

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

UNITED STATES OF AMERICA,)
ET AL.,)
)
 PLAINTIFFS,)
)
)
)
 v.)
)
 STATE OF NEW MEXICO)
 COMMISSIONER OF PUBLIC)
 LANDS, ET AL.,)
)
 DEFENDANTS.)
 _____)

CIV NO. 01- 00072 BDB/WDS

ZUNI RIVER BASIN ADJUDICATION

**ADDITIONAL COMMENTS OF DEFENDANTS RICHARD DAVIS
MALLERY ET AL. TO ISSUES RAISED BY THE ORDER TO SHOW CAUSE**

In accordance with the Special Master’s instructions during the August 23, 2005 hearing on the Order to Show Cause filed with the Court on July 26, 2005, Defendant Richard Davis Mallery, Western New Mexico Water Preservation Association (“WNMWPA”), appreciates the additional opportunity to comment on the existence of global issues related to the treatment of domestic wells in this stream adjudication.

COMMENTS

The Special Master appears to be concerned regarding whether there are, in fact, any issues that would be subject to global consideration. The WNMWPA believes that there are such issues, and that these issues should be framed as follows:

1. Does the domestic well statute, NMSA 1978, §72-12-1 *et seq.*, when coupled with the Rules and Regulations implementing the statute, NMAC 19.27.1.22, and the prior policy of the Office of the State Engineer, create a reasonable expectation of a property interest of three acre feet per annum of water rights in the domestic well?

Since 1959, the New Mexico legislature has allowed a person, firm, or corporation to seek a domestic well permit for “watering livestock, for irrigation of not to exceed one acre of non-commercial trees, lawn, or garden; or for household or other domestic use.” (Laws 1959, Chapter 193, Section 1.) The Rules and Regulations implementing this section have long provided that the amount diverted under a domestic well permit shall not exceed three acre-feet. NMAC 19.27.1.22. The permits that the State Engineer has issued for domestic well permits have historically not required the applicant to file a proof of beneficial use within any time period. The permits have not warned that the State Engineer will restrict the diversion amount under the permits to the amount beneficially used under the permit. Taken together, these conditions have created an expectation in domestic well owners that they have a three acre foot property right in their domestic wells. *See, Turner v. Bassett*, 111 P.3d 701, 708 (2005), citing case law “recognizing that both *permitted* and licensed water rights are alienable property rights.” *See also, Pierce v. State*, 121 N.M. 212, 225-226, 910 P.2d 288,301 - 302 (1995), holding that the legislature had created an expectancy in receiving pension benefits.

2. Can domestic well users, diverting water under either a domestic well permit, or through a pre-basin well, have their right to divert up to three acre feet of water per annum curtailed or limited, without prior notice, based upon their historical usage, even though they have not thus far been subjected to any conditions requiring the water to be placed to beneficial use by a definite time or requiring the filing of a proof of beneficial use by a date certain?

Again the circumstances surrounding the legislative enactment and the administrative framework utilized by the State Engineer in implementing the legislative enactment, leads to an expectation in domestic well owners that they may divert up to three acre feet per year from their domestic wells. Once vested, the State Engineer may not curtail the right of domestic well users to divert up to three acre feet per annum for a domestic well. The owner of the domestic well has a vested interest in his or her permit to continue to divert under the permit. *See, e.g. KOB-TV, LLC v. City of Albuquerque*, 2005 NMCA 049, 111 N.M. 708.

3. Even if a domestic well user has not perfected a water right up to the amount of three acre feet per annum under a domestic well permit, does he or she nonetheless have a protected interest in the permit to appropriate water that cannot be curtailed without prior notice?

The Consent Orders that will likely be used by the Office of the State Engineer and the United States in this proceeding will contain provisions that enjoin the user from diverting any water in excess of the amount stated in the Order. Thus, if any domestic well owner has not historically diverted and placed to beneficial use his or her full allotment of three acre feet per annum, he or she will be forbidden from doing so in the future. As noted above, domestic well permits have historically not required permittees to either file proofs of beneficial use or to place the water to beneficial use by a specific date. The sudden imposition of a limitation upon such a right to divert amounts to the curtailment of a right under the statute and permits issued under the statute, without prior notice limits domestic well users of the right to place their water to full beneficial use before the deadline. Due process requires that the domestic well user be notified a reasonable time before such limitations are imposed. *See, e.g. KOB-TV, LLC v. City of Albuquerque, supra.* This issue is especially compelling in that the Plaintiffs apparently decided on this policy in February of this year, yet did nothing to notify domestic well users that the policy was going to be implemented in this adjudication.

4. Does the State Engineer or the judiciary have any authority to limit the diversion of water under a domestic well permit, issued pursuant to N.M.S.A. §72-12-1, when the legislature has mandated that the State Engineer “shall” issue a permit for the irrigation of not to exceed one acre of non-commercial trees, lawn and garden, or household or other domestic use?

If the domestic well user has not utilized the full three acre feet of the amount that can legally be diverted under N.M.S.A. 1978, §72-12-1 *et seq.*, his or her ability to do so in the future will be terminated by virtue of the Consent Order entered. This procedure does not comply with N.M.S.A. 1978, §72-12-1, which specifically mandates the State Engineer to issue a permit allowing the diversion of the water applied for. That statutory section also anticipates the

shifting uses of amounts of water and times of watering. The statute contains no provision for freezing water usage from a domestic well in time. Neither the State Engineer nor the judiciary has the authority to limit the diversion from a domestic well for all time.

5. Is any limitation upon a domestic well in this stream adjudication a violation of Art. IV, §34 of the New Mexico Constitution providing that no existing rule of court or regulatory rule shall be changed during a pending action?

Art. IV, §34 of the New Mexico Constitution provides that “No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.” This provision of the Constitution has been held applicable to acts of regulatory agencies. *Pineda v. Grande Drilling Corp.*, 111 N.M. 536, 807 P.2d 234 (Ct. App. 1991). To have the State Engineer suddenly determine that it will limit, as a matter of policy, the maximum amounts to be diverted under domestic wells during this ongoing adjudication, is a violation of this constitutional provision.

6. If the facts demonstrate that, a) the actual amount of water required to irrigate not more than one acre of non-commercial trees or garden is a diversionary amount of three acre feet per year, b) if the existing permits on their face provide an entitlement to this amount and do not require application of water to beneficial use within a specific period of time, and c) that allowing the diversion of this amount of water would have a *de minimus* effect on all other users of water within the basin, then should each domestic user be authorized to divert this amount under his permit as a part of a final decree whether or not he has done so historically?

While beneficial use is the measure and the limit of the right to use water in New Mexico, this Court could find that it was the intent of the legislature in the domestic well statute to compel the State Engineer to issue domestic well permits for an amount of up to three acre feet per year—an amount required to allow domestic well users to support not only their uses in their homes, but also trees and garden in support of their lifestyle. Furthermore, if recognizing this legislative entitlement would have a *de minimus* impact on others, there would be no policy or other basis for denying the legislature’s clear intent. If, in the *inter sese* portion of the proceeding, a party was able to demonstrate that one or more domestic wells did, in fact, affect

his or her senior right, then in those individual instances, the Court could act to limit the right. However, it is not the function of the State Engineer to presume injury to other senior users. It is the policy of the State Engineer to take a neutral stance and assert a policy consistent with the legislature. The facts may demonstrate that the State Engineer has not done that here.

CONCLUSION

Defendant Richard Davis Mallery, on behalf of all members of the Western New Mexico Water Preservation Association, appreciates the opportunity to comment on the questions posed by the Special Master. He has attempted to provide the Special Master with specific questions that need to be answered on a global or basin wide basis, as well as a cursory discussion of the law supporting these questions. Others may have additional suggestions for issues that should be pursued on a global basis. In any event, these are questions that will likely advance the final adjudication of water rights in the basin. As a practical matter, these questions will likely be considered globally because of anticipated motions to intervene or consolidate that are sure to follow.

Dated: August 30, 2005

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

By:  _____

Charles T. DuMars
Tanya L. Scott
Attorneys at Law
Albuquerque Plaza, 201 3rd Street NW, Ste. 1750
Albuquerque, NM 87102
(505) 346-0998 / FAX: (505) 346-0997

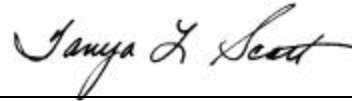
CERTIFICATE OF MAILING

In accordance with the instructions of the Special Master, the foregoing Comments are being served on the Special Master and the following parties. These Comments are also being filed of record, but not served upon any other party.

Special Master Vicki Gabin
Attorney at Law
Post Office Box 2384
Santa Fe, NM 87504-2384

Edward C. Bagley
Office of the State Engineer
Litigation and Adjudication Program
P.O. Box 25102
Santa Fe, NM 87504
(505) 827-6150

Bradley S. Bridgewater
U.S. Department of Justice
999 18th Street, Suite 945 North
Denver, CO 80202
(303) 312-7318



Tanya L. Scott