

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

UNITED STATES OF AMERICA, and)	
STATE OF NEW MEXICO, ex rel. STATE)	No. CV 01-00072 MV/JHR
ENGINEER,)	
)	ZUNI RIVER BASIN
Plaintiffs,)	ADJUDICATION
)	
and)	
)	Subfile No. ZRB-1-0148
ZUNI INDIAN TRIBE, NAVAJO NATION,)	
)	
Plaintiffs in Intervention,)	
)	
v.)	
)	
A & R PRODUCTIONS, et al.,)	
)	
Defendants.)	
_____)	

UNITED STATES OF AMERICA’S RESPONSE IN OPPOSITION TO *NORMA MEECH’S CORRECTED MOTION TO CERTIFY QUESTIONS TO THE NEW MEXICO SUPREME COURT (DOC. 3488)*

Subfile Defendant Norma M. Meech, individually and as the successor-in-interest to Walter V. Meech (“Meech”), requests that this Court certify to the New Mexico Supreme Court, rather than determine itself, two questions¹ concerning how the relation-back doctrine announced in *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, should be applied to the

¹ The two questions are whether, under existing statutes, (i) a court can “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” and (ii) “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.” Mot. to Certify (Doc. 3488) at 2.

determination of Meech's water rights in this subfile proceeding. The United States urges the Court to deny the Motion to Certify for the following reasons.

1. This Court construed a similar motion to certify earlier in this adjudication. *See* Mot. to Certify Questions to N.M. S.Ct. (Doc. 396, Nov. 2, 2005); Mem. Op. and Order (Doc. 733, June 15, 2006).² Then, the Court stated the applicable standard thusly: “‘Novel, unsettled questions of state law, ... not ‘unique circumstances,’ are necessary before federal courts may avail themselves of state certification procedures.’” Mem. Op. and Order (Doc. 733) at 3 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)). The standard remains unchanged. *Compare* Mot. to Certify (Doc. 3488) at 7-8. “For the purpose of deciding whether to certify the question to the New Mexico Supreme Court,” the Court in resolving the earlier motion thus determined “whether this question is unsettled in New Mexico law.” Mem. Op. and Order (Doc. 733) at 4 (footnote omitted).

2. Despite arguing that “there is no controlling precedent,” Mot. to Certify (Doc. 3488) at 8, Meech has failed to cite any authority suggesting there is anything novel or unsettled about the application of the relation-back doctrine and *Mendenhall*. Acknowledging, as she must, that “the elements of *Mendenhall* are well established in New Mexico law,” Meech simply asserts that “there is no controlling New Mexico precedent on the application of [*Mendenhall*] to the mining industry.” *Id.* at 11. But, as this Court has made plain, “‘unique circumstances’” are not sufficient grounds for “‘federal courts [to] avail themselves of state certification

² The earlier motion asked the Court to certify six questions to the New Mexico Supreme Court. Mem. Op. and Order (Doc. 733) at 2. As described by the Court, “the questions raised boil down to one central issue: are water rights for domestic wells in New Mexico limited to the quantity of water beneficially used?” *Id.* at 4.

procedures.” Mem. Op. and Order (Doc. 733) at 3 (quoting *Arizonans for Official English*, 520 U.S. at 79). Meech has cited no case suggesting that *Mendenhall* and its progeny are in question or inapplicable to Meech’s water rights. There is thus nothing “[n]ovel” or “unsettled” about *Mendenhall* and the relation-back doctrine that should compel this Court to certify the questions posed. Indeed, the Court previously reached this very conclusion on a certification request regarding the applicability of *Mendenhall* in the Jemez River adjudication. See *United States v. Abousleman*, No. 83-1041 JC, 1999 WL 35809618, at *4 n.3 (D.N.M., May 4, 1999) (Mem. Op. and Order) (“The Court declines Chaparral’s request to certify this case to the New Mexico Supreme Court. There is sufficient guidance in New Mexico law to decide this case without the delay and expense of certification.”).

3. Meech further asserts that “there is no constitutional provision or statute that would answer the questions posed.” Mot. to Certify (Doc. 3488) at 11. Meech apparently forgets that the *sine qua non* for all water rights arising under New Mexico state law, including water rights to which *Mendenhall* may be applicable, is beneficial use. See N. M. Const. art. XVI, § 3 (“Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”); NMSA 1978, § 72-12-2 (“Beneficial use is the basis, the measure and the limit to the right to the use of waters described in this act.”); *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 34, 135 N.M. 375, 386, 89 P.3d 47, 58 (“As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to beneficial use.”) (quoting *State ex rel. Cmty. Ditches v. Tularosa Cmty Ditch*, 1914-NMSC-069, ¶ 23, 19 N.M. 352, 371, 143 P. 207, 213). See also *Abousleman*, No. 83-1041 JC, 1999 WL 35809618, at *4

(“The notion that a pre-basin right must be put to beneficial use within a reasonable time is consistent with *Mendenhall* and its progeny.”). Simply put, the body of constitutional, statutory, and decisional law comprising New Mexico water law generally and the relation-back doctrine specifically provides ample and sufficient guidance for this Court to determine whether “a business that has been steadily applying water to beneficial use for half a century and that will require greater amounts of water to mine and process limestone ore over the next century,” Mot. to Certify (Doc. 3488) at 12, is entitled to a *Mendenhall* right for future use.³

CONCLUSION

Meech has failed to articulate a question of law that is novel or unsettled under relevant state law authorities. Rather, Meech presents only the application of settled law in a different industry. This Court, as it has done repeatedly over the course of this adjudication, should apply applicable New Mexico water law, including *Mendenhall* and its progeny, to determine the extent of Meech’s water rights. The United States respectfully urges the Court to deny the Motion to Certify, without prejudice to Meech’s ability to file a suitably tailored motion for summary judgment with this Court.

DATED: March 11, 2021

³ Even assuming *arguendo* that the “factual predicate underlying the application of *Mendenhall* to this subfile” is, as Meech asserts, “uncontested,” Mot. to Certify (Doc. 3488) at 12, a point the United States does not concede, Meech has established no “unusual difficulty in deciding the state law question,” Mem. Op. and Order (Doc. 733) at 3 (quoting *Copier by and Through Lindsey v. Smith & Wesson*, 138 F.3d 833, 839 (10th Cir. 1998)), that would justify a decision to certify in the circumstances presented.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 11, 2021, I filed the foregoing **United States of America’s Response in Opposition to Norma Meech’s Corrected Motion to Certify Questions to the New Mexico Supreme Court (Doc. 3488)** 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.



Samuel D. Gollis