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,	)	**No. CV 01-00072 MV/JHR**
Plaintiffs,	)	**ZUNI RIVER BASIN ADJUDICATION**
and	)	
ZUNI INDIAN TRIBE, NAVAJO NATION,	)	**Subfile No. ZRB-1-0148**
Plaintiffs in Intervention,	)	
v.	)	
A & R PRODUCTIONS, et al.	)	
Defendants.	)	

STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO NORMA M. MEECH'S CORRECTED MOTION TO CERTIFY

COMES NOW, the State of New Mexico, and hereby responds in opposition to Defendant Norma Meech's February 25, 2021 *Corrected Motion to Certify Questions to the New Mexico Supreme Court* (No. 3488), and in support thereof, states as follows:

INTRODUCTION

The Court should deny Defendant's *Corrected Motion* because the questions posed do not present novel or unsettled questions of law that would support certification by this Court, or meet the standard for certification set out under state law in NMRA 12-607 (1987) of the New Mexico Rules of Appellate Procedure or NMSA 1978, Section 39-7-4 (1997). For ease of reference, Defendant's two questions are restated here in full:

1. May an adjudication court, pursuant to NMSA 1978, Sections 72-4-13 through 20, adjudicate a water right in an amount that accounts for the

> reasonable, continuous expansion of beneficial use of water pursuant to a plan put in place prior to the declaration of an underground water basin?
>
> 2. May an adjudication court, pursuant to NMSA 1978, Sections 72-4-13 through 20, apply the relation back doctrine announced in *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467 to a mining operation that has been diligently pursuing beneficial use of water pursuant to a plan developed and initiated prior to the declaration of the underground water basin over thirty-six years previously?

Corrected Motion at 2 (emphasis added). Stated more succinctly, Defendant asks: 1) does the *Mendenhall* doctrine of relation back apply to "a mining operation"; and if so 2) can such a *Mendenhall* right be continuously expanded. As will be discussed below, long established New Mexico law unequivocally provides the answer to both these questions.

The *Mendenhall* doctrine is narrow in scope and fully developed in New Mexico law. It concerns only whether a claimant may relate back her priority date to when work was begun on the project, prior to the declaration of the basin, and whether she may continue to develop her water right in accordance with the project as originally planned. New Mexico law, as will be discussed below, provides extensive guidance on this, and on the reasonable time within which such a right may be developed.

Consequently, there is no unsettled question of state law to certify to the New Mexico Supreme Court, and therefore, the Court should deny Defendant Norma Meech's *Corrected Motion.*

THE STANDARD FOR CERTIFICATION

In its June 15, 2006 *Memorandum Opinion and Order* (No. 733), this Court denied a similar motion to certify questions to the New Mexico Supreme Court, and commenced its analysis by noting that there are two standards that have to be met: the federal court standard to certify a

question, and the standard under which the New Mexico State Supreme Court may accept such a certification.

With regard to the standard that must be met in federal court for a party to request the certification of a legal question, this Court held certification is not to be "routinely invoked." Moreover, it should never be invoked absent an "unusual difficulty in deciding the state law question."

> Novel, unsettled questions of state law, … not 'unique circumstances,' are necessary before federal courts may avail themselves of state certification procedures." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). Whether to certify a question to the state court is within the discretion of the federal court, *Albert v. Smith's Food and Drug Centers, Inc.*, 356 F.3d 1242 (10th Cir. 2004), and certification is not to be routinely invoked whenever federal court is presented with an unsettled question of state law. *Armijo v. Ex Cam, Inc.*, 843 P.2d 406 (10th Cir. 1988). There is no certification absent an "unusual difficulty in deciding the state law question." *Copier by and Through Lindsey v. Smith & Wesson*, 138 F.3d 833 (10th Cir. 1988).

Mem. Op. and Order at p. 3. Here, there is no difficulty in deciding the state law questions presented regarding *Mendenhall* and the relation back doctrine, because existing New Mexico statutes and case law provide ample guidance, as explained below. Moreover, the allegedly "unique circumstances" of Defendant's claims are not sufficient to warrant certification.

The New Mexico State Supreme Court's authority to accept certification of a question of law from a court of the United States is limited to those circumstances where "the answer may be determinative of an issue in pending litigation in the certifying court" and "the question is one for which an answer is not provided by controlling: (1) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or (2) constitutional provisions or statute of this state. NMRA, 12-607; NMSA Section 39-7-4." *Id.*

As will be discussed below, Defendant's request for certification is superfluous, because answers to her proposed questions are provided by controlling appellate opinion of the New

Mexico Supreme Court and the New Mexico Court of Appeals, as well as constitutional provisions and the statutes of this state. *See, e.g.,* N.M. Const. art. XVI, Section 3, *Mendenhall*, 1961-NMSC-083, 68 N.M. 467 (1961); *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375, 384; *U.S. v. Abouselman, et al.*, 83cv1041, May 4, 1999 *Memorandum Opinion and Order*. The first and foremost of these principals of law is that "[b]eneficial use shall be the basis, measure and the limit of the right to the use of water." N.M. Const. art. XVI, Section 3.

BENEFICIAL USE

Before examining the flaws in Defendant's *Mendenhall* arguments, it is worth taking a step back to the well established first principal of any New Mexico water rights adjudication—a person's water right is adjudicated in the amount of their actual beneficial use. Defendant's water right should be adjudicated on the basis of her actual historical beneficial use, not her planned future uses.

Applying the doctrine of beneficial use means that a water right cannot continue to expand: "Only by applying water to beneficial use can an appropriator acquire a perfected right to that water." June 15, 2006 *Memorandum Opinion and Order* at 4 (No. 733) (citing *State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch*, 143 P. 207 (1914); *Hanson v. Turney*, 94 P.3d 1 (Ct. App. 2004)). As such, adjudication courts adjudicate *existing water rights*, and they adjudicate them based on the actual beneficial use of water, even for mining operations.

As this Court has observed: "New Mexico's Constitution and statutory scheme define the parameters of a water right in New Mexico. 'Beneficial use shall be the basis, measure and the

limit of the right to the use of water.' N.M. Const. art. XVI, Section 3."[1] *Mem. Op. and Order* at p. 3. In that same 2006 *Memorandum Opinion and Order* this Court went on to say:

> New Mexico law is clear on the subject. The constitutional provision and statutes cited above as well as abundant case law clearly state that beneficial use defines the extent of a water right. This fundamental principal "is applicable to all appropriations of public waters." *State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 58-9 (2004), quoting *State ex rel. Eng'r v. Crider*, 431 P.2d 45, 48 (1967). Only by applying water to beneficial use can an appropriator acquire a perfected right to that water. *State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch*, 143 P. 207 (1914), *Hanson v. Turney*, 94 P.3d 1 (Ct. App. 2004). Further, the purpose of a stream system adjudication is to determine the amount of water which each water right claimant is entitled to in order to facilitate the distribution of unappropriated water. NMSA Sections 72-4-15 through 72-4-9; *Snow v. Abalos*, 140 P. 1044 (1914).

Id. at pp. *3 to 4*. It is beyond dispute that the doctrine of beneficial use is fully developed in this state, and applies to "all appropriations of public waters", *including mining operations*. And no appropriator—including a mining operation—can acquire a right to take water absent applying such water to beneficial use

Defendant, on the other hand, attempting to use *Mendenhall* as a lever, deliberately conflates the legal ability to continue the development of a water right with the existence of a water right, and pretends this is a "novel" and "unsettled" issue worthy of certification. It is not.

MENDENHALL IS ALREADY A FULLY DEVELOPED LEGAL DOCTRINE WHICH IN NO WAY EXCLUDES "A MINING OPERATION"

In *Mendenhall*, the New Mexico Supreme Court faced a situation that the legislature had not contemplated in the statutes. That is, how should the State Engineer recognize and administer groundwater rights where the development of that water right began prior to the State Engineer's

[1] The language of NMSA Section 72-12-1 applies the constitutional provision specifically to groundwater, the type of right claimed in the instant matter. *Id.*

authority to administer, but where the water was not put to beneficial use until after the State Engineer had authority.

New Mexico's groundwater code allows the State Engineer to assert administrative jurisdiction over a groundwater basin by entering a special order defining the declared boundaries of an underground basin. *See* NMSA 1978, § 72-2-8 (B)(4) (1967); § 72-12-20 (1983). Before the State Engineer had declared a groundwater basin by special order, a water right could be established without a permit from the State Engineer. After a basin is declared by the State Engineer's special order, a permit to appropriate water is required. In 1949, Mr. Mendenhall's predecessor landowner planned and commenced a project to irrigate lands before the declaration in 1950 of the groundwater basin where his well is located. As the Supreme Court stated the issue:

> Does a landowner who lawfully initiates the development of an underground water right and carries the same to completion with reasonable diligence acquire a water right with a priority date as of the beginning of his work, notwithstanding the fact that the lands involved were put into a declared artesian basin before work was completed and water put to beneficial use on the ground?

Mendenhall, 1961-NMSC-083, ¶ 1, 68 N.M. 467, 468. The New Mexico Supreme Court answered this question in the affirmative and allowed Mendenhall to relate back his priority date to when work was begun on the project, prior to the declaration of the basin, and to continue to develop his water right in accordance with the project as originally planned.

Therefore, most of Defendant's second question for certification has already easily been answered by the New Mexico Supreme Court. As noted above, she asks:

> May an adjudication court, pursuant to NMSA 1978, Sections 72-4-13 through 20, apply the relation back doctrine announced in *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467 to a mining operation that has been diligently pursuing beneficial use of water pursuant to a plan developed and initiated prior to the declaration of the underground water basin over thirty-six years previously?

Motion at p.2. Nothing in *Mendenhall* distinguishes the purpose of use of the water as having a bearing on the analysis. The purpose of use, such as mining, is not culled out by *Mendenhall* as an exception, or identified as an area in need of special attention or different rules. Indeed, the purpose of use of the water under a *Mendenhall* claim is irrelevant, so long as it is beneficial.

In *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, 143 N.M. 142, the New Mexico Supreme Court ruled with regard to another aspect of water law, and determined that it is not the role of courts to carve out statutory exceptions for particular industries to New Mexico's statutory water law scheme. In that case, as with this one, the claimant was a mining operation. Specifically, in *Hydro Resources*, the issue was the severability of a water right, and the Supreme Court observed that "the legislature has decreed, as an exception to the general rule, that water rights are appurtenant to irrigated land, and follow a conveyance of that land unless specified differently." *Id.* at 148. "Obviously," the Court in *Hydro Resources* held, "mining is not irrigation." *Id.* The New Mexico Supreme Court then concluded that "[i]t would be for the legislature, not this Court, to add mining as an additional exception to this rule." *Id.*

In sum, the fact that Defendant's use of water happens to be for a mining operation does not change the analysis under *Mendenhall*.

It was left to other New Mexico cases (*State ex rel. Martinez v. City of Las Vegas*; *U.S. v. Abouselman, et al.*, 83cv1041, May 4, 1999 *Memorandum Opinion and Order)*, however, to elucidate the hanging chad of Defendant's second question for certification, namely does *Mendenhall* still apply despite the fact that the use was initiated "thirty-six years previously?" *Corrected Motion* at 2. Whether thirty-six years is too long to develop a Mendenhall right is a question of fact, not a question of law, and therefore not a proper subject for certification.

However, it dovetails with Defendant's first question for certification which asks whether she can continuously expand her beneficial use under the *Mendenhall* doctrine:

> May an adjudication court, pursuant to NMSA 1978, Sections 72-4-13 through 20, adjudicate a water right in an amount that accounts for the reasonable, continuous expansion of beneficial use of water pursuant to a plan put in place prior to the declaration of an underground water basin?

Motion at 2. In other words, may a claimant who legally commenced drilling their well prior to declaration of the basin expand their right forever? This is essentially the question Defendant wants to certify to the New Mexico Supreme Court, but as will be discussed below, the New Mexico Supreme Court already provides its answer to that question.

A CONTINUALLY EXPANDING RIGHT IS THE ANTITHESIS OF NEW MEXICO WATER LAW

Of course, the question seeking the validity of an ever expanding water right is neither "novel" or "unsettled", and the answer unsurprisingly is no. *See, e.g., Mendenhall*, 1961-NMSC-083, 68 N.M. 467 (1961); *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375, 384; *U.S. v. Abouselman, et al.*, 83cv1041, May 4, 1999 *Memorandum Opinion and Order*. It has been asked and answered many times, and presents no need for certification. As noted above, under New Mexico law every water right is established by the historic application of water to beneficial use. *See, e.g.*, June 15, 2006 *Memorandum Opinion and Order* at pp. 3 to 4 (No. 733).

Defendant seeks to continually develop her water right at least for the next century, although nothing in her *Corrected Motion* suggests 100 years would necessarily be the limit to that expansion. *Corrected Motion* at p. 5 ("Tinaja mine has about 100 million tons of limestone accessible for mining. Mined at a rate of 1,000,000 tons per year, the mine has an active life

expectancy of at least 100 years.").[2] The legal question of whether such an ever-expanding water right claim can be recognized is not novel, and applicable New Mexico State law is well settled—it cannot be. *See e.g.*, *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375.

An ever expanding right is inconsistent with beneficial use and the prior appropriation doctrine, which holds that:

> Although "the water in a public stream belongs to the public, *Snow v. Abalos*, 18 N.M. 681, 693, 140 P. 1044, 1048 (1914), unappropriated water is "subject to appropriation for beneficial use." N.M. Const. art. XVI, § 2. Once appropriated, "[p]riority of appropriation shall give the better right." N.M. Const. art. XVI, § 2.

State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 384. It is also completely at odds with the relation back doctrine under *Mendenhall* which Defendant asserts.

In *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375, the New Mexico Supreme Court expressly and unambiguously ruled against the notion of an ever expanding water right claim as being obnoxious to the State's statutory scheme. In that case, it was with regard to a non-Indian pueblo (the City of Las Vegas) which attempted to claim the right to continually expand their use of water under what is called the "pueblo rights doctrine"[3]:

> [T]he pueblo rights doctrine recognizes the right of the inhabitants of Mexican or Spanish colonization pueblos to use as much of an adjoining river or stream as is necessary for municipal purposes. The doctrine contemplates the expansion of the pueblo's right to use water in response to increases in size and population, and if necessary, the right can encompass the entire flow of the adjoining water course.

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[2] In *Mendenhall*, the New Mexico Supreme Court held that the water right related back to the date of the pre-basin well because the user had proceeded diligently and within less than two years to complete his use of the water. *Mendenhall* at 475, 362 P.2d at 1001.

[3] To be abundantly clear, the "pueblo rights doctrine" discussed above refers to pueblos in the sense of non-Indian communities established during the Spanish or Mexican periods, and is unrelated to Indian Pueblos.

State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 378 (citations omitted). The Supreme Court in *Martinez* found that the pueblo rights doctrine is inconsistent with the principle of beneficial use that lies at the heart of New Mexico water law, and found that the doctrine "unduly interferes with the State's regulation of water rights," "represent a 'positive detriment to coherence and consistency in the law'" and "poses a direct obstacle to the realization of important objectives embodied in New Mexico water law." *Id* at pp. *387* and 389-390 (citations omitted). Such an expanding water right "intolerably interferes with the goals of definiteness and certainty contemplated by prior appropriation." *Id.* at p. 387. That uncertainty "could potentially paralyze others from legitimately making beneficial use of unappropriated waters on the same stream as a [non-Indian] pueblo out of fear of potential future interference with the pueblo's expansion." *Id. at p. 387.*

However, the Supreme Court in that same case expressly distinguished *Mendenhall* and the relation back doctrine, finding that *Mendenhall* was a different matter entirely, and for the sole reason that *Mendenhall* in fact did not contemplate an ever-expanding right. The New Mexico Supreme Court in *Martinez* found that *Mendenhall* works within the State's statutory scheme for water rights administration specifically because it does not contemplate an ever expanding right as was claimed by the City of Las Vegas, but rather because it reasonably limits a claimant's right to develop their water use to a finite period:

> In applying these principles, we have recognized that water users have **a reasonable time** after an initial appropriation to put water to beneficial use, known as the doctrine of relation.

Id. at p. 387. (emphasis added). *Mendenhall* works because under "the doctrine of relation [aka *Mendenhall*] other water users 'are on notice that the law is granting them water rights that are temporary only' pending a reasonable time for the senior appropriator to complete the initial

appropriation." *Id.* at p. 387. (emphasis added). *Mendenhall* does not fail under the analysis in *Martinez* specifically because it is not an ever expanding right.

With an ever expanding right there is no reasonable notice to other water users of a user's potential water needs in the future because there is no limit to the quantity of water available to the user, nor to the amount of time available to complete its initial appropriation. *Id.* That is not the case with *Mendenhall*. Under *Mendenhall*, "water users have a reasonable time after an initial appropriation to put water to beneficial use." *See also*, *State ex rel. State Engineer v. Crider*, 78 N.M. 312, 316, 431 P.2d 45, 49 (1967) (extending doctrine of relation back to municipalities whose populations and water needs may increase "within a reasonable period of time"); *Rio Puerco Irrigation Co. v. Jastro*, 19 N.M. 149, 153, 141 P. 874, 876 (1914) (actual appropriation within a reasonable time necessary to application of doctrine of relation back); *Keeny v. Carillo*, 2 N.M. 480, 493 (1883) (holding that due diligence and completion of work within reasonable time are necessary for relation back).

As such, contrary to Defendant's assertion that there is no guidance at State law for her ever-expanding water right claim under *Mendenhall*, the New Mexico Supreme Court has provided us with ample guidance with regard to that exact thing in *Martinez* and elsewhere.

The only remaining question is, what constitutes "a reasonable time". This is a question of fact, not law. It is therefore not a proper subject for review to the Supreme Court. But even assuming *arguendo* that it were, as will be discussed below, New Mexico caselaw addresses what is reasonable.

A REASONABLE TIME IS DEFINITELY NOT 100 YEARS OR MORE

In 1999, in the *Abouselman* water rights adjudication, this Court referred to New Mexico law to identify the four elements of *Mendenhall*: (1) pre-basin initiation of groundwater rights; (2)

due diligence; (3) completion of the appropriation; and (4) the application of those right to actual beneficial use within a reasonable time. *U.S. v. Abouselman, et al.*, 83cv1041, May 4, 1999 *Memorandum Opinion and Order* at p. 3. It found that "[t]he notion that a pre-basin right must be put to beneficial use within a reasonable period of time is consistent with *Mendenhall* and its progeny, and that "a reasonable time element under Mendenhall separate from the diligence element is entirely consistent with the New Mexico Constitution, statutes and case law." *Id.* at p. 4. "New Mexico water laws," it said, "are designed to encourage use and to discourage waste and non-use." *Id.*

The *Abouselman* Court then discussed what constituted a "reasonable time" under the law of the State of New Mexico:

- Four years not too long when steps taken to complete the well. *State ex rel. Reynolds v. Rio Rancho Estates*, 95. N.M. 560, 563, 624 P.2d 502, 505 (1981);
- 40 years of non-use unreasonable. *State ex rel. Martinez v. McDermett*, 120 N.M. 327, 901 P.2d 745 (Ct. App. 1995).
- Refusing to apply relation-back of a water right where appropriation not completed for 20 years. *Hagerman Irrigation Co. v. J.F. McMurry*, 16 N.M. 172, 179-180 (1911).

Id. at 4. In surveying New Mexico law on the subject of a "reasonable time", the *Abouselman* Court also found that the "reasonable time" under *Mendenall* was necessarily a shorter period of time than that necessary to lose water right to non-use under the doctrines of forfeiture or abandonment: "In other words, it is entirely rational to more easily lose a right that has never become vested than to have one taken away that was once owned." *Id.* at 7.

Ultimately, the *Abouselman* Court held that seventeen (17) years was not a reasonable time, and ruled against the claimant and its *Mendenhall* based claim. *Id.* at 6.[4] The *Abouselman* Court found that the claimant in that case had not put their water to actual beneficial use within a reasonable time, and ruled against its *Mendenhall* claim despite the fact that—as Defendant alleges in the instant matter—they had a plan in place to develop their water. The *Abouselman* Court agreed with its Special Master that the claimant's future planned uses for its water are of no import in a water rights adjudication", and held that:

> In this case, having failed to develop the water within a reasonable time, Chaparral's rights to future development have been lost, at least with the benefit of the relation back doctrine.

Id. at 6. The *Abouselman* Court then concluded with an analysis that is equally applicable to this case, stating this result was "not akin to [the claimant's] losing something it owned, but rather losing the hope of gaining something it never owned:

> If [the claimant] develops more water in the future, it must do so in accordance with the statutory scheme imposed when the basin was declared in 1973, with priority according to that scheme. It can no longer stretch its pre-basin rights into the future.

Id. at 9. The exact same statement applies here, with the sole exception that the Zuni basin was declared in 1994. Certification of Defendant's questions is not necessary to know this. As discussed above, all the authority and guidance necessary is already plentiful in New Mexico law.

CONCLUSION

WHEREFORE, Plaintiff the State of New Mexico requests this Court deny Defendant Norma Meech's *Corrected Motion to Certify Questions to the New Mexico Supreme Court* as her

[4] Prior the Abouselman Court's finding that seventeen (17) years was not a reasonable time, the Special Master had also ruled that 26 and 19 years of non-use, each contemplated under different scenarios presented by the claimant there, were, as a matter of New Mexico law, unreasonable spans of time. *Id.* at 3.

proposed questions are already answered by the ample guidance and authority provided by New Mexico state law, and that this Court instead should adjudicate Defendant's water rights on the basis of her actual historical beneficial use of water.

Dated: March 11, 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2020, 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/ Edward C. Bagley
EDWARD C. BAGLEY