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 and NAVAJO NATION, Plaintiffs-in-Intervention	)	No. 01cv0072 MV/WPL
v.	)	ZUNI RIVER BASIN ADJUDICATION
A & R PRODUCTIONS, et al.,	)	Subfile No. ZRB-2-0098

RESPONSE OF PLAINTIFF STATE OF NEW MEXICO TO DEFENDANTS' OBJECTIONS TO MAGISTRATE JUDGE'S ORDER RECOMMENDING SUMMARY JUDGMENT BE GRANTED TO THE UNITED STATES REGARDING SUBFILE ZRB-2-0098

The State of New Mexico *ex rel.* State Engineer ("State"), pursuant to Fed.R.Civ.P. 72(b)(2), hereby responds to Defendants JAY Land Ltd. Co. and Yates Ranch Property LLP's ("JAY" or "Defendants") March 21, 2016 *Objections to the Proposed Findings and Recommended Disposition of the Magistrate* ("*Objections*") (Doc. 3230). The Court should overrule these objections and adopt the Magistrate's *Proposed Findings and Recommended Disposition* (Doc. 3223) ("*Proposed Findings*").

I. Introduction and Standard of Review

The *Proposed Findings* concluded that summary judgment should be granted to the United States on JAY's water right claims, finding specifically that no water right should be recognized in connection with Atarque Lake. Included in the *Objections* were assertions that the Magistrate Judge failed to recognize that the Shoenfeld Declaration served as proof of a water

right in Atarque Lake and that Defendants had presented evidence the Atarque Lake right had not been abandoned. Defendants' objections should be overruled because they ignored the law of the case regarding the Shoenfeld Declaration, and did not demonstrate that the evidence supports a valid water right existed related to Atarque Lake. Moreover, the evidence clearly demonstrated that even if water right had existed at some point in the past related to Atarque Lake, that it had been abandoned.

Rule 72 requires a district judge to "determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). The summary judgment motions, filings, and attachments clearly demonstrate that the Magistrate's *Proposed Findings* are supported by the evidence.

II. The Shoenfeld Declaration has No Preclusive Effect on This Court's Adjudication Authority

Defendants' objections based upon the alleged preclusive effect of the Shoenfeld Declaration should be overruled because they ignore a previous ruling in this case and misstate the law.

On March 31, 2004, more than three years after the commencement of this adjudication, JAY's counsel, attorney Peter Shoenfeld, executed a Declaration of Ownership of Water Right of Surface Waters Perfected Prior to March 19, 1907 ("Shoenfeld Declaration") describing certain water uses associated with Atarque Lake, and later filed that declaration with the Office of the State Engineer. "The Shoenfeld Declaration claims . . . 3,535 AFY consumption for evaporation; livestock, irrigation, and recreation uses . . . and [states] that the claimed water right has not been exercised since the dam's destruction in 1971." *Proposed Findings* at 5. During the summary

judgment proceedings, "JAY argue[d] that the Shoenfeld Declaration satisfies § 72-1-3 for purposes of creating a prima facie case entitling it to a water right in Atarque Lake, absent rebuttal by competent evidence from the United States." *Id.* at 6. The Magistrate Judge did not agree, and stated:

> Even if the Shoenfeld Declaration is prima facie evidence of the proof of the truth of its contents, it 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; fails to include a description of the land where the water was used to irrigate; and most importantly, fails to establish continuity of use. In fact, the Shoenfeld Declaration establishes that there has not been continuous use of water associated with Atarque Lake. Accordingly, I find that the presumption does not apply.

Id. at 6. Defendants now object to the Magistrate Judge's *Proposed Findings* because "[t]he validity of the water right declaration is beyond the power of this Court to adjudicate. That function was administratively performed by the State Engineer when he accepted the declaration for filing." *Objections* at 4. Defendants essentially argue the application of administrative estoppel, which is an argument that this Court has previously found to be invalid.

On March 12, 2004, the District Court Judge entered its *Memorandum Opinion and Order* regarding the Shoenfeld Declaration, holding that "[t]his Court will . . . not give preclusive effect to any decision reached by the State Engineer on Defendants' declaration." (Doc. 330) (emphasis added). The Court specifically held that the application of administrative estoppel is not consistent with New Mexico's statutory scheme for adjudications. (Doc. 330 at 2-3) (*citing* NMSA 1978, §§ 72-4-15 to 19, 72-4-17.) The Court found that "[t]he legislature intended that a stream-system adjudication be all embracing" and that the court adjudicating the water right "shall have *exclusive* jurisdiction to hear and determine *all* questions necessary for the

adjudication of all water rights within the stream system involved.' NMSA 1978 § 72-4-17 (*emphasis added*); *Reynolds v. Lewis*, 508 P.2d 577, 581 (1973) (only courts have power to adjudicate water rights)." (Doc. 330 at 3). Adjudicating water rights in the Zuni River stream system is within the sole jurisdiction of this Court. The acceptance of a declaration by the State Engineer is not an adjudication of a water right.[1]

The Court noted that "[t]his adjudication was initiated well before the State Engineer took action and made a decision on Defendants' declaration." (Doc. 330 at 3). Thus,

> [w]here a party in a federal court proceeding is involuntarily required to participate in a state administrative action, decisions in that action are not generally given preclusive effect in the federal proceeding. *United Parcel Serv. v. California Public Utilities Comm'n.*, 77 F.3d 1178, 1182-87 (9th Cir. 1996); *My Club v. Edwards*, 943 F.2d 270 (3d Cir. 1991). Application of this principle makes eminent sense in this context since 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 right claims.

Id. at 3. JAY's objection that the Shoenfeld Declaration alone proves a water right in Atarque Lake, merely because it was filed with the State Engineer, should be overruled based on this Court's prior ruling.

The Magistrate Judge also identified another failing with the Shoenfeld Declaration. He cites *Trevizo v. Adams*, 455 F. 2d 1155, 1160 (10th Cir. 2006) for the rule that "the content of evidence presented [on summary judgment] must be capable of being presented in an admissible form at trial." *Proposed Findings* at 3. "For example, parties may submit affidavits to support or

[1] The declaration form makes this clear, stating at the bottom of page 4: "The acceptance by the State Engineer Office does not constitute validation of the right claimed." June 26, 2015 *Motion for Summary Judgment*, Exhibit 2 (Doc. 3059-2) (emphasis added).

oppose a motion for summary judgment, even though the affidavits constitute hearsay, provided that the information can be presented in another, admissible form at trial, such as live testimony." *Id.* (citing Fed.R.Civ.P. 56(c)(4); *Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1209-10 (10th Cir. 2010); *Treviso*, 455 F.3d at 1160) (emphasis added). The Shoenfeld Declaration is at odds with the plain language of Rule 56:

> **Affidavits or Declarations.** An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

Fed.R. Civ. P. 56(c)(4) (emphasis added). The Shoenfeld Declaration states the Atarque Lake water right was first applied to beneficial use "before March 19, 1907." JAY's counsel, attorney Peter Shoenfeld, the person who executed the declaration and personally affirmed it was true, has no personal knowledge to an alleged event which purportedly occurred one-hundred and sixteen (116) or more years ago. Thus, his testimony would not be admissible evidence and disqualifies the Shoenfeld Declaration from consideration on summary judgment.

Finally, the declaration statute states that a declaration "shall be prima facie evidence of the truth of their contents." NMSA 1978, § 72-1-3 (2002). That requirement is not the same as being prima facie evidence of a water right, as Defendants assert. Indeed, as the Magistrate Judge found, the Shoenfeld Declaration fails to state the elements of a water right, even if its contents are taken as true: "[a]djudicated water right decrees must declare the 'priority, amount, purpose, periods and place of use.'" *Proposed Findings* at 4 (citing NMSA 1978, § 72-4-9). These elements must be established for a water right to be adjudicated, and the burden of proof falls squarely on the defendant or user of the water right to do this. *Id.* (citing *State v. Aamodt*,

No. Civ. 66-6639 MV/WPL, Subfile PM-67833, Doc. 8119 at 6 (D.N.M. Feb. 24, 2014) (unpublished) (citing *Pecos Valley Artesian Conservancy Dist. v. Peters*, 193 P.2d 418, 421-22 (N.M. 1948)).

The Shoenfeld Declaration fails to present all the elements of a water right with regard to Atarque Lake. It does not present testimony in a form that could be present at trial with regard to the priority of the right.[2] As the Magistrate Judge found, it also fails to describe "the land where the water is used to irrigate." *Proposed Findings* at 6. "JAY produced no further evidence establishing a water right in Atarque Lake." *Proposed Findings* at 6. As a result, the Magistrate Judge stated, "[b]ecause the presumption does not apply and JAY did not otherwise meet its burden of establishing a water right in Atarque Lake, I recommend that the Court deny JAY's partial motion for summary judgment with regard to Atarque Lake." *Id.* at 6-7. The recommendations of the Magistrate Judge should be adopted by the Court.

III. Defendants Failed to Present Reasons for Non-Use of Atarque Lake

The Magistrate Judge further found that "[e]ven if JAY did meet its initial burden of establishing a water right in Atarque Lake, any water right that existed was forfeited or abandoned long ago." *Proposed Findings* at 7. It is undisputed that use of any water associated with Atarque Lake ceased with the destruction of the dam in 1971 – forty-five (45) years ago. The Magistrate Judge observed that JAY had failed to explain this very long period of nonuse:

> While JAY presented competent and admissible evidence that the owners since 1978 have not intended to abandon any water right in Atarque Lake, that is not the only element they must meet rebut the presumption of abandonment. JAY must also show reasons for nonuse. *See Elephant Butte Irr. Dist.*, 287 P.3d[, 324] at

[2] Indeed, the Magistrate Judge found the Shoenfeld Declaration even "fails to state the date of first application to beneficial use, stating only that such date was, conveniently, before March 19, 1907." *Proposed Findings* at 6.

> 331. JAY failed to provide any valid reason for the nearly forty years of nonuse under its ownership and the ownership of its predecessors in interest. Accordingly, I recommend that the Court deny JAY's partial motion for summary judgment to the extent that it requests a determination that JAY did not abandon any water right in Atarque Lake.

Proposed Findings at 9. Jay now objects to this finding and recommendation, stating for the first time that "[t]he reason for the nonuse is that the dam was not there." *Objections* at 9-10. This is not a valid reason for nonuse of the water right, it is simply a physical description of the state of the impoundment structure. Defendants have not provided a reason for their decades-long non-use of any water right associated with Atarque Lake. Indeed, the corollary, that JAY or its predecessor(s)-in-interest destroyed the dam in 1971 is not a valid reason for forty-plus years of nonuse. Rather, it more strongly suggests an affirmative intent to abandon. *See, e.g.*, *Defendants' Reply to United States' Response* at 21 (Doc. 3093) (". . . all that might be inferred from the destruction is that the owners did not want and were forsaking the dam.").

JAY again raises the shield of the Shoenfeld Declaration, stating that with regard to their failure to explain the protracted period of nonuse, "[t]he functionality of the declaration is beyond the reach of this Court" and "[t]he declaration created the prima facie proof of the facts stated in it." *Objections* at 10. JAY is not correct. This Court has already held that there is no preclusive effect to the Shoenfeld Declaration. Doc. 330.

JAY also complains that "[t]he Plaintiffs have not presented any legal argument or authority that a 30+ year delay in rebuilding of a dam is as a matter of law unreasonable." *Objections* at 10. Again, JAY is not correct. The Magistrate Judge spoke specifically to this, stating:

> The 45-year period of nonuse involved in this case is an unreasonable period of nonuse and creates the presumption of intent to abandon. *See South Springs*, 452 P.2d at 483 (citing with approval Colorado cases that found an unreasonable period of nonuse at forty, thirty and eighteen years).

Proposed Findings at 8-9. JAY has not presented any authority to the contrary, suggesting almost a half-century of nonuse is reasonable. *See Valdez v. Yates Petroleum Corp.*, 2007-NMCA-038, ¶ 24, 141 N.M. 381, 155 P.3d 786 (declining to consider an issue for which the appellant had failed to cite any "on-point" supporting authority). JAY's objection on this score should be overruled, and the findings and recommendations of the Magistrate Judge adopted.

WHEREFORE, the State of New Mexico *ex rel.* State Engineer requests the Court overrule Defendants JAY Land Ltd. Co. and Yates Ranch Property LLP's objections, and adopt the proposed findings and recommended disposition of the Magistrate Judge.

Electronically Filed

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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/ Kelly Brooks Smith
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