

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

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|------------------------------------|---|---------------------|
| STATE OF NEW MEXICO, ex rel. STATE |) | |
| ENGINEER, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | |
| |) | |
| R. LEE AAMODT, et al., |) | No. 66cv6639 MV/WPL |
| |) | |
| Defendants, |) | |
| |) | |
| and |) | |
| |) | |
| UNITED STATES OF AMERICA, |) | |
| PUEBLO DE NAMBÉ, |) | |
| PUEBLO DE POJOAQUE, |) | |
| PUEBLO DE SAN ILDEFONSO, |) | Subfile: PM-43319 |
| and PUEBLO DE TESUQUE, |) | |
| |) | |
| Plaintiffs-in-Intervention. |) | |

DEFENDANT TRUJILLO’S REPLY TO PLAINTIFF’S RESPONSE ON APPEAL OF SPECIAL MASTER’S RECOMMENDATIONS TO DENY DEFENDANT’S MOTION FOR RELIEF FROM THE COURT’S ORDER (7033)

Defendant, by her undersigned attorney, Replies to Plaintiff’s Response on Appeal of Special Master’s Recommendations to Deny Defendant’s Motion for Relief From the Court’s Order (No. 7011), as follows:

1. The Court has jurisdiction to enter a preliminary injunction to maintain the status quo or to prevent an irreparable harm pending the entry of a final judgment. **O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft (389 F.3d 973, NM)** The preliminary injunction herein (No. 641) orders the Plaintiff State Engineer to restrict domestic well water use to indoor use

only when it issues permits. The Order is not expressly limited in its operation to such time as the Court enters its final judgment. The Court is without jurisdiction to make the preliminary injunction permanent without a trial. ***O Centro Espirita Beneficiente Uniao Do Vegetal v.***

Ashcroft, Id at p. If the Court's Order is limited by practice and implication to such time as a final judgment is entered, the Plaintiff State Engineer gives the Order a meaning of permanency of the permit restriction not intended by the Court.

2. The preliminary injunction herein is subject to heightened scrutiny because it 1) changes the status quo by restricting the issuance of domestic well water permits; 2) it commands the Plaintiff State Engineer to restrict the non-Indians' water use. Although the Order does not differentiate between non-Indians and Pueblos, the Pueblos are not required to obtain a permit so the Order is not applied to the Pueblos; and 3) it operates to award the Pueblos all that they could recover by a trial by its unequal treatment of non-Indians and the Pueblos. The Pueblos are not required to apply for permits so the preliminary injunction is not enforced against the Pueblos. The Pueblos are not monitored nor regulated by the Plaintiff State Engineer which is a *de facto* permit for the Pueblos, through the United States of America, to take all the groundwater in the N-P-T Basin. ***O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft (389 F.3d 973, NM)***

3. The ***Stop the Beach Renourishment, Inc. v. State of Florida Department of Environmental Protection***, 560 U.S. ____ (2010) case cited to support the Recommendations that the Due Process Clause is not violated simply reaffirms the prior holdings that property is determined by state law as a function of expectation. The beachfront property owners had no expectation of

a property right to have their property boundary extend to the sea. Florida law allows the state to renourish the beach, which it does with publicly owned sand, therefore the new extended beach is owned by the public. Then the Justices engage in academic dictum regarding a taking versus a deprivation without Due Process. The case herein involves a permanent taking of the statutory and historical right to irrigate one's land if the water is available.

4. The Recommendations urge the Court to deny Defendant Trujillo's motion for relief from the Court's Order because to grant the Order "...invites the invalidation of the injunction for each and every post-1983 moratorium permittee, and therefore invites the complete negation of the very terms of the injunction." (Recommendations, p. 5). The injunction has been in effect since 1983. To date, the restrictions to indoor use have not been enforced. The adjudications are just commencing. Even if granting Defendant's motion for relief from Order results in the removal of the restriction against non-commercial irrigation for post-1983 moratorium permittees, the result will have minimal impact on the progress of the adjudication because the 1966 hydrographic study is stale and must be redone and the adjudication is now being restarted. Now is the time to correct the Order before the adjudication progresses.
5. The possibility of affecting other domestic well owners by lifting the stay is more reason to lift the stay is a legal argument which raises issues of justice and rule of law. The Recommendation's concern that granting Defendant's motion for relief will invalidate the progress of the adjudication seems to recommend ignoring the rights of the permittees for the convenience of the Court and some of the parties. The recommendations do not cite authority for preferring convenience to rule of law.

6. The Special Master submits that the permit must be read as a whole. (Recommendations, p.)

Yet on one hand, the Recommendations give the restriction to indoor use contained in the permit the force of an absolute requirement that must be enforced while treating another part of the permit, the part that makes it legal for Defendant to divert up to 3.0 acfy of groundwater, as if it confers no right in the Defendant and no obligation in the Plaintiff State as if Section 72-12-3(E) NMSA 1978 does not exist. Defendant Trujillo's expectation is that she owns a perpetual legal right to divert up to 3.0 afpy from the N-P-T Basin, limited by Section 72-12-8 NMSA 1978.

7. The preliminary injunction is now twenty seven years old. If the preliminary injunction is based on a hydrographic study, that study is now stale and must be redone. If the preliminary injunction was once necessary and legal, it is now subject to a heightened scrutiny. Defendant Trujillo respectfully submits that the Court's preliminary injunction is not intended to be a permanent restriction against use of domestic well water for non-commercial irrigation without a trial. For the foregoing reasons, Defendant respectfully requests the Court to grant her motion for relief from the Court's preliminary injunction to the extent that it restricts her use of her domestic well water to indoor use only.

FAMILIA LEGAL SERVICES

Filed electronically

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I hereby certify that on August 17, 2010, I filed the foregoing electronically through the CM/ECF system which caused the parties or counsel reflected on the Notice of Electronic filing to be served by electronic means.

Filed electronically

Lorenzo E. Atencio