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**

PLAINTIFFS' JOINT MOTION IN LIMINE TO PROHIBIT TESTIMONY FROM DEFENDANTS' EXPERTS CONCERNING CANYON AND JARALOSA SPRINGS

Plaintiffs the United States of America and the State of New Mexico (Plaintiffs) jointly move this Court to prohibit Defendants Yates Ranch Property, LLP and Jay Land, LTD (Defendants) from offering at the evidentiary hearing any testimony from its identified witnesses, Don Alam and Darrell Brown, to establish any attribute of a water right for Canyon Spring and Jaralosa Spring (collectively "Springs") pursuant to Fed. R. Civ. P. 37(c)(1). Neither witness provided any opinion regarding water rights associated with these Springs in their expert report and, therefore, are precluded from testifying about any aspect of the claimed water rights. In addition, because any opinion about these century-old water rights could not be based on their sensory perceptions, these witnesses cannot provide their opinion as lay witness.

MEMORANDUM IN SUPPORT OF PLAINTIFFS' JOINT MOTION

I. INTRODUCTION AND BACKGROUND

The parties come to this Court with few remaining issues in dispute. As the result of the parties' motions for summary judgment, dispute remains only over those water rights claimed by Defendants and associated with two springs (the Springs) and several stockponds.[1] This motion in limine is focused on the water right claims for the Springs.

Defendants claim two different water rights. For Canyon Spring, Defendants' claim a livestock use water right with a quantity of 15 acre feet per year (AFY) and a non-specific priority of "before March 19, 1907."[2] For Jaralosa Spring, Defendants' claim a livestock use water right in an "amount required to keep Stock Pond 10A-4-SP01 filled 365 days per year" and a non-specific priority of "before March 19, 1907."[3]

As this Court is aware, during the course of this litigation, the parties engaged in and completed discovery between September 5, 2014 and March 2015.[4] With respect to Defendants' Springs claims, Plaintiffs inquired about and asked for discovery of all information and material concerning the springs. Plaintiffs asked Defendants to identify and provide all documents and all witnesses that establish the water rights associated with the springs. In response, Defendants

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[1] *See Proposed Findings and Recommended Disposition* (ECF No. 3223) ("Findings and Dispositions") at 33-35.

[2] *See Subfile Answer of Defendants Yates Ranch Property, LLP and Jay Land, LTD* (ECF No. 2925) ("Subfile Answer") at 71.

[3] *Id.*

[4] *See Order Setting Pretrial Deadlines and Adopting Joint Status Report* (ECF No. 2991) (and as subsequently amended).

neither identified nor provided any document that specifically referenced the Springs. Instead, Defendants identified Don Alam and Darrell Brown as the witnesses who would establish the quantity of water from each spring that had been put to beneficial use.[5]

On December 4, 2014, Defendants provided Plaintiffs a copy of an expert report prepared by Don Alam. In this report, Mr. Alam described numerous wells and stockponds on Atarque Ranch. The only description Mr. Alam provided for Canyon Spring or Jaralosa Spring was to provide a description of the ponds/tanks that were filled from Canyon Spring (serving stockponds 9C-4-SP16, 9C-4-SP17, and 9C-4-SP18) and Jaralosa Spring (serving pond 10A-4-SP01 and secondary steel storage).[6] Mr. Alam has not amended or supplemented his expert report. Also, the parties do not dispute the water rights with respect to the stockponds associated with Canyon Spring and Jaralosa Spring.

On January 14, 2015, Defendants provided Plaintiffs a copy of an expert report prepared by Darrell Brown; Mr. Brown is a current manager of Atarque Ranch. In this report, Mr. Brown did not discuss the Springs. In fact, he did not address any specific water feature on the ranch (well, pond, or spring) and made no attempt to specify any attribute for a water right claim.[7] Instead, he presented a "general description of how ranches in the west work on providing water to cattle" and identified the factors that could influence a cow's consumption of water.[8] Mr. Brown has not amended or supplemented his expert report.

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[5] *See* Attachment 1 - Springs Discovery - Plaintiffs' Interrogatories and Defendants' Responses.

[6] *See* Attachment 2 - Alam Report - Excerpts Concerning Canyon Spring and Jaralosa Spring.

[7] *See* Attachment 3 - Deposition of Darrell Brown at 41 lns. 23-25 and 42 lns. 1-10.

[8] *See id.* at 42 lns. 7-8.

Also, during the course of litigation Defendants provided two other pieces of information concerning the Springs. First, Defendants provided a copy of a declaration concerning Canyon Spring; this declaration was dated April 12, 2004, and completed by Defendants' counsel, Peter Shoenfeld.[9] Second, Defendants provided an affidavit by Mr. Brown in which he provides a brief description of Jaralosa Spring.[10] Mr. Brown's description was apparently based on observations made by him of the Springs. His brief description of Jaralosa Spring was limited to the current-existence of pipe, troughs, tanks, and earthen stockponds around the spring. He provided no additional detail as to the attributes, e.g., the priority date or the historic quantity of beneficial use of a water right associated with either Canyon Spring or Jaralosa Spring.[11]

But in the end, Defendants have produce no expert opinion to support any attribute of the claimed water rights associated with the springs. Notably, Defendants have produced no expert opinion to establish the quantity of water that Defendants claimed in their Subfile Answer at 71: Canyon Spring "15 AFY" and Jaralosa Spring "[an] amount required to keep Stock Pond 10A-4-SP01 filled 365 days per year." Further, Defendants have produced no expert opinion to support a "before March 19, 1907" priority date associated with a water right claims for the Springs.

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[9] This surface water declaration was first disclosed to Plaintiffs by Defendants as an attachment to Defendants' Response to the Cross-Motion for Summary Judgment (ECF No. 3093-27) and is the subject of Plaintiffs' Joint Motion in Limine to Prohibit Introduction of Surface Water Declaration for Canyon Spring filed simultaneously with this motion.

[10] Defendants' Response to United States' Cross-Motion for Summary Judgement, (ECF No. 3093 - 26) at 2 ¶2.

[11] These additional pieces of information, the Canyon Spring declaration and Mr. Brown's affidavit, were provided in response to Plaintiffs' summary judgment argument that Canyon and Jaralosa Springs were unimproved water features.

II. ARGUMENT

A. Expert opinion not disclosed in expert reports is not admissible.

It is well-established that a water right in New Mexico is established by evidence of historic beneficial use.[12] Also, no dispute exists about what must be established before a water right can be recognized: purpose of use, place of use, period of use, quantity, and priority.[13] Finally, the elements of a water right must correspond with one another to make up a single water right, i.e., to establish a water right with a specific priority, the water right claimant must establish water use in the amount claimed on the identified priority date.[14]

The water right claims in question here purportedly extend back more than a century as Defendants claim that the water rights for Canyon Spring and Jaralosa Spring go back to some non-specific time "before March 19, 1907."[15] Necessarily, quantification of a water right that extends back more than a century requires either contemporaneous documentation or a technical/historical analysis that is well beyond the perceptive senses of any living person. But Defendants have not provided or identified either contemporaneous documentation or produced any technical/historical analysis.

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[12] *Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition* (ECF No. 3325) at 3-4.

[13] NMSA § 72-4-19.

[14] *See* Findings and Recommended Dispositions (ECF No. 3223) at 6 (to establish a water right, the water right claimant must establish water use at the time of the claimed priority date).

[15] Subfile Answer at 71.

The Federal Rules of Civil Procedure govern threshold requirements for the presentation of expert opinion. A person who is intended to testify as an expert must timely provide, among other things, a written report or a summary of all facts and all opinions to which the witness will testify.[16] As well, the report or summary must contain "the basis and reason" for every expert opinion.[17] In the event that a witness holds an expert opinion that was not previously disclosed, such opinion is generally not admissible.[18] Exclusion of expert opinion not previously disclosed is a "self-executing sanction for failure to make a disclosure required by Rule 26(a), without need for a motion under [Rule 37](a)(2)(A)."[19]

In this subfile action, Defendants have identified only two potential witnesses, both of whom are identified as expert witnesses: Don Alam and Darrell Brown. For these experts, Defendants prepared and disclosed an expert report for each witness. In only Mr. Alam's expert report was any mention made of Canyon Spring and Jaralosa Spring. But even in Mr. Alam's report, he does no more than identify the ponds/tanks associated with the springs and no dispute

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[16] Fed. R. Civ. P. 26(a)(2)(B)(i) (retained expert witness required to report "a complete statement of all opinions the witness will express and the basis and reasons for them") and Fed. R. Civ. P. 26(a)(2)(C)(ii) (expert witness required to report a summary of all "facts and opinions to which the witness is expected to testify.").

[17] *Id.*

[18] Fed. R. Civ. P. 37(c)(1); *see e.g., Guidance Endodontics, LLC v. Dentsply Int'l., Inc.*, No. 08-1108 JB/RLP, 2009 WL 3672502 (D. N.M. Sept. 29, 2009) (opinion of expert provided in untimely expert report supplementation not admissible).

[19] Fed R. Civ. P. 37(c)(1) (1993 Committee comments) ("This automatic sanction provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence, whether at a trial, at a hearing or on a motion . . . ."); *see also Klonoski v. Mahlab*, 156 F.3d 255, 269 (1st Cir. 1998) (Rule 37(c)(1) required exclusion of information that should have been disclosed pursuant to Rule 26(a)).

exists with respect to water rights associated with these ponds/tanks. Nowhere in either Mr. Alam's report or Mr. Brown's report did these experts opine on any attribute of a water right associated with the springs. Particularly as it relates to establishing a water right purportedly existing since "before March 19, 1907," Mr. Alam and Mr. Brown cannot now offer expert opinion on any element of a water right associated with the springs.

B. Testimony from Mr. Alam or Mr. Brown to establish water right attributes for Canyon and Jaralosa Springs is not admissible as lay opinion.

Defendants assert a water right claim associated with the Springs based on presumed activities and the purported beneficial use of water that extend back more than a century.[20] For any element of the water right claimed (purpose of use, place of use, period of use, quantity, and priority), this information (i.e. water use activities at the Springs more than a century ago) is well beyond the personal observations of any living human being. As such, testimony concerning the attributes of Defendants' claimed water rights can only be presented, if at all, through expert testimony. But, as established above, Mr. Alam and Mr. Brown cannot present expert opinion on this subject for failure to articulate any expert opinion as required by Fed. R. Civ. P. 26(a)(2)(B). As well, they cannot present as lay opinion testimony as to the elements of the water rights claimed for the Springs (purpose of use, place of use, period of use, quantity, and priority).

If a witness intends to testify as to his opinions, his testimony is admissible under either Fed. R. Evid. 701 or 702.[21] With respect to whether their testimony might be admissible under

[20] Subfile Answer at 71 (asserting a water right claim with a priority "before March 19, 1907").

[21] Admissibility of Messrs. Alam's and Brown's testimony Fed. R. Evid. Rule 702 has been addressed in Section II.A, above.

Rule 701, the plain language controls the question and likewise prohibits admission of such testimony. The rule provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
> a) rationally based on the witness's perception;
> b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.[22]

Thus, Fed. R. Evid. 701 specifies that lay opinion testimony must be based on the witness's perception and cannot convey the scientific, technical or specialized knowledge that falls within the scope of expert testimony governed by Fed. R. Evid. 702. "[A] person may testify as a lay witness [under Fed. R. Evid. 701] only if his opinions or inferences do not require any specialized knowledge and could be reached by any ordinary person."[23]

The Tenth Circuit has considered the line between opinion evidence governed by Fed. R. Evid. 701 and 702. Rule 701 "does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which require the special skill and knowledge of an expert witness."[24] The Tenth Circuit has identified four non-exclusive considerations to determine whether proffered opinion is based upon common experience of an ordinary person or, instead, on scientific, technical or specialized knowledge:

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[22] Fed. R. Evid. 701.

[23] *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004) (quoting *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996)).

[24] *James River Ins. Co. v. Rapid Funding, Inc.*, 658 F.3d 1207, 1214, (10th Cir. 2011) ("James River") (quoting *Randolph v. Collectramatic, Inc.*, 590 F.2d 844, 846 (10th Cir. 1979)).

a) whether the opinion was based on common sensory observations such as "appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences;"

b) whether the opinion was based on professional experience;

c) whether the opinion was based on technical reports or publications; and

d) whether the rules of evidence generally consider the opinion evidence to be expert opinion.[25]

These relevant considerations, as well as Rule 701's plain language, establish that potential testimony from Messrs. Alam and Brown is not the province of lay opinion as it pertains to the purported water right extending more than a century into the past.

First, the fact that Defendants seek water rights based on activities that occurred sometime "before March 19, 1907" precludes Messrs. Alam and Brown from opining on the existence of any element of such a right. The circumstances that might give rise to such a right more than a century ago could not have been derived from any common sensory observations made by Messrs. Alam and Brown today.

Second, although it might be possible that under the right circumstances, observations of lay witnesses might establish some elements of a water right (e.g., beneficial use, period of use, etc.), these circumstances involve a century-old claim for which first-hand knowledge/experience of water use since the right was established is impossible. Under these circumstances, water

[25] *James River* at 1214-15 (quoting *Asplundh Mfg. Div. v. Benton Harbor Eng.*, 57 F.3d 1190, 1196 (3d Cir. 1995)).

quantity is an element of a water right that can only be established through expert testimony or by actual metering records. Based on the information presented by Defendants through discovery, metering records do not exist for Canyon and Jaralosa Springs. Likewise, establishing a priority for a water right existing almost a century ago necessarily involves the investigation, understanding, and analysis of historic circumstances and documents. At a minimum, the technical/historical analysis would have to pinpoint the date by which water from the spring was first diverted for use. And, if it were to be presented through testimony in federal court, such an analysis based on historic documents and technical information could only be conducted by a qualified expert under Fed. R. Evid. 702. Therefore, quantification of a water right, determination of a priority date, and analysis of historic water use patterns could only be derived from calculations and analysis made by someone with the knowledge, training, skills, and experience to do so, in other words an expert. Under the requirements of Fed. R. Evid. 701, this analysis, and the information and documentation supporting it, cannot be simply relabeled as "lay opinion."

III. CONCLUSION

Pursuant to Fed. R. Civ. P. 37(c)(1), this Court should prohibit any expert testimony from Messrs. Alam or Mr. Brown offered to establish any element of the water right claimed for Canyon Spring or Jaralosa Spring. Further, this Court should prohibit any lay testimony from Messrs. Alam or Mr. Brown offered to establish any element of the water right claimed for Canyon Spring or Jaralosa Spring.

Respectfully submitted this 14th day of April, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 14th day of April 2017, I filed the foregoing electronically through the CM/ECF system, which caused CM/ECF Participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Andrew "Guss" Guarino
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