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- No. 01cv00072-MV-WPL
Subfile ZRB 2-0098

A & R Productions, et al.,

Defendants.

DEFENDANTS' REPLY BRIEF RE PRIMA FACIE EVIDENCE, BURDENS OF PROOF, GOING FORWARD, AND PERSUASION IN WATER CASES; PROCEDURE FOR ADJUDICATING WATER RIGHTS NOT APPURTENANT TO REAL ESTATE

In their response to these Defendants' memorandum respecting presumptions, going forward, etc., the only authorities cited by the Plaintiffs are rulings of this Court in the Aamodt case. Those rulings have no precedential value whatever.

Under Rule 302, Federal Rules of Evidence, (erroneously cited by these Defendants in their brief-in-chief as F. R. Civ. P.):

> state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

This is such a case. The New Mexico law is that those

decisions in subfiles of the Aamodt case have no precedential value. The rule was initially adopted in State ex rel. Anaya v. Jaramillo, 1979-NMSC-026, 92 N.M. 617, 593 P.2d 58 (S. Ct. 1979), and was subsequently codified by the New Mexico Supreme Court as a rule in NMRA 12-405, respecting the precedential effect of judicial opinions. Both show that the rulings of trial courts respecting presumptions, as cited by the Plaintiffs, have absolutely no precedential value whatever.

While the rule may apply directly only to appellate courts, by even greater rationale it must apply to trial courts. "Disposition by order, decision or memorandum opinion . . . mean[s] that the disposition is not precedent. . . ."

Part D of NMRA 12-405 governs the citation of non-precedential dispositions, and provides that

> Any citation to a non-precedential disposition from any jurisdiction shall indicate in a parenthetical that the disposition is non-precedential or unpublished . . . .

Plaintiffs failed to so state, and even were it otherwise meaningful, the Plaintiffs' use of Aamodt as precedent should be ignored by the Court.

At p. 3 of their response, the Plaintiffs concede that the governing statute, NMSA § 72-4-17, in pertinent part, states that a complete hydrographic survey must be furnished for the "determination of the rights involved." They erroneously state, howver, that it does not require them to identify all potential

claims of water rights, asserting that such a requirement would result in an unwieldy hydrographic survey congested with unnecessary information as to the claims of any possible water user.

They have overlooked the provisions also contained in the same section of the statute to which they refer, that require them to join:

> all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, [who] shall be made parties.

Not only does the statute so require, the State Engineer's practice for decades, perhaps for more then a century, as pointed out in these Defendants' brief-in-chief, has been to join all such claimants and to seek the Court's ruling that the rights claimed by them are invalid. At the top of p. 4 of their brief, Plaintiffs inaccurately state that "Plaintiff most commonly does not include claims when they are not expected to give rise to a water right." To the contrary, in fact and in practice, those claimants whose claims the State deems invalid or improper are and ever have been given a "no right" offer.

Examples of two such "no right" offers or proposed consent orders are attached hereto as exhibits "1" and "2". We suggest that due process so requires in order that such claimants might have their day in Court.

The Plaintiffs' arguments respecting undrilled domestic

wells make no sense, because undrilled wells do not give rise to water rights, and more importantly, in this case, no claims whatever are based on wells which have not been drilled or in which was rights have not been perfected.

The Plaintiffs' duty is set forth in the statute[1] and requires them to seek from the Court a determination of all claimed rights.

Without asserting the existence or nonexistence of all those rights which are claimed, even those with which they disagree, they can hardly be deemed to comply with the statute. If there is a water right which is claimed, by one of the persons ordered by the statute to be joined as a defendant, the Plaintiffs cannot ignore it and yet assert they have complied with the statute. Nor can they determine existing water rights without asking the Court to determine what claims do not give rise to water rights. At the end of the day Plaintiffs can only secure from the Court an injunction prohibiting use of water except in conformity with the adjudication. There could be no valid injunction against a known claimant exercising a water right which has been omitted by

[1]See also NMSA § 72-4-15 (1907) : Upon the completion of the hydrographic survey of any stream system, the state engineer shall deliver a copy of so much thereof as may be necessary for the determination of **all rights** to the use of the waters of such system together with **all other data in his possession necessary for such determination**, to the attorney general of the state who shall, at the request of the state engineer, enter suit on behalf of the state for the determination of all rights to the use of such water, in order that the amount of unappropriated water subject to disposition by the state under the terms of this chapter may become known, and shall diligently prosecute the same to a final adjudication. (Bold added.)

the Plaintiff and hence not determined by the Court to be invalid or non-existent.

At p. 4 of their brief the Plaintiff assert that they do not have the burden to prove "abandonment" because this is not a forfeiture case. The *non sequitur* to one side, here the Plaintiffs are plainly seeking to once again avoid the effect of the statute § 72-1-3 (1961), which provides:

> 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 declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the diversion works therein described are located. **Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents.** (Bold added.)

These Defendants' water right in Atarque Lake has been declared. The State Engineer refused to receive the declaration, and the Court held that our motion to force its filing was moot because the Court would determine the issue of the validity of the Atarque Lake water right in this case irrespective of whether the State Engineer accepted the declaration for filing. We

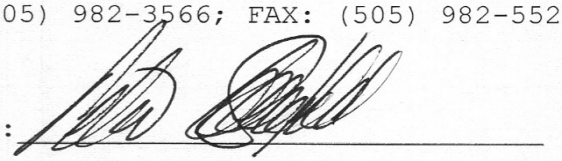
submit that the Court must do so as if the declaration had been filed, since the Engineer was without power to decline to receive it. See Exhibit 3. The briefing of the parties, leading to the issuance of Exhibit 3 could be of value to the Court.

The Plaintiffs state that this is not an abandonment proceeding. Defendants are not totally clear on the concept of or even if an "abandonment proceeding" exists or has ever existed as a matter of law. If this is not an "abandonment proceeding" the Plaintiffs should make clear that they are disclaiming the intention to assert that the water right for Atarque Lake has been abandoned. If so, they should so state. The issue of the validity of the water right in the lake is before the Court (See the Court's memorandum of May 11, 2004, regarding the filing of the declaration. Because it is without a document number, which was more recently added as part of the Court's filing protocol, it is otherwise difficult to find in the record. A courtesy copy is attached as an exhibit ("3") hereto.

WHEREFORE, these Defendants respectfully request that the Court adjudicate the contested rights in this subfile proceeding in accordance with the rules of law submitted by these Defendants.

Respectfully submitted:

PETER B. SHOENFELD, P.A.
P.O. Box 2421
Santa Fe, New Mexico 87504-2421
(505) 982-3566; FAX: (505) 982-5520

By: 

Attorney for JAY Land LTD and Yates Ranch Property LLP

Certificate of Service

I served a copy of the foregoing Reply on counsel for Plaintiffs this 2nd day of June, 2014, by means of the Court's e-filing and service system.