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

STATE OF NEW MEXICO, ex rel. STATE ENGINEER, Plaintiff, v. R. LEE AAMODT, et al., Defendants, and UNITED STATES OF AMERICA, PUEBLO DE NAMBÉ, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, and PUEBLO DE TESUQUE, Plaintiffs-in-Intervention.	)	No. 66cv6639 WJ/WPL Subfile: PM-89217

MOTION AND MEMORANDUM FOR SUMMARY JUDGMENT ON THE CLAIMS OF CHRISTIAN GOSSEIN UNDER SUBFILE PM-89217

COMES NOW the Plaintiff State of New Mexico, ex rel. State Engineer ("State") and pursuant to Fed.R.Civ.P. 56, moves the Court for summary judgment with respect to the post-1982 domestic well right of Defendant Christian Gossein under subfile PM-89217, and as grounds Plaintiff states the following:

I. Introduction

The elements that must be declared in the adjudication of an individual water right such as that claimed by Defendant Gossein, are described expressly by statute:

> Upon the adjudication of the rights to the use of the waters of a stream system, a certified copy of the decree shall be prepared and filed in the office of the state engineer by the clerk of the court, at the cost of the parties. Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation,

> except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

§72-4-19 NMSA 1978. Therefore the only information that is relevant in this domestic well subfile proceeding are the elements of the water right arising from Defendant's beneficial use of water from his one-household domestic well developed under permit number RG-89217.

That permit is one of hundreds issued after January 13, 1983, all of which are limited to indoor use only pursuant to the Court's *Order* (No. 641) of that same date. Those permits, and their resulting wells, are alternatively characterized as being "post-moratorium" or "post-1982." On June 14, 2007, the Court entered its *Procedural and Scheduling Order for the Adjudication of Water Rights Under Domestic Wells Permitted After January 13, 1983* (No. 6239), requiring all identified post-1982 domestic well water right claimants be served with a packet that includes a proposed Domestic Well Order describing the elements of their post-1982 domestic well water rights, and the Court's December 11, 2006 *Notice and Order to Show Cause* ("*Order to Show Cause*") (No. 6194). The *Order to Show Cause* requires that Defendants who have a claim to a water right under post-1982 domestic wells show cause:

> 1. Why the claimants' water rights under a post-1982 domestic well permit should not be adjudicated in the quantity of 0.5 acre feet per annum; and
>
> 2. Why the claimants' water rights under a post-1982 domestic well permit should not otherwise be adjudicated consistent with the terms of the domestic well permit.

Id.

On or about January 10, 2014, Defendant was served with a packet containing a proposed Domestic Well Order and the *Order to Show Cause*, as required by the Court. See January 10,

2014 *Order Granting The State of New Mexico's Thirtieth Motion to Join Additional Parties Defendant* (No. 8074); *see also* December 17, 2013 *Thirtieth Motion to Join Additional Parties Defendant* at 2 (No. 8048). The substantive elements of his water right described in the proposed Domestic Well Order are as follows:

Purpose: Domestic use for One Household pursuant to NMSA § 72-12-1 and -1.1

State Engineer File No.: RG-89217

Priority: 04/27/2007

Source of Water: Underground waters of the Rio Grande Underground Water Basin.

Point of Diversion: Well No. RG-89217 Location: X= 568,648 Y= 1,782,841 on the New Mexico State Plane Coordinate System, Central Zone, 1927 N.A.D.

Place of Use: Within the property owned by the Defendant(s) served by the well

Amount of water: Not to exceed a diversion and consumption of 0.5 acre feet per year from the well described above unless a more restrictive diversion limit applies pursuant to court order, covenant or ordinance.

Other Conditions: Use shall be limited strictly to household, drinking and sanitary purposes; water shall be conveyed from the well to the place of use in closed conduit and the effluent returned to the underground so that it will not appear on the surface. No irrigation of lawns, gardens, trees or use in any type of pool or pond is authorized. All other conditions of State Engineer Permit No. RG-89217 for the above described well are also incorporated herein.

On November 12, 2014 Defendant filed a *Subfile Answer* (No. 9918) rejecting the State's proposed Domestic Well Order with respect to subfile PM-89217 stating that "Defendant claims 3.0 AFY pursuant to his permit and Sec. 72-12-1-1 NMSA (1978)" and "Defendant claims a right to irrigate his trees, garden and lawn with domestic well water." In the February 18, 2015 *Joint Status Report and Provisional Discovery Plan* at 2 ("*JSR*") (No. 10106), Defendant Gossein again contends that "Defendant's post-1982 domestic well water rights should allow for outdoor water

use of their permit quantities of 3.0 acre feet per year."

It is worth noting at the outset that Defendant Gossein's permit limit is actually 1.0 acre foot per year, not 3.0.

In sum, Defendant rejects the substantive elements of the State's proposed determination of his water rights in this subfile only as to: 1) the amount of water; and 2) the condition limiting the use of water to indoor use only.

II. The Summary Judgment Standard

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is an integral part of the Federal Rules of Civil Procedure, which are intended to "secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1). Under Rule 56(c), summary judgment is appropriate when the court, viewing the record in the light most favourable to the non-moving party, determines that "there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law." *Thrasher v. B & B Chem. Co., Inc.*, 2 F.3d 995, 996 (10th Cir. 1993).

The movant bears the initial burden of showing "there is an absence of evidence to support the non-moving parties' case." *Celotex*, 477 U.S. at 325. Once the movant meets this burden, Rule 56(e) "requires the non-moving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324. (quoting Fed. R. Civ. P. 56(e)).

"Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

III. Statement of Undisputed Material Facts

1. On April 27, 2007, the State Engineer issued Defendant Gossein's predecessor-in-interest domestic well permit RG-89217. RG-89217 Permit at p. 1, attached hereto as Exhibit A.

2. Permit RG-89217 allows for the diversion of up to one (1.0) acre-foot of ground water per annum for use in "one household". *Id.* at pp. 1-3.

3. Permit RG-89217 contains an indoor use restriction pursuant to the Court's *Order* of January 13, 1983:

> Use shall be limited strictly to household, drinking and sanitary purposes; water shall be conveyed from the well to the place of use in closed conduit and effluent returned to the underground so that it will not appear on the surface. No irrigation of lawns, gardens, trees or use in any type of pool or pond is authorized under this permit.

Id. at p. 4.

4. On February 22, 2013, Defendant Gossein filed his change of ownership with the State Engineer identifying himself as the successor-in-interest to, and sole owner of domestic well RG-89217. State Engineer Change of Ownership for RG-89217, attached hereto as Exhibit B.

5. Neither Defendant Gossein, nor any of his predecessors-in-interest, ever appealed the indoor use restriction contained in permit RG-89217 or the limitation to one (1.0) acre foot through the Office of the State Engineer administrative processes.

6. During the course of discovery, Defendant Gossein did not identify an expert

witness, nor disclose the existence of any evidence of any kind to show cause why his "water rights under a post-1982 domestic well permit should not be adjudicated in the quantity of 0.5 acre feet per annum" or why they "should not otherwise be adjudicated consistent with the terms of the domestic well permit."

7. Discovery is now closed, and Defendant Gossein has disclosed no evidence of the quantity of water he is beneficially using.

IV. Memorandum - The State is Entitled to Judgment as a Matter of Law

A. Defendant's post-1982 domestic well right should be adjudicated in the quantity of 0.5 acre feet per year.

As noted above, Defendant Gossein's domestic well permit allows for the diversion of up to 1.0 acre foot of ground water per annum, not 3.0. That said, here the permit limit is irrelevant. The Constitution of the State of New Mexico requires that beneficial use, not a permit, define the quantity of a water right. *See* N.M. Const. Art. 16, § 3. On September 20, 2012, in ruling on a similar post-1982 domestic well claim this Court found that:

> A permit is not a water right and Trujillo does not cite any authority, nor did the Court find any authority, for the proposition that a permit to appropriate water is a perfected property right.

Memorandum Opinion and Order at p. 6 (No. 7757) (emphasis added). The Court continued:

> "A water permit is an inchoate right, and is the necessary first step in obtaining a water right. It is the authority to pursue a water right – a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired." *Hanson v. Turney*, 136 N.M. 1, 3 (Ct. App. 2004) (language in New Mexico water statutes "is compelling evidence that the legislature did not intend to allow permit holders who had not yet applied any water to beneficial use to be considered owners of a water right); see also N.M. Stat. Ann. § 72-12-18 (distinguishing an "owner of a water right" from a "holder of a permit").

Id. The Court added that it had previously addressed the issue of whether water rights for domestic wells in New Mexico are limited to the quantity of water beneficially used, as opposed to the permit amount, and quoted the Zuni River Basin Adjudication Court in support of the former approach:

> New Mexico law is clear on the subject. The constitutional provisions and statutes . . . as well as abundant case law clearly state that beneficial use defines the extent of a water right. This fundamental principal is applicable to all appropriations of public waters. Only by applying water to beneficial use can an appropriator acquire a perfected right to that water.

Id. at p. 7 (citing *U.S. v. A & R Productions*, No. 01cv72, Doc. No. 733 at 4, filed June 15, 2006 (D.N.M.) (Black, J.) (citations and quotation marks omitted). Therefore, as well established under existing law, Defendant Gossein's water right is quantified by the amount of his beneficial use, not by the terms of the permit.

This Court has approved an evidentiary presumption that the quantity of beneficial use associated with a post-1982 domestic well limited to indoor use is 0.5 acre-feet per annum. *See* December 11, 2006 *Notice and Order to Show Cause* (No. 6194); see also June 14, 2007 *Procedural and Scheduling Order for the Adjudication of Water Rights Under Domestic Wells permitted After January 13, 1983* (No. 6239). This evidentiary presumption has been upheld by the Court on many occasions. *See e.g.*, September 20, 2012 *Memorandum Opinion and Order* at 9-10 (No. 7757). It is supported by a variety of sources already in the Court record in this case. *See e.g.*, June 24, 2009 *Notice of Filing 2008 Report of Post Moratorium Wells Water Master* (No. 6740). Literally hundreds of orders adjudicating wells with that quantity have been entered by this Court.

The burden of proof with respect to quantifying a water right in a stream system

adjudication falls squarely on a defendant, or the owner of the water right. *See e.g.*, February 26, 2010 *Order Granting Motion for Summary Judgment Regarding the Claims of Elisa Trujillo Under Subfile PM-43319* at 6 (No. 6917) (citing *Pecos Valley Artesian Conservancy Dist. v. Peters*, 54 N.M. 148, 152-153, 193 P.2d 418, 422-423 (1948)). Defendant has not identified any expert witness, fact witness, or disclosed any evidence of any kind to show cause why the Court should not apply the 0.5 acre feet per year evidentiary presumption to quantify his domestic well water use. Defendant Gossein has not provided any evidence to show that he is beneficially using any amount greater than 0.5 acre-feet per year, as proposed in the *Order to Show Cause*. As such, there is no issue of material fact, and Plaintiff is entitled to judgment as a matter of law.

B. Defendant's Post-1982 Domestic Well Right Should be Adjudicated Consistent with the Terms of His Domestic Well Permit.

Permit RG-89217 includes a specific condition of approval, No. 06-8, which restricts the use of water from Defendant's well

> . . . strictly to household, drinking and sanitary purposes; water shall be conveyed from the well to the place of use closed conduit and the effluent returned to the underground so that it will not appear on the surface. No irrigation of lawns, gardens, trees or use in any type of pool or pond is authorized under this permit.

See RG-89217 Permit at p. 4, attached hereto as Exhibit A. Neither Defendant Gossein nor his predecessors-in-interest ever pursued their administrative remedies to appeal the indoor use restriction contained in permit number RG-89217. Such administrative remedies require an appeal within thirty days through the statutory process for appealing State Engineer decisions provided by NMSA 1978 Section 72-2-16 and NMSA 1978 Section 72-7-1. Part (B) of Section 72-7-1 expressly provides that such appeals must be taken within "thirty days after receipt by certified mail of notice of the decision, act or refusal to act. <u>If an appeal is not timely taken, the</u>

action of the State Engineer is conclusive." NMSA 1978 Section 72-7-1 (B) (emphasis added). As a result, by operation of statute, the action of the State Engineer on Defendant's permit number RG-89217 became conclusive in 2007.

The notion that such an indoor use restriction may be included in a domestic well permit is fully supported by New Mexico law. This Court has determined that "the Domestic Well Statute, when construed with other provisions in New Mexico's water code, does not grant a domestic well permit holder an absolute right to use one acre-foot of water for non-commercial irrigation":

> Instead, New Mexico law provides that the State Engineer may issue domestic well permits with conditions which limit the amount and use of water, including limitations imposed by courts.

March 30, 2012 *Memorandum Opinion and Order* at pp. 7-8 (No. 7579) (emphasis added). Indeed, the New Mexico Administrative Code expressly provides that "[t]he drilling of a 72-12-1.1 domestic well and the amount and uses of water permitted are subject to such additional or more restrictive limitations imposed by a court, or by lawful municipal or county ordinance." 19.27.5.9(D) (emphasis added). As the New Mexico Supreme Court noted, "[t]herefore, not only are domestic wells subject to curtailment by the State Engineer, they are explicitly subject to limitations by our courts and by local ordinance, should such a need arise after a proper evidentiary showing." *Bounds v. D'Antonio*, 2013-NMSC-037, ¶ 38, 306 P.3d 457, 471 (NM 2013). In the instant matter, of course, the "additional and more restrictive limitation" to indoor use only on Defendant Gossein's permit number RG-89217 was imposed as a result of this Court's January 13, 1983 *Order*.

Defendant Gossein has not identified any evidence that his use of water is not limited by this condition. There is no issue of material fact, and Plaintiff is entitled to judgment as a matter

of law that Defendant's post-1982 domestic well right should be adjudicated consistent with the terms of the domestic well permit, including the limitation to indoor use only.

V. Conclusion

Pursuant to this Court's Order to Show Cause and existing law, Defendant Gossein's post-1982 domestic well right should be limited to indoor use only pursuant to the conditions of his permit, and adjudicated an amount of water not to exceed a diversion and consumption of 0.5 acre feet per year from the well unless a more restrictive diversion limit applies pursuant to court order, covenant or ordinance. There is no genuine issue of material fact regarding these elements of Defendant Gossein's post-1982 domestic well water right, and the State is entitled to judgment as a matter of law.

Plaintiff's counsel contacted Defendant's counsel, and she has indicated she opposes this Motion.

WHEREFORE, Plaintiff the State requests this Court grant summary judgment in its favor regarding the claims of Defendant Christian Gossein under domestic well permit RG-89217, and enter the Domestic Well Order adjudicating Defendant Gossein's post-1982 domestic well right in an amount of water not to exceed a diversion and consumption of 0.5 acre feet per year from the well, for household, drinking and sanitary purposes only, and otherwise under the terms of the State's Proposed Domestic Well Order.

/s/ Edward C. Bagley

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on January 11, 2016, 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.