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

ZUNI INDIAN TRIBE, NAVAJO NATION

Plaintiffs-in-Intervention,

-vs- No. 01cv00072-MV-WPL
Subfile ZRB 2-0098

A & R Productions, et al.,

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

Introduction

In the initial pretrial conference in the captioned subfile the Court ordered the briefing of two issues. This is the memorandum brief of Defendants Yates Ranch Property LLP and JAY Land LTD on those issues.

Statement of Facts

Defendants Yates Ranch Property LLP and JAY Land LTD (hereinafter for brevity “Yates”) own a large ranch as tenants in common, the water rights of which are being adjudicated herein. The United States performed a hydrographic survey. Whether it

conforms to the requirements of the statute remains to be seen. See NMSA 72-4-13 et seq. The results of that hydrographic survey as affects Yates was a proposed consent order prepared by the United States. The proposed consent order set forth the United States' and New Mexico's claim of the water rights held by Yates. It reflected 122 "water features"[1], but apparently does not deem the term "water features" to mean water rights. As best counsel knows, the term "water features" has no meaning in the New Mexico law of water rights. (The Yates Defendants have treated the proposed consent order as a subfile complaint.)

To the extent the "water features" identified in the Plaintiffs' proposed consent order means "water rights" Yates concur that the water rights so identified and defined are correct as to the 37 water rights which they have admitted in their Subfile Answer (Document No. 2925).

Yates have denied the allegations respecting at least some aspects of the remaining 85 water rights. (The term "aspects" of a water right means those items set forth in NMSA 72-4-19, NMSA, (1919) which are required to be determined in a water rights adjudication and to be set forth in the final judgment:

> "the priority, amount, purpose, periods and place of use, and as to water used for irrigation . . . the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.")

[1]A term used by counsel for Plaintiff United States in the initial pretrial conference.

In addition to the 122 water rights set forth in the Plaintiffs' proposed consent order, Yates have claimed 24 additional water rights. Of the 24 additional water rights the Plaintiffs had knowledge of at least the two claimed water rights set forth on page 71 of the subfile answer (the Plaintiffs having assigned hydrographic survey identification numbers to them); they have and had knowledge of Yates' claim for Atarque Lake, which is the subject of a declaration of surface water rights which the State Engineer refused to file, and which was the subject matter of a dispute before this Court resolved on May 11, 2004, by an order entered on that date (Document No. 330); and they have and had knowledge of Yates' claims to water rights in three wells for which the Yates had filed declarations with the State Engineer (pp. 77, 78, of the subfile answer.) Those wells are located on land owned by the State of New Mexico as represented by the State Land Commissioner ("SLO"). The land on which the wells are located is the subject of a grazing lease from the State to Yates.

Some, perhaps all, of the water rights not recognized by Plaintiffs were pointed out to personnel of Plaintiffs on the occasion of a field inspection and tour of Yates' ranch on June 13, 2006. (Plaintiffs' knowledge of the water right claims of Yates, as discussed in this paragraph, is important because it bears on the procedural issues arising with respect to Yates'

water rights and the obligation of the Plaintiffs to seek the adjudication of some of those water rights in this first phase of this lawsuit rather than leaving it to the later *inter se* phase of the lawsuit, as Plaintiffs propose.)

Statement of Issues

1. The water rights claims of Yates having been identified by the subfile answer, who has the burden (a) of proof with respect to the extent of the water rights; (b) to go forward with respect to each of the contested water rights; and (c) to persuade the Court that those parties' claims with respect to the water right is the correct one?

Included within each of these issues is the question of the effect of the statutory definition of prima facie evidence of a water right.

2. Whether Yates is entitled to have a determination in this phase of the lawsuit of the water rights claimed by them, the points of diversion of which are located on lands owned by the State of New Mexico?

Resolution

1. The Plaintiffs have the burden of proof, the burden to go forward and the burden of persuasion with respect to all issues raised by the denials in the Yates Answer to the Consent Order. Portions of that burden might shift depending on the proof to be submitted by Plaintiffs with respect to Atarque Lake and if the

Plaintiffs had claimed that the water rights in it were abandoned. (They have not made that claim.) To the extent Yates present prima facie evidence of the disputed water rights they claim, if not rebutted, they prevail.

2. Yates claim the water rights with points of diversion (as well as places of use) located on State Land; as such they are entitled under governing State law to a determination by this Court, in this phase of the adjudication, of the issues respecting those water rights claimed by them.

Discussion

BURDEN OF PROOF, PRESUMPTIONS, PRIMA FACIE EVIDENCE, GOING FORWARD AND PERSUASION

New Mexico water jurisprudence contains only little guidance respecting presumptions, burden of proof, going forward, prima facie evidence, and persuasion. The two exceptions are the common law of abandonment of water rights and the statutory law respecting declarations of water rights.

The New Mexico law of abandonment of water rights goes to two important but separate principles at work in this case. The two principles are (1) that the party asserting abandonment of a water right (here the Plaintiffs) must go forward and present proof of an unreasonable delay in order then to create a rebuttable presumption of abandonment and shift the burden of

proof to the person denying the abandonment; (2) that the shift in the burden of proof from Plaintiff to Defendant demonstrates that the burden of proof was on the Plaintiff to begin with. (I.e., if already on the Defendant, as Plaintiffs claim, there would be no reason to shift that burden.)

It is therefore appropriate to examine the meaning of a rebuttable presumption as well as the burden of proof which exists before such a shift takes place.

A presumption disappears once proof contrary to the presumed fact is produced. See Hudson v. Otero, 1969-NMSC-125, 80 N.M. 668, 459 P.2d 830 (S. Ct. 1969), infra. The Court is then left in the position of having to decide the issue based on its resolution of the factual issues before it. As is clearly distinguished in the cases, prima facie evidence does not disappear, and in the absence of proof presented by the opponent, the prima facie evidence establishes its proponent's case unless overcome by other evidence.

In Hudson, supra, the New Mexico Supreme Court recognized and rejected:

> . . . the tendency to use "presumption" and "prima facie" interchangeably as though they were synonymous. In . . . [the case internally cited] we made a distinction, and held that the prima facie evidence intended by the statute there being considered "does not disappear upon proof to the contrary," as a presumption might disappear . . . .

More simply and more recently the same Court defined "prima facie evidence":

> In general legal parlance, "prima facie evidence" is "[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced." State v. Trossman, 2009-NMSC-034, 146 N.M. 462, 212 P.3d 350.

I.e., the burden to overcome prima facie evidence remains wherever it was to begin with. In this case, that burden was on the Plaintiffs.

Nothing in the adjudication statutes shift the burden of proof in any manner.

This action is governed in part by NMSA § 72-4-17 (1965), which provides that:

> . . . When any such [water rights adjudication] suit has been filed the court shall . . . direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided in this article, in order to obtain all data necessary to the determination of the rights involved. . . .

A “complete hydrographic survey” has always meant, in all of the adjudications before this court as well as those pending and completed in the State Courts, that the Plaintiff includes all known claims of water rights. See the Aamodt case hydrographic survey report, 1966, on file in this Court (if it can be found in the labyrinthine files of that case), throughout which there appear reflections that the water right is “none”, which is then followed by an Offer of Judgment (now termed a proposed consent order) to the hapless water right claimant, which reflects that the Plaintiff takes the position that water right does not exist. See randomly selected pp. 11, 99, 167 of the Aamodt case

hydrographic survey. (Civ. 66-06639MV/WPL.)

In such instances where the Plaintiff knows of but asserts that some claim of a water user is invalid, it has been the uniform practice for decades in stream system adjudications such as this that the Plaintiff makes a "No Right" offer to the water user.

NMSA § 72-4-16 (1919) provides only for the admissibility in evidence of the hydrographic survey. It does nothing in connection with the burden of proof or the burden to go forward:

> All reports of hydrographic surveys of the waters of any stream system . . . when made in writing and signed by the party making the same shall be received and considered in evidence in the trial of all causes involving the data shown in such survey, the same as though testified to by the person making the same, subject to rebuttal, the same as in ordinary cases.

In 1919 the legislature was apparently less concerned than Defendants now are with due process matters such as the Defendant's right to cross examine the witnesses, i.e., those preparing the hydrographic survey. The omission by the legislature to mention cross-examination cannot mean that water right claimants such as Yates do not have that right. (If it does mean there is no right to cross examination, the statute is on its face defective. A "reasonable right of cross-examination" is afforded in civil cases. In re First Nat'l Bank, 1977-NMCA-005, 90 N.M. 110, 560 P.2d 174 (Ct. App. 1977).

The statutes obviously create Plaintiffs' burden to go

forward. Plaintiffs can do so by placing an appropriate hydrographic survey in evidence to the extent it covers all the claimed water rights, provided Defendants have the right to cross examine the persons creating the report.

Filing a hydrographic survey which omits known or reasonably discoverable claims, such as those of Yates, and thereby attempting to place on Yates the burden to in effect, perform their own hydrographic survey, clearly defeats the statutory purpose of having the Plaintiffs perform the tasks necessary for inclusion in the "**complete hydrographic survey** of such stream system . . . in order to obtain **all data necessary to the determination of the rights involved**." § 72-4-17, supra. (Bold added.) Known claims are surely "data necessary" under the statute. Not going forward with that necessary data should entitle Yates to judgment in their favor at the latest at the close of Plaintiffs' case. Furthermore, if Plaintiffs have not pleaded those water rights they claim are not valid they should be disqualified from making proof outside the pleadings with respect to those claimed water rights.

Obviously, the meaning of the statute is that the Plaintiff(s) have the burden to go forward. By introducing in evidence the hydrographic survey, if it meets the requirements of the statute, they may, depending on what the Court hears in cross examination of the "person making the same", have proved or

failed to prove their claims, to the extent their claims have been made.

As respects the Yates claim for Atarque Lake water rights, Yates need to know what the Plaintiffs' claims are. To date, Yates has made their claim, but we do not know whether Plaintiffs recognize them, or assert the rights were forfeited or abandoned, or differ with respect to some aspect of them, such as priority, amount of water, etc.

> Clear and convincing evidence of non-use of water for an unreasonable period may raise a rebuttable presumption of an intent to abandon a water right and thereby shift the burden to the water right claimant to show excuse for non-use. United States v. Abousleman, Civ 83-1041 (D.N.M. February 7, 1994) (interpreting Reynolds v. South Springs Co., 80 N.M. 114, 452 P.2d 478 (1969)). (As cited in Waltrip, Jr. v. Association of Mutual Protection and Mutual Benefit of the Community of Cerro De Guadalupe, CIV-03-1245 BB/WDS, United States District Court for the District of New Mexico (March 23, 2005.))

It is clear that for such a shift from Plaintiff to the water right claimant to take place, the burden must have been on the Plaintiff to begin with. It is further clear that because a rebuttable presumption may be "raised" under the circumstances before the Court, there is no such presumption in existence before that occurs.

The statutory law governing declarations of water rights is contained in NMSA §72-1-3. (1961) (for surface water rights) and § 72-12-5 (1931) for groundwater rights. The statutes are for all practical purposes, identical, and so only the groundwater

version is set forth:

> Any person, firm or corporation claiming to be the owner of a vested water right from any. . . underground sources . . . by application of waters therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting 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. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. . . . **Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.** (Bold added).

This section has the purpose and effect of making the declaration of beneficial use of ground water prima facie evidence of the claim. Eldorado Utils., Inc. v. State ex rel. D'Antonio, 2005-NMCA-041, 137 N.M. 268, 110 P.3d 76, cert. denied, 2005-NMCERT-004, 137 N.M. 454, 112 P.3d 1111.

Yates in 2004 attempted to file a declaration of the water rights in Atarque Lake. The State Engineer refused to file the declaration, notwithstanding the mandatory provision of NMSA § 72-1-3, and § 72-12-5, supra. This action was already underway, and Yates perceived that the decision of the State Engineer was intended to preclude Yates from having the benefit of the declaration for the lake, i.e., the prima facie evidence afforded by the statute. The question was raised in a motion to the Court, and the Court held that:

> {3} The State Engineer, a party in the federal proceeding,

> becomes the adjudicator in the state administrative action. The adjudicatory process in this Court provides both the State Engineer and Defendants the opportunity to present evidence and make legal arguments regarding their positions on the subject water rights claim. Giving preclusive effect to the State Engineer's decision on Defendants' declaration would require Defendants to litigate in state court the {4} identical issue that will be before the Court in this adjudication. This Court will, therefore, not give preclusive effect to any decision reached by the State Engineer on Defendants' declaration. [And, therefore, the Court determined that the issue raised was moot.]

Notwithstanding the declaration has not been filed, Judge Black's decision leaves the parties in the same position as if it had been filed, and these Defendants should have the mandatory benefit of the prima facie evidence reflected in the declaration.

Except as discussed above in the context of water litigation, Yates relies on New Mexico law in general respecting presumptions, burden of proof, going forward and persuasion.

The general rule is that the burden of proof or persuasion as to a fact or an issue generally rests on party asserting or pleading it. Armstrong v. Csurilla, 1991-NMSC-081, 112 N.M. 579, 817 P.2d 1221 (S. Ct. 1991). Here, the Plaintiffs pleaded the 85 contested "water features" shown in the consent order. They have not pleaded anything else. Without having done so they are not entitled to make any proof of anything else. If they had done so they would be obliged to go forward with their proof in support of their allegations.

Rule 302. F.R.Civ.P. provides that:

In a civil case, state law governs the effect of a

presumption regarding a claim or defense for which state law supplies the rule of decision.

ENTITLEMENT TO A DETERMINATION OF WATER RIGHTS CLAIMED BY YATES WHERE THE POINT OF DIVERSION AND OR PLACE OF USE IS ON STATE OWNED LAND

There is a limited issue before the Court with respect to whether the Court should entertain the issues of water rights with a point of diversion or place of use on State land which is leased by Yates. Yates have made a claim to such water rights, and they are therefore "known claimants" who are entitled to be heard with respect to those water rights. See § 72-4-17, supra. While the statute says only that known claimants must be joined, the meaning of the statute must be deeper. If all that need be done under the statute is the joinder of Yates, and thereafter the Plaintiffs can ignore the Yates' claims, the statute is meaningless.

The Plaintiffs state that because there has been a determination as between the State Land Office ("SLO") and the Plaintiffs defining those water rights, without the participation of Yates, Yates's rights are protected by their ability to make *inter se* challenges to whatever has been adjudicated in the first instance between Plaintiffs and the SLO.

The institution of the *inter se* phase of water rights adjudications has its genesis in State ex rel. Reynolds v. Sharp, 66 N.M. 192, 344 P.2d 943 (1959). Even though there is no

mention of the *inter se* phase of the adjudication in the statute, Sharp held:

> . . . no decree declaring "the priority, amount, purpose, periods and place of use * * * the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority" as required by [now 72-4-19, N.M.S.A. 1978], can be entered concerning the waters of the Roswell Artesian Basin until hydrographic surveys thereon have been completed and all parties impleaded, **at which time it is contemplated a further hearing to determine the relative rights of the parties, one toward the other**, will be held. We cannot say that when this is done, and a decree entered pursuant to the provisions of 75-4-8 quoted above, all of the statutory requirements will not have been met. (Bold added.)

The suggestion of the Plaintiffs that Yates' rights are protected by the *inter se* proceedings available to them is inaccurate. The question of the extent of the rights under discussion is not one involving the "relative rights of the parties, one toward the other" but a question of the rights of Yates vis-a-vis the Plaintiffs.

The ordinary *inter se* proceeding has the objective of, e.g., affording a downstream water user "D" the opportunity to claim and prove that an upstream water user "U" is not entitled to the amount of water adjudicated between "U" and the Plaintiff, or that "U"'s priority is later than "D"'s. The purpose of the *inter se* proceeding is to give "D" his day in Court to enable "D" to make his claim for more water in times of shortage, for example, **relative** to "U".

It is preposterous to take the position that Yates could use

an *inter se* proceeding to assert that the water right previously adjudicated to the competing claimant, here the SLO, is larger than as adjudicated to the SLO. The perhaps predictable result is that the SLO would respond by admitting the larger water right, perhaps even counterclaiming that it is even larger than as claimed by Yates. Whereupon the Plaintiffs would be bound by the larger right agreed upon by two water users without the participation of the Plaintiffs?

As all parties apparently agree, ownership is not determined in a water right adjudication. The only items determined are those in NMSA § 72-4-19, supra. It is in the interest of the Plaintiffs to determine who makes claims to the water rights, because they are required to be joined as parties.

> " . . . all those whose **claim** to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties." NMSA § 72–4-17, supra. (Bold added.)

Ownership is only of even passing interest because ownership of irrigated land carries wih it the ownership of unsevered irrigation rights. NMSA § 72-1-2 (1907), Hydro Resources Corp. v. Gray, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749, thus making ownership of land a streamlined means of identifying defendants where the subject is irrigation water rights. We are here not dealing with irrigation water rights and so ownership of land by the SLO is meaningless. Yates has a claim to the water rights in wells on SLO land which Yates has operated, maintained and

equipped[2], and so should have the benefit of making its own case for those water rights. If between Yates and SLO there is a dispute as to ownership, that dispute can only be heard in another venue.

The procedural problem facing Yates is that if the amount of water or priority adjudicated as between SLO and Plaintiffs is, in Yates' view, too small or too junior, they will have been deprived of the opportunity to assert that the water right is larger or older than aas determined between the SLO and Plaintiffs. (Yates have reviewed the hydrographic materials prepared by the United States and cannot determine from such inspection that the wells and water rights claimed by them and located on SLO lands (see pp. 77, 78, Yates subfile answer) have been adjudicated to the SLO, but they have been so advised by counsel for the United States, and are proceeding and relying on that information.)

RESPECTFULLY SUBMITTED

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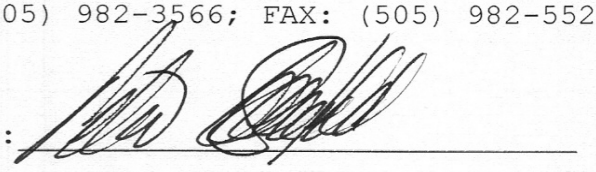
By: 

[2]The identity of the driller of the wells is shrouded in the darkness of time; Yates believes their predecessor drilled the wells and that the value of those wells and the water rights in them was included in the price they paid for the ranch, and of which the SLO grazing leases are a part.

CERTIFICATE OF SERVICE

I served a copy of the foregoing on all parties by means of the Court's digital filing and service system on April 28, 2014.