

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA)	
and)	No. 01CV00072-MV-WPL
STATE OF NEW MEXICO, ex rel.)	
STATE ENGINEER,)	ZUNI RIVER BASIN
)	ADJUDICATION
Plaintiffs,)	
)	
v.)	
)	Subfile No. ZRB-2-0038
A & R PRODUCTIONS, et al.)	
)	
Defendants.)	
_____)	

JOINT RESPONSE TO MOTION TO STRIKE

Plaintiffs United States of America (United States) and State of New Mexico (New Mexico) (collectively Plaintiffs) jointly respond to *Defendants’ Motion to Strike Plaintiffs’ Untimely Reply Brief* (ECF No. 3328). The Motion to Strike seeks to strike that portion of the *Joint Reply on Plaintiffs’ Cross-Motion for Summary Judgment and on the United States’ Motion to Exclude Expert Opinion Testimony* (ECF No. 3327) that pertains to the *Motion to Exclude Expert Opinion Testimony* (ECF No. 3316).

Defendants’ Motion to Strike Plaintiffs’ Untimely Reply Brief is contrary to the Court’s Scheduling Order, the Federal Rules of Civil Procedure, the New Mexico Local Rules, and common sense and must be denied.

1. On February 16th, the Court issued its *Order Setting Discovery Deadlines and Adopting Joint Status Report* (ECF No. 3301) (Scheduling Order). Pursuant to the Scheduling Order, the Parties were ordered to file their motions for summary judgment as follows:

Defendants' motion, Plaintiffs' response, Defendants' reply: August 15th, September 14th, and September 29th, respectively, *id.* at 2; and

Plaintiffs' cross-motion, Defendants' response, and Plaintiffs' reply: September 14th, September 29th, and October 14th, respectively, *id.*

2. Pursuant to the Scheduling Order, Plaintiffs timely filed their *Joint Cross-Motion for Summary Judgment on the Disputed Water Right Claim and Response to Defendants' Motion for Summary Judgment* (ECF No. 3317-1). In addition, Plaintiffs simultaneously filed their *Motion to Exclude Expert Opinion Testimony* (ECF No. 3316) (Motion to Exclude). Subsequently, Defendants filed their response to the Cross-Motion and the Motion to Exclude in a **single** document on September 28th. *See Defendants' Response to Plaintiffs' Corrected Joint Cross-Motion for Summary Judgment and Motion to Exclude Expert Opinion Testimony* (ECF No. 3320) (Defendants' Response). Pursuant to the Scheduling Order, Plaintiffs filed their *Joint Reply on Plaintiffs' Cross-Motion for Summary Judgment and on the United States' Motion to Exclude Expert Opinion Testimony* (ECF No. 3327) (Plaintiffs' Joint Reply).
3. The Cross-Motion and Motion to Exclude are related and inseparable documents; this is established by Defendants' response to these motions in a **single** document. *See id.* The second and alternative grounds for relief under the Cross-Motion is based on the now undisputed fact that Defendants have no admissible evidence to support their contested livestock use water right claim. Defendants rely exclusively on the opinion evidence of Defendant Craig Fredrickson to establish their water right claim and the Motion to Exclude establishes the inadmissibility of Mr. Fredrickson's testimony. Defendants concede that Mr. Fredrickson is not an expert on cattle operations and Fed. R. Evid. 702

prevents him from testifying. *See* Cross Motion at 14 § V.B and Motion to Exclude at 5 – 12 § III.A (Mr. Fredrickson not qualified as an expert) and 12 – 24 § III.B (Mr. Fredrickson’s expert opinions not reliable); *see also* Defendants’ Response at 7 - 12 (asserting that Mr. Fredrickson’s written opinions represent lay opinions under Fed. R. Evid. 701).

4. *Defendants’ Motion to Strike Plaintiffs’ Untimely Reply Brief* (Motion to Strike) seeks to strike that portion of the Plaintiffs’ Joint Reply as it pertains to the Motion to Exclude. The complaint raised in the Motion to Strike boils down to this – because Plaintiffs chose to file two separate motions simultaneously on September 14th, the Motion to Exclude was governed not by the Scheduling Order but by the Court’s generic procedural rules as a separate and distinct procedure. As such, according to Defendants two separate replies were required at different times; one for the Cross Motion (due October 14th) and one for the Motion to Exclude (due October 12th). Defendants seek to strike select lines from Plaintiffs’ Joint Reply. *See e.g.*, Motion to Strike at 2 n.1.
5. Plaintiffs could have presented the arguments for both motions in a single document; the pages of Plaintiffs’ motions combined do not exceed the established page-limit. *See* ECF No. 3167-1 at 8. Nevertheless, Plaintiffs presented their Cross-Motion and Motion to Exclude simultaneously, but separately, for clarity to the Court and the pro se Defendants; so that the boundaries between the distinct legal principles underlying each motion remained clear. The Motion to Exclude is undeniably an inseparable component of the Cross-Motion and is therefore governed by the filing requirements of the Scheduling Order. Both motions were filed in compliance with the Scheduling Order and

Defendants responded to the motions in a single responsive document.

6. Defendants are simply wrong to conclude that the Scheduling Order does not control the timing and length of the replies to the Cross-Motion and the Motion to Exclude. In fact, Defendants' argument becomes remarkable; Defendants filed a single response to both motions, yet they claim that Plaintiffs should have replied separately to the component parts of the response. Defendants' "separate-filing" theory is contrived and their litigiousness reaches new levels to suggest that Plaintiffs were required to file two separate replies under two distinct procedural rules to reply to Defendants' single September 28th response. Plaintiffs do not state lightly and do not engage in hyperbole to characterize Defendants' position as absurd.
7. Further, even if Defendants were correct that the Motion to Exclude falls outside the Scheduling Order because it was a separately filed document, Defendants fail to accurately calculate the filing deadline for a motion.
8. Under application of the Local Rules, after response the movant has 14 days to reply. D.N.M.LR-Civ. 7.4(a). In addition to the 14-day period provided by the Local Rules, the Rules of Civil Procedure permit an additional 3 days to the reply period. Fed. R. Civ. P. 6(d). Also, the Rules of Civil Procedure specify that if the filing period ends on a Saturday, Sunday or a holiday, the filing period is extended to the next business day. Fed. R. Civ. P. 6(a)(1)(C).
9. Even under Defendants' erroneous "separate-filing" theory, Plaintiffs would have been required to submit their reply to the Motion to Exclude no later than Monday, October 17th – the same day that the Motion to Strike was filed. Thus, under Defendants' theory,

Plaintiffs filed their reply to the Motion to Exclude 3 days early and the Motion to Strike was, in fact, filed prematurely and without support from the very rules they rely.¹

For the reasons articulated in the paragraphs above, the Motion to Strike must be denied.

Respectfully submitted this 20th day of October, 2016.

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¹ Though required by the Local Rules, Defendants failed to consult with undersigned counsel before filing their Motion to Strike. *See* D.N.M.LR-Civ. 7.1(a). Had Defendants consulted with undersigned counsel on their Motion to Strike, undersigned counsel would have explained how the Local Rules and the Rules of Civil Procedure worked to establish a filing period even under Defendants' separate-filing theory. Likely, this would have obviated the need for the Court to resolve the Motion to Strike. Plaintiffs now ask that the Motion to Strike be denied exclusively for Defendants' failure to follow the Local Rules requiring consultation with opposing counsel before filing a motion. *Id.* ("a motion that omits recitation of a good-faith request for concurrence may be summarily denied").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 20, 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
Andrew "Guss" Guarino