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, v. A & R PRODUCTIONS, et al. Defendants.	)	No. 01cv00072-MV-WPL ZUNI RIVER BASIN ADJUDICATION **Subfile No. ZRB-2-0098**

UNITED STATES' RESPONSE AND OBJECTION TO DEFENDANTS' MOTION REQUESTING ORAL ARGUMENT

Plaintiff United States of America ("United States") responds to Subfile Defendants JAY Land Ltd. Co.'s and Yates Ranch Property LLP's ("Defendants") Motion Requesting Oral Argument (Doc. 3099) and their memorandum in support (Doc. 3099-1) ("Motion"). Pursuant to D.N.M.LR-Civ. 7.6(a), the United States objects to and opposes Defendants' request for oral argument. No justification exists to support Defendants' motion. The summary judgment motions pending before the Court are thoroughly briefed, and oral argument is unnecessary to resolve the pending motions. The Court should deny Defendants' request for oral argument and resolve the pending summary judgment motions based on the well-established law concerning summary judgment and New Mexico water rights and on the complete record presented to the Court. The paragraphs below are presented in support of this Objection.

I. No Basis Exists to Permit Oral Argument

The Court's scheduling order controlling this subfile action was put in place with the

consent of the parties more than a year ago. *See Order Setting Pretrial Deadlines and Adopting Joint Status Report* (September 5, 2014, Doc. 2991) ("Scheduling Order"). The Scheduling Order does not contemplate that oral argument will be held on motions for summary judgment. *Id*. at 2. Once established, the Scheduling Order can only be modified for good cause. Fed. R. Civ. P. 16(b)(4). "Good cause" means that through no fault of a party, a necessary goal cannot be achieved. *See Gerald v. Locksley*, 849 F.Supp.2d 1190, 1210 (D.N.M. 2011) ("Properly construed, 'good cause' means that scheduling deadlines cannot be met despite party's diligent efforts." *quoting Advanced Optics Elec., Inc. v. Robins*, 769 F.Supp.2d 1285, 1313 (D.N.M. 2010)).

Further, the local rules governing oral argument provides:

Oral Argument.

(a) **When Allowed.** A motion will be decided on the briefs ***unless*** the Court sets oral argument.

D.N.M.LR-Civ. 7.6(a) (emphasis added). Defendants' characterization of the rule that "[i]t is a matter of he (sic) Court's discretion whether to allow oral argument" is simply wrong. *See* Motion at 1.[1] By its plain terms, the local rule presumes that on any motion, oral argument shall not occur unless the Court determines otherwise. By necessity, sufficient, legitimate grounds must exist (under these circumstances, good cause must exist) for the Court to determine

[1] In the cases identified by Defendants as examples discussing a court's ability to call for oral argument under its applicable local rules, each example illustrates that oral argument was not necessary. *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) (Attachment A) ("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"). In any event, these examples did not apply the Local Rules of the District of New Mexico and have no applicability to the circumstances here.

otherwise - to modify the Scheduling Order and now allow oral argument.

Here, the question is whether the Court can rule on the summary judgment motions based on the pleadings presented. Defendants identify no aspect of the motions that have not been adequately addressed in the pleadings.[2] The following four documents have been presented to the Court, constitute the entirety of the two summary judgment motions, and are pending resolution:

a. *Motion for Partial Summary Judgment* (Doc. 3059) and *Memorandum in Support of Motion for Summary Judgment* (Doc. 3059-1) (June 26, 2015) ("Defendants' Summary Judgment Motion");

b. *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* (August 18, 2015) (Doc. 3076) ("Cross-Motion");

c. *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)* (September 14, 2015) (Doc. 3093 ("Defendants' Response"); and

d. *Reply on Cross-Motion for Summary Judgment* (September 30, 2015) (Doc. 3097) ("United States' Reply").

[2] Defendants' suggest that "the relative inexperience of the United States as a Plaintiff" and the United States' "odd double role" as both plaintiff and trustee for the Zuni and Navajo Nations somehow justify oral argument. Motion at 2. 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 began more than a decade ago with the initiation of this litigation and is well established. Further, the United States pursues its duties as a plaintiff 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. *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). Any suggestion to the contrary is simply without basis.

The issues presented are straightforward and have been well-briefed. The issues presented by Defendants can be succinctly stated:

a. whether Defendants are entitled to judgment as a matter of law that a water right "at Atarque Lake exists," Defendants' Summary Judgment Motion at 19-20; and

b. whether Defendants are entitled to judgment as a matter of law that they are entitled to a water right that includes a water quantity for evaporative loss in an amount of "approximately 5 feet per year," *id.* at 20.

In the Cross-Motion, the United States moved for summary judgment on all water rights that remain in dispute between the parties. The United States argued that it was entitled to judgment as a matter of law in three areas of dispute:

a. the water rights for the 21 wells that remain in dispute, Cross Motion at 3-4 and 13-22;

b. the claimed water rights for natural springs and depressions, *id.* at 4-5 and 22-23; and

c. the claimed water right associated with Atarque Lake, *id.* at 5-6 and 23-37.

The issues presented to the Court through these motions are not novel or complex. At their core, these motions present the same question: whether either party is entitled to judgment as a matter of law. In both, Defendants' Summary Judgment Motion and the Cross-Motion work from an identical summary judgment standard; a standard that this Court has deftly applied on other occasions in this adjudication. *See, e.g., Proposed Findings and Recommended Disposition* Subfile No. ZRB-2-0014 (May 27, 2015) (Doc. 3049). Further, both parties present issues of well-established New Mexico law.[3] Neither Defendants nor the United States present any

[3] New Mexico water law is neither "arcane" nor too difficult for the Court to understand without the explanation of

question that could be even remotely construed as novel, unsettled, or complex. Regardless the issue presented, both parties rely on fundamental New Mexico law that a water right is established only by establishing beneficial use. Defendants' Response at 12 ("[The measure of a water right] is beneficial use." citing NM Const. art. XVI, §3); Cross Motion at 8-9 (same).

Based upon the briefing, the Court is left with a straight forward legal question: whether either party has established that it is entitled to judgment as a matter of law. If answered in the affirmative, the Court should rule that judgment enters. If answered in the negative, the Court should deny the relevant portion of the motion. The complete, straightforward body of material that each party has to answer this question has been presented to the Court and no additional explanation is necessary. Oral argument will not assist the Court in answering the question presented to the Court.

II. Conclusion

For the reasons articulated above, Defendants Motion Requesting Oral Argument should be denied.

Respectfully submitted this 22nd day of October, 2015.

/s/ Andrew "Guss" Guarino
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counsel at oral argument. *See* Motion at 2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 22, 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_____