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

UNITED STATES OF AMERICA, ET AL.,	)	
PLAINTIFFS,	)	
	)	**CIV NO. 01- 00072 BDB/WDS**
v.	)	**ZUNI RIVER BASIN ADJUDICATION**
STATE OF NEW MEXICO COMMISSIONER OF PUBLIC LANDS, ET AL.,	)	
DEFENDANTS.	)	

MOTION TO CERTIFY QUESTIONS
TO THE NEW MEXICO SUPREME COURT

COMES NOW, the Western New Mexico Water Preservation Association ("WNMWPA"), by and through its attorneys of record, Law and Resource Planning Associates, P.C., and moves the Court for an Order certifying questions involving domestic water wells, allowed under NMSA 1978, § 72-12-1 (2003), to the New Mexico Supreme Court for final determination. As grounds for this Motion, WNMWPA states that the answers to the questions posed will be determinative of pending, global issues in the case, and that there is no controlling precedent of a New Mexico appellate court that controls the answers to the questions.

This action involves the adjudication of water rights within the Zuni Basin of the State of New Mexico. The case was originally brought in the Federal District Court for the District of New Mexico by the United States as the plaintiff. When the case was commenced, the State Engineer of the State of New Mexico was named as a party defendant. *See* Complaint (Doc. No.

1). However, the State Engineer has now been realigned as a party plaintiff in the action. *See* Amended Complaint (Doc. No. 222).

During recent status conferences before Special Master Vicki Gabin, attorneys for the United States and for the New Mexico State Engineer announced their intention to serve offers of judgment for domestic wells in the amount of .7 acre feet per annum. In response, the Special Master required the Plaintiffs to appear to explain why the issue of the amount of water that would be offered for a domestic well should not be considered a global issue for basin-wide determination. *See* Order to Show Cause and Notice of Hearing re: Stream System-wide Issue (Doc. No. 370). The reason why such a hearing was required is clear. The amount of water individuals can obtain from their domestic wells is a critical issue within this basin.

The basin is far reaching, covering thousands of acres of ranch land with individual ranch houses miles apart. There is no major stream system such as the Rio Grande or Pecos that feeds the aquifers in the area. Rather, the small amount of surface water that is available is miles away from the majority of the domestic wells in the area. While there are a small number of subdivision homes, in general the area is very rural with great distances separating the houses from one another. Thus, the probability of well interference from domestic wells is slight and the probability of any actual effect on stream systems by domestic wells is even more remote. The individuals who live in this ranching area rely on their domestic wells for multiple uses including gardens, watering of trees, irrigation and watering domestic livestock. Indeed, the domestic well statute, as currently in force, describes their circumstance exactly and allocates three acre feet per annum for that purpose.

The State Engineer, publicly expressing concern that in hydraulically connected aquifers or in rapidly declining mined basins three acre-feet per annum is excessive, has sought to change

the domestic well statute in the legislature by elimination the three acre feet per annum requirement. Each attempt has failed. In response, the State Engineer has now concluded that he has the administrative discretion to do what the legislature has not allowed him to do--limit the amount of water from domestic wells to .7 acre feet per annum.

As discussed in detail below, this raises numerous New Mexico law questions never before interpreted by an appellate court. While the questions are framed specifically below, the central issue is whether a person supported by a domestic well permit that allows the use of three acre feet per annum and a statute that does the same can be denied three acre feet per annum by the New Mexico State Engineer. The State Engineer proposes to administratively repeal the permit amount and the amount authorized by statute by restricting use to .7 acre feet per annum, and place the burden on the individual domestic well user to prove current use in excess of this amount.

This is not a wealthy basin. The wells are not metered. Domestic well users do not have financial resources to hire hydrologists in every case to prove actual historic beneficial use or well capacities. Granting the three acre feet per annum right to one rancher, as contemplated by the New Mexico Legislature, would have no effect on any other users in ranch houses miles away. Because of the rural nature of the area, there are few, if any, community water systems and every user in the area will likely have a domestic well and/or a livestock water right. To proceed forward in all of these cases without clarification from the New Mexico Supreme Court would place an impossible burden on all of these individuals. The best method for proceeding would be to move forward in individual cases, developing the facts of each case but leaving the sub-file orders open until resolution of this issue by the New Mexico Supreme Court.

Even though the Special Master acknowledged this issue as a global one, after receiving comments from the affected parties, the Special Master determined that the posited questions would not be considered on a basin-wide basis. *See* Amended Procedural and Scheduling Order for the Adjudication of Water Rights Claims in Sub-Areas 4 and 8 of the Zuni River Stream System (Doc. No. 387); Letter From Special Master Vickie L Gabin to Counsel of Record & Parties Pro Se (filed October 21, 2005). This Certification Motion is consistent with the Special Master's proposed procedure. This matter can proceed on certification to the New Mexico Supreme Court, but until the matter is resolved by the Supreme Court, each domestic well user who objects to the .7 acre feet per annum offer of judgment can have his or her objections considered on a case-by-case basis subject to the resolution of this issue by the New Mexico Supreme Court.

This Motion is appropriate because of the immediate need for clarification by the New Mexico Supreme Court. The United States and the New Mexico State Engineer have, in fact, begun serving offers to settle water rights for domestic wells in the amount of .7 acre foot per annum despite the provisions of NMSA 1978, § 72-12-1 (2003). The matter is ripe for resolution. The Rules and Regulations of the State Engineer governing domestic wells, NMAC 19.27.1.22, allow up to three acre feet per annum for the irrigation of one acre of non-commercial trees, lawn, and garden. While these initial offers are in Areas 4 and 8 of the adjudication area, the Plaintiffs have expressed their intention to extend offers of .7 acre feet per annum for all domestic wells in the adjudicated area thus clarifying the global nature of the issue and further explicating immediate need for resolution.

The United States District Court has utilized the certification process to good effect in other contexts. For example, in *State ex rel Reynolds v. Aamodt*, 111 N.M. 4, 800 P.2d 1061

(1990), this Court was faced with the state law question whether it should deny water rights decrees to water rights holders who had failed to properly file for extensions of time to put water to beneficial use under their State Permit--a purely state law question affecting numerous files. The State Engineer contended that it could grant extensions retroactively; water right holders contended he could not. By certifying the question, the United States District Court sought a prompt resolution of the issue and avoided an incorrect decision as to the validity of water rights based on New Mexico law. The present case presents an even more compelling case for Certification.

WNMWPA states that the determination of whether a domestic well owner is entitled to three acre feet per annum pursuant to statute and to the Rules and Regulations of the New Mexico State Engineer poses important issues of State law and public policy for which no controlling precedent exists. The answering of the questions posed will finally determine an important aspect of this water rights adjudication, *i.e.*, the nature and extent of water rights associated with domestic wells. Because many of the water rights involved in this adjudication are domestic well rights, it is critical to have a final determination of this important question.[1]

No New Mexico appellate court has considered the questions posed for determination by the New Mexico Supreme Court. There is a dearth of case law regarding domestic wells in general and none specifically addressing the nature and extent of water rights associated with domestic wells. It is anticipated that the questions for which certification is sought will arise again due to the State Engineer's announced policy of limiting domestic wells to .7 acre feet per year. Thus any precedent set by this court may have far reaching consequences in other

[1] This issue is certain to arise again in the context of one of the several adjudications pending in the state courts, and will likely be finally determined by the New Mexico Supreme Court in the future. If that final determination conflicts with a federal court determination of the same issue in this case, the defendants in this case may have lost valuable rights.

adjudications. Under these circumstances, a consideration and decision by the New Mexico Supreme Court on this important issue of state law is particularly compelling.

Certification of the questions posited by WNMWPA is appropriate. It is particularly appropriate to certify questions of state law to the state courts for determination when the question is novel and the application of state law is unsettled. *Allstate Ins. Co. v. Brown,* 920 F.2d 664, 667-668(10th Cir. 1990); "When used properly, certification 'saves time, energy, and resources, and helps build a cooperative judicial federalism'." *Boyd Rosene and Associates, Inc. v. Kansas Mun. Gas Agency*, 178 F.3d 1363, 1365 (10th Cir. 1999), *quoting*, *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). While certification lies within the discretion of the Court, the New Mexico Supreme Court encourages the federal courts to certify novel questions of law when to do so will avoid unnecessarily protracted litigation. *Schlieter v. Carlos,* 108 N.M. 507, 511, 775 P.2d 709, 713 (1989), *citing*, *Amoco Prod. Co. v. Action Well Serv.* 107 N.M. 208, 755 P.2d 52 (1988). Certification is proper when the answer by the Supreme Court will be determinative of the issue facing the federal court. *Ormsby Development Co. v. Grace,* 668 F.2d 1140, 1149 (10th Cir. 1981). Certification must be requested before the applicant receives an adverse decision on the issue. *Armijo v. Ex-Cam, Inc.*, 843 F.2d 406 (10th Cir. 1988); *Massengale v. Oklahoma Bd. Of Examiners in Optometry,* 30 F.3d 1325 (10th Cir. 1994).

In this case, the nature and extent of water rights associated with domestic wells will not be decided on a global or basin-wide basis, meaning that these issues will be litigated on a case by case basis. As discussed above, the expense to individual water rights holders would be crushing. In contrast, a final determination of the questions by the New Mexico Supreme Court will completely determine these issues in this federal court adjudication and could avoid these costs. Because the issues are unsettled, it is appropriate to have the New Mexico Supreme

Court's analysis and decision on the issue, rather than rely on the federal court to make its best prediction on how the state's highest court would rule. *See e.g., Pehle v. Farm Bureau Life Ins. Co., Inc*., 397 F.3d 897, 901-902 (10th Cir. 2005).

The various issues surrounding domestic wells are appropriate for certification to the New Mexico Supreme Court. Several weeks ago, Mr. Charles DuMars asked Mr. D. L.Sanders, Chief Counsel for the New Mexico State Engineer, whether he would concur in certification. He indicated he would need to seek concurrence with the United States on this issue and would let Mr. DuMars know. He has not responded to that inquiry. While one would hope to receive the concurrence of Mr. Sanders and Mr. Bridgewater, their concurrence is not required. *See* Procedural and Scheduling Order (Doc. No. 215). This matter is of utmost importance to hundreds of rural residents living with the basin. A determination by the New Mexico Supreme Court will definitively answer the questions raised in this proceeding, and will promote judicial economy by saving time, energy and resources that will be necessarily be expended in litigating the issues on a case by case basis.

WHEREFORE, based upon the foregoing, WNMWPA respectfully requests that the Court certify the following questions to the New Mexico Supreme Court for consideration pursuant to Rule 12-607 NMRA (2005):

1. Does the domestic well statute, NMSA 1978, §72-12-1 *et seq.*, when coupled with the Rules and Regulations implementing the statute, NMAC 19.27.1.22, the actual language of permits issued by the State Engineer and the prior policy of the Office of the State Engineer, create a legal right and a reasonable expectation of a property interest of three acre feet per annum of water rights in the domestic well?

2. Can domestic well users, diverting water under either a domestic well permit, or through a pre-basin well, have their right to divert up to three acre feet of water per annum curtailed or limited, without prior notice, based upon their historical usage, even though they have not thus far been subjected to any

conditions requiring the water to be placed to beneficial use by a definite time or requiring the filing of a proof of beneficial use by a date certain?

3. Even if a domestic well user has not perfected a water right up to the amount of three acre feet per annum under a domestic well permit, does he or she nonetheless have a protected interest in the permit to appropriate water that cannot be curtailed without prior notice?

4. Does the State Engineer or the judiciary have any authority to limit the diversion of water under a domestic well permit, issued pursuant to NMSA 1978, § 72-12-1, when the legislature has mandated that the State Engineer "shall" issue a permit for the irrigation of not to exceed one acre of non-commercial trees, lawn and garden, or household or other domestic use?

5. Is any limitation upon a domestic well in this stream adjudication a violation of Art. IV, §34 of the New Mexico Constitution providing that no existing rule of court or regulatory rule shall be changed during a pending action?

6. If the facts demonstrate that, a) the actual amount of water required to irrigate not more than one acre of non-commercial trees or garden is a diversionary amount of three acre feet per year, b) if the existing permits on their face provide an entitlement to this amount and do not require application of water to beneficial use within a specific period of time, and c) that allowing the diversion of this amount of water would have a *de minimus* effect on all other users of water within the basin, then should each domestic user be authorized to divert this amount under his permit as a part of a final decree whether or not he has done so historically?

Dated: November 2, 2005

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Motion to Certify Questions to the New Mexico Supreme Court was mailed by first class mail to all counsel of record and *pro se* parties, as follows:

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