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,	)	No. 66cv6639 WPJ/WPL
	)	Sub-file RG 89217
and	)	
UNITED STATES OF AMERICA, PUEBLO DE NAMBE, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, and PUEBLOS DE TESUQUE,	)	
Plaintiffs-in-Intervention.	)	

DEFENDANT GOSSEIN'S RESPONSE TO THE PLAINTIFF'S JANUARY 11, 2016 MOTION FOR SUMMARY JUDGEMENT

COMES NOW Defendant Christian Gossein and pursuant to Fed.R.Civ.P. 56 submits his combined Memorandum and Response to the State of New Mexico, ex rel. State Engineer's ("State") Motion and Memorandum for Summary Judgment on the Claims of Christian Gossein under Subfile RG-89217 (doc. 10438) and responds as follows:

I. INTRODUCTION

On January 11, 2016, the State filed its Motion and Memorandum for Summary Judgment on the Claims of Christian Gossein under Subfile RG-89217 (10438) (hereinafter referred to as "Motion for Summary Judgment"). In that motion the State asserted that:

> "*…the only information 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 RG-89217*".

See Introduction to State's Motion for Summary Judgment at Paragraph 1 (No. 10438). The State's Motion for Summary Judgment asserts that the Court's January 13, 1983 Order (No. 641) correctly applied a restriction on Christian Gossein's well permit that limited his use of water from well RG-89217 to indoor use only. The Order provides that:

> "*no permits to appropriate underground waters shall be issued within the Rio Pojoaque stream system under Section 72-12-1, N.M.S.A. 1978. Permits may issue limited to the use of water for household, drinking and sanitary purposes within a closed water system that returns effluent below the surface of the ground minimizing and [sic] consumptive use of water. All subject to further order of the court*."

This is hereinafter referred to as the "indoor use restriction", which was applied to all Post-1983 wells. That restriction was reflected in the language of Mr. Gossein's permit as follows: "*Use shall be limited strictly to household, drinking or sanitary purposes…No irrigation of lawns, gardens, trees or use in any type of pool or pond is authorized under this permit.*" See Permit: Special Condition 06-8 (Exhibit 2).

Finally, the State's Motion for Summary Judgment also cites to the December 11, 2006 Order to Show Cause (No. 6194) (hereinafter referred to as "Order to Show Cause"), which was issued to Christian Gossein, and asserts that with that Order to Show Cause the court created 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*."

Of the factual elements that Christian Gossein must establish to prove his water right's claim as will be discussed in detail below, Defendant agrees with the State's summary of uncontested facts in paragraphs 1-5 but disputes paragraphs 6 and 7 as those facts are expressly disputed. Specifically, Mr. Gossein attaches his affidavit (Exhibit 1) with this response to

illustrate why those are contested material facts in this case that illustrate that the grant of the State's Motion for Summary Judgment would be improper. In addition to the general elements of a water rights claim, under the applicable substantive law, Defendant raises an additional legal defense, which presents a material issue of fact before the court, pursuant to the holding of the New Mexico Supreme Court in *State ex rel. Reynolds v. Mendenhall*, regarding whether Mr. Gossein has provided evidence of diligent development of his water right sufficient to relate back to the amount of water issued in his original permit for 1.0 acre foot of water per year even if he has not provided facts sufficient to show that he was able to put the full amount of water issued in the permit to use on the ground. 68 N.M. 467 (N.M. 1961).

II. APPLICABLE LEGAL STANDARDS OF REVIEW

Defendant Gossein agrees with general summary of the standard of review on Motions for Summary Judgment presented by the State, however, the law applicable must be looked at in further detail in order to provide a full analysis of whether it is proper to grant the State's Motion for Summary Judgment, and therefore, Defendant submits the following supplement to the State's statement of applicable law.

In creating a rebuttable presumption that no material fact exists, as the moving party, the State must first establish *"that the materials cited do not establish the…presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.*" FRCP 56(c)(B). In determining whether summary judgment is appropriate, the court must determine "*whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law*." *Id.* at 251–52, 106 S.Ct. at 2511–12". *Thrasher v. B&B Chemical Co., Inc.*, 2 F.3d 995, 996 (10th Cir. 1993). Therefore, *"At the summary judgment stage, the court's function is not to weigh the evidence and*

determine the truth, but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The State's burden of production as the movant is to point to the uncontested or non-controverted facts on the record that *"demonstrate an absence of a genuine issue of material fact given the relevant substantive law." Thomas v. Wichita Coca-Cola Bottling Co.,* 968 F.2d 1022, 1024 (10th Cir.1992) (citing Celotex, 477 U.S. at 322-23, 106 S.Ct. at 2552-53) See also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251, 106 S.Ct. 2505, 2511-12, 91 L.Ed.2d 202 (1986)). It is impermissible for a Court to establish a greater evidentiary burden to be imposed at summary judgment that would shift the Court's assessment of the case from an evaluation of minimum facts to an evaluation of the weight of the facts presented. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, at 247, 106 S. Ct. 2505, at 2509, (U.S. 1986) (citing *New York Times Co. v. Sullivan,* 376 U.S. 254, 279–280, 746 F.2d, at 1570, 84 S.Ct. 710, 725–726, (U.S. 1964)).

Once the State, as the movant, has met its initial burden, the Defendant must then *"either establish the existence of a triable issue of fact under Fed.R.Civ.P. 56(e) or explain why he cannot ... under Rule 56(f)." U.S. v. Simons,* 129 F.3d 1386 at 1386 (10th Cir. 1997) (citing *Pasternak v. Lear Petroleum Exploration,* 790 F.2d 828, 832 (10th Cir.1986))." *U.S. v. Simons,* 129 F.3d 1386 at 1386 (10th Cir. 1997).

The substantive law will identify which facts are material, and the inquiry regarding materiality is separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. "*While the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (U.S. 1986).

The substantive law on water rights claims recognizes that "*all existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed*." *Estate of Boyd v. US*, 344 P.3d 1013 (N.M. App. 2014). To establish an existing water right, a claimant must show:

a) intent to appropriate the water;

b) actual diversion of water; and

c) application of water to beneficial use.

Id. In general, the Court reviews the claimants permit for evidence of these elements and any objections that have been made to the permit conditions. *State ex rel. Reynolds v. Molybendum Corp*., 570 F.2d 1364 (10th Cir. 1978). In a stream system adjudication, the defendant owner of the water right has the burden of proof with respect to quantifying a water right. See *Pecos Valley Artesian Conservancy Dist. v. Peters*, 193 P.2d 418, 422-423 (1948). However, the New Mexico Supreme Court provided a defense or exception to this burden of quantifying a water right in *State ex rel. Reynolds v. Mendenhall* where a water rights claimant can show that he has diligently developed his water right but was unable to divert water for the beneficial use intended. 68 N.M. 467 (N.M. 1961).

III. ARGUMENTS

Of the factual elements that Christian Gossein must establish to prove his water right's claim, the parties dispute whether he has established an intent to apply water from well RG 89217 to outdoor beneficial use; whether he has actually diverted water from well RG-89217 for outdoor use; whether water was beneficially used outdoors from RG-89217; and whether he has diligently developed his water right. As we discussed previously, Defendant Gossein has

presented triable and material issues of fact regarding his water rights claims in this suit and therefore a grant of Summary Judgment is not proper.

1. **First, the indoor use restriction in the permit for RG-89217 and the Order on which it is based, is void because it is a *per se* violation of §72-12-1.1 NMSA; and b) the indoor use restriction creates an additional burden of proof of the water rights claimant that runs contrary New Mexico law and the federal case law pertaining to Motions for Summary Judgment. Because the indoor use restriction is void, evidence of outdoor beneficial use of water is relevant in assessing whether to grant the State's Motion for Summary Judgment and Defendant has provided facts sufficient to defeat that Motion.**

Here a review of the permit shows that Mr. Gossein's well RG-89217 was permitted pursuant to the domestic well statute at N.M.S.A §72-12-1.1 (hereinafter "domestic well statute"). The domestic well statute at §72-12-1.1 reads:

"*A person… desiring to use public underground waters…for irrigation of not to exceed one acre of noncommercial trees, lawn or garden or for household or other domestic use shall make application to the state engineer for a well on a form to be prescribed by the state engineer... provided that permits for domestic water use within municipalities shall be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978.*"

N.M. Stat. Ann. §72-12-1.1

Further, Christian Gossein's well permit for RG-89217 contains the following specific condition of approval "*Use shall be limited strictly to household, drinking or sanitary purposes…No irrigation of lawns, gardens, trees or use in any type of pool or pond is authorized under this permit.*" See Exhibit 2 Permit: Special Condition 06-8.

If Mr. Gossein can show that the indoor use restriction in his permit is void as a matter of law, then the facts supporting his claims to outdoor water usage consistent with the provisions at §72-12-1 *et seq.* (also referred to as "the domestic well statute") may be considered by the court in evaluating the amount of water he has placed to use from his well, and also in evaluating whether Summary Judgment is appropriate. Therefore, it follows that the court must make a determination of whether the indoor use restriction in his permit is valid.

a) Pursuant to the Statutory provision at §72-12-1.1 NMSA 1978 Defendant disputes the State's assertion that the State Engineer had legal authority to place a restriction on his domestic well permit that limited his use of water from well RG-89217 to indoor use only, and asserts that outdoor water usage is part of the measure of beneficial use per the statute.

In evaluating whether summary judgment is appropriate, the court should consider facts Mr. Gossein has presented to support his outdoor usage of water from his domestic well for irrigation of non-commercial trees, lawn and garden because whether outdoor irrigation of non-commercial trees, lawn and garden is considered to be a "beneficial use" of water as contemplated by the legislature in enacting the domestic well statute at 72-12-1.1 NMSA 1978 is a material issue of fact before the court because the indoor use restriction in his permit, or alternatively in the January 13, 1983 Order (doc. 641), constitute a *per se* violation of the statutory provision at §72-12-1.1 NMSA 1978 and is therefore illegal and void as a matter of law. The general rule of law is that a restriction made in violation of a statute is void. *Douglass v. Mutual Benefit Health & Accident Ass'n*, 1937-NMSC-097, 42 N.M. 190, 76 P.2d 453 (S. Ct. 1937). In 1937 the United States Supreme Court stated the rule as follows:

"*We are, therefore, brought to the true test, which is that while, as a general rule, a penalty implies a prohibition…the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition or to render the prohibited act void, the courts will so hold, and construe the statute accordingly.*"

Douglass v. Mutual Benefit Health & Accident Ass'n, 1937-NMSC-097, 42 N.M. 190, 76 P.2d 453 (S. Ct. 1937) (citing *Pangborn v. Westlake*, 36 Iowa 546 (U.S. 1851). Whether the indoor use restriction constitutes a *per se* violation of the domestic well statute is a matter of statutory interpretation and will affect the evidentiary standard because on one hand, if the indoor use restriction is applicable, then Defendant can only offer facts that prove beneficial use

indoors, whereas if the indoor use restriction is void, Defendant may provide evidence of both indoor and outdoor use of water in establishing the material elements of his water rights claim.

In looking at matters involving statutory construction the court first must determine "*whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case*." *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 450, 122 S. Ct. 941, 950, 151 L. Ed. 2d 908 (U.S. 2002) (citing *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997)) (citing *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). There is nothing left for further determination if "*the statutory language is unambiguous and 'the statutory scheme is coherent and consistent*." *Id*. at 450.

Here, the January 13, 1983 Order (doc. 641) completely prohibits any outdoor irrigation whatsoever in any domestic well permit issued after January 13, 1983, in direct contravention to the plain and unambiguous language of the domestic well statute. See *Barnhart v. Sigmon Coal Co*., 534 U.S. 438, 450, 122 S. Ct. 941, 950, 151 L. Ed. 2d 908 (U.S. 2002). The text of the domestic well statute provides:

> "*A person… desiring to use public underground waters…for irrigation of not to exceed one acre of noncommercial trees, lawn or garden or for household or other domestic use shall make application to the state engineer for a well on a form to be prescribed by the state engineer…"* N.M. Stat. Ann. §72-12-1.1.

The statute permits domestic well water to be applied to outdoor irrigation because trees, lawn and garden exist outdoors. The statute also expressly limits the amount of water that can be placed to use for that purpose specifying that use may not exceed a duty of water sufficient to irrigate one acre; and that the use must not be commercial in nature. Further, if you read on, the text of the statute contains other language of limitation that establishes when other conditions

may be placed on the proscribed usage...*" provided that permits for domestic water use within municipalities shall be conditioned to require the permittee to comply with all applicable municipal ordinances enacted pursuant to Chapter 3, Article 53 NMSA 1978*." §72-12-1 N.M.S.A. 1978.

Here, Defendant is not aware of any applicable municipal ordinance restricting use of Defendant's well. Further, the Court's January 13, 1993 Order (doc. 641) is not a municipal ordinance that could place a limitation on the usage permitted by the statute. Moreover it is clear that the January 13, 1983 Order (doc. 641) expressly places a prohibition on outdoor use under the domestic well statute:

> "*no permits to appropriate underground waters shall be issued within the Rio Pojoaque stream system under Section 72-12-1, N.M.S.A. 1978. Permits may issue limited to the use of water for household, drinking and sanitary purposes within a closed water system that returns effluent below the surface of the ground minimizing and [sic] consumptive use of water. All subject to further order of the court*."

The effect of this restriction on use to exclusively "*household, drinking and sanitary purposes*" is to completely eliminate all outdoor usage of water under the domestic well statute. Further, the statutory scheme is coherent and consistent as the domestic well statute §72-12-1*et seq.* has been applied to all domestic well permits issued in the State of New Mexico since its inception without disturbance until the court issued its January 13, 1993 Order (doc. 641). Moreover even if the language of the Court's Order (doc. 641) in itself does not violate the statute at §72-12-1 et seq. the language contained in Mr. Gossein's domestic well permit conditions which was issued pursuant to the State Engineer's administrative authority certainly would constitute a *per se* violation of the statute "*Use shall be limited strictly to household, drinking or sanitary purposes…No irrigation of lawns, gardens, trees or use in any type of pool or pond is authorized under this permit*" (See Gossein well permit (Exhibit 2)). Simply stated,

the State Engineer does not have legal authority to issue such a restriction even based upon its interpretation of the Court's Order (doc. 641). Therefore it is illegal and void as applied to Mr. Gossein's permit and instead the terms contained at §72-12-1.1 will apply to permit evidence of outdoor irrigation to be considered in determining whether the grant of summary judgment is appropriate.

b) The indoor use restriction in the permits of post 1983 water rights claimants places an additional unjustified burden of proof on the water rights claimant which runs contrary to New Mexico water law and the standard of review on Motions for Summary Judgment.

As discussed above a Motion for Summary Judgment is to be reviewed based on an evaluation of the minimum amount of facts needed to raise a material issue of fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, at 247, 106 S. Ct. 2505, at 2509, (U.S. 1986). In *Anderson v. Liberty Lobby, Inc.*, the United States Supreme Court found in part that "*…to impose the greater evidentiary burden at summary judgment would change the threshold summary judgment inquiry from a search for a minimum of facts supporting the…[non-movant's] case to an evaluation of the weight of those facts and (it would seem) of the weight of at least the…[movants] uncontroverted facts as well*." 477 U.S. 242, at 247, 106 S. Ct. 2505, at 2509, (U.S. 1986) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–280, 746 F.2d, at 1570, 84 S.Ct. 710, 725–726, (U.S. 1964)).

The State's Motion for Summary Judgment admits that the December 11, 2006 Order to Show Cause (No. 6194) when read with the indoor use restriction creates an evidentiary presumption i.e. a factual presumption by the court that a well owner subject to the 1983 indoor use restriction does not use more than 0.5 AF of water per year. The presumption directly affects Mr. Gossein's water rights claims by creating an additional element of proof that must be established in order to show the amount of water he has placed to beneficial use (a material

factual element of his water rights claim). Namely, in showing use of water from his well the State asserts that he must be able to differentiate between indoor and outdoor use of water or accept that 0.5 acre feet per year represents the amount of his indoor use. Because it is impossible to prove indoor usage without a well meter or electrical meter, neither of which Mr. Gossein possesses, for the purposes of this litigation Mr. Gossein does not dispute that 0.5 acre feet is a sufficient measure of his indoor usage. However, outdoor usage from the well, which Mr. Gossein can establish through his testimony and the evidence and documents in the court record, should be added to the presumed indoor use to determine the total diversion and beneficial use of water from well RG-89217.

c) A review of the materials in the record demonstrates that there is a genuine dispute of material fact regarding the amount of water placed to beneficial use from Mr. Gossein's well, and therefore, the State's Motion for Summary Judgment should fail.

The 10th Circuit has held that the determination of the diversion amount and beneficial use is a question of fact. *Jicarilla Apache Tribe v. U.S.*, 657 F.2d 1126 (10th Cir. 1981). While the Order to Show Cause (No. 6194) does not directly reference the indoor use restriction, Defendant agrees with the State's assessment of the effect of the Order to Show Cause as creating 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 *State's Motion for Summary Judgment* (doc. 10438) Page 7, line 14 (emphasis added). An evidentiary presumption creates a rebuttable presumption of fact. See *Estate of Trentadue v. US,* 397 F.3d 840 at 841-43 (10th Cir. 2005) *quoting Weber v. Continental Cas. Co.*, 379 F.2d 729, 732 (10th Cir.1967) (quoting *Stumpf v. Montgomery*, 101 Okla. 257, 226 P. 65, 68 (1924)). "*When evidence is introduced rebutting the presumption, the presumption disappears, leaving in evidence the basic facts which are to be weighed*." *Id.* Here, Mr.

Gossein does not seek to rebut that 0.5 acre feet is the measure of his indoor beneficial use of water but to provide evidence of his outdoor usage of water to add to the number for indoor use to get a total measure of his beneficial use of water from the well. Specifically, Defendant has presented the following facts in his affidavit regarding his outdoor beneficial use of water from RG-89217:

a) He has used water for outdoor irrigation of his non-commercial trees, lawn and garden at times when the Trujillo ditch, from which he has an adjudicated surface water right in the amount of 2.446 acre feet per year, does not run or has an inadequate supply to meet his outdoor irrigation needs. Gossein Aff. ¶¶ 5, 9.

b) Specifically, in 2013, he used water from the well for outdoor irrigation of non-commercial trees, lawn and garden for one month out of the year when the ditch was not running to the tune of 0.2 acre feet of water usage. Gossein Aff. ¶ ¶14, 15 and 20.

c) His well pumps 20 gallons per minute. Gossein Aff. ¶ 6.

d) His lot is approximately 0.73 acres of land. Gossein Aff. ¶ 2.

In support of the testimony in his affidavit Mr. Gossein has also provided his well permit (Exhibit 2); photographs of his property (Exhibit 3); copies of his well records (Exhibit 4); cites the Court's Order determining the duty of water required for outdoor irrigation in the NPT stream system (Exhibit 5); provides papers that show that the outdoor irrigation for his property is 2.446 acre feet per year (Exhibit 6); cites his Subfile Answer which expressly objects to the indoor use restriction: "*Defendant claims a right to irrigate his trees, garden and lawn with domestic well water*" See *Subfile Answer of Christian Gossein* ¶ 2 (doc. 9918); and cites the Court's Order to Show Cause (doc. 6194) dictating the water presumed to be required for indoor beneficial use.

The factual argument presented to the court is as follows: This Court entered an Order on August 18, 1994 in this adjudication pertaining to the duty of water required to irrigate an acre of

land (Exhibit 5). That Order stated that to irrigate one acre of land from a well head requires a diversion of 3.35 acre-feet per year.

If Mr. Gossein's lot is 0.73 acres, then based on the court's August 18, 1994 Order, it requires 2.446 acre feet of water to irrigate that lot over the course of a year (0.73 acres x 3.35 diversion = 2.446 acre feet per year).

When that number is divided by the number of months in a year, it provides the amount of water needed each month to water the lot, which is 0.203 acre feet (2.446 AFY ÷ 12 months = 0.203 acre feet per month).

You can then multiply that number by the amount of months he testified he used water to irrigate outdoors from the well (1 month) to get a good estimate of his outdoor beneficial use at 0.203 acre feet. Further, the well has the capacity to pump the amount of water that Mr. Gossein has testified he put to beneficial use based on the pump size, model and flow rate. Gossein Aff. ¶ 6.

That number for outdoor irrigation can be added to the 0.5 acre feet that the court said is the measure of indoor use in their Order to Show Cause (doc. 6194) for a total combined indoor/outdoor use of 0.7 acre feet per year. In other words, there are facts sufficient on the record to establish that Mr. Gossein could prevail in asserting a water rights claim because he can show a diversion amount and placement of water to beneficial use exceeding 0.5 acre feet per year by the State. See the Court's Order to Show Cause (doc. 6194)

This evidence is enough to raise a material issue of fact regarding his water rights claim regarding the amount of water diverted and placed to beneficial use, and therefore, a grant of summary judgment would not be proper.

2. The arguments presented in the adjudication of subfile 43319 pertaining to the water right claims of Elisa Trujillo are distinguishable and independent from Mr. Gossein's water rights claims.

Finally, Defendant also asserts that this argument is distinguishable from the argument in the subfile proceeding on the claims of Elisa Trujillo, which this court decided in its September 20, 2012 Memorandum Opinion and Order. Specifically there, the indoor use restriction was challenged not as to whether it was a *per se* violation of §72-12-1*et seq.* or runs contrary to the legislative intent in enacting that statute, but instead, on whether issuance of a permit in itself creates an entitlement to the amount of water therein. There the court cited *Hansen v. Turney* for the proposition that a water right does not vest until it is put to its intended beneficial use. 136 N.M. 1, 3 (Ct. App. 2004). Here Defendant makes no assertion of entitlement to 1.0 acre foot of water based on the amount of water permitted to him, and therefore, the legal issues presented are completely different and should be distinguished.

3. The State's argument that Mr. Gossein or his predecessors-in-interest failed to lodge a timely objection to the indoor use restriction in the permit for well RG-89217 is unrealistic and without merit given that at the time the appeal would have been ripe for review, both the state engineer and the state district court were without jurisdiction to hear it.

The State's second justification for the validity of the permit's indoor use restriction is that Mr. Gossein's predecessors in interest did not lodge any appeal or objection to the permits indoor use restriction. First, as we have already pointed out, the applicable rule where a permit restriction violates a statute is that it is void. *Douglass v. Mutual Benefit Health & Accident Ass'n*, 1937-NMSC-097, 42 N.M. 190, 76 P.2d 453 (S. Ct. 1937). Naturally, the owner of water right has duty to comply with law. *State ex rel. Reynolds v. S. Springs Co.*, 80 N.M. 144, 452 P.2d 478 (N.M. 1969). Here, if the indoor use restriction is void then Mr. Gossein's placement of

water to use outdoors under his domestic well permit was an act in compliance with the domestic well statute and New Mexico law.

Presuming that the court does not find the indoor use restriction to be void *per se*, we move on to consider the State's argument regarding lack of objection and assert that not only is the argument without merit but moreover Mr. Gossein has lodged a valid objection to the indoor use restriction. The State cites §75-6-1 NMSA 1978, which provides that anyone dissatisfied with a decision of the State Engineer may take an appeal to the appropriate **state district court** within 30 days after notice of the decision (emphasis added). The same section also provides that "*unless such appeal is taken within said time, the action of the state engineer shall be final and conclusive*." *State of N. M. ex rel. Reynolds v. Molybdenum Corp. of Am.*, 570 F.2d 1364, 1368 (10th Cir. 1978). It appears that the State would argue that Mr. Gossein's predecessors-in-interest were required to object to the indoor use restriction within 30 days of the date the permit was issued in 2007, because they are the only ones who would have had standing to object at that time because they were the holders of the water permit for RG-89217. This argument is without merit because they could not have filed an objection through the administrative appeals process of the state engineer or in state district court at that time pursuant to §75-6-1 NMSA 1978.

At the time the permit for RG-89217 was issued in 2007 the adjudication of the NPT-Basin was declared and ongoing. All elements of the water rights claim essential to the adjudication of rights of any individual water rights claimant are left to the exclusive jurisdiction of the federal adjudication court. (NM Admin. Code 1929 Comp., § 151-122. "…*The court in which any suit involving the adjudication of water rights may be properly brought, shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved*…") Further, the State Engineer's administrative

authority is limited to administration of the state's waters and they are not permitted to adjudicate water rights. See *City of Albuquerque v. Reynolds, N.M.,* 71 N.M. 428, 379 P.2d 73, 76 (N.M. 1962) ; also *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 772, 508 P.2d 577, 581 (N.M. 1973); See also *Eldorado Utilities, Inc., v. State ex rel. D'Antonio*, 137 N.M. 268, 110 P.3d 76 (N.M. App. 2005). The indoor use restriction directly involves the question of permitted usage i.e. purpose of use and diversion requirements, which are essential elements of the Defendant's water rights claim in the federal adjudication. Therefore, the state engineer and state district court were both without jurisdiction to make any determination as to the indoor use restriction for well RG-89217 because it involved a matter of adjudication of the Defendant's water rights. The State's assertion that Defendant, or his predecessors-in-interest, failed to object fails to consider whether they, in fact, had an opportunity to object.

This raises the question of whether Mr. Gossein and other similarly situated litigants are considered to have forfeited their opportunity to object to entry of the indoor use restriction despite a complete lack of notice and opportunity to object that could impact hundreds of other litigants in this adjudication in violation of the Fourteen Amendment's guarantee of procedural due process. Specifically the courts have held that the Fourteenth Amendment contains a guarantee of fair procedure and therefore we review the procedures employed here. *Parratt* v. *Taylor*, 451 U. S. 527 (1981).

The first opportunity that actually arose to object to the indoor use restriction was when it was put in effect by the adjudication court in 1983. At that time, Mr. Gossein had not been joined as a party to this suit and his predecessors-in-interest had not even contemplated drilling well RG-89217. In fact, Mr. Gossein was first served with notice of this adjudication and subfile proceeding in 2014, more than 30 years after the deadline to object to the indoor use restriction

had passed. Further, when presented with his first opportunity to object to the indoor use restriction he did so. Namely, Mr. Gossein fully disclosed his objection in his subfile answer: "*Defendant claims a right to irrigate his trees, garden and lawn with domestic well water*" See *Subfile Answer of Christian Gossein* (doc. 9918) at ¶ 2. Therefore, it follows that if he is not permitted to lodge his objection to the indoor use restriction through this subfile proceeding then he and his predecessors-in-interest, in all aspects of the judicial process, have been deprived of their right to object, which violates his rights to fundamental fairness under due process. N.M. Const. art III § 18; U.S. Const. Amend XIV § 1. We therefore urge the court to dismiss the State's argument and allow his objections to stand for consideration on their merits.

4. Defendant has raised facts material to his legal argument that he has diligently developed his well water right and therefore should be permitted the full allotment of water under his permit subject to continued diligent development of beneficial use.

The evidence in the record reveals that there is also a material dispute as to Mr. Gossein's diligent development of his well water right. Under the substantive law regarding the determination of beneficial use it is clear 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*." *Hansen v. Turney*, 136 N.M. 1, 3 (Ct. App. 2004); *see also* N.M. Stat. Ann. § 72-12-8 (distinguishing an "owner of a water right" from a "holder of a permit"). However, in *State ex rel. Reynolds v. Mendenhall*, the courts have carved out a limited exception to this rule holding that where a well owner "diligently develops" his water right but cannot place it to actual use on the ground, he will not forfeit that right. 68 N.M. 467, 362 P.2d 998 (N.M. 1961). In that case out of the Supreme Court of New Mexico a landowner who lawfully initiated development of underground water right and carried it to completion with reasonable diligence acquired water right with priority date as of beginning of his work,

notwithstanding the fact that the lands involved were put into declared artesian basin before work was completed and water put to beneficial use on ground. *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (N.M. 1961). There the Court reasoned that the doctrine of "relation back" provided that beneficial use was met:

> "*We are clear that ... the legislature ... had in mind the entire procedure necessary to accomplish a beneficial use of water. It is oft times a long drawn out enterprise that must be accomplished between initiation of a right and the final act of irrigating a quantity of land. Months and years may reasonably elapse. A four year span is recognized under certain circumstances in § 75–11–31, N.M.S.A.1953. To conclude otherwise would possibly result in years of effort and many dollars being lost by one who commenced an appropriation and had drilled a well, installed his equipment, dug his ditches and leveled his land, when on the day before he was to turn water onto the land the basin was declared by the State Engineer*." *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (N.M. 1961).

Here, even if the court determines that Mr. Gossein cannot establish sufficient facts to show his beneficial use of water outdoors, he has established facts sufficient to show that there is a disputed material fact as to whether he has shown "diligent development" of his outdoor water right from his domestic well pursuant to the domestic well statute (§72-12-1.1 NMSA 1978). Specifically the following facts related to diligent development of that well are provided in the court record:

a) The well was drilled in September of 2007. Gossein Aff. ¶ 7

b) Since then Mr. Gossein's predecessors-in-interest installed a small drip irrigation system for one of the flower beds. Gossein Aff. ¶ 18

c) He purchased the property in December 2012. Gossein Aff. ¶ 4, Deeds to 45 Bouquet Lane (Exhibit 7).

d) Mr. Gossein has developed the water right by planting more plants, attaching hoses to the line for the well for irrigation. Gossein Aff. ¶ ¶14, 17.

e) Mr. Gossein has placed water to beneficial use outdoors in times when the Trujillo ditch was not running or when there was an inadequate water supply from the ditch. Gossein Aff. ¶¶ 5, 11-13.

These specific facts are further supported by the Well Permit (Exhibit 2) and Well Record for RG-89217 (Exhibit 4); as well as in the deeds to the property at issue in this subfile proceeding (Exhibit 7); and these documents together illustrate that since he has only resided at the property since December 2012, he has not had sufficient time to sufficiently develop his water rights for outdoor irrigation when water supply from the Trujillo Ditch is insufficient to irrigate his non-commercial trees, lawn and garden.

It logically follows that he has provided evidence that raises a material issue of fact regarding whether he has had sufficient time to "*diligently develop*" his water right for outdoor irrigation of trees, lawn and garden in times when the Trujillo Ditch provides an inadequate water supply to keep his plants alive. While these facts presume that the indoor well restriction in his permit is void as a matter of law, they are sufficient to raise a factual question regarding the diligent development of his well water right for outdoor irrigation, and therefore, the State's Motion for Summary Judgment must fail.

IV. CONCLUSION

There are material issues of fact that need to presented to the trier of fact in this case regarding the three essential elements of Mr. Gossein's water rights claims because he has

provided testimony regarding his diversion and placement of water to beneficial use for irrigation of non-commercial trees, lawn and garden from his domestic well issued pursuant to the domestic well statute at 72-12-1.1 NMSA 1978 at times when his surface water rights off the Trujillo Ditch are insufficient to keep maintain his garden, trees and lawn. He also has raised a material fact as to whether a trier of fact must determine whether he has provided evidence sufficient to show diligent development of his right to outdoor irrigation of trees, lawn and garden. For these reasons, based on the applicable substantive law regarding water right claims and the rules for granting summary judgment, the State's Motion for Summary Judgment should be denied.

V. PRAYER FOR RELEIF

For the reasons provided in this response to the State's Motion for Summary Judgment Defendant Gossein respectfully requests that the court deny the State's Motion for Summary Judgment and grant any other relief the court deems just. Counsel for the Defendant does not request a hearing on this Response to the State's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date of filing, I caused the foregoing to be filed electronically through the CM/ECF system which caused the parties on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail

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