

**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
Plaintiffs,	)	ADJUDICATION
v.	)	
	)	Subfile No. ZRB-2-0038
A & R PRODUCTIONS, et. al.,	)	
Defendants.	)	
_____	)	

**DEFENDANTS’ OBJECTIONS TO THE PROPOSED FINDINGS AND  
RECOMMENDED DISPOSITION BY THE MAGISTRATE JUDGE (DOC. 3337)**

Pro se Subfile Defendants Craig and Regina Fredrickson (“Defendants”) respectfully object to the recommendation by the Magistrate Judge to grant the Plaintiffs’ cross-motion for summary judgement regarding the livestock water right for well 10A-5-W06. Defendants contend that there is admissible evidence that supports the existence of a pre-basin livestock water right for the well. Defendants further contend that they have not abandoned the well but have placed the livestock water right, or the water, to beneficial use within the past nine years.

The Livestock Water Right: The Magistrate Judge incorrectly concludes that Defendants produced no admissible evidence establishing an existing livestock water right for well 10A-5-W06. Neither the withdrawal of Plaintiffs’ settlement offer nor the proposed finding by the Magistrate Judge to exclude Defendant’s proposed testimony is basis to exclude from consideration other admissible evidence in the record that supports the existence of a pre-basin

livestock water right for well 10A-5-W06. Defendants respectfully request the Court to reweigh the evidence.

Well 10A-5-W06 is a pre-basin well for which a 1990 declaration of water right was filed and recorded in full accordance with New Mexico Water Law and in a form prescribed by the State Engineer. Defendants' Request for Consultation of November 14, 2006 included a copy of the declaration of ownership of the well accepted for filing by the State of New Mexico, Office of State Engineer ("OSE") on March 27, 1990 ("Well Declaration"). The Well Declaration was produced by the Plaintiffs as Exhibit E to the May 18, 2016 deposition of Tom Cox (Doc. 3305-11 at 10-11) and is included herewith as Exhibit 1.

NMSA 1978, § 72-12-5 provides for a well declaration to set forth "the beneficial use to which said water has been applied, the date of first application to beneficial use, the continuity thereof, the location of the well and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof." The Well Declaration contains the specific information required by the statute. Defendants contend that the Well Declaration represents admissible, relevant evidence and, having been officially certified, is "prima facie evidence of the truth of its contents" in accordance with New Mexico Water Law.

Since many of the underground water basins in New Mexico were declared after wells had been drilled and water put to beneficial use, New Mexico Water Law recognizes these rights as valid. NMSA 1978, § 72-12-4 states that "existing water rights based upon application to beneficial use are hereby recognized." Such is the case for well 10A-5-W06.

The Well Declaration was supplemented by the sworn testimony of Tom Cox. He previously managed a commercial cow-calf operation involving well 10A-5-W06. He testified to the continuity of use of the livestock water right until the year 2000 (Doc. 3316-3 at 2). Defendants contend that this testimony is relevant, admissible evidence and, taken together, the Well Declaration and the deponent's testimony verify continuity of use of the well 10A-5-W06 from 1955 until 2000.

From the Well Declaration (Exhibit 1), elements of the livestock use water right for Well 10A-5-W06 are established as follows: priority – December 31, 1955; amount – less than 18+ gallons per minute; purpose of use – livestock watering; period of use – January 1 - December 31; and place of use – NE 1/4 of the NE 1/4 of the NW 1/4 of Section 19, Township 5N, Range 18W N.M.P.M.

Paragraph 4 of the Well Declaration identifies the then present capacity of the well as 18+ gallons per minute (gpm). Paragraph 5 of the Well Declaration specifically notes that the quantity of water appropriated and beneficially used for livestock watering is not calculated and references Paragraph 8 of the Well Declaration. Paragraph 8 explains that “this well is equipped with a windmill and auxiliary pump jack and does not pump the full capacity the year-round, however, should we have the need for full production in the future, we reserve that right (example: future irrigation or domestic use).”

These referenced paragraphs clearly infer that any recognized domestic use water right amount should be subtracted from the 18+ gpm (29+ acre-feet per year [AFY]) capacity of the well to arrive at a maximum amount appropriated and beneficially used for livestock watering. Assuming

that 0.7 AFY is the recognized domestic use water right amount as the Magistrate Judge has proposed, the maximum amount appropriated and beneficially used for livestock from well 10A-5-W06 is 28.3 AFY.

Even with the exclusion of Defendant's proposed testimony and Plaintiffs' withdrawal of their settlement offer, there is additional admissible evidence that establishes an existing livestock water right amount.<sup>1</sup> The Plaintiffs prepared a rebuttal expert witness report that estimated the historic livestock water right amount for well 10A-5-W06 as 1.1 AFY (Doc. 3320-8 at 29); the report was prepared in accordance with the pre-trial order (Doc. 3201 at 1). While the Plaintiffs did not choose to reference their report, the Defendants included a copy of it in response to Plaintiffs' motion to exclude (Doc. 3320 at 16). Plaintiffs did not move to exclude their own expert witness report from the record and its estimated livestock water right amount, while subject to rebuttal by Defendants at trial, represents admissible evidence of the minimum amount appropriated and beneficially used for livestock from well 10A-5-W06.

A larger estimate of the livestock water right amount for Well 10A-5-W06 can be inferred from the testimony of Tom Cox and the action of this Court. Tom Cox identified well 10A-5-W06 and well 9C-5-W04 (the Amado well) as having the identical winter season usage by his cow-calf operation; he also testified that while well 10A-5-W06 was used year-round, well 9C-5-W04 was used only during the winter season (Doc. 3316-3 at 4-5). The Court recognized a livestock water right amount for well 9C-5-W04 of 1.841 AFY (Doc. 2776 at 3). Remarkably, the hydrographic survey field notes characterize the Amado well as "abandoned" (Doc. 3305-12 at 2 and Doc. 3320-

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<sup>1</sup> Plaintiffs' explicitly withdrew their settlement offer thereby inferring that their offer applied to non-lactating cows, not cow-calf pairs, as acknowledged in Plaintiffs' declaration (Doc. 3315-1 at 13-14).

9). If the Plaintiffs and the Court intend to treat all subfile defendants equally, then well 10A-5-W06 should be assigned a water right of at least 1.841 AFY.

From the above, the evidence establishes that well 10A-5-W06 does have a livestock use water right and in an amount between a minimum of 1.1 AFY and a maximum of 28.3 AFY.

No Presumption of Abandonment: The Magistrate Judge incorrectly concludes that Defendants have abandoned their livestock water right for well 10A-5-W06. The Magistrate Judge concludes that the Defendants presented no evidence or valid reason for the period of non-use of the livestock water right and further states that Defendants have not attempted to make use, of any kind, of the water right. Defendants respectfully disagree and request the Court to reweigh the evidence.

Defendants purchased Section 19, Township 5N, Range 18W N.M.P.M. and associated well 10A-5-W06 in 2006 to reintroduce cattle to the rangeland of the upper Rincon Hondo Canyon. The pasture was and still suffers from long-term regional drought and had been severely overgrazed. Although the capacity of the well to produce water at 18+ gpm did not appear to have been affected by drought, the ability of the rangeland to produce the forage necessary to support a viable cow-calf operation had. Defendants acted responsibly in not introducing cattle to the range under these circumstances. Alternatively, Defendants exercised stewardship and put the livestock water right to use in helping remediate their rangeland as follows.

In 2006 Defendants sought and received the advice and assistance of the United States Department of Agriculture, Natural Resources Conservation Service (NRCS) in evaluating the status of the forage and developing a plan for rehabilitating Defendants' rangeland. Key elements

of the NRCS recommendations included: 1) removal of juniper, rabbit brush and snakeweed that had encroached on the pastures; 2) construction of brush and rock dams to reestablish rainfall-related sheet flow across bottom lands and to mitigate soil erosion occurring in cow paths and major drainages; and 3) re-seeding the overgrazed areas to transition back to grassland and seeding the silt collection areas up-gradient of constructed brush and rock dams.

The NRCS advised that Western Wheatgrass, a deep-rooted grass indigenous to the region, would be effective both in erosion control and as forage for cattle. In 2007 Defendants established a one-quarter acre Western Wheatgrass seed production field adjacent to well 10A-5-W06 for the purpose of growing and harvesting grass seed for re-seeding purposes (3316-2 at 8). A photograph of this field was previously provided (Doc. 3320-6) and satellite imagery included as Plaintiffs' Exhibit D to the Tom Cox deposition (Doc. 3316-3 at 6) (included herewith as Exhibit 2). Water was diverted from the well and through the existing livestock watering infrastructure for the specific purpose of flood irrigating the seed production field from 2007 through 2009. Defendants maintain that this represents a beneficial use of the livestock water right. Defendants cite the use of water in excess of 0.7 AFY for irrigated, seed production in the subfile answer (Doc. 3161 at 6). Defendants harvested the seed so irrigated and grown, and sowed the seed upon Defendants' rangeland.

Plaintiffs were briefed on and provided a copy of Defendants' plan for use of the livestock water for this specific irrigation purpose during Defendants' July 17, 2007 consultation meeting. In attendance were Plaintiffs, Bradley Bridgewater and Edward Bagley, as well as representatives of Natural Resources Consulting Engineers, Inc. As agreed at this meeting,

Defendants prepared an annual status report regarding implementation of the plan in a letter dated July 8, 2008. The status report estimated combined usage, domestic and irrigation, of 1.915 AFY as of that date.<sup>2</sup> Upon request during discovery (Doc. 3305-6 at 3), Plaintiffs produced their file copy of the status report thus verifying their knowledge of the plan and of the actual use of the livestock water for this beneficial purpose (included herewith as Exhibit 3).<sup>3</sup> The temporary use of the livestock water right, or the water, for irrigating a seed production field establishes that Defendants have put the water to beneficial use within the past nine years.

The drought and associated overgrazed condition of the range that has thus far precluded returning cattle to the land is a condition beyond Defendants' ability to control; the drought continues and the rangeland has simply not yet recovered. However, and despite the absence of cattle, Defendants have not abandoned their livestock water right but instead have proactively placed that water to beneficial use for the irrigation of a Western Wheatgrass seed production

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<sup>2</sup> Defendants' status report assumed that the irrigation of the seed-production field represented a domestic use of water allowed under Defendants' domestic permit. In retrospect it is unclear whether the domestic use assumption was correct as the production of grass seed was used in the remediation of rangeland used for a commercial cow-calf operation. It could alternatively be construed as commercial irrigation or a temporary change in purpose of use from livestock to irrigation. In any event, water was used in excess of the domestic water right amount for this purpose.

<sup>3</sup> Plaintiffs' transmittal of their file record did not include Attachment 2 to the status report as referenced therein. Attachment 2 was a copy of Defendants' presentation made at the consultation meeting including details regarding the seed-production field and its irrigation.

field as described above. Thus the period of “nonuse” is at most nine years, not sixteen, and therefore there is no presumption of abandonment supported by case law cited by the Magistrate Judge. Defendants have paid their property taxes, defended their legal right to the water, maintained the well, cattle-watering infrastructure and fencing, and have neither expressed nor inferred by their actions the intent to abandon their livestock water right.

Conclusion: For the foregoing reasons Defendants recommend that the Court deny the Plaintiffs’ cross-motion for summary judgement regarding the livestock water right. Defendants are willing to engage in settlement discussions and sincerely believe that a settlement conference with the Magistrate Judge may be useful.

Respectfully submitted this 27th day of February, 2017.

Craig Fredrickson     /s/ Craig Fredrickson

Regina Fredrickson   /s/ Regina Fredrickson

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on February 27, 2017, 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.

Electronically Filed

/s/ Craig Fredrickson

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