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

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UNITED STATES OF AMERICA,
and
STATE OF NEW MEXICO, *ex rel.*
STATE ENGINEER,

Plaintiffs,

And

ZUNI INDIAN TRIBE AND
NAVAJO NATION,

Plaintiffs-in-Intervention

v.

A & R Productions, *et al.*,

Defendants.

CIV No. 01 0072 BB/WWD-ACE

ZUNI RIVER STREAM SYSTEM

STATE OF NEW MEXICO'S RESPONSE TO THE WESTERN NEW MEXICO WATER PRESERVATION ASSOCIATION'S MOTION TO CERTIFY QUESTIONS TO THE NEW MEXICO SUPREME COURT

The State of New Mexico *ex rel.* State Engineer ("State") hereby responds to the Motion to Certify Questions to the New Mexico Supreme Court filed by the so-called "Western New Mexico Water Preservation Association" (hereinafter referred to as "WPA"). The Court should deny WPA's Motion, because the "questions" posed by WPA do not meet the standard for certification set out in NMRA 12-607 (1987) of the New Mexico Rules of Appellate Procedure or NMSA 1978, § 39-7-4 (1997). Notwithstanding WPA's proposed list of compound and largely immaterial questions, only one essential question is actually presented: *On what basis should the amount of a water right be quantified, where the right arises out of a permit issued by the New*

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Mexico State Engineer pursuant to NMSA 1978, § 72-12-1.1 (or its predecessors). However, long-established New Mexico law unequivocally provides the answer to this one essential question: "*Beneficial use shall be the basis, the measure and the limit of the right to the use of water.*" N.M. Const. Art. XVI, § 3. Although nowhere cited by WPA, New Mexico statutes, case law, and all other sources of authority uniformly provide that the constitutional requirement of beneficial use applies to all water rights arising under state law. Consequently, there is no unsettled question of state law to certify to the New Mexico Supreme Court, and therefore, the Court should deny WPA's Motion.

ARGUMENT

I. Standard Applicable to Certified Questions.

The New Mexico Supreme Court may answer a question certified to it by this federal Court only if "the answer ... may be determinative of an issue in pending" litigation before this Court "*and* the question is one for which the answer is *not* provided by a controlling:

(1) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or

(2) constitutional provision or statute of this state."

NMRA 12-607 (1987)(emphasis added"); NMSA 1978, § 39-7-4 (1997) (statutory provision setting out same standard); *City of Las Cruces v. El Paso Elec. Co.* 1998-NMSC-006, ¶ 22, 124 N.M. 640, 646 (the Supreme Court's "authority to review [a certified] question ... is limited to matters for which "there are no controlling precedents" in decisions of the New Mexico Supreme Court or the New Mexico Court of Appeals"); *Schlieter v. Carlos*, 108 N.M. 507, 775 P.2d 709, 710 (1989).

WPA's Motion presents no such question. If one ignores the many red herrings imbedded in WPA's six "questions," one is left with just a single essential question: *On what basis should the amount of a water right be quantified, where the right arises out of a permit issued by the New Mexico State Engineer pursuant to NMSA 1978, § 72-12-1.1* (or its predecessors).[1] *See* WPA Motion: Question 1 ("Does ... 72-12-1 ... create ... a property interest of three acre feet..."); Question 2 ("Can domestic well users ... have their right to divert up to three acre feet..."); Question 3 ("Even if a domestic well user has not perfected a water right up to ... three acre feet..."); Question 4 ("Does the State Engineer or the judiciary have any authority to limit the diversion of water under ... 72-12-1..."); Question 5 ("Is any limitation [of amount] upon a domestic well [unconstitutional]"...); Question 6 ("...should each domestic user be authorized to divert this amount under his permit..."). Since the New Mexico Constitution, statutes, and numerous decisions of New Mexico Supreme Court and Court of Appeals squarely answer the one essential "question" posed by WPA, the Court should *not* certify any of WPA's "questions" to the New Mexico Supreme Court.

II. Existing, Long-Established New Mexico Law Provides the Answer to the Essential Question Posed by WPA.

A. Under New Mexico's Constitution and statutes, beneficial use is the basis, the measure and the limit of the right to use water.

In direct answer to WPA's essential "question," the New Mexico Constitution provides:

> *Beneficial use shall be the basis, the measure and the limit of the right to the use of water.*

[1] Notwithstanding WPA's allusion to "pre-basin" wells in Question 2, the first sentence of its Motion "moves the Court" only to certify "questions involving domestic wells, allowed under NMSA 1978, § 72-12-1 (2003)."

N.M. Const., Art. XVI, § 3. This unequivocal constitutional requirement admits no exceptions and is repeated, virtually verbatim, in the statutes that govern the use of water in New Mexico. NMSA 1978, § 72-1-2 (1907) ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water"); NMSA 1978, § 72-12-2 (1931) ("Beneficial use is the basis, the measure and the limit to the right to the use of the waters described in this act"). Indeed, the first sentence of the very same statute on which WPA relies provides: "The water of underground ... reservoirs ... having reasonably ascertainable boundaries, are declared to be ... subject to appropriation for *beneficial use*." NMSA 1978, § 72-12-1 (1907) (emphasis added). Moreover, the same constitutional requirement regarding beneficial use is incorporated into New Mexico's interstate compacts with other states and the federal government. NMSA 1978, § 72-15-19 (VI)(f) (Pecos River Compact) ("beneficial use shall be the basis, the measure and the limit of the right to use water"); NMSA 1978, § 72-15-26 (III)(2) (Upper Colorado River Basin Compact) ("beneficial use is the basis, the measure and the limit of the right to use.") *None* of these statutes or compacts exempts domestic wells from the fundamental, constitutional requirement of beneficial use, arguably the cornerstone of New Mexico water law; and, even if they did, such purported exemption would violate the New Mexico Constitution.

B. Under New Mexico's case law, beneficial use is the basis, the measure and the limit of the right to use water.

Given the clarity of New Mexico's Constitution and its statutes on the fundamental principle that water rights under state law are defined strictly by beneficial use, it is not surprising that New Mexico cases, dating back to early statehood, uniformly uphold this principal:

> In New Mexico, "beneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. art. XVI, § 3. ***We have said that this fundamental principle "is applicable to all appropriations of public waters***." *State ex rel. State Eng'r v. Crider*, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967) [emphasis added]. "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 a beneficial use*." *State ex rel. Cmty. Ditches v. Tularosa Cmty. Ditch*, 19 N.M. 352, 371, 143 P. 207, 213 (1914); *accord Snow v. Abalos*, 18 N.M. 681, 694, 140 P. 1044, 1048 (1914) ("It is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives the appropriator the continued and continuous right to take the water.") [full citation added]. The principle of beneficial use is based on "imperative necessity," *Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 181, 113 P. 823, 825 (1911), and "aims fundamentally at definiteness and certainty." *State ex rel. State Eng'r v. Crider*, 78 N.M. 312, 315, 431 P.2d 45, 48 (1967) (quotation marks and quoted authority omitted) [full citation added]. It promotes the economical use of water, while also protecting the important interest of conservation. *See Yeo v. Tweedy*, 34 N.M. 611, 620, 286 P. 970, 974 (1929).

State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 34, 135 N.M. 375, 386-7, 89 P.3d 47, 58-9 (2004); *see also, e.g., Hanson v. Turney*, 2004 NMCA 69, ¶ 10, 136 N.M. 1, 3-4 ("For more than a century, our law has been that a water right is perfected by the application of the water to beneficial use."). Thus, like New Mexico's Constitution and applicable statutes, New Mexico's state courts do not mince words or carve out any special exceptions: Under New Mexico law, "beneficial use is the basis, the measure and the limit of the right to use water," period. *Id.* Accordingly, WPA's statement that "no controlling precedent exists," WPA Motion at 5, is incorrect and seriously misinformed.

III. No Water Rights Arising Under State Law are Excluded from the Constitutional Requirement of Beneficial Use.

However, through various subtle and not-so-subtle mischaracterizations, WPA argues that water rights associated with permitted domestic wells, as a special class of

water rights, are exempt from the New Mexico Constitution, statutes, and case law. No authority supports WPA's argument. Indeed, in order to construct its alleged "questions of first impression," WPA must necessarily ignore and rewrite established New Mexico water law.

A. No statute or permit allocates a fixed three acre-feet per annum to domestic well owners.

In a single sentence, WPA manages to fit in no less than six material mischaracterizations about domestic wells: "[1] The State Engineer proposes to [2] administratively repeal the [3] permit amount and [4] the amount authorized by statute by [5] restricting use to .7 acre feet per annum, and [6] place the burden on the individual domestic well user to prove current uses in excess of this amount." WPA Motion at 3. For convenience, the State has numbered WPA's mischaracterizations and responds to each one as follows:

[1] WPA likes to believe that it can read the mind of the State Engineer and divine the true motivation behind his administrative policies. *See also* WPA Motion at 3 ("... the State Engineer has now concluded..."). WPA's divinations are wrong, and moreover, the State Engineer's motivation in this context is wholly immaterial. The "State" is the plaintiff in this water rights adjudication, *not* the State Engineer, and the difference between the "State" as plaintiff and the "State Engineer" is significant. The State represents the public, not just one agency, and the State is therefore free in this lawsuit to investigate the legal basis of any State Engineer permit or regulation, as necessary, to assure that all claimed water rights arising under state law are correctly adjudicated. Accordingly, even if a domestic well permit (or any other permit) purported to exempt the permittee from the constitutional requirement of beneficial use, the State

would have the duty and the ability in this adjudication to challenge the validity of the permit as unconstitutional.

[2] The State and the United States, as plaintiffs in this litigation, are willing to *presume* a water right of 0.7 acre-feet per annum for domestic wells without any proof of actual beneficial use. Contrary to WPA's interesting assertion, this mere presumption by plaintiffs does not and could not "administratively repeal" anything.

[3] There is no fixed "permit amount" of water granted by any domestic well permit or regulation, as this would violate the constitutional precept that actual beneficial use, rather than a piece of paper, defines all water rights under state law. *See Hanson*, 2004 NMCA at ¶ 9, 136 N.M. at 3 (holding that a permit is not a water right, but only the "necessary first step in obtaining a water right.") The applicable regulation provides: "Permits [for domestic uses] may be granted in an amount *not to exceed* three acre-feet per annum." Rules and Regulations Governing the Appropriation and Use of Groundwater in New Mexico, § 1.15.3 (2005); *see also* Application for Permit to Use Underground Waters in Accordance with Section 72-12-1[2] (Permit Condition A) (providing that the "*maximum amount*" that may be appropriated under a domestic well permit is three acre-feet per annum). The limiting language of "not to exceed" and "maximum amount" would be entirely superfluous if all permittees were simply granted a fixed amount of three acre-feet per annum, as WPA argues, regardless of their actual beneficial use. Such a strained and illogical reading of this language makes no sense and would render the regulation and permits unconstitutional. Fortunately, the plain language used in the domestic well permits and the regulations clearly indicates that the amount

[2] Re-codified at 72-12-1.1.

stated (three acre-feet per annum) represents a "ceiling," which can only be reached by actual application of water to beneficial use.

[4] One of the most repeated mischaracterizations WPA makes is that the "domestic well statute ... allocates three acre feet per annum" to domestic well permittees, regardless of their actual beneficial use. WPA Motion at 2. This is also incorrect. In reality, the "domestic well statute" (presumably Section 72-12-1.1) *never mentions three acre-feet or any other amount.* Moreover, when the Legislature in another context actually does refer to three acre-feet, it very carefully limits the permitted appropriation to "an amount *not to exceed* three acre-feet for a definite period of *not to exceed one year*." NMSA 1978, § 72-12-**1.3** (2003) (providing temporary permits for certain non-domestic uses) (emphasis added). In this context, like the domestic well permits and regulations of the State Engineer, "three acre-feet" obviously refers to the *maximum* amount of water that can be appropriated under a one-year permit issued pursuant to Section 72-12-**1.3**. Consistent with the New Mexico Constitution, this statute does not grant a fixed amount of water; nor is it divorced from the universal precept of beneficial use. WPA's contrary arguments regarding Section 72-12-**1.1**, *which sets out no amount whatsoever*, derive from little more than myth and misinformation.

The conclusion that there is no fixed permit or statutory amount assigned to permitted domestic wells (or to any other water right) is further supported by this Court's prior orders in other adjudications, as well as State Engineer Guidelines. *See, e.g., State et al. v. Molycorp et al.*, No. CIV-9780 SC, December 1, 2000, Final Judgment and Decree on Non-Federal Water Rights, ¶ 3, (excluding domestic uses in "*de minimis*" amounts from the Red River adjudication) & December 1, 1988, Order ¶ 1(a) (defining a

domestic well diversion and consumptive use of 0.5 and 0.1 acre-feet per annum, respectively, as *de minimis* in the Red River Adjudication); *United States et al. v. Abousleman et al.*, No. 83cv01041-JEC-ACE, December 1, 2000, Partial Final Judgment and Decree on Non-Federal Water Rights ¶ 5 (excluding domestic uses in "*de minimis*" amounts from the Jemez River adjudication) & June 22, 1987, Order at 2 (excluding from the Jemez Adjudication "minimal water rights" defined to include certain "domestic well uses" restricted to indoor household uses); *cf. also* January 13, 1983 Order in *State et al. v. Aamodt et al.*, No. 6639 Civ. (ordering "that no permits to appropriate underground waters shall be issued within the Rio Pojoaque stream system under Section 72-12-1, N.M.S.A. 1978"); *see also* June 20, 2002, Estancia Underground Water Basin Guidelines for Review of Water Right Applications, § 14 (limiting new domestic well appropriations under Section 72-12-1.1 to 0.5 acre-feet per year). These additional authorities further refute the notion of any "statutory entitlement" to a fixed three acre-feet per annum for domestic well owners.

[5] The State is not "restricting use to 0.7 acre feet per annum" for domestic wells. The State and the United States, as plaintiffs, are instead willing to presume this amount for domestic wells without requiring the claimant to submit any proof of actual beneficial use. Claimants are free to prove greater amounts of beneficial use, up to the permitted maximum amount. Evidence of such greater use can be deduced from various, readily observable facts and circumstances. Accordingly, contrary to WPA's assertions (WPA Motion at 3), claimants will not need to rely on metering of past water use or the testimony of hydrologists to prove uses greater than 0.7acre-feet per annum.

[6] The State and the United States have not foisted any new burden of proof upon water rights claimants, since claimants *always* bear the burden of proving their claims. *See PVACD v. Peters*, 52 N.M. 148, 152, 193 P.2d 418 (1948); *State ex rel. Martinez*, 18 N.M. 446, 449, 882 P.2d 37, 40 (Ct. App. 1994). Indeed, the plaintiffs are partially relieving claimants of their burden of proof if they agree to claim no more than 0.7 acre-feet per annum for domestic uses.[3]

B. There is no basis for excluding domestic well owners in the Zuni River Stream System from the New Mexico Constitution.

WPA alleges without citing any authority that various, unique hydrologic and economic facts exist within the Zuni River Basin, and that 0.7 acre-feet per annum is just not that much water. *See, e.g.*, WPA Motion at 3 ("[this] is not a wealthy basin" and "[granting] the three acre-feet per annum ... would have no [hydrologic] effect on any other users"). Based on these immaterial and unsubstantiated conclusions, WPA suggests that, even if domestic wells are not generally excluded from the fundamental requirement of beneficial use, the folks in the Zuni River Stream System ought to be. Although this may play well with client-claimants in the basin, there is no basis under New Mexico law to exempt any claimant from the New Mexico Constitution. All claimants of water rights under state law are subject to the same Constitution, including Article VXI, and the same general water law. Moreover, 0.7 acre-feet per annum amounts to about *625 gallons per day*—not a trivial amount in an arid desert state in the midst of a long-term drought.

[3] Other water rights claimants could, of course, freely challenge the presumed beneficial use of 0.7 acre-feet per annum during *inter se*, forcing the claimants to prove actual beneficial use.

C. Domestic well claimants do not have unlimited time to place water to beneficial use.

In "question" 6, WPA wonders whether domestic well owners should have unlimited time to place water to beneficial use. WPA Motion at 8. New Mexico case law answers this question in the negative. "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." *Las Vegas, 2004-NMSC at 35, 135 N.M. at 59* (citing *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 470-71, 362 P.2d 998, 1001 (1961); *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. at 824-25) (emphasis added). Again, no special exemption has been carved out for domestic well owners. Indeed, *not even a municipality that provides drinking water to the public* has an unlimited amount of time to place water to beneficial use. *Id.* ("... even for municipalities, if the water is not applied to beneficial use within a reasonable time, "such right may be lost"). Accordingly, like all other water right claimants, domestic well owners have a "reasonable time" to apply water to beneficial use.[4]

IV. The Court Should Not Certify WPA's Questions to the New Mexico Supreme Court, because the State Disputes Many of the Factual Predicates Underlying WPA's Proposed Questions.

Finally, the New Mexico Supreme Court has "by and large ... limited [its] acceptance of certifications prior to judgment to those cases in which there is no dispute over the factual predicates to the Court's determination of the questions certified [.]" *Schlieter*, 108 N.M. at 508, 775 P.2d at 710. In the instant controversy, the State disputes many of WPA's factual and legal assumptions. For example, the State disputes WPA's

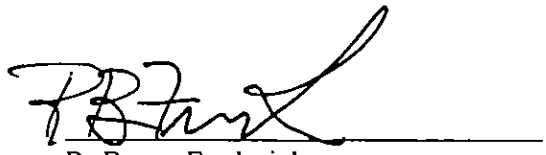
[4] Although the State has not fully developed its position on the issue, the amount of time that is "reasonable" may depend on facts unique to each claimant.

contention that the State Engineer had any "policy" that created a "legal right" in any claimant to three acre-feet of water (*but cf.* WPA Motion, Question 1 at 7);[5] the State disputes WPA's contention that the plaintiffs' mere offer of 0.7 acre-feet per annum constitutes any "curtailment" or "limit" on any claimant's water right (*but cf.* WPA Motion, Questions 2 & 3, at 7-8); the State disputes WPA's contention that Section 72-12-1 "mandates" the State Engineer to issue permits under any and all circumstances, and moreover, the State disputes the relevance of this assertion (*but cf.* WPA Motion, Question 4, at 8); the State disputes WPA's contention that Article IV, Section 34, of the New Mexico Constitution has even a remote connection to the plaintiffs' offer of 0.7 acre-feet per annum (*but cf.* WPA Motion, Question 5, at 8); the State disputes WPA's contentions that three acre-feet is necessary under any and all conditions to irrigate "one acre of non-commercial trees," etc.; the State disputes that any "existing permits on their face provide an entitlement" to any fixed amount of water; and the State disputes that three acre-feet is "*de minimus*" – especially in an arid state suffering through a prolonged drought (*but cf.* WPA Motion, Question 6, at 8). Given the disputed predicates underlying WPA's questions, the Court should not certify any of WPA's questions to the New Mexico Supreme Court.

WHEREFORE, for the foregoing reasons, the State requests the Court to deny WPA's Motion.

[5] And, in any event, such alleged "legal right" would not be enforceable against the State, the United States, or other third parties who had nothing whatever to do with the State Engineer's alleged "policy."

Respectfully submitted,



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Certificate of Service

I certify that on this 30th day of ~~December~~ November 2005, a true and correct copy of the foregoing was mailed by first class mail to the attached list of counsel of record and *pro se* parties:

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