

**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,**

Plaintiffs,

and

No. 01cv00072 BB/WWD-ACE

**ZUNI INDIAN TRIBE AND
NAVAJO NATION,**

ZUNI RIVER BASIN

Plaintiffs-in-Intervention,

v.

A & R Productions, *et al.*,

Defendants.

**UNITED STATES' RESPONSE TO MOTION TO CERTIFY QUESTIONS TO
THE NEW MEXICO SUPREME COURT**

The United States of America (“United States”) hereby responds to the *Motion to Certify Questions to the New Mexico Supreme Court*, filed November 2, 2005 (Doc. No. 396) (“Motion to Certify”) by counsel for members of the Western New Mexico Water Preservation Association (“WNMWPA”). As an opening matter, the United States notes that the motion incorrectly identifies the WNMWPA as movant. Because the United States has never joined the WNMWPA as a defendant, and the organization has never been granted leave to intervene, the WNMWPA is not a party to this action and therefore cannot file motions in the case. Accordingly, the United States

will treat the motion as having been filed on behalf of the members of the WNMWPA who are defendants in this action (the “Movants”). The United States urges that the motion be denied for the following reasons¹:

1. Movants base their Motion to Certify, in part, on unsubstantiated factual assertions. For example, the Motion to Certify states, at 2, that “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.” This assertion is not supported by any affidavit and the United States declines to stipulate that counsel for Movants is an expert in hydrology. Moreover, Movants do not offer authority supporting their suggestion that “the probability of well interference” is relevant to the question of the quantity of the water right held by any domestic well user.

2. Movants admit in their Motion to Certify at 6, and cite authorities holding, that it is “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” and “when the answer by the Supreme Court will be determinative of the issue facing the federal court.” Nonetheless, Movants have failed to show that these conditions are satisfied.

3. The United States submits that the convoluted wording of the six questions set forth in the Motion to Certify at 7-8 disguises only one real question: Are

¹ The Motion to Certify, at 7, suggests that counsel for the Movants was not obliged to determine whether other parties concurred with or opposed the motion, citing the Special Master’s July 20, 2003 *Procedural and Scheduling Order* (Doc. No. 215). However, that Order, at 6, clearly states that motion practice in this matter is governed by Judge Black’s March 27, 2003 *Administrative Order Establishing Motion Practice and Procedure* (Doc. No. 191). The March 27, 2003 Order, in turn, in Rule 7.4(a) on pages 2-3 provides that “[f]or motions of general application or substantive impact, any movant, either by counsel or appearing pro se, must attempt to determine whether there is concurrence or opposition to a proposed motion and order granting the motion by contacting each attorney of record and defendant pro se before filing the motion.” Rule 7.4(c) then requires that each motion include a recitation concerning the efforts movant has made to comply with Rule 7.4.(a).

water rights for domestic wells in New Mexico limited to the quantity of water beneficially used? Movants, however, have failed to cite any authority suggesting that there is anything novel or unsettled about the proposition that all water rights arising under New Mexico state law, including water rights for domestic wells, are limited to the amount applied to beneficial use. *See* N. M. Const., art. 16, § 3 (“Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”); § 72-12-2 NMSA 1978 (“Beneficial use is the basis, the measure and the limit to the right to the use of waters described in this act.”); State ex rel. Martinez v. City of Las Vegas, 135 N.M. 375, 386, 89 P.3d 47, 58 (2004) (“As it is only by the application of the water to a beneficial use that the perfected right to the use is acquired, it is evident that an appropriator can only acquire a perfected right to so much water as he [or she] applies to beneficial use.”) (quoting State ex rel. Cmty. Ditches v. Tularosa Cmty Ditch, 19 N.M. 352, 371, 143 P. 207, 213 (1914)); Hanson v. Turney, 136 N.M. 1, 94 P.3d 1 (Ct. App. 2004) (*inter alia*, discussing the distinction between water rights and permits to appropriate water). Movants have cited no case suggesting that these established precedents are in question or inapplicable to water rights for domestic wells.

4. Nor have Movants shown that any answer provided by the New Mexico Supreme Court to the six questions set forth in the Motion to Certify at 7-8 will be determinative of the issues facing this Court with respect to the adjudication of domestic well users’ water rights. For example, Movants’ fourth question asks, *inter alia*, whether “the judiciary have any authority to limit the diversion of water under a domestic well permit...” Movants do not spell out what they mean by “the judiciary.” However, if they intend thereby to include the present Court, the United States submits

that it is obviously inappropriate, and contrary to law, for a United States District Court to ask a state supreme court to determine the extent of the federal court's authority. In addition, even if the New Mexico Supreme Court were to rule in Movants' favor on all of the questions proposed in the Motion to Certify – a circumstance that seems highly unlikely given the authorities cited *supra* at 2 - 3 –, this Court would still have to decide whether domestic well rights in the Zuni River Basin should be limited to beneficial use as a consequence of federal law. *Cf. e.g., Arizona v. California*, 298 U.S. 558, 565-66 (1936) (“Under [the doctrine of appropriation], diversion and application of water to a beneficial use constitute an appropriation, and entitle the appropriator to a continuing right to use the water, to the extent of the appropriation, but not beyond that reasonably required and actually used.” (Emphasis added.)).

5. Much of the Motion to Certify seems to be, in essence, a complaint about the conduct of the New Mexico State Engineer with regard to this proceeding. The United States defers to the State of New Mexico with regard to more particular issues the Motion to Certify may raise concerning the authority of the New Mexico State Engineer, the interpretation of rules promulgated by the State Engineer, or whether the State Engineer can be estopped based on circumstances relevant to this case. The United States asserts that nothing in state law precludes the State Engineer from advocating the view that domestic water rights are limited to the amount applied to beneficial use. However, even if the State were subject to such a legal impediment, it could have no force or effect against the United States.

CONCLUSION

Movants have failed to articulate a question of law that is novel or unsettled under relevant state law authorities. In addition, they have not shown that answers to the six questions proposed in the Motion to Certify would determine any actual issue before this Court. The United States respectfully urges the Court to deny the Motion to Certify, without prejudice to Movants' ability to file a suitably tailored motion for summary judgment with this Court.

Submitted this 30th day of November, 2005.

COUNSEL FOR THE UNITED STATES:

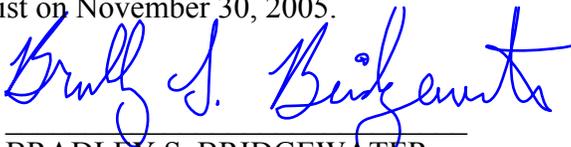


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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing *United States' Response To Motion To Certify Questions To The New Mexico Supreme Court* were mailed to all persons on the attached distribution list on November 30, 2005.



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