

consultation period in this Subfile Proceeding had ended (Doc. 2919), and Subfile Defendants filed their subfile answer nineteen days later (Doc. 2925).

The referral Magistrate Judge set a scheduling conference at Plaintiffs' unopposed request. (*See* Docs 2944, 2947.) Shortly before that conference, the parties filed a Joint Status Report and Proposed Partial Discovery Plan (Doc. 2955), in which they identified disputes concerning the extent of Subfile Defendants' water rights for lands owned in the Zuni River Basin of New Mexico. In addition to maintaining that they are entitled to greater water rights with respect to 84 of the 123 water sources identified by Plaintiffs, Subfile Defendants assert that they are entitled to rights to 24-28 additional sources that Plaintiffs did not include in their proposed consent order.

More fundamentally, the parties identified an impasse on two procedural matters. First, the parties disagree as to who bears the burden of proof in the first instance with respect to water rights in excess to those that Plaintiffs are willing to recognize. (*Id.* at 4-5.) Second, although Plaintiffs believe that this Subfile Proceeding should be limited to water rights associated with land owned by Subfile Defendants, the latter parties contend that the scope of this Subfile Proceeding also should include consideration water rights previously adjudicated in Subfile No. ZRB-1-0075 Consolidated. (*Id.* at 5.) At the scheduling conference held on April 14, 2014, the Magistrate Judge ordered the parties to file short briefs addressing their positions of law. (Doc. 2956.)

DISCUSSION

I. Burden of Proof

The first issue has been straightforwardly addressed by the Special Master in a separate water rights adjudication: as a general rule, “[t]he 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 *State v. Aamodt*, No. Civ. 66-6639 MV/WPL, Subfile PM-67833, Doc. 8119 at 6 (D.N.M. Feb. 24, 2014) (unpublished) (citing *Pecos Valley Artesian Conservancy Dist. v. Peters*, 193 P.2d 418, 421-22 (N.M. 1948)). This holding relied entirely on binding precedent from the New Mexico Supreme Court, and that precedent is equally applicable here.

Subfile Defendants contend in reply that the Special Master’s decision in *Aamodt* is of “absolutely no precedential value whatever” and “should be ignored by the Court.” This assertion ignores the fact that the *Aamodt* order in question relied on a binding opinion from the state supreme court. Moreover, even non-binding precedent may be cited for its persuasive value. *See, e.g.*, 10TH CIR. R. 32.1; *United States v. Austin*, 426 F.3d 1266, 1274 (10th Cir. 2005); N.M. R APP. P. 12-405(A) (discussing precedential value of unpublished state appellate decisions).

Next, Subfile Defendants imply that the law with respect to water right abandonment or forfeiture has bearing on the burden of proof in stream system adjudications. It is true that the party asserting abandonment or forfeiture of a water right bears the burden of proof in such actions. *See State ex rel. Martinez v. McDermott*, 901 P.2d 745, 750 (N.M. Ct. App. 1995) (citing, *e.g.*, N.M. STAT. ANN. § 72-12-8). Yet water rights adjudications such as this one are distinct from such claims, and as such the principles respecting burdens of proof and persuasion in those cases are inapplicable. *See Aamodt*, Subfile PM-43319, Doc. 7757 at 7-8 (D.N.M. Sept. 20, 2012) (unpublished).

Subfile Defendants also argue that N.M. STAT. ANN. § 72-4-17 requires a different outcome. That statute provides that the state engineer, on court order, shall “make or furnish a complete hydrographic survey . . . in order to obtain all data necessary to the determination of the rights involved.” Subfile Defendants insist that the “data necessary to the determination of rights

involved” necessarily includes all known potential claims, which therefore means that the Plaintiffs bear the burden of proof here. They cite no authority to support this interpretation of N.M. STAT. ANN. § 72-4-17, and the Court is aware of none. Further, as Plaintiffs point out, such a requirement “would result in an unwieldy hydrographic survey congested with unnecessary information as to any and all possible claims of any possible water user.” (Doc. 2962 at 3.) Finally, despite Subfile Defendants’ assertion to the contrary, the fact that this same statute requires that “all those whose claims to the use of such waters are of record . . . shall be made parties” does not lead to the inevitable conclusion either that all known potential claims must be included in a hydrographic survey or that the burden of proof in stream system adjudications is therefore placed on Plaintiffs.

It is too soon to say whether the burden assignment might shift at different stages of these proceedings. In general, however, the Court sees no reason to depart from the holding in *Aamodt* that the water rights user bears the burden of proof in water rights adjudications. The Court therefore finds that to the extent that any water right is disputed, Subfile Defendants generally bear the burden of proof in the first instance with respect to the disputed water right.

II. Scope of Proceedings

Subfile Defendants next ask that the Court include in this Subfile Proceeding a determination regarding water rights arising on lands they lease from the State of New Mexico. The water rights on State lands have already been adjudicated as to the New Mexico State Land Office in Subfile No. ZRB-1-0075 Consolidated. (*See* Doc. 2857.) However, Subfile Defendants argue that the determinations in that subfile do not resolve their own claims to those water rights.

This sort of question was previously raised in Subfile No. ZRB-1-0075 Consolidated, albeit in a different context. There, two persons who are subfile defendants in a separate subfile

proceeding sought leave to intervene in ZRB-1-0075, arguing that as lessees of land with water use features, they had an interest in the outcome of the State Land Office's subfile proceeding. (Doc. 2795.) Plaintiffs opposed the attempted intervention, arguing in part that the movants' objections were untimely and could be resolved in the *inter se* phase of proceedings. (Doc. 2797 at 3-4; Doc. 2798 at 2.) The movants disagreed, contending that participation in the *inter se* phase would not protect their interest in negotiating the extent of water rights on lands they were leasing from the State Land Office, as the *inter se* phase typically resolves disputes between parties holding different claims to the same water rights and does not necessarily provide for the renegotiation of the extent of those rights. (Doc. 2799 at 7-9.)

The Court denied the motion to intervene in ZRB-1-0075, relying primarily on the fact that the movants were already parties to the action. (Doc. 2805 at 1-2.) However, the Court also noted that this water rights adjudication as a whole "is in the 'subfile phase.' Even assuming the [movants]' assertions requesting intervention are all true and that the resolution of ZRB-1-0075 Consolidated will not satisfy all concerns that the [movants] may have, the [movants] will have an opportunity to raise their concerns in the '*inter se*' phase before a final decree is entered in this action." (*Id.* at 2.)

Subfile Defendants' concerns arise in slightly different context—at this time, a consent order has already been filed in Subfile No. ZRB-1-0075 Consolidated. (Doc. 2857.) As such, Subfile Defendants do not merely wish to participate in the negotiation of water rights on State Land Office land before a consent order or subfile answer has been filed; instead, they seek to renegotiate those water rights as to themselves, despite the fact that the water rights in question have already been determined in ZRB-1-0075. In doing so, they raise essentially the same arguments unsuccessfully brought by the attempted interveners in that subfile proceeding.

Because Subfile Defendants bring essentially those same failed arguments, the Court concludes that essentially the same answer to those arguments applies here. If other parties could not enter Subfile No. ZRB-1-0075 Consolidated to participate in the negotiation of water rights on State Land Office land, certainly these Subfile Defendants cannot pull the exact same sort of water rights claims into their own Subfile Proceeding after those rights have already been negotiated. Because the water rights on State Land Office land have already been determined in Subfile No. ZRB-1-0075 Consolidated, there is no room in this Subfile Proceeding to readjudicate those water rights as to Subfile Defendants.

Despite Subfile Defendants' concerns, the *inter se* phase will provide an opportunity for all parties to this action to pursue their objections. The consent order reached in Subfile No. ZRB-1-0075 Consolidated provides that the agreed-upon water rights in that proceeding are "subject to the right of any other water right claimant with standing to object prior to the entry of a final decree." (Doc. 2857 at 114.) Whatever objections Subfile Defendants have to the determinations in Subfile No. ZRB-1-0075 Consolidated may be raised during the *inter se* phase and will be resolved at that time.

CONCLUSION

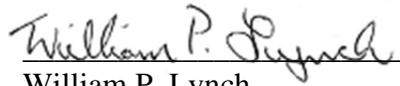
For the reasons stated above, the Court holds that

- (1) Subfile Defendants bear the burden of proof with respect to water rights in dispute in the instant Subfile Proceeding; and

(2) the scope of this Subfile Proceeding is limited to water rights associated with land owned by Subfile Defendants.


UNITED STATES DISTRICT JUDGE

Approved:


William P. Lynch
United States Magistrate Judge