

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. 01cv0072 MV/WPL
ZUNI INDIAN TRIBE and NAVAJO NATION,)	
Plaintiffs-in-Intervention)	
)	
)	ZUNI RIVER BASIN
v.)	ADJUDICATION
)	
A & R PRODUCTIONS, et al.,)	Subfiles No. ZRB-2-0098

**JOINT RESPONSE TO DEFENDANTS’ MEMORANDUM BRIEF
RE BURDEN OF PROOF IN WATER CASES**

NOW COME the State of New Mexico *ex rel.* State Engineer (“State”) and the United States of America (“United States”), and respond to Defendants Yates Ranch Property LLP and Jay Land Ltd.’s (“Defendants”) *Memorandum Brief re Prima Facie Evidence, Burdens of Proof, Going Forward, and Persuasion in Water Cases; Procedure for Adjudicating Water Rights Not Appurtenant to Real Estate* (No. 2960) (“*Memorandum*”), and state as follows:

I. Introduction

As described in the *Joint Status Report* and at the April 14, 2014 Pretrial Conference, two basic procedural matters are disputed between the parties:

- (1) the burdens of the parties with respect to water rights in excess of those recognized by Plaintiffs in the most recent proposed Consent Order, and

(2) the extent to which consideration of water rights previously adjudicated in ZRB-1-0075 are included in the scope of this subfile action.

April 14, 2014 *Clerk's Minutes* (No. 2956); see also April 10, 2014 *Joint Status Report and Provisional Discovery Plan* at 4-5 (No. 2955). Pursuant to the Court's order at the Pretrial Conference, Defendants timely filed their *Memorandum* setting forth their positions of law. Plaintiffs the State and the United States now respond pursuant to the Local Rules, and assert that Defendants have the burden of proof for going forward on any water rights claims beyond those recognized in Plaintiffs' most recent proposed Consent Order. Further, Plaintiffs assert that claims regarding water rights adjudicated to the State Land Office under subfile ZRB-1-0075 are not and should not be included in the scope of this subfile action. Defendants will have an opportunity to raise their own claims with regard to those water rights in the later "inter se" phase before a final decree is entered in this action.

II. It is the Defendants' Burden to Present Evidence of a Water Right in Excess of That Which Plaintiffs Are Willing to Recognize

In the *Aamodt* adjudication lawsuit, this Court recently wrestled with the exact same question raised here by Defendants concerning the parties' respective burdens. The Court resolved the issue in *Aamodt* against the Defendants' position and it should do so here. "The burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right." *State of New Mexico v. Aamodt et al.*, No. 66cv6639, Doc. No. 8119 at 6, filed February 24, 2014 (D.N.M.) (citing *Pecos Valley Artesian Conservancy Dist. v. Peters*, 52 N.M. 148, 152-153, 193 P.2d 418, 422-423, 1948-NMSC-022 (1948)). Further, the Court previously

noted in its February 26, 2010 *Order* granting the State's motion for summary judgment that "Defendant . . . raised various arguments, including that Plaintiff the State, and not Defendant, bore the burden of proof with respect to water use." *State of New Mexico v. Aamodt et al.*, No. 66cv6639, Doc. No. 6917 at 4, filed February 26, 2010 (D.N.M.). The Court was also not persuaded there by Defendant's argument, and concluded that "[I]n order to prevail on her claim . . . , Defendant [] had to show some evidence of the quantity of her use." *Id.* at 8; *see also* June 15, 2006 *Memorandum Opinion and Order* at 4 (No. 733) ("Only by applying water to beneficial use can an appropriator acquire a perfected right to that water."). This she failed to do, and the Court granted summary judgment to the State in that instance as well. *Aamodt*, Doc. No. 6917 at 4.

Defendants in the instant matter argue that Plaintiffs have the burden of proof because under NMSA 72-4-17 (1965) the Plaintiffs must furnish a complete hydrographic survey of the stream system, and that a hydrographic survey "includes all known claims of water rights." *Memorandum* at 7. Defendants are not correct. NMSA § 72-4-17, in pertinent part, states rather that a complete hydrographic survey must be furnished for the "determination of the *rights* involved." (emphasis added). It says nothing about identifying all potential claims that might exist. Indeed, such an approach would result in an unwieldy hydrographic survey congested with unnecessary information as to any and all possible claims of any possible water user, most of which would prove to be unassociated with a water right. This is why, contrary to Defendants' assertion that "in all of the adjudications before this Court as well as those pending and completed in the State Courts, . . . the Plaintiff includes all known claims of water rights," the

Plaintiff most commonly *does not* include claims when they are not expected to give rise to a water right. Again, the best example of this is in the *Aamodt* case. There, permits were issued for domestic wells, but the wells have never been drilled; no water right was developed and such circumstances were not included in the hydrographic survey or reported to the Court. That same approach to undeveloped domestic well permits and other potential water rights claims has been appropriately taken in this case. Defendants' assertion that Plaintiff always includes all such claims in every hydrographic survey is simply unsupported and in fact wrong.

Defendants also claim Plaintiffs have the burden of proof because the New Mexico law of abandonment of water rights requires that "the party asserting abandonment of a water right (here the Plaintiffs) must go forward and present proof . . ." Defendant's argument here is not applicable as this proceeding was not initiated as an abandonment proceeding. As this Court found in the *Aamodt* adjudication, where another litigant similarly tried to shift the burden of proof to the Plaintiff by pretending the matter was a forfeiture proceeding:

This case is a water rights adjudication, the purpose of which is to determine the rights to use water and to declare as to the rights adjudged to each party, the priority, amount, purpose, periods and place of use of that water. See N.M. Stat. Ann. §§72-4-15 and 72-4-19. It is not a forfeiture proceeding. New Mexico's forfeiture statute, N.M. Stat. Ann. § 72-12-18, is not relevant to the Court's determination of [the Defendant's] water right.

State of New Mexico v. Aamodt et al., No. 66cv6639, Doc. No. 7757 at 8, filed September 20, 2012 (D.N.M.) (emphasis added). The same holds true in the instant matter. This case is a water rights adjudication, not an abandonment proceeding. The burdens associated with an abandonment proceeding do not simply transfer to this proceeding.

III. The Scope of This Subfile Adjudication Centers Exclusively on Water Rights Associated With Land Owned by the Defendants

Defendants claim water rights arising on lands owned by the State of New Mexico, and assert that they are entitled to have a determination regarding these claims made in this subfile phase of the lawsuit. *Memorandum* at 4. However, these water rights have previously been adjudicated to Defendant the State Land Office under subfile ZRB-1-0075. Defendants' objections to the Court's *Order* adjudicating water rights to the State Land Office under subfile ZRB-1-0075 is untimely. Defendants will have an opportunity in the *inter se* phase of the adjudication to present these claims.

The Court has already specifically addressed the issue of whether water rights previously adjudicated in subfile ZRB-1-0075 can be included in the scope of another subfile action. On June 28, 2012, for many of the same reasons Defendants in the instant matter now assert, Defendants Edward J. Bawolek and Susan J. Bawolek filed their *Motion to Intervene* (No. 2795) in the State Land Office's subfile ZRB-1-0075. The Court denied their *Motion*, stating that:

. . . [T]his case is in the "subfile phase." Even assuming the Bawoleks' assertions requesting intervention are all true and that the resolution of Subfile ZRB-1-0075 Consolidated will not satisfy all concerns that the Bawoleks may have, the Bawoleks will have an opportunity to raise their concerns in the "inter se" phase before a final decree is entered in this action.

September 25, 2012 *Order Denying Motion to Intervene* at 2 (No. 2805).

To the extent the Defendants here seek to be heard with regard to the State Land Office claims adjudicated in subfile ZRB-1-0075, they will have their opportunity during the later *inter*

se phase of this adjudication. Statutory water rights adjudications commence with a “subfile phase”, the purpose of which is to resolve all claims as between the Plaintiff(s) and the individual subfile defendants only. The instant adjudication lawsuit is currently in the subfile phase. Once all subfile claims have been resolved as between the Plaintiffs and the individual subfile claimants, then an adjudication moves into the *inter se* phase, where all parties can be heard with regard to the individual claimants’ subfile claims.

Consistent with that approach, the New Mexico Supreme Court has held that “[n]o decree declaring the elements of water rights can be entered until after a ‘hearing to determine the relative rights of the parties, one toward the other’ . . .” *Tri-State Generation v. D’Antonio*, 149 N.M. 394, 403, 249 P.3d 932, 941 (Ct. App. 2010) (quoting *State Ex Rel. Reynolds v. Sharp*, 66 N.M. 192, 196-197, 344 P.2d 943, 945-946 (S. Ct. 1959)). Every consent order entered by the Court in this case provides that “[t]he water right(s) described herein, if any, are adjudicated as between the United States, the State and the Defendant, subject to the right of any other water right claimant with standing to object prior to the entry of a final decree.” See *e.g.*, January 31, 2012 *Consent Order* (No. 2755) (emphasis added).

Defendants will have their opportunity to object, along with every other party with standing in this case, during the *inter se* phase of this adjudication. However, the time for that is not during this current subfile phase.

WHEREFORE, the State of New Mexico *ex rel.* State Engineer and the United States of America request the Court find that it is the Defendants’ burden to present evidence of a water

right in excess of that which Plaintiffs are willing to recognize, and that the scope of this subfile adjudication centers exclusively on water rights associated with land owned by the Defendants.

Electronically Filed

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on May 15, 2014, 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.