master held an evidentiary hearing on 42 claims and, thereafter, the parties filed post-trial briefs and proposed findings. Subsequently, three claims settled.

and the Court and the Special Master entered orders<sup>2</sup> reflecting stipulations between the Pueblos and certain claimants. In his April 24, 1995 Report, the Special Master recommended that the Court determine that 15 water rights had been abandoned and 24 water rights had not been abandoned. The parties filed objections, motions for action, and related pleadings. On August 7, 1995, the Court entered an Order (3388) granting Mr. Leroy Trujillo's motion for action, adopting the Special Master's recommendation regarding Subfile 0019.042A.000 and describing the Trujillo water rights for 11.65 acres as not abandoned. On October 3, 1997, the Court entered an Amended Order<sup>3</sup> (3604) adopting the Special Master's unopposed recommendations and determining that water rights for 12 subfiles had been abandoned. On November 4, 1997, the Court entered an Order (3613) recommitting the Jaramillo Subfile 0022.019.000 to the new Special Master for further findings and recommendations.

**B. STANDARD OF REVIEW:** A district court reviews a special master's findings and conclusions using the same standards used by an appellate court in reviewing the district court's findings and conclusions. 9 Moore's Federal Practice §52.13 [3] (Matthew Bender 3d Ed. 1997) ("Moore's"). In non-jury actions, a district court shall accept a special master's findings of fact unless they are determined to be clearly erroneous. Fed. R. Civ. Proc. 53(e)(2); Gottlieb v. Barry, 43 F.3d

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<sup>2</sup> On August 22, 1997, the Court entered a consent Order (3594) between the Pueblos and the Jemez School District regarding Subfile 0018.004B.000 which described water rights for 2.575 acres as abandoned and water rights for 2.575 acres as not abandoned.

On September 3, 1997, the Court entered an Order (3598) adopting the Special Master's December 20, 1994 Order (3333) adopting the December 7, 1994 stipulation (3332) between the Pueblos and Mr. Tom Abousleman regarding Subfile 0006.033A.000 which describes water rights for .51 acres as abandoned and Subfile 0008.001.000 which describes water rights for 1.35 acres as not abandoned.

<sup>3</sup> On September 3, 1997 the Court entered the original Order which it subsequently withdrew to clarify and correct clerical errors.

474 (10<sup>th</sup> Cir. 1994) (“Gottlieb”). A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed" or where it is without factual support in the record. United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948) (“Gypsum Co.”); Zimmerman v. Sloss Equip. Inc., 72 F.3d 822, 825 (10<sup>th</sup> Cir. 1995) (“Zimmerman”). A district court gives controlling weight to findings which are based upon oral testimony and where credibility is involved. Findings based upon documentary evidence are given greater scrutiny because the court is in as good a position as the special master to make a determination. Carter Oil Co. v. McQuigg, 112 F.2d 275, 279-280 (7<sup>th</sup> Cir. 1940) (“McQuigg”). If some findings are deficient, the district court shall subject the remainder which are adequate to the clearly erroneous standard. 9 Moore’s §53.13 [4].

A *de novo* review is required when a party asserts that findings are clearly erroneous. In making the review, the court’s role is to determine whether the facts are clearly erroneous and not to decide factual issues *de novo*. The court is not entitled to reverse the Special Master simply because it is convinced that it would have decided the case differently. Anderson v. Bessemer City, 470 U.S. 564, 573 (1985). If the findings are insufficient or incomplete, the court may make its own findings if ‘the record itself sufficiently informs the court of the basis for the [special master’s recommendation] on the material issues’. Boatman’s First Nat’l. Bank v. Ks. Pub. Employees Retirement System, 57 F.3d 638, 640, n. 5 (8<sup>th</sup> Cir. 1995); 9 Moore’s §52.12[2]. The district court must disregard any error which does not affect the substantial rights of the parties because it constitutes harmless error. Fed. R. Civ. Proc. 61.

A special master’s conclusions of law are merely advisory and are subject to *de novo* review. Gottlieb, 43 F.3d at 486. When a special master makes recommendations which involve mixed

questions of fact and law, a *de novo* review is also necessary. Nat'l R.R. Passenger Corp. v. Koch Indus., 701 F.2d 108, 111 (10th Cir. 1983). If the special master applies an incorrect legal standard, the findings are not subject to the clearly erroneous test. Ampicillin Antitrust Litigation, 81 F.R.D. 377, 383, n. 7 (D.C. 1978). A *de novo* review was required for each of the Special Master's findings and recommendations addressed by this Opinion.

**C. DISCUSSION:**

1. **Special Master's General Recommendation:** Certain Defendants assert that the Pueblos have no right to make *inter se* objections without proving that they will benefit from a favorable decision. The Special Master recommends that the Pueblos' right to pursue these objections should not be predicated upon such proof. No party objects to this recommendation and it should be and shall be adopted by the Court.

2. **General Objections:** The Pueblos have several general objections to and comments about the Report. Many of these objections shall be disregarded because the alleged errors do not prejudice any party's rights, affect no substantive rights, and/or are harmless. Fed. R. Civ. Proc. 61. To the extent that the Pueblos have objected to the Report without specifying the recommendation affected, their objections have been disregarded. *See United States v. Conservation Chem. Co.*, 106 F.R.D. 210, 227 ( W.D. Mo. 1985) (Objections must be specific enough to bring the exact nature of the alleged error into focus.). Having considered each general objection, I find that only the one relating to the Special Master's reliance on the forfeiture statute to excuse nonuse requires attention.

The Special Master relied on a provision found in the water right forfeiture statute, N.M.S.A. 1978, §72-5-28 (Repl. Pamp. 1985), to overcome evidence of long term nonuse of water and to

provide the basis for recommending no abandonment in certain instances. Under the statute, nonuse may be excused when it is caused by circumstances beyond the control of the appropriator. The Pueblos object stating that forfeiture and abandonment are entirely different theories and that the Special Master erred in relying on this provision in an abandonment context. Since a similar excuse for nonuse is found in New Mexico common law on abandonment, I find and conclude that no error has been committed in this regard. New Mexico Products Co. v. New Mexico Power Co., 42 N.M. 311, 321, 77 P.2d 634, 641 (1937) (“NM Products”) (a taking of all of available water by upstream appropriator excuses nonuse); W.S. Ranch Co. v. Kaiser Steel Corp., 79 N.M. 65, 68, 439 P.2d 714, 717 (1986) (“W.S. Ranch”) (drought excuses nonuse); Wells Hutchins, Water Law in the Nineteen Western States, Vol. II, p. 269. This objection should be and shall be overruled.

**3. Recommendations Which Are Not Clearly Erroneous.** Parties have objected to the Special Master’s recommendations listed below. The recommendations are based upon a) findings of nonuse and implied intent to abandon and b) conclusions of law regarding abandonment. The Special Master correctly applied the clear and convincing standard to the evidence. State of New Mexico ex rel. Reynolds v. Mears, 86 N.M. 510, 513-4, 525 P.2d 870, 873-4 (1974), quoting Clesson S. Kinney, 2 Kinney on Irrigation and Water Rights, 2d Ed., §1118 at 2021-2 (1912) (“Kinney”); State of New Mexico ex rel. Reynolds v. South Springs Co., 80 N.M. at 149, 452 P.2d at 483. Having made the necessary review of all the evidence, objections and comments for each subfile listed, I find and conclude that the ultimate recommendations contain no clearly erroneous material fact, that the material findings are supported by the record, and/or that the correct law was applied. Gypsum Co., 333 U.S. at 395; Zimmerman, 72 F.3d at 825. Therefore, the Special Master’s ultimate recommendations, set forth below\*, should be and shall be adopted.

SM NO.	SUBFILE NUMBER	OWNER'S NAME	CLAIMED ACREAGE	SM* REC'	CONTESTED ACREAGE	ADJUDICATED ACREAGE
f-03	002N.0012.000	Sisto Sandoval	36.450	NA	17.050	36.450
f-06	002N.014A.000	Sotero Casaus	3.910	NA	1.740	3.910
f-07	003N.0007.000	Antonio Dominguez (Est.)	18.980	NA	8.100	18.980
f-10	005N.001A.000	Theresa G. Velarde	1.680	NA	1.680	1.680
f-11	005N.0004.000	Anna H. Jaramillo	1.870	NA	1.870	1.870
f-12	005N.0005.000	Elodia Valdez	11.890	NA	11.680	11.890
f-13	005N.005A.000	Katie H. Rivera	4.300	NA	4.300	4.300
f-14	005N.009A.000	Emmett H. & Rosemary Cart <sup>5</sup>	5.150	NA	5.150	5.150
f-15	0015.0002.000	Gilbert F. Gallegos, Michael T. Gallegos, et al.	14.250	A	14.250	0.000
f-18	0017.018B.000	William M. & Mary Louise Worthen	0.230	A	0.230	0.000
f-19	0019.0004.000	Sue Ellen & Scott Niles	3.310	NA	2.090	3.310
f-20	0019.0005.000	Robert & Bobby Sue Meskimen	4.420	NA	3.180	4.420
f-21	0019.0042.000	Leroy Trujillo	1.000	NA	0.750	1.000
f-24	0019.049A.000	Neil Niebes	2.600	NA	1.850	2.600
f-25	0022.0003.000	Neil Niebes	9.620	NA	5.650	9.620
f-29	0022.0016.000	James E. & Glenda Trehern	9.540	NA	4.850	9.540
f-30	0022.0017.000	Elul & Rose Vanlandingham Sam & Rita Vanlandingham	2.240	NA	1.670	2.240
f-33	0006.001A.000	Emmett H. Cart & Katherine E. Cart	1.800	NA	0.800	1.800
f-37	0013.0007.000	Epifanio Garcia & Neyda Maestas	6.450	NA	6.450	6.450
f-38	0018.003A.000	Frederick W. & Helen L. Airy	0.350	NA	0.350	0.350
f-40	0018.005C.000	Edward R. Holling	0.750	NA	0.750	0.750
f-42	0032.0002.000	John R. & Betty Gwin Lansdowne	3.370	NA	3.370	3.370

#### 4. Recommendations Which Are Clearly Erroneous.

##### f-1 002N.010A.000 Village of Cuba

The Pueblos challenge the Village of Cuba's ("Village") claim for a surface irrigation water right appurtenant to its 20.5 acre tract described by Subfile 002N.010A.000 and appearing on Hydrographic Survey Map 2N as tract 10A. Mr. Edward Gonzales, expert witness for the Pueblos, and Mr. Randy Velarde, witness for the Village, testified at the November 1994 evidentiary trial before the Special Master. The Pueblos presented Exhibit 1 and the Village presented no exhibits. The Special Master allowed the parties to file post-hearing supplements to the record. The Village

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<sup>4</sup> A = abandonment  
NA = no abandonment

<sup>5</sup> The record does not contain a description of Emmett H. and Rosemary Cart's water right claim in connection with Subfile 005N.009A.000. Therefore, a description of the claim is attached to this Opinion as Exhibit A.

submitted a) a transfer application filed with the State Engineer on November 13, 1989 and January 30, 1991, b) a January 29, 1990 letter from Jemez Pueblo to the State Engineer protesting the application, and c) a May 29, 1992 letter from the Village to State Engineer in response to the Pueblo's letter. The Report did not discuss these three pieces of evidence or the hydrographic survey maps of the area. I have included these documents in my review.

The Special Master found that the tract had not been irrigated for 16 or more consecutive years and that the diversion dam for the main ditch had been missing for 20 years. He concluded that the missing diversion dam mitigated the nonuse and rebutted the presumption of intent to abandon raised by the Pueblos' showing of nonuse. He recommended that I deny the Pueblos' challenge and determine that the water right had not been abandoned.

The Pueblos object to the Special Master's recommendation as being clearly erroneous. The Village responds that the Pueblos ask the Court to improperly reweigh the evidence. Having made the required *de novo* review of evidence, objections and comments, I find and conclude that the Special Master's findings are not clearly erroneous and should be adopted, but that he did not consider all the relevant evidence and make all the necessary findings. As a result, he committed clear error which rendered his findings and recommended conclusions inadequate and incorrect in this instance. 1994 Opinion at 5-6. I have culled the record and found sufficient facts to make a decision. See Boatmen's Bank, 57 F.3d at 640, n. 5. To the extent that the Special Master's findings are correct, I adopt them and include them in the findings section below. 9 Moore's §52.12(2).

**FINDINGS:** The evidence and testimony reveal the following. The Village is located in the Rio Puerco stream system and outside of the Rio Jemez stream system. The water for the claim comes from the Rio Jemez system through a transmountain diversion. This Opinion applies only to



those rights to use water from the Rio Jemez system and does not apply to any other claims the Village may have to rights to use water from the Rio Puerco stream system.

The Village's tract is located west of the end of the northern branch of the Francisco Chavez Ditch #6. The land has been fallow since about 1974. The ditch's diversion dam in Nacimiento Creek washed out around 1969 and, thereafter, the replacement structures were also destroyed. As a result, much of the Francisco Chavez Ditch does not carry water. The northern branch of the ditch, however, receives water through an extension from the Nacimiento Ditch which is located to the east.

The Village purchased the tract and appurtenant water rights for municipal, domestic and related purposes. It has never irrigated the land or intended to use the surface water right for agricultural purposes. Public housing and municipal buildings occupy about one half of the tract while the remainder is fallow. The Pueblos challenged both parts of the tract.

The Village did not pursue any actions to preserve the water rights prior to 1989 because of its poor financial condition. In November 1989, it filed an application with the State Engineer requesting a transfer of the point of diversion and the purpose of use. After 1990, it filed extensions of time for the use of the water rights with the State Engineer. The Village has never prepared a 40-year plan or any other plan for future use of this water as required under N.M.S.A. 1978, § 72-1-9.B (Repl. Pamp. 1997). ("Water rights for municipalities... shall be based upon a water development plan...")

**DISCUSSION & CONCLUSIONS:** The Pueblos met their burden of proof and raised a presumption of an intent to abandon with a showing of 16 or more years of nonuse of water by the defendant. The Special Master erred in excusing the nonuse and finding the presumption had been rebutted through evidence of condition of the diversion dam. This excuse may be relevant to other

tracts located on the Francisco Chavez Ditch because, through no fault of the irrigator, water is generally not available for irrigating. NM Products, 42 N.M. at 321, 77 P.2d at 641; W.S. Ranch, 79 N.M. at 68, 439 P.2d at 717; Wells Hutchins, Water Law in the Nineteen Western States, Vol. II, p. 269. It is not, however, relevant to the Village's situation because the Village admitted that it never intended to use the water rights for irrigation. Thus, the unavailability of water, missing dam and failed efforts to rebuild it have no bearing on the Village's nonuse of water. The Special Master's finding that the missing dam excused the nonuse is clearly erroneous and his recommendation of no abandonment should be and shall be rejected.

The Village took no other actions during the relevant time which would have protected the claimed water right and/or rebutted the presumption raised by the Pueblos. Actions taken after the Pueblos' filed their challenges were too late to preserve the right because it had already terminated. Mr. Velarde testified that the Village intended to use the water for municipal, domestic and related purposes, but no other evidence of actions prior to 1989 support this contention. An intended future or speculative use without evidence of more is insufficient to establish beneficial use or a water right if the water is not put to actual use within a reasonable time. New Mexico ex rel. Martinez v. McDermott, 120 N.M. 327, 331, 901 P.2d 745, 748 (1995); Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1135 (10<sup>th</sup> Cir. 1981); New Mexico ex rel State Engineer v. Crider, 78 N.M. 312, 315-6, 431 P.2d 45, 48-9 (N.M. 1967). The Village's assertion that poor financial conditions prevented it from taking steps to preserve its water rights is insufficient in the face of no other excuse for its inaction. In re CF&I Steel Corp., 515 P.2d 456, 457-8 (Colo. 1973).

The transfer application submitted to the State Engineer in November 1989 after the Pueblos made their challenge may provide some evidence of the Village's intent to preserve this right for non-

irrigation purposes, but it has little evidentiary value since the right had already terminated after the 16 or more years of neglect. Once a water right has been terminated through abandonment, nothing can be done to breathe life into the corpse. Knapp, 279 P.2d at 422; Southeastern Colo. Water Cons. Distr. v. Twin Lakes Asscs., 770 P.2d 1231, 1237-8 (Colo. 1989); 2 Kinney, §1100 at 1978; §1104 at 1988. Even municipalities cannot sit on their rights without consequence. See Consolidated Home Supply Ditch & Reservoir Co. v. Town of Berthoud, 896 P.2d 260, 267, n. 6 (Colo. 1995) (Court rejects town's claim that it cannot abandon water rights because it is a municipality); City and County of Denver v. Snake River Water Dist., 788 P.2d 772 (Colo. 1990) (Court finds abandonment where City provided no justification for nonuse of a water right); San Luis Valley Irrig. Dist. v. Alamosa, 135 P. 769 (Colo. 1913) (Court holds that a town abandoned its water right through a long period on nonuse).

I conclude that the Pueblos' evidence of 16 years of nonuse raised a presumption of an intent to abandon which the defendant's evidence failed to rebut. The Special Master's recommendation should be and shall be rejected. The Pueblos' challenge to the water right should be and shall be granted. The surface irrigation water right associated with the 20.5 acres owned by the Village of Cuba, described by Subfile 002N.010A.000 and appearing on Hydrographic Survey Map 2N as tract 10A should be and shall be determined as abandoned.

**f-08 003N.0010A.000 Sophie & Amadeo G. Salaz**

The Pueblos challenge Sophie & Amadeo G. Salaz's claim for a surface irrigation water right for a 3.86 acre tract described by Subfile 003N.010A.000 and appearing on Hydrographic Survey Map 3N as tract 10A. At the 1994 hearing, the Pueblos' expert witness, Mr. Gonzales, testified using

Exhibit 8. Mr. and Mrs. Salaz, *pro se* defendants, did not appear at the hearing or otherwise participate in this segment of the proceedings. In the findings and conclusion section of the Report, the Special Master found that the tract had not been irrigated for 8 consecutive years, concluded that there was insufficient evidence of an intent to abandon and recommended that I deny the Pueblos' challenge and determine that the water right had not been abandoned. In the discussion portion of the Report, he stated that there had been nonuse for 16 years, there was no evidence to rebut the presumption of nonuse raised by the Pueblos, and recommended that I grant the Pueblos' challenge and determine that the water right had been abandoned.

The Pueblos object to the Special Master's recommendations as being clearly erroneous. The defendants did not respond to the objection. Having made the required *de novo* review of evidence, objections and comments, I find and conclude that the Special Master has made conflicting recommendations and findings, and thus, a mistake has clearly been made which requires a redetermination of this challenge. Gypsum Co., 333 U.S. at 395; Zimmerman, 72 F.3d at 825.

**FINDINGS:** Upon reviewing the evidence, I find that nonuse continued for 8 consecutive years and that in 1989, the ditch was in poor to bad condition, sage and weeds were present on the land, and the defendant did not participate in the proceedings or appear at the 1994 hearing.

**DISCUSSION AND CONCLUSIONS:** The Pueblos did not meet their burden of proof. Evidence of a fallow condition for 8 years is insufficient without more to imply an intent. 1994 Opinion at 12. The Pueblos' witness, Mr. Gonzales, stated in his September 1989 deposition that a fallow condition reflects a lack of recent cultivation. This condition, however, does not necessarily reflect a lack of irrigation. The other evidence offered by the Pueblos together with the 8 year showing is insufficient to support a finding of intent to abandon. While I have found that the ditch

was in poor to bad condition, there is no evidence that the ditch could not convey water to the tract. While I have found that sage and weeds are growing on the land, there is no evidence of the density of growth, the time it takes the growth to reach the reported heights, or the point at which growth precludes an agricultural use such as irrigated pasture. Without more, the claimants' failure to participate in the proceedings is not enough to imply an intent to abandon.

I conclude that the Pueblos' evidence did not raise a presumption of intent to abandon and, therefore, the defendants were not required to present a rebuttal case. The Pueblos' challenge to the water right should be and shall be denied. The surface irrigation water right associated with Amadeo G. and Sophie Salaz's 3.86 acre tract as described by Subfile 003N.010A.000 and appearing on Hydrographic Survey Map 3N as tract 10A should be and shall be determined as not abandoned.

**f-41 0031.006.000 Manuelita M. Garcia**

The Pueblos challenge Ms. Manuelita M. Garcia's claim to a surface irrigation water right for a 8.92 acre tract which is a part of a 39.01 acre tract described by Subfile 0031.006.000 and which appears on Hydrographic Survey Map 31 as tract 6. At the 1994 hearing, Mr. Gonzales testified using Exhibit 41<sup>6</sup>. Ms. Garcia, a *pro se* defendant, did not attend the hearing or otherwise participate in the proceedings. The Special Master found that nonuse of water had continued for eight consecutive years and concluded that the Pueblos had not made a clear showing of an intent to abandon. The Special Master recommends that I deny the Pueblos' challenge and determine that the water right has not been abandoned.

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<sup>6</sup> This exhibit was mis-identified as Exhibit 37 in the findings and conclusion section of the Report.

The Pueblos object to the Special Master's recommendation as being clearly erroneous because they raised a presumption of intent to abandon through evidence of 16 years of nonuse and since the defendant failed to appear or otherwise participate in the proceedings, this showing was not rebutted. Ms. Garcia did not respond to their objection. Having made the required *de novo* review of evidence, objections and comments, I find and conclude that the Special Master's findings relating to the period of nonuse are not supported by the evidence and are, therefore, clearly erroneous. To the extent that the Special Master's findings are correct, I have adopted them and included them in the findings section below. 9 Moore's §53.13[3][d][C]. Those findings which are based upon oral testimony and where credibility is involved are entitled to great weight. Since the court is in as good a position as the Special Master to interpret findings which are based upon documentary evidence, they are subject to greater scrutiny. McQuigg, 112 F.2d at 279-280. I have formed a definite and firm conviction that an error has been made, I have culled the record for enough facts to make the correct the determination. Boatmen's Bank, 57 F.3d at 640, n. 5; Gypsum Co., 333 U.S. at 395; Zimmerman, 72 F.3d at 825.

**FINDINGS:** The evidence and the testimony reveal the following. There were 16 years of nonuse on the 8.92 acre tract challenged by the Pueblos. Shrubs, weeds and native grass grew on the land and they appear the same as the plants on adjacent native lands. The existing ditch is in good condition.

**DISCUSSION & CONCLUSIONS:** The Pueblos met their burden of proof regarding the element of intent to abandon through their showing of 16 years of nonuse of water. I reject the Special Master's finding of eight years of nonuse because a careful review of the evidence shows that

Mr. Gonzales made a misstatement in his testimony which is readily apparent in reviewing the map included in Exhibit 41, from which he testified.

The Pueblos presented Exhibit 41 which consists of Mr. Gonzales' classification schedule, 35mm photographs of the land and a map of the tract. The acreage also appears on Hydrographic Survey Map 31. Mr. Gonzales testified as follows, using the Pueblos' exhibit as a guide.

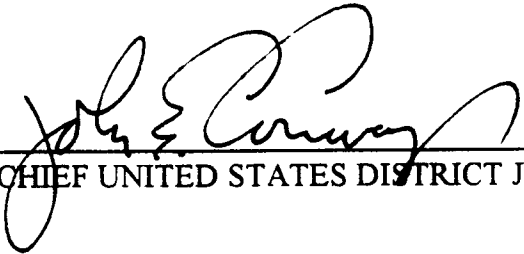
“...My review of the aerial photography in 1935 showed this tract irrigated. In 1963 [the aerial photography] showed this tract irrigated. [For] 1973 [I] said [it was] part irrigated. The west half of the east half was fallow. Now, that can be a little confusing but I think you will be able to recoup that off the map. [In] 1981 I showed that same part fallow...”

In comparing this testimony with Exhibit 41, it is apparent that, as he discussed the classification schedule, the witness misstated the location of the 1973 fallow acreage. In the portion of the schedule describing the land's condition shown in the 1973 aerial photographs, he had typed “Part irrigated, west half--east half fallow”. On its face, this portion of the exhibit indicates that the east half of the property was fallow in 1973 while the west half was irrigated. The map to which Mr. Gonzales refers for clarification of his testimony shows that 8.92 acres located in the east half of the east half (that is, the far eastern quarter) of the 39.01 acre tract were fallow. The review of the evidence leads me to find that the witness misstated the location of the 1973 fallow lands and to conclude that the Special Master clearly erred in finding that there have only been eight consecutive years of nonuse on this portion of the tract. The correct finding is that there have been 16 years of nonuse.

I conclude that the Pueblos raised a presumption of an intent to abandon with their evidence of 16 years of nonuse of water. There was no evidence presented which rebuts this presumption. The Special Master's recommendation should be and shall be rejected. The Pueblos' challenge to the

tract should be and shall be granted. The water right associated with the 8.92 acres of Ms. Manuelita Garcia's 39.01 tract described by Subfile 0031.006.000 and appearing on Hydrographic Survey Map 31 as tract 6 should be and shall be determined to be abandoned.

An order in accordance with this Opinion shall be entered.

  
\_\_\_\_\_  
CHIEF UNITED STATES DISTRICT JUDGE



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SURFACE WATER USE

SUBFILE: 005N.009A.000

**Owner:** Emmett H. & Rosemary Cart

**Purpose:** Irrigation

**State Engineer No.:** 0580

**Priority:** 1882-12-31

**Point of Diversion:** Copper City Ditch, NE $\frac{1}{4}$  SW $\frac{1}{4}$  SW $\frac{1}{4}$  Section 36, T. 21N., R. 1W., N.M.P.M., and located by New Mexico State Plane Coordinate System, Central Zone X = 307,930 feet, Y = 1,820,690 feet.

**Location and Amount of Acreage:** Within part of the W $\frac{1}{2}$  NW $\frac{1}{4}$  of Section 2, T.20N., R.1W., N.M.P.M. 5.15 acres as shown on hydrographic survey map sheet number 5N, tract 9A.

**Amount of Water:** The amount of water shall not exceed 3.26 acre-feet per acre per year diverted by the ditch from the surface source of water, or 2.28 acre-feet per acre per year delivered at the farm headgate, or a beneficial consumptive use (CIR) of 1.14 acre-feet per acre per year, whichever amount is less.

<sup>1</sup> The Nacimiento Community Ditch Association takes water from two basins, the Nacimiento Creek drainage basin which is within the Rio Puerco drainage basin and the Jemez River drainage basin. An agreement between the Pueblos of Jemez, Zia and Santa Ana and the Nacimiento Community Ditch Association regarding the use of the Jemez River basin waters within the Rio Puerco drainage basin was filed in this case on June 14, 1990 (Docket No. 2240).

<sup>2</sup> Such supplemental irrigation wells which may exist and which may be used as points of diversion for this irrigation right were not catalogued or adjudicated in this adjudication.

EXHIBIT A

ATTACHMENT B