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 SURREPLY IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Norma Meech ("Meech"), by and through her attorneys, Law & Resource Planning Associates, P.C., having been granted leave by the Court to file a Surreply in opposition to Plaintiffs' Motion for Summary Judgment [ECF 3522], hereby presents additional arguments in response to the new material and arguments raised in Plaintiffs' Reply Brief [ECF 3504].

I. PLAINTIFFS' HAVE NOT MET THEIR BURDEN OF SHOWING THE ABSENCE OF MATERIAL FACT THROUGH THEIR EXPERT'S OPINION.

As noted in Meech's objections to the new material attached to Plaintiffs' Reply Brief, [ECF 3507], Plaintiffs' expert witness, Dr. Thomas Ley, opines that the highest production of water from well 8B-1-W10 (a/k/a State Engineer File #G-337) occurred in 2006 when the pumping rate from that well amounted to 2.04 acre-feet per annum. [ECF 3491 at 4, ¶ 8]. This conclusion

is based solely upon his interpretation of how the currently installed meter on 8B-1-W10 should be read and interpreted. Plaintiffs do not lay a foundation for when the current meter was installed. Similarly, Plaintiffs fail to present any evidence whatsoever regarding what meter was on the well in 2006 when Dr. Ley computed what he believes is the year of maximum water production.

As Walter Meech testified during his deposition, there has been more than one meter on 8B-1-W10.

> Q: So let's take a look first at the – at the – at the first photograph I mentioned which is the Model 55 Recordall, which also appears to be a – a one inch meter. The "1 inch" appears just above and to the left of the word "Gallons." Are you able to – to tell us which well, if any, this meter either is or was at some time in the past attached to?
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> A: Being one inch, I would assume the G-336.
>
> Q: Okay. Do you know if that – that meter is—is currently attached to 336?
>
> A: I do not.
>
> Q. Okay. Do you know if that's the only meter since that well was drilled and installed that's been attached to 336?
>
> A. It is not.

[ECF 3504-6, 30:3-19].

In Answers to Interrogatories, Meech specifically indicated that C&E Concrete does not have records reflecting the dates of installation or use of any water meters on either of the wells. [ECF 3504-4 at 2-3] ("C&E does not have records of the dates of use of each water meter."). In his Affidavit, filed in conjunction with Meech's Response to the Motion for Summary Judgment, Walter Meech again confirmed that the Badger Recordall 55 has not always been the meter installed on 8B-1-W10. [ECF 3496-1, ¶ 7] ("There have been several meters on the well over time and it is impossible to say when this specific meter was installed on the well.").

A review of the meter records that have been kept by C&E Concrete and submitted monthly to the Office of the State Engineer discloses that 8B-1-W10 likely has had more than one meter installed. [ECF 3496-1, ¶ 6, ¶ 8, Ex. 2 (p. 7 of 41)]. A spreadsheet compiling all the meter records with the corrected decimal point is attached to Walter Meech's previous Affidavit as Exhibit 4. [ECF 3496-1, Ex. 4 (p. 39 of 41)]. The spreadsheet shows a gradually increasing quantity of water produced from 8B-1-W10 beginning in 2001. The recorded numbers mostly reflect a monthly progression of higher values once the decimal place is corrected.[1] The increasing water production numbers continue unabated until 2011 when they end abruptly on April 1, 2011. Following that date, the data submitted to the State Engineer reflects that either the well or the meter or both were out of service for four months. [ECF 3496-1 (p. 12 of 41)]. The meter readings recommence on August 1, 2011, with a very small number ("4"), which then marks the beginning of another upward trajectory.

It is unlikely that this sudden change in the upward progression of water production numbers simply reflects the meter turning over. The highest recorded number before the abrupt return to a single digit reading is 1185. That would be an unexpectedly odd number if the meter were merely turning over. Rather, if the meter were turning over, the final number before the abrupt change would likely have been in the neighborhood of 9,999. A meter that simply turned over also would not be recorded as "out of service." Rather, a new low number, perhaps with an explanatory note, would be expected.[2]

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[1] There are some obvious errors in the recording of the meter readings. *See, e.g.*, the meter readings for 2008 [ECF 3496-1 (p 15 of 41]. The reading from August 1, 2008 *decreases* from the July 1, 2008 reading, before continuing its upward trajectory on September 1, 2008.

[2] *See, e.g.*, meter records for 8B-1-W11, where the recordings reflect a turnover of the meter following a meter reading of 99443 and include a notation of "meter turnover." [ECF 3496-1, p. 30 of 41)].

Clearly, Walter Meech's testimony, his Affidavits, the Answers to Interrogatories, and a review of the meter records all reflect that the currently installed Recordall 55 was not installed on 8B-1-W10 in 2002, which is the year during which the highest water production from this well occurred and is reflected in the records submitted to the State Engineer. Nor was it installed in 2006, the year during which Dr. Ley opined the well had its highest production of water. A change in the installed meter plainly occurred in 2011. Thus, any opinion of Dr. Ley regarding his assessment of how the erroneous meter readings occurred, based on the currently installed meter, is irrelevant and should be disregarded. It certainly does not create any genuine issues of fact in rebuttal of Walter Meech's Affidavit explaining why he believes the meter readings from 2002 reflect the highest water production. [ECF 3496-1]

Even if Plaintiffs' expert's opinions regarding meter readings were afforded any credence whatsoever, it would only drive home the point that there are genuine issues of material fact regarding maximum water production from 8B-1-W10 that renders summary judgment inappropriate. Plaintiffs' asserted "undisputed fact" that "During the period from 2001 to 2012, the maximum annual pumping rate for Well 8B-1-W10 occurred in 2006 and amounted to 2.04 ac-ft.," is, in fact, disputed. Walter Meech has provided credible evidence as to the amount of water formerly produced from this well. [ECF 3496-1]. Similarly, Meech's expert Dr. Alan Kuhn, reached similar conclusions on water usage from the two production wells. [ECF 3504-2 (p. 7 of 12)]. On summary judgment, the Court is not to weigh the evidence or determine the credibility of the opposing witnesses. *Hinkle v. Beckham County Bd. Of County Commissioners*, 962 F.3d 1204, 1219 (10th Cir. 2020); *McGuire v. Nielsen*, 448 F.Supp. 3d 1213, 1239 (D.N.M. 2020). Its role is simply to determine whether there are issues of fact to be determined by the fact finder upon a full evidentiary record.

II. A REASONABLE TIME FOR A MINING OPERATION TO PLACE WATER TO BENEFICIAL USE UNDER THE *MENDENHALL* DOCTRINE IS NOT 20 YEARS AS A MATTER OF LAW.

In their Reply Brief, Plaintiffs raised a new argument that, pursuant to the *Mendenhall* doctrine,[3] the continuation of efforts to place water to beneficial use after twenty years is unreasonable as a matter of law regardless of the accompanying circumstances. In support of this new argument, Plaintiffs directed the Court's attention to various cases, all unrelated to mining, where the Courts found under varying factual circumstances that the *Mendenhall* requirements were not met. Since the briefing on Plaintiffs' Motion for Summary Judgment was completed, however, the New Mexico Court of Appeals filed an opinion in the Lower Rio Grande Adjudication in a case involving copper mining. *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District (Harris Gray, William Frost, and New Mexico Copper Corporation)*, 2021 WL 4272676, ___P.3d___ (September 17, 2021) ("*State ex rel. State Engineer v. Gray*"); *see also* Notice of Supplemental Authority (Sept. 24, 2021) [ECF 3521]. This is the first significant opinion related to the *Mendenhall* doctrine from a New Mexico appellate court in forty years. The new opinion reinforces that the exercise of reasonable diligence in the development of a *Mendenhall* right (thereby allowing placement of the water to beneficial use) is fact dependent and requires consideration of all surrounding circumstances. There is no set number of years after which the placing of water to beneficial use is considered unreasonable as a matter of law.

Tracing the history of the relation-back doctrine (known in New Mexico by its moniker "*Mendenhall* right"), the Court of Appeals noted that the doctrine was fully developed within

[3] *See State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998.

twenty years of its first announcement in cases involving beneficial use of water in the mining industry and stated:

> Thus, the contours of the doctrine of relation as it applied to claims to water under the western concept of prior appropriation were well known within twenty years after the concept first arose. Relation in this context embodied two features: (1) embarking in good faith on a project to appropriate water; and (2) consummating the project without unnecessary delay by exercising reasonable diligence in constructing facilities, diverting water, and completing the appropriation by applying the water to beneficial use.
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> ***
>
> The rule requiring diligence in pursuing the work initially grew out of the custom among the miners working their claims, but quickly became associated with the property concept of relation as a doctrinal matter. *The doctrine of relation provided a theoretical basis for protecting the interests of persons undertaking a potentially long and expensive process from frustration at its end.*

State ex rel. State Engineer v. Gray, 2021 WL 4272676, *8 (emphasis added).

Importantly for the case at bar and in contrast to Plaintiffs' newly raised arguments, the Court of Appeals emphasized the flexibility of the relation doctrine and courts' willingness to apply it to new situations and circumstances.

> "Relation back was designed for an era of small ditches. It gave the appropriator time to finance his diversion works, but was relatively unforgiving of excuses. Long delays in putting water to beneficial use suggested speculation and could result in loss of early priority." The treatise suggests that courts have adjusted the doctrine to accommodate more complex projects… *New Mexico has similarly made room in its relation doctrine to accommodate questions of future use by industry and municipalities… But these iterations of relation have not changed the bedrock requirement of diligently applying water to beneficial use within a reasonable time given the circumstances at hand. The cases from the beginning understood that each case would have to stand and be decided on its facts.*

Id., *10 (emphasis added) (internal citations omitted).

Rather than articulate a finite time period to place water to beneficial use—such as the twenty years suggested by Plaintiffs—the Court of Appeals emphasized that each case will be determined on its own facts.

> In sum, the concept of relation has been applied to determine priority to water since the earliest days of the development of prior appropriation. *It has been adapted flexibly to meet new circumstances as cases presenting new issues arose.* But the core of relation—requiring a lawful commencement of an appropriation with notice to the world of intent, followed by diligence in bringing the planned appropriation to fruition by application of water to beneficial use in a reasonable time—has remained the same. The question in each case is whether in a given circumstance the would-be appropriator has been diligent. Our task is to determine whether the adjudication court applied the doctrine correctly to the facts in this case.

Id., *12.

In applying the doctrine to the facts before it, the Court of Appeals reflected that "We see no difficulty with using a totality of the circumstances approach to evaluating a case such as this." *Id.*, *13. Indeed, the Court would "agree that the 'unique character of extractive industries' and the environment they operate in are part of the calculus courts should take into account when assessing diligence . . . [T]he doctrine of relation has always recognized that each case should be judged on its own circumstances." *Id.*, ¶ 72.

The Court of Appeals approvingly cited *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 36 (Colo. 1997) as "articulating a six-factor test for modern nonspeculative projects" when demonstrating due diligence in appropriating water. *Gray*, 2021 WL 4272676, *10. The *Dallas Creek* case involved a Colorado water court cancelling a conditional right to appropriate water because of the owner's failure to timely file an application with the water court for a finding of

reasonable diligence.[4] As the Colorado Court observed, to maintain the conditional right to continue an appropriation, the applicant must demonstrate a continued intent to vest the water right coupled with progress toward finalizing the appropriation through beneficial use of the water. The six-factor test noted by the New Mexico Court of Appeals is as follows:

> Considerations include but are not necessarily limited to: (1) economic feasibility; (2) the status of requisite permit applications and other required governmental approvals; (3) expenditures made to develop the appropriation; (4) the ongoing conduct of engineering and environmental studies; (5) the design and construction of facilities; and (6) the nature and extent of land holdings and contracts demonstrating the water demand and beneficial uses which the conditional right is to serve when perfected.

Dallas Creek Water, 933 P.2d at 36. In New Mexico, diligent development and beneficial use of water are closely connected. *State ex rel. Martinez v. McDermett*, 1995-NMCA-060, ¶ 8, 120 N.M. 327, 330 ("diligent development and beneficial use . . . are closely connected."). Diligent development allows water to be put to beneficial use within a reasonable time. *Id.* ("Diligent development is important because it allows relation back of the priority date to the beginning physical acts to take and use water, even though the beneficial use did not occur until sometime after the drilling of the well or the laying out and digging of irrigation ditches.").

There is no set time period in New Mexico that automatically terminates the right to continue the vesting of an inchoate water right. Thus, based upon the Court of Appeals' recognition of the unique character of the extractive industries, coupled with its adherence to the long-established principle that application of the *Mendenhall* doctrine is dependent upon the circumstances of each case, a hard deadline for placing water to beneficial use that does not account for either of the foregoing factors seems particularly inappropriate.

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[4] Colorado issues conditional water rights through its water court system. Holders of the conditional rights must periodically demonstrate due diligence in placing water to beneficial use to keep the conditional right in good standing and maintain the priority date. *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 34-35.

Plaintiffs admit that Meech has exercised due diligence in developing the water rights. They also do not argue that her well development was too slow. *See* Plaintiffs' Reply Brief [ECF 3504] at 7 ("The United States and the State do not assert that Meech was not diligent in developing her water rights in Wells 8B-1-W10 and 8B-1-W11, nor do they argue that Meech's well development was too slow."). Nor have they made a *prima facie* case that Meech or her family's company have acted indolently in their mining activities or operations so as to unreasonably extend the period necessary to beneficially use their declared water rights. Rather, Plaintiffs simply contend that a reasonable period of time to place water to beneficial use is capped at twenty years.

However, applying the factors from *Dallas Creek Water*, cited with approval by the New Mexico Court of Appeals, it is clear the Meech family has acted diligently as they work towards full development of the water rights disclosed in their Declarations. As shown by the Affidavit of Walter Meech, attached hereto as Exhibit 1, C&E Concrete has demonstrated its intent in completing the water appropriation and has made significant progress in that direction. (Exhibit 1 at ¶ 8). C&E Concrete has had a consistent business operation since it was purchased by Meech and her deceased husband. (Exhibit 1 at ¶ 21). It is now run by her son and the company's current owner. At no time has the business ceased or paused production but has expanded operations in response to overall business demand. (Exhibit 1 at ¶¶ 13, 22). It owns the land and mineral rights at the Tinaja pit in fee simple, meaning that it can continue to expand until the mineral deposit is exhausted without fear of losing a mineral lease. (Exhibit 1 at ¶ 17). All required governmental permits are and have been in place for many years. (Exhibit 1 at ¶¶ 10-12). The company has made significant investments in repairing its main production well to recover the well's former capacity. (Exhibit 1 at ¶ 14). It will do the same with the other production well. (Exhibit 1 at ¶ 15). It has recently expanded its operations to include an additional asphalt plant that will, in turn,

require additional materials and additional water to produce those materials. (Exhibit 1 at ¶ 13). It places water to beneficial use in a manner that is consistent with conservation principles—that is, only using the required amounts, which vary according to daily conditions. (Exhibit 1 at ¶ 20. Indeed, Dr. Alan Kuhn, C&E Concrete's expert witness, has noted how conservative C&E Concrete is in comparison with other open pit mining operations of similar size. [ECF 3504-2, p. 6 of 12]. Use of water in excess of the amount presently needed is wasteful and not a beneficial use of water. *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 22, 62 N.M. 264, 271 ("Wasteful methods, so common among the early settlers do not establish a vested right to their continuance.").

Pit mining must proceed in a systematic manner. (Exhibit 1 at ¶ 18). Overburden must be removed. The mineral is then removed in accordance with a plan that imposes an orderly process. *Id*. Through this process, C&E Concrete has already placed over sixty-four acre-feet per annum of water to beneficial use as of 2019 out of a declared total of 97.26 acre-feet per annum. (Exhibit 1 at ¶¶ 6-7). Pursuant to their mining plan, they anticipate that the entire declared amount will be placed to beneficial use within the next five to ten years. (Exhibit 1 at ¶ 16).

New Mexico has never imposed a set period as a "reasonable" time to place water to beneficial use. Rather, exercising due diligence to place water to beneficial use within a reasonable period of time is fact dependent with the Court considering all relevant circumstances *in toto*. And the unique characteristics of mining and the extractive industries are part of the equation. As the Court of Appeals noted in its recent opinion, it is common for mining operations to cease production in varying degrees when market conditions demand it.

> It is a common practice in the copper mining industry to cease operations when copper prices drop sufficiently to make operations economically not feasible. The degree to which operations cease varies, ranging from a temporary cessation that leaves a mine's

> infrastructure in place, maintained and ready to resume—colloquially termed "mothballing"—to permanent abandonment of a mine with no intent to resume.

State ex rel. State Engineer v. Gray, 2021 WL 4272676, *4. Under these unique circumstances, the rule suggested by Plaintiffs would mean that mining companies would lose valuable water rights after twenty years when market forces made mining temporarily unfeasible. This result flies in the face of the *Mendenhall* doctrine and its underpinnings—protecting the interests of persons undertaking a potentially long and expensive process from frustration at its end. *Id.* at *8.

C&E Concrete has methodically been mining and processing limestone for more than a half century. It has been beneficially using water from its declared wells for over thirty-three years. (Exhibit 1 at ¶ 3). It does so in a thoughtful, conservation-minded manner that recognizes that mining must be accomplished in a planned and systematic way. The alternative would be a haphazard approach that uses water in a wasteful way. But for the intervention of the Zuni Basin adjudication, C&E Concrete would continue its reasonable diligence in ultimately placing all the declared rights to beneficial use in a reasonable time under the circumstances. Application of the relation doctrine to this case will reflect the flexibility that has always been the hallmark of the doctrine. *Id.*, *12 ("It has been adapted flexibly to meet new circumstances as cases presenting new issues arose.").

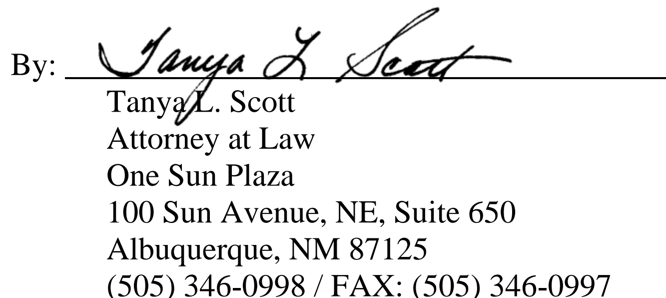
CONCLUSION

The Plaintiffs have failed to meet their burden of demonstrating that there are no genuine issues of material fact that establish that Meech and her family company have not placed water to beneficial use in a reasonable time. Having failed to make that *prima facie* showing, the Court should deny Plaintiffs' Motion for Summary Judgment. In addition, there are genuine issues of material fact regarding the amount of water placed to beneficial use from Well 8B-1-W10 making

summary judgment on that point inappropriate. Thus, Plaintiffs' Motion must be denied in its entirety.

Respectfully submitted,

LAW & RESOURCE PLANNING ASSOCIATES,
A Professional Corporation

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 19, 2021, I filed the foregoing pleading 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