

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

UNITED STATES OF AMERICA, and)	
STATE OF NEW MEXICO <i>ex rel.</i>)	
STATE ENGINEER,)	No. 01cv00072-MV/WPL
)	
Plaintiffs,)	ZUNI RIVER BASIN
)	ADJUDICATION
)	
-v-)	Subfile No. ZRB-2-0098
)	
A & R PRODUCTIONS, <i>et. al.</i> ,)	
)	
Defendants.)	
_____)	

**PLAINTIFFS’ JOINT MOTION IN LIMINE TO PROHIBIT INTRODUCTION OF
SURFACE WATER DECLARATION FOR CANYON SPRING**

Plaintiffs the United States of America and the State of New Mexico (Plaintiffs) jointly move to prohibit Defendants Yates Ranch Property, LLP and Jay Land, LTD (Defendants) from introducing into evidence their Declaration of Ownership of Water Right of Surface Waters to establish a water right for Canyon Spring (Canyon Spring declaration). Consistent with this Court’s previous decision in this case, the Canyon Spring declaration does not meet the requirements of NMSA 1978 § 78-1-3 and is not admissible, and is otherwise the inadmissible hearsay of Defendants’ counsel.¹

¹ A copy of the Canyon Spring declaration has been attached to this motion as Attachment 1.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' JOINT MOTION

I. INTRODUCTION AND BACKGROUND

The parties come to this Court with few remaining issues in dispute. As the result of the parties' motions for summary judgement, dispute remains only over those water rights claimed by Defendants and associated with two springs and several stockponds.² This motion in limine is focused on Defendants' water right claim tied to the spring commonly referred to as Canyon Spring.³

Defendants claim a water right for Canyon Spring: a livestock use water right with a quantity of 15 acre feet per year (AFY) and a non-specific priority of "before March 19, 1907."⁴ As this Court is aware, during the course of this litigation, the parties engaged in and completed discovery between September 5, 2014 and March 2015.⁵ During the course of litigation, Defendants provided a copy of the Canyon Spring declaration; this declaration is dated April 12,

² See *Proposed Findings and Recommended Disposition* (ECF No. 3223) ("Findings and Dispositions").

³ The companion spring to Canyon Spring is Jaralosa Spring; however, no surface water declaration exists for Jaralosa Spring and is therefore not addressed in this motion.

⁴ See *Subfile Answer of Defendants Yates Ranch Property, LLP and Jay Land, LTD* (ECF No. 2925) ("Subfile Answer") at 71.

⁵ See *Order Setting Pretrial Deadlines and Adopting Joint Status Report* (ECF No. 2991).

2004 and, based on the signatures of the declaration, was completed by Defendants' counsel, Peter Shoenfeld.⁶

Based on previous arguments presented by Defendants, Plaintiffs anticipate that Defendants will seek to introduce as evidence the Canyon Springs declaration pursuant to NMSA 1978 § 72-1-3.⁷ Examination of the Canyon Springs declaration reveals that the assertions made in the declaration by Mr. Shoenfeld do not satisfy NMSA 1978 § 72-1-3 and the declaration does not otherwise constitute admissible evidence.

II. ARGUMENT

A. The Canyon Springs declaration does not satisfy NMSA 1978 § 72-1-3.

The Canyon Springs declaration on which Defendants seek to rely was completed by Mr. Shoenfeld in 2004 after Defendants were served and joined as parties to this case. And it reasonably appears to Plaintiffs that Defendants will seek to introduce the declaration pursuant to NMSA 1978 § 72-1-3 and Plaintiffs reasonably believe that this declaration is the only basis on which Defendants will seek to establish their century-old Canyon Springs water right claim. But this is not the first time that this Court has had to address Mr. Shoenfeld's declarations. The Canyon Spring declaration is very similar to the declaration previously presented by Defendants

⁶ A copy of this declaration was previously presented to the Court. This declaration was attached as Exhibit 13 to Defendants' Response to the United States' Cross-Motion for Summary Judgment (ECF No. 3093-27).

⁷ See Defendants' Response to the United States' Cross-Motion for Summary Judgment (ECF No. 3093) at 14 ("[The declaration for Canyon Springs] is *prima facie* proof of the facts stated in it.").

to support their “Atarque Lake” water right claim (hereafter, “Atarque Lake declaration”).⁸ Ultimately, this Court determined, and the District Court affirmed, that the Atarque Lake declaration did not satisfy the statute, did not constitute *prima facie* evidence, and was not admissible under the statute.⁹ The Canyon Spring declaration suffers the same defects as the Atarque Lake declaration. In the end, no basis exists to admit the Canyon Spring declaration into evidence as it is otherwise the inadmissible hearsay of Defendants’ counsel.¹⁰

NMSA 1978, § 72-1-3 provides for the admission of a surface/ground water declaration as *prima facie* proof of the contents of the declaration.¹¹ And this Court has determined that for the presumption to arise under the statute, the claimant must satisfy the statute’s requirements, in other words not every declaration for a surface water right meets the statutory presumption resulting in *prima facie* evidence.¹² Among the specific information that must be included, the statute requires that the declaration state “the date of first application to beneficial use.”¹³ This

⁸ See United States’ Cross-Motion for Summary Judgment (ECF No. 3076) at 25-27 (concerning whether the Atarque Lake declaration satisfied NMSA 1978 § 72-1-3 to constitute admissible evidence).

⁹ *Findings and Dispositions at 6 and Order Adopting Magistrate Judge’s Proposed Findings and Recommended Disposition* (ECF No. 3325) at 5 - 7.

¹⁰ Fed. R. Evid. 801(a) and 802.

¹¹ United States’ Cross-Motion for Summary Judgment (ECF No. 3076) at 25 - 27; *Findings and Dispositions at 6*; and *Order Adopting Magistrate Judge’s Proposed Findings and Recommended Disposition* (ECF No. 3325) at 5 - 7.

¹² Although a declaration “shall be *prima facie* evidence of the truth of their contents” under NMSA 1978 § 72-1-3, that requirement is not the same as being *prima facie* evidence of a water right.

¹³ NMSA 1978 § 72-1-3.

fact as well as all of the conditional facts required by the statute are facts that Plaintiffs (and the Court) can examine, verify, and, if necessary, rebut. Without such specificity, declarations would become meaningless because water claimants would be free to claim whatever water rights they desired rather than water rights established by and limited to historic, beneficial use based upon competent evidence. Consistent with this Court's previous findings, without this information, a declaration simply fails to satisfy the statute as it fails to meet the conditions to justify recognition of *prima facie* evidence.

In his declaration, Mr. Shoenfeld alleged no more than that water had been first put to use sometime "before March 19, 1907."¹⁴ This is precisely a circumstance for which this Court has already determined that the requirements of § 72-1-3 are not satisfied.

Even if the [Atarque Lake declaration] is *prima facie* proof of the truth of its contents, [the declaration] does not satisfy § 72-1-3 because it fails to state the date of first application to beneficial use, stating only that such date was, conveniently, before March 19, 1907"¹⁵

In this regard, the Canyon Spring declaration is indistinguishable from the Atarque Lake declaration that the Court previously considered. Just as found by the Court for the Atarque Lake declaration, Defendants' Canyon Spring declaration here is not grounded in fact but rather is

¹⁴ Attachment 1 at 2.

¹⁵ Proposed Findings and Recommended Dispositions (ECF No. 3223) at 6. The Proposed Findings were adopted by the District Court in the *Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition* (ECF No. 3325) at 4-7 (discussing application of NMSA 1978, § 72-1-3 to the Atarque Lake declaration).

employed for convenience and appears to be little more than a transparent attempt to avoid the need to produce a water right permit.¹⁶

Accordingly, as outlined in the paragraphs above, Defendants' declaration does not satisfy § 72-1-3 and is therefore not admissible evidence under the statute.

B. The Canyon Spring declaration is not otherwise admissible.

The contents of the Canyon Spring declaration are the 2004 assertions of Mr. Shoenfeld made after the initiation of and in conjunction with his representation of Defendants in this general stream adjudication. But the Canyon Spring declaration, besides being not admissible under NMSA 1978 § 72-1-3, is inadmissible hearsay of Defendants' counsel.¹⁷ And Defendants have no admissible evidence to support the assertions made in the declaration.

Necessarily, all evidence that existed to support Mr. Shoenfeld's assertions should have been preserved for examination in connection with this subfile litigation as "litigants have a duty to preserve documents or materials . . . that may be relevant to ongoing and potential future litigation."¹⁸ And "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."¹⁹ If any document or witnesses existed to support the assertions

¹⁶ Since March 19, 1907, any entity seeking to acquire a water right to the surface waters of New Mexico has been required to first make application to the state engineer. NMSA 1978, § 72-5-1. Without such application in place with the State Engineer, Defendants cannot establish a water right for any date after the 1907 cutoff.

¹⁷ Fed. R. Evid. 801 and 802.

¹⁸ *Philips Elecs. N. Am. Corp. v. BC Tech.*, 773 F. Supp. 2d 1149, 1195 (D. Utah 2011)

¹⁹ *Zubulake v. UBS Warburg, LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003). (Citations omitted).

made in 2004, one fairly could expect Defendants to identify them. Yet, Defendants' responses to discovery identify absolutely no admissible evidence to support what was asserted in the Canyon Springs declaration, namely, a 15 acre-foot stock water right existing more than a century ago.

During discovery concerning Canyon Springs, Plaintiffs specifically inquired of Defendants and Defendants responded:

Plaintiffs' Interrogatory No. 5 – In their *Subfile Answer of Defendants Yates Ranch Property, LLP and Jay Land, LTD* (January 25, 2014) (Doc. 2925) (pages 71 through 73), Defendants asserted water rights associated with springs. For each water right associated with a spring and asserted by Defendants, identify all documents that relate to or reflect the beneficial use of water from each spring in dispute.

Defendants' Response to Interrogatory No. 5 - Alam report and GoogleEarth photographs contained in it; photographs, which have been temporarily misplaced, and will be provided to you as soon as they are located.

Plaintiffs' Interrogatory No. 6 – In their *Subfile Answer of Defendants Yates Ranch Property, LLP and Jay Land, LTD* (January 25, 2014) (Doc. 2925) (pages 71 through 73), Defendants asserted water rights associated with springs. For each water right associated with a spring and asserted by Defendants, identify the witness(es) or potential witness(es) who will establish the quantity of water from each spring in dispute that has been put to beneficial use.

Defendants' Response to Interrogatory No. 6 - Darrell Brown and Don Alam

Plaintiffs' Interrogatory No. 7 – For each spring for which a water right is claimed by Defendants and described in Interrogatory No.3, identify all documents that support Defendants' claim to a "priority before March 19, 1907" for each spring and that establish such priority.

Defendants Response to Interrogatory No. 7 - Declarations either filed at or attempted to be filed at the office of the State Engineer of New Mexico, to wit: all documents identified as submitted in response to Request for Production No. 2; in addition

the 1934 homestead documents and the 1936 aerial photographs, also submitted herewith.²⁰

Examination of Defendants' discovery responses as well as the documents referred to in their discovery responses reveal that Defendants have no admissible information to support the assertions made in the Canyon Springs declaration. In fact, with the exception of the Canyon Spring declaration itself and the expert report of Mr. Alam, Defendants have neither provided nor identified any information or potential evidence associated with Canyon Spring. As described in Plaintiffs' companion motion in limine, the expert report of Don Alam does no more than identify the stockponds that are in proximity to Canyon Springs.²¹

In the end, the Canyon Springs declaration constitutes the hearsay of Defendants' counsel and is not admissible under the Federal Rules of Evidence. The Court should prohibit the introduction of the declaration.

III. CONCLUSION

For the reasons given in the paragraphs above, this Court should prohibit the introduction of the Canyon Springs declaration into evidence.

Respectfully submitted this 14th day of April, 2017.

²⁰ The interrogatories and responses listed are those exchanged between the parties associated with *Plaintiffs' (First) Joint Discovery Requests to Defendants Yates Ranch Property LLP and Jay Land Ltd.* See ECF. No. 3011.

²¹ See *Plaintiffs' Joint Motion in Limine to Prohibit Testimony from Defendants' Experts concerning Canyon and Jaralosa Springs* (filed simultaneously with this Motion) Attachment 2 (limited excerpts from Don Alam's expert report relating to Canyon Springs). In addition, the parties have no dispute with respect to the stockponds that are in proximity to and may receive water from Canyon Springs.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of April 2017, I filed the foregoing electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Andrew "Guss" Guarino
Andrew "Guss" Guarino