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 REPLY BRIEF IN SUPPORT OF CORRECTED MOTION TO CERTIFY QUESTIONS TO THE NEW MEXICO SUPREME COURT

Defendant Norma Meech ("Meech"), by and through her attorneys of record, Law & Resource Planning Associates, P.C., hereby submits her Reply Brief in Support of her Corrected Motion to Certify Questions to the New Mexico Supreme Court [ECF 3488]. Nothing in the Plaintiffs' Responses [ECF 3489; ECF 3490] to Meech's certification motion mitigates against the conclusion that certification is proper in this matter.

Plaintiffs argue that because the District Court denied a Motion for Certification on an entirely unrelated question in this adjudication in 2005, the Court should likewise deny this Motion, because it presents only "unique circumstances," not unsettled questions of state law.

N.M. Resp. (ECF 3489) at 3; U.S. Resp. (ECF 3490) at 2. Of course, the referenced certification motion that was denied by this Court some sixteen years ago had nothing to do with the *Mendenhall* Doctrine or its application to the mining industry. It concerned domestic wells and whether the holder of a domestic well permit was limited to the amounts of water beneficially used. *See* Mem. Op. and Order (June 15, 2006) [ECF 733]. Substantively, there is no relationship between a domestic well permit and the ability to continue development of a water right in the mining industry pursuant to the "relation back" or *Mendenhall* Doctrine.

Furthermore, the "unique circumstances" noted in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 46 (1997) (cited by the Honorable Bruce Black in denying the previous Motion for Certification) refers to the unique *procedural* circumstance of a State Attorney General conceding that a state statute is unconstitutional if construed in the manner suggested by the Plaintiffs. *Id.* at 46 (referencing the Ninth Circuit's opinion in *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 931 (9th Cir. 1995)), *vacated sub nom. Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). The "unique circumstances" had nothing to do with how the Court would apply a legal principle to a given set of facts. Rather, in the words of the Supreme Court, the Ninth Circuit was "blending abstention with certification" when it decided the certification motion based not on unsettled law, but whether the court *should* determine the constitutionality of a state statute. The Ninth Circuit had determined that "unique circumstances" were required before questions could be certified to state courts. The Supreme Court disagreed, finding that unique circumstances were not required before certification—only novel unsettled questions of state law.

In the case at bar, Meech is not asking this Court to certify questions to the New Mexico Supreme Court based upon some procedural anomaly. Rather, she is asking the Court to allow the New Mexico Supreme Court the opportunity to analyze and render its opinion on whether the

Mendenhall Doctrine, born in the context of agriculture, should be extended to the mining industry where water rights will not likely be placed to beneficial use for years, perhaps decades, in the future.

Citing a ruling in the Jemez water rights adjudication, Plaintiffs claim that there is nothing novel or unsettled about *Mendenhall* that should compel this Court to certify questions to the Supreme Court. *See United States v. Abousleman*, No. 83-1041, 1999 WL 35809618 (D.N.M. May 4, 1999) (the "*Chaparral* Opinion."). Again, the *Chaparral* Opinion case has no relevance to mining, but is a garden variety water rights matter where the Chaparral Girl Scout Council could essentially offer no valid reason for why due diligence had not been exercised in placing water to beneficial use. The case and opinion have nothing to do with an industry that necessarily requires an extensive capital investment, years to complete mineral mining and processing, and is dependent on market conditions to fully develop a water right.

The *Chaparral* Opinion notes that certification is an expensive and lengthy process that was not justified by the facts. In the present case, however, the New Mexico Supreme Court can only accept certification if the answer to the certified questions "may materially advance the ultimate resolution of the adjudication." Rule 12-607 NMRA. In this case, the major disagreement between the Plaintiffs and Meech is whether *Mendenhall* allows the continuation of efforts to beneficially use water after a general adjudication of the stream system intervenes. The best time to decide that question is now before the parties expend considerable time and money pursuing their theories of this case. As the United States Supreme Court has noted, "Certification saves time, energy, and resources and helps build a cooperative judicial federalism." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 46 (citing *Lehman Brothers v. Schein,* 416 U.S. 386, 391 (1974)). As noted in Meech's Motion, there is currently pending before the New Mexico Court

of Appeals a case with similar issues as those posed in this litigation: how does *Mendenhall* apply in the mining industry when the vesting of water rights may be interrupted for decades while mineral prices fluctuate, and extensive environmental reviews are ongoing. In the interest of "cooperative judicial federalism," these questions should be resolved by New Mexico appellate courts.

Plaintiffs further argue that there is controlling precedent from New Mexico, *i.e.*, the New Mexico Constitution, that provides beneficial use is "the basis, the measure and the limit of the right to the use of water." N.M. CONST. art. XVI, § 3. This argument, of course, begs an obvious question. Under such a simplistic analysis, *Mendenhall* and its progeny would all be unconstitutional because in each case, days, weeks, or perhaps years were going to pass before water was placed to beneficial use. *See, e.g.*, *State ex rel. Reynolds v. Rio Rancho Estates, Inc.*, 1981-NMSC-017, 95 N.M. 560 (developer wanted to develop water rights for municipal uses); *State ex rel. State Eng'r v. Crider*, 1967-NMSC-133, 78 N.M. 312 (cities needed future ability to develop water rights for anticipated population growth). The question raised in this case is not whether a water right must eventually be vested through beneficial use. Meech does not dispute this. The question is whether the appropriator can continue efforts to develop that beneficial use even though that development may extend years into the future. The related question is whether vesting of the water right through beneficial use can continue after a general stream adjudication has been commenced.

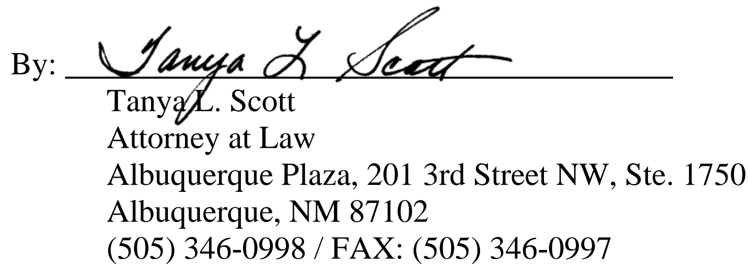
Plaintiffs do not dispute any of the facts set forth in Meech's motion. Because these are undisputed facts, the certification of the questions posed in Meech's brief is even more appropriate. There is no chance that the Supreme Court will be issuing an advisory opinion. *Schlieter v. Carols*,

1989-NMSC-037, ¶ 5, 108 N.M. 507. The questions pose concrete matters that are ripe for determination and the answers should be provided by New Mexico's highest court.

For the reasons discussed herein and in Meech's Motion, the Court should certify the two questions posed in the Motion to the New Mexico Supreme Court.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation



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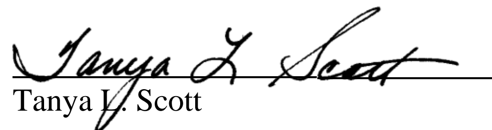
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 12, 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.



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