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**

RESPONSE TO OBJECTIONS TO THE PROPOSED FINDINGS AND RECOMMENDED DISPOSITION OF THE MAGISTRATE[1]

The United States responds to *Defendants' Objections to the Proposed Findings and Recommended Disposition of the Magistrate* (Doc. 3223) ("Objections").[2] The Court should adopt the Magistrate's *Proposed Findings and Recommended Disposition* (Doc. 3223) ("Findings and Recommendations")[3] and overrule the Objections.[4]

[1] The United States has reviewed the response to objections prepared by Plaintiff State of New Mexico and filed simultaneously with this response. The United States concurs and joins the position of Plaintiff State of New Mexico as presented in its response.

[2] Fed. R. Civ. P 6(a)(1)(C), 6(d), and 72(b)(2); and Amended *Order Granting Unopposed Motion for Extension of Time for Plaintiffs to Respond to Defendants' Objections* (Doc. 3243).

[3] The Findings and Recommendations are supported by and consistent with the arguments and evidence presented by the United States in:

A) *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) ("United States' Cross-Motion"); and

B) *Reply on Cross-Motion for Summary Judgment* (Doc. 3097) ("United States' Reply on Cross-Motion").

[4] The arguments and evidence presented by Defendants JAY Land Ltd. Co.'s and Yates Ranch Property LLP's ("Defendants") to the Magistrate below consist of:

A) *Motion for Partial Summary Judgment* (Doc. 3059) *and Memorandum in Support of Motion for Summary Judgment* (Doc. 3059-1) ("Defendants' Summary Judgment Motion"); and

INTRODUCTION AND SUMMARY OF THE PROCEEDINGS BELOW

Atarque Ranch is a ranch of approximately 100,000 acres found within the Zuni River basin owned by Defendants. The water rights tied to this property is the subject of this subfile proceeding and the Findings and Recommendations. The dispute between the parties center on those Atarque Ranch water rights to which the parties cannot agree. In this general stream adjudication, to the extent that a water right is contested between the parties, the water right claimants, here Defendants, have the burden to establish the elements of any water right in dispute: priority, quantity, purpose of use, period of use, and place of use.[5] As such, Plaintiffs have no burden to present evidence on or establish Defendants' contested water right claims.

The water rights at issue below concerned the following water features: 1) Atarque Lake; 2) 21 livestock wells; and 3) natural springs and depressions. Below, Defendants claimed water rights associated with these water features. To the extent that Plaintiffs were willing to recognize a water right associated with the any of the water features, Plaintiffs specified the extent to which they were willing to stipulate.[6] Plaintiffs identified the water right attributes to which it would stipulate for the 21 contested livestock wells;[7] Plaintiffs made no stipulation with respect to water rights associated with Atarque Lake or the natural springs and depressions found on Atarque Ranch. To the extent

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B) *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)* ("Defendants' Response on Cross-Motion").

[5] Findings and Recommendations at 4.

[6] The United States detailed the basis of Plaintiffs' proposed settlement of the Defendants' water rights. United States' Cross-Motion at 10 - 13. The process followed and estimates made to develop a proposed Consent Order as a settlement was consistent with the process followed and estimates made for many years and for subfile defendants throughout the Zuni River Basin. Defendants, like all subfile defendants, were free to accept or reject Plaintiffs' settlement offer. Here, Defendants chose to reject it. In consequence, Defendants shouldered the burden to establish each of their disputed water right claims and the assumptions on which Plaintiffs previously estimated Defendants' water rights largely became irrelevant.

[7] *Id.* at 3 n.3 and Attachment A.

Defendants sought to establish water rights that were different from Plaintiffs' stipulations, the burden remained on Defendants to establish before the Magistrate each and every element of the contested water rights. Nevertheless, as for all subfile defendants, Defendants did not establish their contested water right claims, Plaintiffs remained willing to agree to the water right attributes they proposed for stipulations.[8] Thus, when Defendants' claims failed on summary judgment, the Magistrate acted appropriately to recommend that judgment enter for Defendants' water rights in amounts and with attributes as stipulated to by Plaintiffs. Without Plaintiffs' stipulation, Defendants water right claims would have simply failed and they would have been left with no water rights for the 21 contested livestock wells.

Below, the parties completed an extensive discovery process and presented motions for summary judgment. Defendants raised just two issues before the Magistrate. They sought: a determination that an Atarque Lake water right had not been abandoned[9] and a determination that an unstated quantity of water from evaporation must be included with the water rights claimed for the 21 contested livestock wells.[10]

The United States' Cross-Motion was more comprehensive. The United States asked for judgment against Defendants on their Atarque Lake water right claim.[11] The United States demonstrated that Defendants could not establish any water right associated with that impoundment and that even if a right could be established, the right had been abandoned. The United States also asked for judgment against Defendants on their water right claims for the 21 contested livestock wells.[12] The United States demonstrated that Defendants did not have evidence to support the water

[8] *See id.*

[9] Defendants' Summary Judgment Motion at 8 - 16.

[10] *Id.* at 16 - 19.

[11] United States' Cross-Motion at 23 - 37.

[12] *Id.* at 13 - 22; *see also Subfile Answer* (Doc. #2925).

rights claimed.[13] Finally, the United States asked for judgment against Defendants on their water right claims for natural springs and depressions.[14] The United States demonstrated that Defendants did not have evidence to support the water rights claimed.

In the Findings and Recommendations, the Magistrate applied the proper standard of review for summary judgment motions and issued a decision to the extent necessary to resolve the motions presented.[15] The Magistrate first addressed the arguments presented concerning Defendants' Atarque Lake water right claim. The Magistrate determined that Defendants did not have sufficient evidence to establish, in the first instance, a water right associated with Atarque Lake.[16] Further, the Magistrate concluded in the alternative that even if a water right for Atarque Lake could be established in the first instance, the undisputed 45-year period of nonuse was an unreasonable period of nonuse and created a presumption of abandonment.[17] Despite having the burden and every opportunity to respond, Defendants presented no evidence or reasonable basis that justified the period of nonuse.[18]

Next, the Magistrate turned to the 21 contested livestock wells. The Magistrate correctly observed that the Defendants failed to meet their burden to produce evidence to establish their claimed water rights.[19] Further, the Magistrate correctly observed that the only response offered by Defendants to the Cross-Motion was to claim that the United States had failed to identify the wells in dispute[20] – a claim patently not true.[21] In other words, despite the fact that Defendants had the

[13] United States' Cross-Motion at 13 - 22.
[14] *Id.* at 22 - 23.
[15] Findings and Recommendations at 2 – 3.
[16] *Id.* at 4 - 7 and 10.
[17] *Id.* at 7 - 9 and 10.
[18] *Id.* at 9 and 10.
[19] *Id.* at 11 - 33.
[20] *Id.* at 11.
[21] *Subfile Answer* (Doc. 2925); United States Cross-Motion at 3 n.3 and Attachment A; and United

burden to establish the water rights for the 21 contested livestock wells, Defendants presented nothing to avoid summary judgment. Thus, the Magistrate correctly determined that Defendants presented no basis to rebut the United States' argument; Defendants offered no argument and pointed the Magistrate to no evidentiary basis to establish the elements of a water right (priority, quantity, purpose of use, period of use, and place of use) for the rights claimed.[22] For each of the 21 wells, the Magistrate made specific findings that Defendants had failed to present sufficient argument or evidence to support their water right claims.[23]

Finally, the Magistrate turned to Defendants' water right claims for natural springs and depressions.[24] With respect to two of the springs (Jaralosa Springs (10A-4-SPR01) and Canyon Springs (9C-4-SPR02)) and the natural depressions claimed in Defendants' Subfile Answer, the Magistrate determined that Defendants had sufficiently raised material issues of fact as to the existence of water rights and as such the United States' Cross-Motion could not be granted for these water features.[25] Nevertheless, for the two remaining, disputed springs (Los Alamos Springs), the Magistrate determined that Defendants' affidavit presented in response to the United States' motion and the scintilla of material contained therein was not sufficient to avoid summary judgment.[26]

Ultimately, the Finding and Recommendations are well supported and are as follows. With respect to the Defendants' Summary Judgment Motion, the motion should be denied. First, Defendants claim that any Atarque Lake water right has not been abandoned presupposes that Defendants could establish a water right in the first instance; they could not.[27] Second, that a water

States' Reply on Cross-Motion at 2 n.1.

[22] Findings and Recommendations at 11.

[23] *Id.* at 11, 12, 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, and 32.

[24] *Id.* at 33 - 35.

[25] *Id.*

[26] *Id.* at 34 - 35.

[27] *Id.* at 4 - 7 and 10.

right may include some losses as a result of evaporation is not disputed by the parties; however, Defendants did not establish how any such loss might be calculated and tied to any of the 21 contested livestock wells.[28] And in any event, Defendants could not, in the first instance, establish their water right claims for the 21 contested livestock wells and, therefore, any decision concerning evaporative losses was not necessary.[29]

With respect to the United States' Cross-Motion, the Magistrate found that the motion should be granted in part. With respect to the water right claims for Atarque Lake and the 21 contested livestock wells, the United States demonstrated that Defendants could not establish the elements of a water right for these water features; Defendants presented no admissible evidence to meet their burden on summary judgment and to establish the basis for the water rights in dispute.[30] With respect to Los Alamos Springs, the Magistrate found that Defendants failed to carry their burden to establish essential elements of their water right claims.[31]

STANDARD OF REVIEW

Defendants challenge the Findings and Recommendations pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b). Once timely and specific objections are raised to a magistrate's decision, the district court reviews the magistrate's decision *de novo.*[32] However, one challenging a magistrate'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.[33] Further,

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[28] *Id.* at 9.

[29] *Id.* at 11 - 33.

[30] *Id.* at 10 - 11 (Atarque Lake) and at 11 (21 contested livestock wells).

[31] *Id* at 34 - 35.

[32] *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.").

[33] *Marshall v. Chater,* 75 F.3d 1421, 1426 (10th Cir. 1996); *see United States v. Garfinkle,* 261 F.3d 1030 -

although a district court makes a *de novo* determination of the magistrate recommendations, the district court is not precluded from relying on the magistrate proposed findings and recommendations.[34]

Here, the Magistrate issued Findings and Recommendations based on the parties' motions and the argument and evidence provided therein. No party challenges the summary judgment standard of review articulated in the Findings and Recommendations.[35] On *de novo* review of the specific issues, arguments, and theories raised below, the Court applies the same summary judgment standard of review. However, for those objections that consist of or contain issues, arguments, and theories not raised below, the Court should provide no review and simply overrule the objections.

ARGUMENT

I. A surface water declaration containing specific information and filed with the State Engineer's office is entitled, by statute, to be considered to have its content considered to be *prima facie* evidence. The declaration on which Defendants relied was filed with the State Engineer's office but did not contain the specific information required by the statute. The Magistrate did not err when he determined Defendants were not entitled to the benefit of *prima facie* evidence.

Defendants' Atarque Lake water right claim below rested exclusively on the declaration

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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.").

[34] *See Raddatz,* 447 U.S. at 676, 100 S.Ct. 2406 ("[I]n providing for a '*de novo* determination' rather than *de novo* hearing, Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.") (emphasis omitted) (quoting 28 U.S.C. § 636(b)(1)); *Bratcher v. Bray–Doyle Indep. Sch. Dist. No. 42 of Stephens Cnty., Okla.,* 8 F.3d 722, 724–25 (10th Cir. 1993) (the district court's adoption of the magistrate judge's "particular reasonable-hour estimates" is consistent with a *de novo* determination, because "the district court 'may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate, ... [as] 'Congress intended to permit whatever reliance a district judge, in the exercise of sound judicial discretion, chose to place on a magistrate's proposed findings and recommendations.'"(quoting 28 U.S.C. § 636(b)(1))).

[35] The United States agrees with the summary judgment standard of review as stated in the United States' Cross-Motion, at 6 - 8, and the Findings and Recommendations, at 2 - 3, and incorporates by reference that material here.

prepared by Defendants' counsel in 2004 (Shoenfeld Declaration) – Defendants had no other evidence to support their claim.[36] Defendants assert that their declaration entitles them to *prima facie* evidence of the contents of the declaration by application of NMSA 1978, § 72-1-3; that the mere fact of filing the declaration with the State Engineer's office entitles them to all benefits of *prima facie* evidence; and that with such *prima facie* evidence no circumstance exits under which summary judgment was proper.[37] The Magistrate properly analyzed the effect of the Shoenfeld Declaration and Defendants' objection is without support.[38]

A. A challenger's objections to a magistrate order that raises issues, arguments, and theories for the first time are deemed waived. Before the Magistrate, Defendants made no claim that the fact of filing of a declaration constituted a decision by the State Engineer as to the application of *prima facie* evidence in these proceedings. Defendants have waived the argument not raised below.

In their Objections, Defendants argue that "[t]he validity of the [Shoenfeld Declaration] is beyond the power of this Court to adjudicate."[39] Defendants go on to argue that because the declaration was filed with the State Engineer's office, this Court cannot consider the contents or the effect of the Shoenfeld Declaration because the declaration constitutes an unreviewable "determination" of the State Engineer – Defendants assert that unless "the State Engineer's determination was clearly incorrect this Court is obliged to respect that decision."[40]

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[36] *See* United States' Cross-Motion at 27 - 33.

[37] Objections at 3 - 11.

[38] As shown in the paragraphs below, Defendants are wrong with their conclusion that they are entitled to any benefit of *prima facie* evidence. Nevertheless, below the United States also established that even if Defendants were entitled to an benefit of *prima facie* evidence for any reason, such evidence and the presumptions from such evidence was conclusively rebutted by the complete absence (or void) of evidence to establish any of the critical assertions made in the 2004 declaration concerning priority, amount, purpose, periods of use, and place of use. United States' Cross-Motion at 27 - 33. Thus in the end, even if Defendants are entitled to *prima facie* evidence, such evidence ultimately has no value to Defendants and does not prevent summary judgment from entering. Given the Magistrate's conclusion on the existence of *prima facie* evidence, he had no reason to rule on this issue.

[39] Objections at 4.

[40] *Id.* (internal quotes removed) (emphasis added).

Below, the parties thoroughly addressed and heavily briefed issues associated with the existence and effect of the Shoenfeld Declaration, application of NMSA 1978, § 72-1-3, and what that declaration could or could not establish.[41] Defendants did no more than state and restate to the Magistrate that "[t]he declaration itself is the proof."[42] The argument now raised by Defendants was not argued below. Nowhere below did Defendants argue that the declaration constitutes a determination by the State Engineer that entitled Defendants to the benefits of *prima facie* evidence in this Court, that the validity of the Shoenfeld Declaration is beyond the power of this Court to adjudicate, or that only by finding the State Engineer "clearly incorrect" could this Court decline to respect the declaration as *prima facie* evidence.

Defendants may not challenge the Findings and Recommendations based on arguments not presented below.[43] To the extent that Defendants seek to have the Findings and Recommendations rejected based on this argument, Defendants' objection should be overruled.

In any event if the Court considers for any reason these new arguments not presented below, the arguments should be quickly rejected on substantive grounds. Defendants argue that the Shoenfeld Declaration was an unreviewable determination by the State Engineer's office. They embrace the remarkable position that, no matter how outlandish the contents might be, the contents of every declaration must be recognized as *prima facie* evidence in this Court, or any court, so long as the declaration is found filed in the State Engineer's office. Defendants provide no authority for such a remarkable contention. Defendants' new argument mistakenly equates an individual's action

[41] Defendants' Summary Judgment Motion at 10 - 11 (Defendants claimed no more than that "[t]he effect of the [Shoenfeld Declaration] here is to create a *prima facie* case which, unless rebutted by competent evidence, entitle Defendants to summary judgment."); United States' Cross-Motion at 23 - 27; Defendants' Response on Cross-Motion at 17; and United States' Reply on Cross-Motion at 3 - 7.

[42] *E.g.,* Defendants' Response on Cross-Motion at 17.

[43] *Garfinkle*, 261 F.3d at 1030 - 31; *Pevehouse,* 229 Fed.Appx. at 796; and *Marshall,* 75 F.3d at 1426.

to file a surface water declaration under NMSA 1978, §72-1-3 with a state agency's action or determination.[44] Again Defendants provide no authority for such a remarkable contention.

NMSA 1978, §72-1-3 provides in relevant part:

> Any person, firm or corporation claiming to be an owner of a water right which was vested prior to the passage of Chapter 49, Laws 1907, from any surface water source by the applications of water 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 source of said water 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. (emphasis added)

The very statute on which Defendants rely does not equate filing a declaration with action or a decision of the State Engineer as to the declaration's contents.[45] By its plain language, the statute requires nothing more than that the water right claimants file a declaration that specifies the following critical facts if the declaration is to be used as *prima facie* evidence: 1) the beneficial use to which water has been applied; 2) the date of first application to beneficial use; 3) that water was continuously put to beneficial use; 4) the location of the source of the water; and 5) if the water has been used for irrigation, a description of the land (and owner of the land) on which the water has been used.

By its plain language, the statute does not authorize the recognition of *prima facie* evidence

[44] Defendants' reliance on *Macias v. New Mexico Dept. of Labor*, 21 F.3d 366 (10th Cir. 1994) is misplaced. There, plaintiffs sued the state agency over its interpretation and application of a state statute as it applied to plaintiffs. The Court was asked to review the agency's decision. Here, no decision has been made by any state agency with respect to the sufficiency of the Shoenfeld Declaration to meet the requirements of NMSA 1978, §72-1-3.

[45] *Compare e.g.,* Objections at 6 ("the State Engineer accepted [the Shoenfeld Declaration] for filing, showing that he found it to conform with the requirements for filing, and under New Mexico law it affords to Defendants the prima facie proof they claim for it.").

based on the filing of a declaration with the State Engineer's office alone. The statute's use of the phrases "[s]uch declaration" and "such records or copies" references the type of declaration that must be filed if the declarant wishes to use it as *prima facie* evidence – the type of declaration is one that includes the specified information laid out in the statute. Thus, by the statute's very terms, if the filed declaration includes the information specified, it may be used as *prima facie* evidence of its contents; if not, the filed declaration may not be relied on as *prima facie* evidence. The only forum that might properly review whether the contents of the declaration satisfy the statute's requirements is the court, in this instance this Court, in which the declaration is presented as evidence and the benefits under NMSA 1978, § 73-1-3 are claimed.

Defendants' new argument that the Magistrate invalidated the declaration and somehow reversed a decision of the State Engineer is without basis.[46] The Magistrate's decision has no impact on the declaration or any decision of the State Engineer. The Magistrate did no more than correctly determine that the declaration did not provide the information required under the statute. As such, Defendants were not entitled to rely upon the Shoenfeld Declaration in these proceedings for any evidentiary purposes as the declaration was not otherwise admissible evidence.

B. A declaration is not *prima facie* evidence of its contents unless the declarant specifies the date of first application of beneficial water use, the place of use for irrigation, and that the water had been used continuously. The Shoenfeld Declaration did not specify the date of first application of beneficial water use from Atarque Lake, the place of use for irrigation with Atarque Lake water, or that the water had been used continuously from Atarque Lake. The Shoenfeld Declaration is not entitled to the benefit of *prima facie* evidence under the statute.

In the Findings and Recommendations, the Magistrate examined whether the Shoenfeld Declaration met the requirements of NMSA 1978, § 72-1-3 to establish it as *prima facie* evidence of a water right. The Magistrate properly determined that the declaration did not meet the statute's

[46] *See* Objections at 4.

requirements for at least three reasons: 1) the declaration did not specify the date of first application of beneficial use for any water use (irrigation, stock, or recreation); 2) the declaration did not specify the place of use for irrigation; and 3) the declaration did not state that the water had been used continuously. In their Objection, Defendants attempt to defend the declaration but their arguments are without merit.

First, Defendants argue that the Shoenfeld Declaration sufficiently identifies the date of first application of water to meet the statute's requirement. It does not. In 2004, Mr. Shoenfeld simply stated that water was first applied to beneficial use "before March 19, 1907." This is not a statement of the "date of first application to beneficial use" as required by the statute. Instead, it is a non-specific, unlimited expanse of time that specifies, really, nothing because the very statute Defendants invoke applies only to water rights that might have arisen before March 19, 1907. Further, the Magistrate properly described the statement in the Shoenfeld Declaration as "convenient," reflecting a reasonable conclusion that the statement was made not because it was true, but to avoid the obvious consequence if surface water was first applied after March 19, 1907.[47] Surface water applied after that date could only result in a water right if the appropriator first secured a permit from the State Engineer.[48] Below, the United States conclusively demonstrated that Defendants had absolutely no factual basis to state in 2004 that water from Atarque Lake had been applied to beneficial use (irrigation, stock, or recreation) before March 19, 1907.[49] The "convenience" of the statement made in the declaration is obvious; it was made to avoid the necessity of otherwise having to produce a required permit.[50]

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[47] Findings and Recommendations at 6.

[48] NMSA 1978, §72-5-1 (since March 19, 1907, any entity seeking a surface water right must first secure a permit from the State Engineer's office, otherwise a water right may not be secured).

[49] United States' Cross-Motion at 27 – 33 (no evidence or records exist to support any assertion made in the Shoenfeld Declaration).

[50] *Id.* at 27 n.18.

Second, Defendants argue that the Shoenfeld Declaration sufficiently identifies the place of use of water to meet the statute's requirement.[51] Again, it does not. Defendants simply conflate the statute's requirements. The statute requires that "if such water has been used for irrigation purposes," the declaration must include a description of the land upon which such water has been so used.[52] Contrary to Defendants' arguments, this requirement is not tied to the other uses claimed: stock watering and recreation. Yet, the Shoenfeld Declaration very specifically alleges a water use for "irrigation … on an unknown number of acres, the precise location of [irrigation] is [ ] unknown." In the end, Defendants' argument here ignores both the language of the statute and the actual language of the Shoenfeld Declaration. The Magistrate correctly concluded that the Shoenfeld Declaration did not identify the place of irrigation use to meet the statute's requirements.[53]

Third, Defendants argue that the Shoenfeld Declaration sufficiently stated that the water use from Atarque Lake had been continuously used.[54] Again, the plain language of the statute does not support Defendants' argument. The statute requires that before a water right claimant can benefit from recognition of *prima facie* evidence, the declaration must specify "the date of first application to beneficial use, [and] the continuity thereof." The phrase "the continuity thereof" refers to the continuity of "beneficial use" from the "date of first application." Thus, without a continuity of beneficial use from the date of first application, the declaration does not satisfy the statute and the discontinued water use is not entitled to any benefit of *prima facie* evidence.

Defendants spend considerable, and unnecessary, effort to establish that a water right comes into being without the need to establish continuous use. Objections at 7 – 8. Defendants ignore that "[t]he continuance of the title to a water right is based upon continuing beneficial use." *State ex rel.*

[51] Objections at 5 - 6.
[52] NMSA 1978, § 72-1-3.
[53] *Id.;* Findings and Recommendations at 6.
[54] Objections at 6 – 11.

Office of the State Engineer v. Elephant Butte Irrigation Dist., 2012-NMCA-090, ¶14, 287 P.3d 324, 328 (2012) (quoting *State ex rel. Reynolds v. South Springs Co.,* 80 N.M. 144, 147, 452 P.2d 478,481 (1969)). But this is beside the point. The Magistrate made no determination that a water right must be continuously used to arise in the first instance. The question before the Magistrate below and the Court now is whether the requirements of the statute have been satisfied to entitle Defendants any benefit of *prima facie* evidence from a declaration filed with the State Engineer's office.

Defendants' interpretation of "the continuity thereof" would render the requirement meaningless - every alleged water use, even those discontinued decades ago, would be given the benefits of *prima facie* evidence. The statute's requirement that the declaration state that the water had been continuously used since beneficial use first began ensures that only the water use that unquestionably continues to exist benefits from application of *prima facie* evidence. Those water uses discontinued long ago, here at least 45 years ago, and whose likely existence diminishes increasingly over time for various reasons (unsupported speculation, lack of evidence, abandonment, forfeiture, etc.), should not benefit from the recognition of *prima facie* evidence and do not under the plain language of the statute.

C. The United States established that any water from Atarque Lake had gone unused for at least 45 years and that such period of nonuse was unreasonable. Below, Defendants offered no basis to establish the reason for such nonuse. Defendants now claim that the water went unused because the dam had been destroyed 45 years ago. The Findings and Recommendations cannot be overruled based on an argument not raised below.

In the course of Defendants' argument that "continuous use" is not a necessary element of a water right, they also take issue with the Magistrate's conclusion that even if an Atarque Lake water right had existed, it was abandoned long ago.[55] In the Findings and Recommendations, the Magistrate concluded in the alternative that even if a water right might have existed associated with

[55] Objections at 9 - 11.

Atarque Lake for irrigation, stock use, or recreation, such a water right had undeniably gone unused for no less than 45 years. As such, the Magistrate properly determined that the period of nonuse was unreasonable and a presumption of abandonment arose.[56] Despite squarely facing the presumption of abandonment below, Defendants presented no basis, with argument or evidence, to justify the extended period of nonuse. Therefore, the Magistrate correctly determined that the United States was entitled to summary judgment on Defendants' Atarque Lake water right claim on the alternative grounds of abandonment.[57]

Defendants claim that the Magistrate confused the questions whether Defendants were entitled to the benefit of using the declaration as *prima facie* evidence and whether any Atarque Lake water right had been abandoned.[58] The Magistrate confused no issue; as established above, he answered both questions clearly and separately: the Shoenfeld Declaration does not satisfy NMSA 1978, § 72-1-3 to entitle Defendants to any benefit of *prima facie* evidence and, in the alternative, any Atarque Lake water right that might have existed, has been abandoned. Defendants failed to carry their burden in response to the United States' Cross-Motion to identify, let alone establish, any reason for the undeniable, unreasonable 45-year period nonuse.[59]

Further, Defendants now remarkably claim that the only reason that any Atarque Lake water

[56] Findings and Recommendations at 8.

[57] *Id.* at 9.

[58] Objections at 9.

[59] Defendants' claim that abandonment creates a question of fact that cannot be resolved by summary judgment is wrong. *See id.* at 10. The United States established an undisputed 45-year period of unreasonable water nonuse. Findings and Recommendations at 8 – 9. Once the presumption arose, "the burden shift[ed] to the holder of the right to show the reasons for nonuse." *State of New Mexico, ex rel. Reynolds v. South Springs*, 180 N.M. 144 ¶ 20, 452 P.2d at 482; *Elephant Butte Irr. Dist.*, 2012-NMCA-090, ¶25, 287 P.3d at 331.Thus, to avoid summary judgment, Defendants had the burden to justify the unreasonable period of nonuse. Defendants presented nothing to the Magistrate to show the reasons for nonuse. Thus, the United States was entitled to summary judgment because it had provided "affirmative evidence that negate[d] an essential element of [Defendants'] claim." *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986).

right has gone unused for so long is that "the dam, being gone, could not hold any water." As an initial matter, the Defendants "reason" for nonuse presented in their Objection was not presented below. Again, Defendants cannot now present new reasons for nonuse to the Court as basis to object to the Findings and Recommendations.[60] Yet even had such a reason been presented below, such an excuse could not have met Defendants' burden. As established by the New Mexico Supreme Court,

> [a]fter a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for nonuse … to rebut the presumption of abandonment arising from such long period of nonuse, there must be established not merely expressions of desire or hope or intent, but some fact or condition excusing such long nonuse.[61]

Defendants' assertion that they did not use Atarque Lake water for 45 years because the dam had been destroyed is not "a fact or condition that excuses such long nonuse." The fact that the dam was destroyed 45 years ago is simply the fact that precipitated subsequent nonuse, and, frankly, reflects the then-owners intention to immediately abandon the water right.[62] The initial destruction of the dam is not an ongoing excuse for the subsequent 45 years of nonuse. If such an excuse were an acceptable one, then every explanation of why a water use stopped in the first place would satisfy the requirement and in effect no water right could be abandoned.

In fact even today, Defendants' offer no fact and no condition that reasonably explains ongoing, continuous, unreasonable nonuse. At its core, Defendants' assertion that they did not use Atarque Lake water for 45 years because the dam had been destroyed is substantially less than even a speculative "expression[] of desire or hope or intent" to use water from Atarque Lake one day in the

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[60] *Garfinkle*, 261 F.3d at 1030 –31; *Pevehouse,* 229 Fed.Appx. at 796; and *Marshall,* 75 F.3d at 1426.

[61] *South Springs*, 452 P.2d at 482.

[62] Remarkably, the evidence below established that it was a previous landowner that intentionally destroyed the dam forming Atarque Lake. United States' Cross-Motion at 35 - 36. Thus, to the extent that a water right existed at all, the owner of the water right long ago intentionally destroyed the only means by which exercise of the water right could be achieved.

distant, unspecified, and unforeseeable future.

II. The United States established that Defendants could not establish their water right claims for the 21 contested livestock wells. Below, Defendants offered no substantive response to the United States' Cross-Motion. Defendants now argue that the water right claims are sufficiently supported by the well declarations. The Findings and Recommendations cannot be overruled based on a new argument not raised below.

Below, the United States established that Defendants had no evidence to support their water right claims associated with the 21 contested livestock wells.[63] The Magistrate determined the United States had established that "there is an absence of evidence to support the nonmoving party's case." Therefore, the burden had shifted to Defendants to "identify specific facts that show the existence of a genuine issue of material fact."[64] The Magistrate determined that Defendants "failed to respond to this portion of the United States' motion, stating instead that the United States failed to identify the wells at issue."[65] Defendants' statement proved to be simply untrue as the United States unquestionably identified the 21 contested livestock wells.[66] As such, and with no other argument presented by Defendants to otherwise defend against the United States' Cross-Motion, the Magistrate properly found that judgment should enter against Defendants on these water right claims. The Magistrate properly determined that judgment should enter establishing Defendants' water rights consistent with those attributes to which Plaintiffs were willing to stipulate.

Defendants assert that the Magistrate wrongly determined that Defendants' water rights must be based on the land area of Atarque Ranch and the amount of water actually consumed by cattle.[67] But the Magistrate made no such finding concerning Defendants water rights and land mass and no statement found in the Findings and Recommendation can be so construed. As explained in

[63] United States' Cross-Motion at 13 – 22.
[64] *See* Findings and Recommendations at 2.
[65] *Id.* at 11.
[66] United States' Cross-Motion, Attachment A.
[67] Objections at 12.

the paragraphs above, the Magistrate entered judgment against Defendants' water right claims for the 21 contested livestock wells only after Defendants failed to present sufficient argument and evidence to support their claims and withstand the United States' Cross-Motion.[68] With judgment against Defendants' water right claims, the only appropriate avenue left to the Magistrate was to recommend that Defendants' water rights be adjudicated with those attributes to which Plaintiffs were willing to stipulate.[69] Thus, Defendants' argument here is a non-sequitur to the Findings and Recommendations. The pages that Defendants devote in their Objections to dispute findings that were not made are off-the-mark and irrelevant.[70]

Defendants also dispute the Magistrate's conclusion that Defendants did not present evidence with respect to the wells. They point to 21 well declarations that they attached to Defendants' Cross-Motion Response.[71] Examination of Defendants' Cross-Motion Response reveals that Defendants' only discernable response to the United States Cross-Motion on the 21 contested livestock wells indirectly arose in Defendants' discussion of evaporation from stock watering devices as part of a water right. Defendants stated:

> Neither Mr. Turnbull nor the United States' motion or response identifies the 21 wells, thus making it impossible to formulate a meaningful response. We refer the Court to the [previous] discussion in this pleading, in which the inappropriate grouping of Defendants' wells as if they gave rise to a single water right is discussed.[72]

Thus, the Magistrate was exactly right when he found that "[Defendants] failed to respond to this portion of the United States' motion, stating instead that the United States failed to identify the wells

[68] Findings and Recommendations at 11.

[69] As explained above, how Plaintiffs may have estimated a water right for settlement purposes is not the subject of Defendants ability to establish a water right claim. In other words, the parties are not required to litigate Plaintiffs' settlement offer.

[70] *See* Objections 11 - 21.

[71] *See e.g., id.* at 20.

[72] Defendants' Response to Cross-Motion at 23.

at issue."[73]

Fundamentally, Defendants again assert arguments that were not presented to or developed below. Defendants now argue that well declarations filed with the State Engineer's office by Defendants constitute *prima facie* evidence under NMSA 1978, §72-12-5 and, like application of NMSA 1978, § 72-1-3, unreviewable evidence of the water rights associated with the 21 contested livestock wells.[74] However, the 21 well declarations were not considered by the Magistrate because like their argument associated with the Shoenfeld Declaration, Defendants made no attempt to argue below that the well declarations constituted unreviewable, irrebuttable evidence of a water right. Again, Defendants cannot now present argument not developed before the Magistrate as basis to reject the Findings and Recommendations.[75]

In any event, to the extent that this Court considers the substance of Defendants' argument here, the basis for the United States' Cross-Motion is well supported. In response to Defendants attaching the well declarations to their response, the United States established that the well declarations could not constitute *prima facie* evidence and suffered the exact defects that the Shoenfeld Declaration suffered.[76] Further, like the Shoenfeld Declaration, the United States also established that even if the requirements of NMSA 72-12-5 had been met giving rise to a presumption associated with *prima facie* evidence, such presumption was conclusively rebutted by the fact that Defendants well declarations were unsupported by documentation or admissible evidence.[77]

In the end even were the Court to review *de novo,* the Magistrate's decision concerning the 21 contested livestock wells, Defendants did not present sufficient response to carry their burden and

[73] Findings and Recommendations at 11.
[74] Objections at 20.
[75] *Garfinkle*, 261 F.3d at 1030 –31; *Pevehouse,* 229 Fed.Appx. at 796; and *Marshall,* 75 F.3d at 1426.
[76] United States' Reply on Cross-Motion at 3 - 4.
[77] *Id.* at 4 – 7.

avoid summary judgment below.

III. The parties did not dispute below that in principle a water right may include a small quantity of water based, in part, on evaporation. And the Magistrate suggested to the Court that it may wish to issue an order "enshrining this principle." But Defendants did not otherwise establish below that they were entitled to the claimed water right for the 21 contested livestock wells based on historic beneficial use. The Findings and Recommendations were not internally inconsistent because the Magistrate suggested that this Court on the one hand "enshrine" the loss principle but on the other deny Defendants' Summary Judgment Motion?

Below, Defendants argued that they were entitled to a ruling from the Magistrate that evaporation was a part of a water right for stock watering.[78] Defendants asserted that any water right associated with the 21 disputed wells must include a quantity of water for the evaporation of water in the vague amount of "60 inches" or 5 feet per year.[79] In response, the United States established that, in fact, the parties did not have a dispute of material fact on the issue because the quantity to which Plaintiffs were willing to stipulate for the 21 disputed wells included quantities of water in excess of the "5 feet per year" evaporation that Defendants claimed.[80]

In their Objections, Defendants appear to find an issue between the Magistrate's statements:

> the parties do not meaningfully dispute that a water right includes some additional amount for losses. . . . the extent that the Defendants move for a Court order enshrining this principle [concerning loss], I recommend that the Court grant summary judgment in favor of the Defendants on the limited question of whether some loss can be accounted for in a water right[81]

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[78] Defendants' Summary Judgment Motion at 16 – 19.

[79] *Id.* at 4 - 5. It must be noted here that the page-long explanation in the Objections at page 22, describing what constitutes "5-feet of evaporation" is not "simple arithmetic" but a remarkable display of inadmissible evidence/testimony by Defendants' counsel. Moreover, throughout the proceedings below, Defendants have identified no expert that can or will provide such testimony or corresponding expert report that draws such conclusions from any facts that are associated with this subfile action. *See* Fed R. Civ. P. 26(a)(2) (the expert of every party shall be identified and a written report shall be prepared in which the expert shall include "a complete statement of all opinions the witness will express and the basis and reasons for them.").

[80] United States' Cross-Motion at 19 – 22.

[81] Findings and Recommendations at 9.

and the statement in the Conclusion of the Findings and Recommendations, namely, "I recommend that the Court deny [Defendants'] motion in full."[82] Defendants label these two statements as "contradictory;"[83] however, any fair reading of the Findings and Recommendation establishes that the Findings and Recommendations are consistent and well-reasoned.

As explained by the Magistrate, the parties agreed in principle that some amount of water loss (e.g., evaporation) might be included in a water right quantity;[84] this was a principal thrust of Defendants' summary judgment motion and accepted, in principle, by Plaintiffs. However, in the pages immediately after the discussion on losses, the Magistrate properly determined that the United States was entitled to summary judgment on Defendants' water right claims concerning the 21 contested livestock wells. As a result, the only water rights to which the Defendants were entitled were those to which Plaintiffs continued to be willing to stipulate. Therefore, in context, the Magistrates statement is well supported. In the end, without the ability to establish an underlying water right based on historic beneficial use, Defendants were not entitled to be granted a water right based on their claims and no real basis exists for this Court to "enshrine the principle concerning loss."[85]

IV. Summary judgment is appropriate when the movant establishes that the party with the burden of proof cannot establish essential elements of its claim. The United States established that Defendants could not establish a water right for Los Alamos Springs. The scintilla of evidence presented about a man-made feature tied to the springs was not sufficient for Defendants to avoid summary judgment.

Below, the United States moved for summary judgment on the water rights claimed by Defendants associated with springs and natural depressions.[86] The United States demonstrated that

[82] *Id.* at 35.

[83] Objections at 21.

[84] Findings and Recommendations at 9.

[85] *See id.*

[86] *Id.* at 22 - 23.

Defendants' claimed rights for these springs and natural depressions were not supported by admissible evidence. In the Findings and Recommendations, the Magistrate determined that for two springs, collectively referred to as Los Alamos Springs, Defendants stated no more than that these springs served "an additional excavated watering tank" and that such evidence was insufficient to withstand the United States' motion for summary judgment.[87]

In their Objections, Defendants simply assert that because an excavated watering tank was a man-made improvement, the Magistrate erred in granting the United States' Cross-Motion. However, Defendants disregard that once the United States carried their initial burden on summary judgment, the burden shifted to Defendants to present sufficient evidence to support their water right claim.[88] As the Magistrate stated in his discussion of the standard of review, "a mere 'scintilla' of evidence is insufficient to successfully oppose a motion for summary judgment.[89] Defendants had the obligation to present evidence on which the Court could reasonably find in favor of Defendants on their water right claim.[90] To establish a water right, a water right claimant must establish the elements of a water right: priority, amount, purpose, periods of use, and place of use.[91] As well, to establish an agricultural water right under New Mexico law there must be a "man-made diversion, together with intent to apply water to beneficial use and actual application of the water to beneficial use."[92]

The single statement supplied below by Defendants by affidavit that the springs served "an additional excavated watering tank" is at most a base scintilla of evidence on a single, small aspect of

[87] Findings and Recommendations at 34-35.

[88] *Celotex,* 477 U.S. at 323.

[89] Findings and Recommendations at 2 (citing/quoting to *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)).

[90] *Anderson v. Liberty Lobby, Inc.,* 477 U.S. at 248.

[91] Findings and Recommendations at 4.

[92] *State of New Mexico, ex rel. Reynolds, v. Miranda*, 83 N.M. 443 ¶ 9, 493 P.2d 409, 411 (1972).

their claimed water right. Certainly, this statement made in the affidavit does not form the basis on which any court could reasonably find that Defendants had a water right or an element of a water right associated with these springs.

The Findings and Recommendations on this last issue were well founded and should be adopted.

CONCLUSION

For the reasons stated in the paragraphs above, the Findings and Recommendations should be adopted and the Objections should be overruled.

Respectfully submitted this 18th day of April, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 18, 2016 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