

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
	)	ADJUDICATION
Plaintiffs,	)	
	)	
v.	)	
	)	<b>Subfile No. ZRB-2-0098</b>
A & R PRODUCTIONS, et al.	)	
	)	
Defendants.	)	
_____	)	

**JOINT RESPONSE AND OBJECTION TO DEFENDANTS’ MOTION REQUESTING  
ORAL ARGUMENT**

Plaintiffs United States of America (“United States”) and the State of New Mexico (“State”) (collectively “Plaintiffs”) respond to Subfile Defendants JAY Land Ltd. Co.’s and Yates Ranch Property LLP’s (“Defendants”) Motion Requesting Oral Argument (Doc. 3260) (“Motion”) and their memorandum in support (Doc. 3261) (“Memorandum”). Pursuant to D.N.M.LR-Civ. 7.6(a), Plaintiffs oppose Defendants’ request for oral argument. No justification exists to support Defendants’ Motion. The objections to the *Proposed Findings and Recommended Disposition* (Doc. 3223) (“Findings and Recommendations”) are thoroughly briefed, and oral argument is unnecessary to resolve the pending objections. The Court should deny Defendants’ request for oral argument and resolve the objections based on the narrow issues presented, on the well-established law concerning review of a magistrate judge’s findings and recommendations and New Mexico water rights, and on the record presented to the Magistrate Judge. The paragraphs below are presented in support of this Response.

## I. Review of the Findings and Recommendations

The parties do not dispute the standard of review that the Court must apply to its review of the Findings and Recommendations and the basis for the Court's review is well defined. Once timely and specific objections are raised to a magistrate judge's dispositive decision, the district court reviews the decision *de novo*.<sup>1</sup> However, one challenging a magistrate judge's decision is not only required to make objections timely and with specificity, but the challenger is also tied to the specific issues, arguments, and theories raised before the magistrate. A challenger's issues, arguments, and theories raised for the first time to the district court are deemed waived.<sup>2</sup> Thus, objections raised to the district court must be the same contentions raised before the magistrate judge and the record before the magistrate judge is coextensive to the record before the district court.

To resolve the objections pending before this Court, the Court's review is tied to three distinct document sets: the record presented below to the Magistrate Judge; the Findings and Recommendations; and the objections raised by Defendants along with the responses of Plaintiffs. First, the Magistrate Judge issued his recommendation based upon the record presented in briefs, and attachments thereto, by the parties.<sup>3</sup> Second, the Findings and

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<sup>1</sup> *United States v. One Parcel of Real Prop.*, 73 F.3d 1057, 1060 (10th Cir. 1996); *see United States v. Raddatz*, 447 U.S. 667, 674 (1980) (“on [ ] dispositive motions, the statute calls for a *de novo* determination, not a *de novo* hearing.”).

<sup>2</sup> *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *see United States v. Garfinkle*, 261 F.3d 1030, 1031 (10th Cir. 2001) (“In this circuit, theories raised for the first time in objections to the magistrate judge's report are deemed waived.”); *see also Pevehouse v. Scibana*, 229 Fed.Appx. 795, 796 (10th Cir. 2007) (unpublished) (constitutional challenge waived by litigant's failure “to raise it before the magistrate.”).

<sup>3</sup> The record before the Magistrate Judge was established in four filings: *Motion for Partial Summary Judgment* (Doc. 3059) and *Memorandum in Support of Motion for*

Recommendations came only after the parties had a full opportunity to present their arguments.

Third, briefing on Defendants' Objections succinctly took up the findings that formed the core of the Findings and Recommendations, namely, that the claimed Atarque Lake water right had not been established (or in the alternative abandoned) and that Defendants had failed to establish a stock water right greater than or different from Plaintiffs' threshold settlement offer.<sup>4</sup>

The issues presented in the Objections are straightforward:

- a. whether the Magistrate Judge erred by concluding that Defendants had failed to establish their basis for their Atarque Lake water right claim;<sup>5</sup>
- b. whether the Magistrate Judge erred by concluding that Defendants had failed to establish their basis for their stock water right claims for 21 wells;<sup>6</sup> and
- c. whether the Magistrate Judge erred by concluding that Defendants had failed to establish their basis for their water right claims for some springs.<sup>7</sup>

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*Summary Judgment* (Doc. 3059-1); *United States' Response to Defendants' Motion for Partial Summary Judgment, Cross-Motion for Summary Judgment on all Remaining Issues of Dispute, and Memorandum in Support* (Doc. 3076); *Defendants' Reply to United States' Response (Doc. 3076) to Defendants' Motion for Partial Summary Judgment (Doc. 3059) and Defendants' Response to United States Cross-Motion for Summary Judgment (also Doc. 3076)* (Doc. 3093); and *Reply on Cross-Motion for Summary Judgment* (Doc. 3097).

<sup>4</sup> The Objections were fully briefed and no party can claim that any argument went unaddressed. *Defendants' Objections to the Proposed Findings and Recommended Disposition of the Magistrate* (Doc. 3223) ("Objections"); the United States' *Response to Objections to the Proposed Findings and Recommended Disposition of the Magistrate* (Doc. 3250) ("United States' Response"); and *Response of Plaintiff State of New Mexico to Defendants' Objections to Magistrate Judge's Order Recommending Summary Judgment Be Granted to the United States Regarding Subfile ZRB-2-0098 (Doc. 3251)* ("New Mexico Response").

<sup>5</sup> Objections at 3 – 11.

<sup>6</sup> *Id.* at 11 – 23.

<sup>7</sup> *Id.* at 23 – 24.

In response, Plaintiffs argued that Findings and Recommendations were properly issued with respect to:

- d. the claimed water right associated with Atarque Lake;<sup>8</sup>
- e. the water rights for the 21 wells that remain in dispute;<sup>9</sup> and
- f. the claimed water rights for natural springs.<sup>10</sup>

The Court faces the question: whether the Findings and Recommendations are supported by the record below and the law? If answered in the affirmative, the Court should overrule the Objections. If answered in the negative, the Court should sustain the Objections and remand the matter back to the Magistrate Judge with specific findings and instruction concerning any error identified. This matter has been thoroughly briefed, needs no further argument, and is ready for the Court's resolution.

## **II. No Basis Exists to Permit Oral Argument**

Defendants claim that in addition to the extensive record currently before the Court, oral argument is necessary to resolve the Objections. Their claim is without support.

The local rules give clear guidance with respect to the use of oral argument. "A motion will be decided on the briefs unless the Court sets oral argument."<sup>11</sup> By the local rule's plain terms, holding oral argument is not the norm; instead, argument shall not occur unless the Court determines otherwise. By necessity, sufficient, legitimate grounds must exist for the Court to determine otherwise and allow oral argument. Further, in the cases identified by Defendants as

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<sup>8</sup> United States' Response at 7 - 17; New Mexico's Response at 2 - 8.

<sup>9</sup> United States' Response at 17 - 21.

<sup>10</sup> *Id.* at 21 - 23.

<sup>11</sup> D.N.M.LR-Civ. 7.6(a) (emphasis added).

examples discussing a court's ability to call for oral argument, none apply the Local Rules of the District of New Mexico and two illustrate that oral argument was *not* necessary.<sup>12</sup>

Defendants offer no grounds to justify oral argument. For example, they specify no aspect of the Objections that have not been adequately addressed. Instead, Defendants do no more than to generally suggest that issues presented through the Objections are numerous, complex, and/or novel.<sup>13</sup> They are none of these. The Court's standard of review for the Findings and Recommendations is well-established and not in dispute. The parties present issues in areas of well-established New Mexico law.<sup>14</sup> Neither Defendants nor Plaintiffs present any question that could be construed as novel, unsettled, or complex. Regardless the issue presented, both the Magistrate Judge in his Findings and Recommendations and the parties in their arguments rely on fundamental New Mexico law that a water right is established only by establishing prior beneficial use.<sup>15</sup>

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<sup>12</sup> See *Fleetwood Transp. Co. v. Packaging Corp. of America*, Civ. Action No. 6:10-01219-JMC, 2012 WL 761737 at \*3 (D.S.C. March 8, 2012) (“the pending motions have been briefed extensively and oral argument will not aid the decisional process”); *SE Prop. Holdings, LLC v. The Rookery III*, Civ. Action No. 11-0629-WS-B at 1 n.1 (S.D.AL Jan. 3, 2013) (see Doc. 3108 Attachment 1) (“After careful review of the parties’ lengthy written submissions, the [court] finds that oral argument would be neither necessary nor helpful in resolving the issues presented”). With respect to the final authority relied on by Defendants, *George Nelson Found. v. Modernica, Inc.*, 12 F.Supp.3d 635, 645 n.5 (S.D.N.Y., 2014), the court did little more than report that oral argument had been held.

<sup>13</sup> Memorandum at 2.

<sup>14</sup> New Mexico water law is neither “arcane” nor too difficult for the Court to understand without the explanation of Defendants’ counsel at oral argument. See Memorandum at 2.

<sup>15</sup> See e.g. Objections at 13 (“[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water.” quoting NM Const. art. XVI, §3).

Defendants also suggest that “the relative inexperience of the United States as a Plaintiff” and the United States’ “double role” as both plaintiff and trustee for the Zuni and Navajo Nations somehow justify oral argument.<sup>16</sup> Defendants’ argument here is cryptic and has no possible bearing on the need for oral argument. No matter Defendants’ meaning, the United States’ experience in this adjudication is well established as it began more than a decade ago with the initiation of this litigation. Further, the United States pursues its duties in this subfile action, as it has for each of the hundreds of subfile actions in the Zuni River Basin Adjudication, without bias and free of conflict.<sup>17</sup> Any suggestion to the contrary is simply without basis.

### **III. Conclusion**

The parties have had every opportunity to develop and present their arguments. The complete, straightforward body of material that each party has to answer the relevant questions has been presented to the Court, and no additional explanation is necessary. Oral argument will not assist the Court in answering the questions presented. For the reasons articulated above, Defendants’ Motion Requesting Oral Argument should be denied.

Respectfully submitted this 24th day of May, 2016.

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<sup>16</sup> Memorandum at 2.

<sup>17</sup> See *Nevada v. United States*, 463 U.S. 110, 135 n.15 (1983) (although the United States might be charged with more than one litigation responsibility, the United States is able to conduct litigation on behalf of diverse interests without conflict).

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on May 24, 2015, 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.

/s/ Andrew "Guss" Guarino