

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW MEXICO**

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

**vs.**

**NO. CV 01-72 BB/WDS (ACE)**

**A & R PRODUCTIONS, et. al.,**

**Defendants.**

**COMMENTS ON ORDER TO SHOW CAUSE**

**NOW ENTERING COURT** is William G. Stripp, Attorney at Law, on behalf of Paul Davis; the Paul Davis Survivor's Trust; the JoAnn V. Davis Residual Trust; Pamela Kay Davis; Sage Grae Merrill; Kristi Davis; Anita Davis Schafer; Robert Schafer; Barbara Mallery; Lucy Kluckhohn Jones; Priscilla Schulte; Paul Enz; Carol Enz; and Paul Petranto, who make the following comments on the Special Master's Order to Show Cause:

1. Paul Davis et al agree with the additional comments of Richard Davis Mallery et al.

2. On offers of proof, the Office of the State Engineer ("OSE") is continuing to issue domestic well permits authorizing the appropriation of up to three acre feet of water per year in the Zuni River Basin. Furthermore, individuals have already invested or are currently investing between \$10,000 and \$35,000 per well based upon OSE's representation that they will be allowed to appropriate up to three acre feet of water.

3. In Hanson v. Turney, 2004-NMCA-069, ¶ 19, 136 N.M. 1, 94 P.3d 1, the New Mexico Court of Appeals discussed the concept of estoppel as it relates to water rights. While the Court of Appeals stated that courts are reluctant to apply equitable estoppel against a government entity, particularly where waters of the state are involved, the Court also stated that estoppel may be applied where "there is a shocking degree of aggravated and overreaching conduct or . . . right and justice demand it." Id. at ¶ 19. A party seeking estoppel must establish:

- (1) the government knew the facts;
- (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended;
- (3) plaintiffs must have been ignorant of the true facts;
- (4) plaintiffs reasonably relied on the government's conduct to their injury;
- (5) affirmative misconduct on the part of the government; and
- (6) the act sought is not contrary to the requirements expressed by statute.

4. In this case, Defendants believe that the State of New Mexico should be estopped from going through with its plan to offer owners of domestic wells 0.7 acre feet of water.

5. The State of New Mexico knows the facts regarding the current litigation, the geography of the area at issue, the population of the area, the history of the issuance of domestic well permits for the area, and its continuing practice of issuing domestic well permits allowing the appropriation of up to three acre feet of water per year.

6. In issuing domestic well permits and continuing to issue domestic well permits allowing for the appropriation of up to three acre feet of water, the State of New Mexico intended its conduct to be acted upon or so acted that the permittees had the right to believe it was so intended.

7. Owners of domestic wells and current permittees have been unaware that the State of New Mexico intends to offer them only 0.7 acre feet of water and not up to the three acre feet of water as allowed by the permit.

8. Well owners and permit holders have reasonably relied on the State of New Mexico's conduct in investing thousands of dollars in domestic wells with the expectation that they will be allowed to appropriate up to three acre feet of water per year.

9. It is affirmative misconduct on the part of the State of New Mexico to issue permits allowing the appropriation of up to the acre feet of water per year, when they are only preparing to offer 0.7 acre feet of water per year.

10. The expectation of domestic well owners that they will be allowed to appropriate up to three acre feet of water per year is not contrary to the requirements expressed by statute.

11. In Hanson, the New Mexico Court of Appeals referred to the New Mexico Supreme Court's decision in State ex rel. Reynolds v. Mendenhall, 68 N.M. 467, 362 P.2d 998 (1961). In Mendenhall, the New Mexico Supreme Court reversed a decision denying water rights. In summarizing the New Mexico Supreme Court's decision in Mendenhall, the New Mexico Court of Appeals wrote:

The rationale for Mendenhall is that statutes should be construed to avoid injustice and absurd results. The Court felt it would be unfair if an appropriator were to spend years diligently drilling, installing equipment, digging ditches, and preparing land, only to have the State Engineer declare the land to be within a basin the day before the water was to be put to beneficial use, and thereby deny the appropriator the benefits of his labor. Id. at 473, 362 P.2d at 1002-03. In support of its holding, the Court also relied on the doctrine of relation back, which provides that an appropriator's priority date is the date he started the work necessary to appropriate and use the water, not the date the water is actually used. Id. at 470-72, 362 P.2d at 1001-02.

It is possible to read Mendenhall to suggest that, in a specific and limited circumstance, an appropriator may have an enforceable water right at some time before the water has been put to beneficial use.

See Hanson at ¶¶ 15-16.

12. By issuing permits to domestic well users allowing the owners of domestic wells to appropriate up to three acre feet of water per year, the State of New Mexico has led individuals to believe that if they invest a significant sum of money in the development of a domestic well, then they will in fact be allowed to appropriate up to three acre feet of water per year. The difference between .07 acre feet and 3.0 acre feet is as significant as the difference between \$70,000 and \$300,000. The State's action of planning on allowing an appropriation of only 0.7 acre feet of water per year when the expectation has been created of allowing an appropriation of up to 3.0 acre feet of water per year is no different than a fraudulent stockbroker creating an expectation in an investor that the investment will result in a return of \$300,000 when the stockbroker believes that the maximum return will actually only be \$70,000. As the New Mexico Supreme Court decided in Mendenhall, such a result is unfair and unjust.

**CONCLUSION**

The State of New Mexico should be estopped from offering owners of domestic wells 0.7 acre feet of water per year. Any offers should comply with the permit and the statutes and allow the owners of domestic wells to appropriate up to three acre feet of water per year.

Date: August 30, 2005

Respectfully submitted,

----signed electronically-----

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**WILLIAM G. STRIPP  
ATTORNEY AT LAW  
P.O. BOX 159  
RAMAH, NEW MEXICO 87321  
Telephone: (505) 783-4138  
Facsimile: (505) 783-4139**

**Certificate of Mailing**

This certifies that on 8/30/05 this pleading was mailed to counsel of record and parties pro se as listed on the Court's electronic docket by placing the pleading in envelopes with postage prepaid and placing the envelopes with the US Post office in Ramah, NM for delivery.

----signed electronically-----

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William G. Stripp  
Attorney at Law