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 01-0072 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.	)	

NORMA MEECH'S CORRECTED MOTION TO CERTIFY QUESTIONS TO THE NEW MEXICO SUPREME COURT

COMES NOW, Defendant Norma Meech ("Meech"), by and through her attorneys of record, Law & Resource Planning Associates, P.C., and hereby moves the Court for an Order certifying questions to the New Mexico Supreme Court for determination. As grounds for this Motion, Meech states there are no issues of fact regarding anticipated future water uses under this subfile number. Meech further states that she anticipates and has been informed through opposing counsel that Plaintiffs will not agree that Meech has any ability to continue to expand water production and beneficial uses under this subfile after entry of a Final Judgment. Counsel for Plaintiffs have indicated that they will oppose the application of principles announced by the New Mexico Supreme Court in *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467 to this subfile because future water uses are not subject to adjudication and that too many years

have elapsed since the initiation of the water rights under this subfile. Plaintiffs' counsel have signaled their intention of filing a Motion for Summary Judgment on these issues.

Meech has sought the position of the Plaintiffs in this Motion. Plaintiffs oppose the Motion. This Corrected Motion corrects ECF 3487 by noting Plaintiffs' opposition.

QUESTIONS FOR CERTIFICATION

Defendant Meech respectfully requests the Court to certify the following questions to the New Mexico Supreme Court:

1. May an adjudication court, pursuant to NMSA 1978, §§ 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, §§ 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?

FACTS

The following facts are established by the Affidavit of Walter L. Meech,[1] attached hereto as Exhibit A, and are undisputed as to future water needs under this subfile.[2]

1. Norma Meech is the defendant in the referenced subfile for the adjudication of water rights developed by her and her deceased husband in their family business, C&E Concrete,

[1] Mr. Meech is the son of Defendant Norma Meech, and the current President and owner of C&E Concrete, Inc., the family business that has placed the water diverted from wells in this subfile to beneficial uses for mining and mineral processing purposes.
[2] The facts are also primarily undisputed as to past historical use.

Inc. ("C&E Concrete"), located near Grants, New Mexico.

2. Meech and her husband were the owners and operators of C&E Concrete, a company that mines and processes limestone for use as aggregate, sand, gravel, and other limestone products. C&E Concrete is now owned by their son Walter L. Meech. *See* Exhibit A (Meech Affidavit) at ¶ 2.

3. C&E Concrete's mining operation, known as Tinaja pit mine, is located southwest of Grants, New Mexico. Exhibit A at ¶ 5.

4. The mining and processing of limestone at Tinaja requires copious amounts of water for dust abatement and processing of manufactured sand products. Exhibit A at ¶ 6.

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. Exhibit A at ¶ 7.

6. Tinaja is an open pit mine, meaning that overburden is first removed from the mineral deposit, and the mineral is removed. Over time, the mining and removal of the mineral results in a pit that grows larger and larger as more areas are mined. Exhibit A at ¶ 8.

7. As the pit area grows, access roads into the actively mined areas expand as well. Exhibit A at ¶ 9.

8. Tinaja has a Clean Air Permit administered by the New Mexico Department of Environment. The Clean Air Permit requires that dust at mining locations, haul roads, transfer locations, and other areas be suppressed by the application of water on those areas to preserve air quality. Exhibit A at ¶ 10.

9. Tinaja also has a sand and gravel washing operation that requires the application of water to the mined limestone in producing manufactured sand. Exhibit A at ¶ 11.

10. In anticipation of many years of mining and production activities at Tinaja pit, two wells were drilled on the property, the first in October 1988 (State Engineer file number G-336), and the second in October 1990 (State Engineer file number G-337). Exhibit A at ¶ 12.

11. Both wells were drilled prior to the declaration of the extension of the Gallup Underground Basin on March 14, 1994. Exhibit A at ¶ 13.

12. Both wells were drilled for "dust abatement, road base, lab testing facility, commercial and domestic purposes, mining purposes, and a concrete batch plant." *See* Amended Declarations for wells G-336 and G-337; Exhibit A at ¶ 14.

13. The plan at the time of drilling each well was to steadily apply water diverted from the wells to beneficial uses at Tinaja pit for the declared purposes of mining and processing limestone. Exhibit A at ¶ 15.

14. Both wells were put into production for their declared purposes shortly after they were drilled. Exhibit A at ¶ 16.

15. Well G-336 was used for its declared purposes until it would no longer produce water. Exhibit A at ¶ 17.

16. Well G-337 continues to be used for its declared purposes on a near continuous basis. Exhibit A at ¶ 18.

17. Tinaja mine has been continuously mined and limestone products produced at the location since before the drilling of either G-336 or G-337. Exhibit A at ¶ 19.

18. The Meech family and C&E Concrete, Inc. have used reasonable diligence to mine the Tinaja pit and place water from G-336 and G-337 to beneficial use for the declared purposes since the wells were drilled. Exhibit A at ¶ 20.

19. Placing water from Wells G-336 and/or G-337 to beneficial use has been pursuant

to the plan to continue mining the Tinaja pit and processing the material until the mineral deposit is depleted. Exhibit A at ¶ 21.

20. The Meech family and C&E Concrete will continue to place water to beneficial use from well G-337 in the future in furtherance of the plan to continue mining and processing activities at Tinaja pit until the mineral deposit is depleted. Exhibit A at ¶ 22.

21. Well G-336 will also be rehabilitated in the future to provide additional water for mining and processing activities at Tinaja pit, also in furtherance of the plan to continue mining and processing activities at Tinaja pit until the mineral deposit is depleted. Exhibit A at ¶ 23.

22. Well G-336 was declared for consumptive use of 10.16 acre-feet per annum, based upon pumping the well to its full capacity for ninety percent (90%) of the time. Exhibit A at ¶ 24.

23. Well G-337 was declared for consumptive use of 87.10 acre-feet per annum, based upon pumping the well to its full capacity for ninety percent (90%) of the time. Exhibit A at ¶ 25.

24. The Meech family and C&E Concrete anticipate that Tinaja pit will produce an average of 573,617 tons of material each year for the next fifty years. Exhibit A at ¶ 26.

25. The Meech family and C&E Concrete anticipate that an average of 91.78 acre-feet of water will be required each year for mining and mineral production activities at Tinaja. Exhibit A at ¶ 27.

26. The maximum amount of water pumped from G-336 and beneficially used for the declared purposes was 15.458 in 2002 as metered. Exhibit A at ¶ 29.

27. The maximum amount of water pumped from G-337 and beneficially used for the declared purposes was 61.76 acre-feet in 2019 as metered. Exhibit A at ¶ 30.

28. Water requirements for mining, commercial, and domestic activities at Tinaja are expected to grow annually as the pit gets larger and product demand increases. Exhibit A at ¶ 28.

ARGUMENT

I. STANDARD FOR CERTIFICATION OF QUESTIONS TO THE NEW MEXICO SUPREME COURT.

This general stream adjudication of the Zuni River Basin is brought, in part, pursuant to NMSA 1978, §§ 72-4-13 *et seq*. *See* Amended Complaint (August 4, 2003) [ECF 222] at ¶ 22 ("This lawsuit seeks the Court's application of the appropriate laws of the United States as well as the appropriate laws of the State of New Mexico, including but not limited to NMSA 1978, §§ 72-4-13 to 72-4-20 for the adjudication of all rights to the use of the surface and/or groundwater within the Zuni river stream system."). Despite being commenced in the Federal District Court by the United States on its own behalf and on behalf of various tribal entities as their Trustee, the Court applies state law to determine the water rights of the various non-tribal Defendants. *See, e.g.*, *United States v. A & R Productions*, 2017 WL 4271444, at *2 (D.N.M. Mar. 29, 2017) (unpublished) ("New Mexico state law provides the substantive standards for this adjudication."); *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 16, 143 N.M. 142, 147 ("Water rights are determined under state law, not federal law." (citing *Andrus v. Charlestone Stone Prods. Co*., 436 U.S. 604, 613-14 (1978)); *United States v. Bluewater-Toltec Irr. Dist.*, 580 F. Supp. 1434, 1439 (D.N.M. 1984), *aff'd sub nom. U.S. for & on Behalf of Acoma & Laguna Indian Pueblos v. Bluewater-Toltec Irrigation Dist. of New Mexico*, 806 F.2d 986 (10th Cir. 1986) ("Proper adjudication and administration of water rights requires all water claimants along a water course, including the United States, to be amenable to State Law." (citing S.Rep. No. 755, 82d Cong. 1st Sess. 4-6 (1951), *printed in* 4 United States Serials Set No. 11489 (1951)).

Pursuant to the Uniform Certification of Questions of Law Act, NMSA 1978, § 39-7-1 (1997) *et seq.*, the New Mexico Supreme Court can answer questions that are certified to it by a federal district court. NMSA 1978, § 39-7-4 (1997) ("The supreme court of this state may answer

a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation."). New Mexico Appellate Court Rules set out the procedure that must be followed in certifying a question to the Supreme Court and specifies the contents of the order from the certifying court. *See* Rule 12-607 NMRA. The rule specifically addresses the certification of questions arising in New Mexico stream adjudication litigation:

> (2) The Supreme Court may answer by formal written opinion questions of law certified to it by a New Mexico stream adjudication court if
>
> (a) the answer may materially advance the ultimate resolution of the adjudication; and
>
> (b) the question is one for which answer is not provided by a controlling
>
> (i) appellate opinion of the New Mexico Supreme Court or the New Mexico Court of Appeals; or
>
> (ii) constitutional provision or statute of this state.

Id.

Certification of state law questions by federal courts to state courts is appropriate if "the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance." *Morgan v. Baker Hughes Inc.*, 947 F.3d 1251, 1258 (10th Cir. 2020) (quoting *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007)). While the federal court will not certify every "arguably unsettled question of state law [that] comes across our desk," the federal courts are mindful that "judicial policy of a state should be decided when possible by state, not federal, courts." *Id*. (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 391, 94 S. Ct. 1741 (1974)). The federal court has the option of determining what the state court would do if confronted with the same question, or, in the exercise of its sound discretion, it may certify the question to the state court for determination. *Patterson v. Nine Energy Serv., LLC*, 355 F. Supp. 3d 1065, 1103 (D.N.M. 2018). Certification is particularly appropriate

where "the legal question at issue is novel and the applicable state law is unsettled." *Neustrom v. Union Pac. R. Co.*, 156 F.3d 1057, 1065 (10th Cir. 1998), *as amended on denial of reh'g* (Nov. 30, 1998).

For its part, the New Mexico Supreme Court has largely limited its acceptance of certifications "to those cases in which there is no dispute over the factual predicates to the Court's determination of the questions certified, and our answer either disposes of the entire case or controversy or disposes of a pivotal issue that defines the future course of the case." *Schlieter v. Carols*, 1989-NMSC-037, ¶ 5, 108 N.M. 507. "The intent of the certification of facts and the determinative answer requirements is that [the New Mexico Supreme Court] avoid rendering advisory opinions." *Ulibarri v. Southland Royalty Co., LLC*, 209 F. Supp. 3d 1227, 1230-31 (D.N.M. 2016). Quoting *Schlieter*, 1989-NMSC-037. Thus, the facts must be "sufficiently nonhypothetical and evidentiary." *Id.* at ¶ 7.

Requests for certification must be made before the federal court has ruled on the issue as the federal court will not generally certify a question when the matter has already been determined adversely to the moving party. *Massengale v. Okla. Bd. of Exam'rs in Optometry*, 30 F.3d 1325, 1331 (10th Cir. 1994); *XTO Energy, Inc. v. ATD, LLC*, 189 F. Supp. 3d 1174, 1197 (D.N.M. 2016). Thus, Meech is filing this Motion in anticipation of a Motion for Summary Judgment on issues related to future use of water rights from the referenced wells.

II. THE CERTIFIED QUESTIONS INVOLVE MATTERS FOR WHICH THERE IS NO CONTROLLING PRECEDENT AND ANSWERING THEM WILL MATERIALLY ADVANCE THE RESOLUTION OF THIS SUBFILE.

Both questions posed for certification to the New Mexico Supreme Court involve the application of the principles announced by the New Mexico Supreme Court in *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, to the facts of this case. *Mendenhall* is

a case that arose in the Roswell Artesian Basin adjudication wherein the Supreme Court adopted the "relation back" doctrine in New Mexico. In *Mendenhall*, a farmer had lawfully initiated a water right for irrigation purposes through the drilling of a well and was pursuing placement of water to beneficial use with due diligence when the State Engineer administratively declared the underground water basin. The question that confronted the lower district court was whether the farmer could claim the date on which the work commenced as the priority date even though no water was beneficially used until after the declaration of the basin. The Special Master concluded that the priority date for the water right related back to when well drilling commenced—not the date of beneficial use of the water. The District Court disagreed, finding that because no water had been beneficially used before declaration of the basin, the farmer had no water right whatsoever. The New Mexico Supreme Court reversed the District Court, concluding that a water right appropriation commenced prior to the time the State Engineer assumed administrative jurisdiction over an underground basin could be pursued to completion so long as due diligence was applied in placing the water to beneficial use.

In *State ex rel. State Eng'r v. Crider*, 1967-NMSC-133, 78 N.M. 312, the New Mexico Supreme Court further expanded upon the *Mendenhall* doctrine when it determined, also in the context of the Roswell Artesian Basin stream adjudication, that water rights adjudicated for the cities of Artesia and Roswell did not have to be limited to the amount of water that had historically been placed to beneficial use. Recognizing that cities normally grow, the appellate court sanctioned a final judgment based upon the pumping capacities of the cities' wells, not the amount of water already beneficially used. *Id.* at ¶ 26 ("We see no reason why the rule stated should not apply to the future use of water by cities intended to satisfy needs resulting from normal increase in population within a reasonable period of time.").

The most thorough discussion of the application of *Mendenhall* principles is in the Supreme Court's opinion in *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, 95 N.M. 560. In that case, prior to the declaration of the underground basin, a developer had drilled a well, tested it, cased it with a seven-inch casing, and then capped it. Around the same time that the basin was declared, the developer filed a Declaration for the well and sought a permit to repair it from the State Engineer. When the repairs proved to be unfeasible, Rio Rancho filed an application to move the location of the well and drill a well using a much larger diameter casing. The State Engineer issued a permit for the relocation but limited the size of the well to the original seven-inch casing thereby placing a limit on the amount that would be pumped. Rio Rancho appealed, arguing that under the *Mendenhall* doctrine a water appropriation lawfully begun prior to the declaration of the basin could not be limited by the State Engineer.

On appeal, the Supreme Court agreed, holding that so long as the appropriator met the requirements of the *Mendenhall* doctrine, the amount of the appropriation could not be limited by the State Engineer. Those requirements are that the appropriator: (1) legally commence drilling the well prior to declaration of the basin; (2) proceed diligently to develop the water pursuant to a plan; and (3) apply the water to beneficial use. Any limitation on the right would be determined during a general adjudication where the planned future use of the would also be taken into consideration. *Rio Rancho*, 1981-NMSC-017, ¶ 15 ("What is the limitation on such a right? Normally, it is a matter left up to the courts in adjudication proceedings. When determining the extent of a municipal water right, it is appropriate for the court to look to a city's planned future use of water from the well caused by an increasing population." (citing *State ex rel. Reynolds v. Lewis*, 1973-NMSC-035, 84 N.M. 768 and *Crider*, 1967-NMSC-133)).

Mining, by its very nature, necessarily involves long periods of time over which the mineral

is removed and processed. It also involves diversion and consumption of copious amounts of water.[3] While the elements of *Mendenhall* are well established in New Mexico law and the application of *Mendenhall* principles to agriculture and municipalities is also well developed, there is no controlling New Mexico precedent on the application of these principles to the mining industry. Similarly, there is no constitutional provision or statute that would answer the questions posed above.

Resolution of these two questions will also materially advance the adjudication of this subfile. Diversions from G-336 and G-337 have been metered by C&E Concrete since the wells were drilled. Even though there are some differences between Plaintiffs and Meech regarding the actual amount of water that has been diverted from the wells and applied to beneficial use, the determination of this figure is relatively straightforward. Once the actual past beneficial use of the water is determined through a trial or settlement, the remaining factual and legal issues will be the amount of water that will be needed in the future to continue mining and limestone production. Final resolution of the subfile will thus depend upon: 1) whether *Mendenhall* principles apply to the mining industry; and 2) whether anticipated future water use is properly determined in a general stream adjudication. Final answers to the questions requested for certification will materially advance the ultimate resolution of this subfile and will leave no doubt as to how the New Mexico Supreme Court views these strictly state law issues.

There is currently pending before the New Mexico Court of Appeals a case that raises how *Mendenhall* applies to mining interests and how the *Mendenhall* elements are evaluated in an industry where mining and production ebbs and flows with worldwide mineral prices. *See State*

[3] In 2015, New Mexico used between 101 and 200 million gallons of water per day in mining. *See* United States Geological Service, *Mining Water Use*, *available at* https://www.usgs.gov/mission-areas/water-resources/science/mining-water-use?qt-science_center_objects=0#qt-science_center_objects (last visited February 24, 21).

of New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irrigation District, N.M. Ct. App. No. A-1-CA-37258.[4] In a State that relies very heavily on mining and mineral production,[5] the adjudication of future water use in the mining context is an extremely important topic that is already proceeding through New Mexico's appellate courts. These purely state law questions certainly deserve resolution by the highest court in the state. *See, e.g., Walker v. United States*, 2007-NMSC-038, ¶ 2, 142 N.M. 45, 47 (questions regarding water rights on federal grazing allotments certified for decision to the New Mexico Supreme Court). This is particularly true because there is no Tenth Circuit or other federal district court opinion that addresses these specific questions.

The uncontested factual predicate underlying the application of *Mendenhall* to this subfile makes certification likely to be viewed favorably by the New Mexico Supreme Court as well. There is nothing hypothetical about 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. The Supreme Court will not be rendering an advisory opinion; rather it will be assessing whether or not a local business will thrive as its water requirements grow greater with the passing years. With the Plaintiffs planning to file a Motion for Summary Judgment to exclude any consideration or adjudication of future water needs by Meech and C&E Concrete, now is the appropriate time to certify these questions to the New Mexico Supreme Court.

CONCLUSION

Mining is an extremely important industry in a state that frequently struggles for economic development. Inextricably linked to the fortunes of mining companies is the availability of water.

[4] The case is fully briefed, and oral argument is currently scheduled for April 1, 2021.

[5] *See* New Mexico Bureau of Geology & Mineral Resources, *Mineral Resources of New Mexico*, *available at* https://geoinfo.nmt.edu/resources/minerals/home.html (last visited February 24, 2021) ("New Mexico's mineral wealth is one of the richest endowments of any state in the U.S.").

Through the development of the *Mendenhall* doctrine, the New Mexico Supreme Court announced its support of allowing appropriators flexibility to place water to beneficial use even when the State Engineer assumes jurisdiction in the middle of the process and completion of the appropriation extends years into the future. As a doctrine judicially created by the Supreme Court as a matter of state law, it is appropriate to certify questions to the Supreme Court regarding the application of these principals to the mining industry and how these future water rights are to be adjudicated.

WHEREFORE, Defendant Norma Meech ("Meech") respectfully requests that the Court enter an Order certifying questions, as described above, to the New Mexico Supreme Court for determination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 25, 2021, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Filing to be served by electronic means.

Tanya L. Scott
Tanya L. Scott