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-

A & R Productions, et al.,

Defendants.

No. 01cv00072-MV-WPL
Subfile No. ZRB-2-00098
JAY Land Ltd. Co., Yates Ranch Property LLP

REPLY TO U.S. AND NEW MEXICO RESPONSE (DOC 3272) TO MOVANTS' REQUEST FOR ORAL ARGUMENT (DOC. 3260, 3261)

The State of New Mexico and the United States have responded to these Defendants' opposed Motion Requesting Oral Argument and the memorandum in support thereof (Docs. 3260, 3261) by asserting that the options open to the Court, if the Court agrees with the Defendants' objections, are to "sustain the Objections and remand the matter back to the Magistrate Judge with specific findings and instruction concerning any error identified."

The Response incorrectly sets forth the choices available to the Court, and in so doing reveals why the court should entertain

oral argument[1]:

> F.R.Civ.P. 72(b)(3) Resolving Objections. **The district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to.** The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions. (Bold added.)

The Plaintiffs concede that the Magistrate's recommended disposition has been properly objected to, but fail to follow through: the proceedings before the Article III Judge upon objections to the Magistrate's disposition are *de novo*. The concepts of *de novo* and on the record are as diametrically opposite as black and white. Plaintiffs interpret *de novo* to mean "on the record". They cannot do so. See Llano, Inc. v. Southern Union Gas Co., 1964-NMSC-257, 75 N.M. 7, 399 P.2d 646 (S. Ct. 1964); Honeyville Grain, Inc. v. N.L.R.B. (444 F.3d 1269, 10th Cir. 2006) ("if the Board has made a plausible inference from the evidence, we may not overturn its findings, **although if deciding the case de novo we might have made contrary findings.**"(Bold added.)

See also Garrison v. Gambro, Inc., 428 F.3d 933, 935 (10th Cir. 2005), stating that:

> We review the district court's grant of summary judgment de novo, applying the same legal standard as the district

[1]This is not a matter under F.R.Civ.P. 53, which provides "(h) Appointing a Magistrate Judge. A magistrate judge is subject to this rule only when the order referring a matter to the magistrate judge states that the reference is made under this rule." There is no order of reference, but only a non-documentary docket entry reflecting the appointment.

> court. . . . Cross motions for summary judgment are treated separately; the denial of one does not require the grant of another. . . . The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. . . . In determining whether the moving party is entitled to judgment as a matter of law based on the record . . . we view the evidence and draw reasonable inferences therefrom in the light most favorable to . . . the nonmovant. (Internal quotation marks, citations omitted.)

To honor the rule is to grant these Defendants' request for oral argument. We could not and do not demand what we have no right to demand. We urgently so request. *De novo* review by this Court would enable Defendants to argue the matters we deem inappropriate in the Magistrate's recommendations. Some of them were not raised by either party, and should not be deemed to have been fully briefed and argued. For example, the Plaintiffs completely ignore the well declarations for the 21 contested ground water rights, as argued in Defendants' motion for summary judgment, and the Magistrate states that the Defendants never presented evidence or argument with regard to those wells. (Doc. 3223, pp. 11-33.) Because of the order of briefing, the Defendants never had the opportunity to point out to the Magistrate the briefing and evidence which is included in the record, contrary to the Magistrate's statement. See the contrary argument and evidence shown in Document 3093, pp. 22 - 24 and Exhibits 3093-1 through 3093-24.

In Plaintiffs' footnote 14 to their Response (3272) to the

present motion, they state that "New Mexico water law is neither "arcane" nor too difficult for the Court to understand without the explanation of Defendants' counsel at oral argument." In their request for oral argument, Defendants asserted (and continue to assert) the "arcane" nature of New Mexico water law. But they nowhere asserted or implied that New Mexico water law was too difficult for the Court to understand. For the United States to attempt to put words never uttered into Defendants' mouths is inappropriate. In light of its dual role as the impartial adjudication stakeholder and as advocate for the two Indian tribes, and in the absence of valid reasoning and authority to oppose Defendants' request, it has improperly attempted to impute to these Defendants a statement and a position never taken, asserted or intended respecting the difficulty faced by the Court.

WHEREFORE, Defendants respectfully ask that their request for oral argument be granted.

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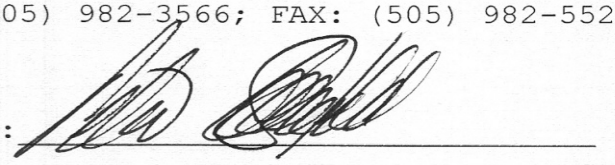
By: 

Attorney for Defendants-Movants

CERTIFICATE OF SERVICE

I served a copy of the foregoing on all counsel and other persons served by the Court's digital filing and service system this June 13, 2016.