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 BRIEF IN SUPPORT OF HIS SUBFILE ANSWER

COMES NOW Defendant Christian Gossein and pursuant to Fed.R.Civ.P. 16 submits this brief in support of his Subfile Answer (doc. 9918) filed on November 12, 2014 as follows:

I. BACKGROUND

On January 13, 1983 the court entered an order (No. 641) which provided 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 by virtue of placement of said restriction in all domestic well permits issued after that date.

This restriction appears in the permit for Well RG-89217, issued in April of 2007, which now belongs to Mr. Gossein. The specific language of that permit restriction reads 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 Exhibit 2 Permit: Special Condition 06-8.

On December 11, 2006, this court entered an Order to Show Cause (No. 6194) (hereinafter referred to as "Order to Show Cause"), a copy of which was issued to Christian Gossein. The parties agree that the Order to Show Cause 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*." It appears that the Order to Show Cause does not contemplate outdoor irrigation of non-commercial domestic trees, lawn and garden; and that the State Engineer was under the impression that they were bound by the indoor use restriction in issuing permits after the 1983 order.

On February 19, 2016, the 10th Circuit court of appeals heard the water right claims of Elisa Trujillo in a separate subfile appeal of this case (attached as Exhibit 8). That appeal was filed on various grounds including a challenge to the validity of the indoor use restriction. While the court denied appellant the relief sought, they made a finding that they had jurisdiction to review the permit restriction limiting water from the appellants domestic well to indoor use only under 28 U.S.C §1292(a)(1) because the adjudication order met the conditions laid out in Carson v. American Brands, Inc., 450 US 79 (1981) for establishing that injunctive relief was granted in that subfile proceeding. In other words the appeals court held that the district court's order of adjudication effectively restrained the appellant's use of water and therefore the relief sought and granted was injunctive in nature and subject to appellate review.

II. LEGAL ARGUMENTS

1. The State Engineer is seeking to enjoin Mr. Gossein's usage of domestic water for outdoor irrigation of non-commercial trees, lawn and garden, and therefore they must prove that the basis for the injunction is legally valid.

As touched on briefly above, the 10th Circuit court of appeals found jurisdiction to hear the appeal of the water right claims of Elisa Trujillo with regard to the injunctive relief sought, but held that the appellant had not presented evidence sufficient to support her claims regarding the invalidity of the injunction and in particular found that the domestic well statute did not create an entitlement to the amount of water permitted. While Mr. Gossein is similarly situated with regard to the indoor use restriction in his permit and the injunctive relief sought by the State Engineer, he has raised different legal arguments that challenge the validity of the indoor use restriction which we assert is presently before this court for consideration.

Prior to entry of the decision of the 10th Circuit Court of Appeals on the claims of Elisa Trujillo, evidence of outdoor usage of water was considered by the district court to be inadmissible and not admissible evidence of the beneficial use of water from post-1983 domestic wells. In light of the holding of the 10th Circuit affirming that the relief sought by the State Engineer is injunctive in nature, the district court is obligated to consider the validity of the indoor use restriction in Mr. Gossein's permit prior to making a decision regarding whether evidence of outdoor usage of water may be entered in establishing the measure of beneficial use of water from his well.

In this proceeding, Mr. Gossein raises the following issues that were not raised in the appeal of Elisa Trujillo's claims before the 10th Circuit: 1. Does the indoor use restriction in his permit violate the domestic well statute at §72-12-1.1 NMSA 1978 on its face or violate the legislative

intent behind enacting that statute?; 2. Has there been a finding of impairment of more senior water rights holders that would support a finding of irreparable harm?; 3. Was the State Engineer's decision to include the indoor use restriction in Mr. Gossein's permit language a valid exercise of their administrative authority?

It is clear that the State Engineer is seeking a court order to enjoin Mr. Gossein from using his water for outdoor irrigation of non-commercial trees, lawn and garden in this subfile proceeding; that the prohibition against outdoor irrigation in his permit violates the domestic well statute; and that the State Engineer acted outside the scope of their legal authority in creating that restriction when there were valid and legal alternative methods of curtailing use and avoiding potential impairment to more senior water users within their administrative powers. It is also clear that Mr. Gossein has placed 0.7 acre feet of water from his well to beneficial use and that an order adjudicating his water rights in that amount should be entered. Finally, if alternatively, the court finds that Mr. Gosssein's evidence of water usage is not sufficient to establish beneficial use of 0.7 acre feet of water from his well, then he has taken all the possible steps needed to show that he diligently developed his water right and therefore he is entitled to his permitted amount of 1.0 acre feet per year subject to continued development of beneficial use of water under New Mexico case law.

1. **The injunctive relief sought in this subfile proceeding (enforcing the indoor use restriction in Mr. Gossein's permit) violates the express language contained in the domestic well statute at §72-12-1.1 NMSA 1978 and runs contrary to the legislature's intent in enacting that statute and therefore is legally invalid. Therefore the language limiting use to indoor use only in Mr. Gossein's permit is void and the court should consider evidence of beneficial use of water for outdoor irrigation.**

Beneficial use is the measure of water rights in New Mexico. See N.M. Const. Art.16, §3. 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 beneficial use of water outdoors 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 beneficial use from his well. Therefore, it follows that the court must make a determination of whether the indoor use restriction in his permit is valid. 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. The domestic well statute 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.

The applicable rule where a permit restriction violates a legally enforceable statute is that the restriction is void. *Douglass v. Mutual Benefit Health & Accident Ass'n*, 1937-NMSC-097, 42 N.M. 190, 76 P.2d 453 (S. Ct. 1937). The State Engineer's Office is a New Mexico administrative agency created by statute and derives its power to issue domestic well permits subject to the provisions at §72-12-1.1 NMSA 1978. Therefore, the State Engineer may only act

within the express authority granted to it therein or must show additional statutory authority that permits it to circumvent that provision.

Whether the indoor use restriction constitutes a *per se* violation of the domestic well statute is a matter of statutory interpretation. In looking at matters involving statutory interpretation 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. It is clear and unambiguous from the text of the statute that outdoor irrigation of non-commercial trees, lawn and garden is considered to be considered a "beneficial use" of water as contemplated by the legislature and that the statutory scheme makes sense and is consistent with the other administrative authority granted to the State Engineer to administer the waters of New Mexico. See *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2012-NMSC-039, 249 P.3d 932 (N.M. Ct. App. 2010).

Further, the text of the statute contains language of limitation that establishes when other conditions may be placed on 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. It follows that the legislature contemplated what restrictions or exceptions to the statute should be in place when they drafted the statute. Here none of the exceptions per the

statute apply since there is no applicable municipal ordinance restricting use of Defendant's well water. Further, the injunctive relief sought is not based on a municipal ordinance that could place a limitation on the usage permitted by the statute; and the State Engineer has not cited any administrative authority pursuant to a statute that would supersede the language contained in the domestic well statute.

Because the State Engineer has cited no authority and we have not found any authority that would show that the State Engineer has been granted the power to adopt restrictions that contradict the domestic well statute the indoor use restriction is void.

2. The State has not met the test for showing that they are entitled to injunctive relief enforcing the restriction against outdoor use in Mr. Gossein's permit, therefore admissible evidence of beneficial use of water outdoors that is consistent with §72-12-1.1 should be considered by the court.

The 10th Circuit has held that a preliminary injunction is appropriate when:

"*(1) the movant will suffer irreparable harm unless the injunction issues; (2) there is a substantial likelihood the movant ultimately will prevail on the merits; (3) the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest*".

American Assoc, of People with Disabilities v. Herrera, 580 F.Supp.2d 1195 (D. N.M. 2008); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d at 354-55. See *Wyandette Nat'l v. Sebelius*, 443 F.3d 1247, 1254-55 (10th Cir. 2006) (quoting *Kiowa Indian Tribe of Okla. v. Hoover*, 150 F.3d 1163,1171 (10th Cir. 1998)); *ACLU v. Johnson*, 194 F.3d 1149, 1155 (10th Cir. 1999). In *City of Albuquerque v. Reynolds*, the court held that the State Engineer's authority to grant or deny an application to appropriate water includes the authority to impose conditions to ensure that the new application does not impair existing rights. 71 NM 428 (N.M.1963). Further under *Mathers v. Texaco*, the court held that the State Engineer has

authority to determine what constitutes impairment. 77 NM 239 (N.M. 1966). Here despite having the power to make a finding of impairment, the State Engineer has not done so.

The State Engineer has failed to meet the threshold showing of irreparable harm because they have not made any determination that the court's failure to enjoin Mr. Gossein's outdoor water usage will cause impairment to senior water rights holders or asserted any other basis for establishing irreparable harm.

The only evidence provided by the State Engineer in support of an injunction is the 1983 Order of the court restricting use of post 1983 domestic wells to indoor usage (doc. 641). That order not only did not contain an express finding of impairment to existing water users as a result of the issuance of new domestic well permits it also was a preliminary injunction that expired as a matter of law 14 days after it was entered by the court. Federal Rule 65 provides that any preliminary injunction issued by the court will expire automatically within 14 days of issuance unless it is extended by the court and the court may only grant 14 day extensions. Fed. R. Civ. P. 65(b)(2). Here it follows that the court's 1983 Order (doc. 641) expired since no extension of that injunction was put in place. However, what remained was the State Engineer's reflection of that order in its issuance of indoor use restrictions on permits for post-1983 domestic wells including the permit at issue in this case (Well RG-89217).

The State Engineer would have been wise to restrict the **amount of water** (emphasis added) permitted to applicants of post-1983 domestic wells since that is a power well within their established administrative authority in curtailing water use, however, instead they placed an illegal restriction in the permit language and in so doing acted outside the scope of their administrative authority. Moreover, at the time the permit for RG-89217 was issued, the State

Engineer had the authority to employ a variety of actions, any one of which would have prevented impairment to existing wells without violating existing law (they could have placed a moratorium on new wells, placed restrictions on how many new permits could be issued, or restricted the amount of water permitted for use to each new domestic well applicant). If the State Engineer felt that the issuance of a permit for 1.0 acre foot of water from RG-89217 would impair more senior water users then they should have curtailed that use by issuing the permit for a lesser amount of water. Finally, there were no objections by more senior water right holders to issuance of the permit for RG-89217. It follows that the State Engineer has declined to enter evidence of impairment or to provide any other allegation of irreparable harm and therefore the court need not look further as outdoor use of water from RG-89217 is part of the measure of beneficial use as per the domestic well statute.

However, if the court does find that the State Engineer has shown that irreparable harm will occur as a result of the use of water for outdoor irrigation from well RG-89217, then the harm to Mr. Gossein will outweigh the benefit of injunctive relief to the State Engineer. Specifically, if Mr. Gossein is enjoined from use of well water when the Trujillo ditch is not running as he has asserted in his affidavit, then his trees, lawn and garden could die and he could suffer an economic loss from a decrease in the value of his property.

In conclusion, the State Engineer is without legal authority to contradict the clear, unambiguous provisions of the domestic well statute and had no justification for placing a limitation on outdoor usage in the permit for well RG-89217, especially because the State Engineer had valid and enforceable alternative legal remedies available for preventing impairment, if in fact any risk of impairment ever existed. Further, the State Engineer has not

provided sufficient evidence to establish that they are entitled to injunctive relief and therefore the court should dismiss their arguments and permit evidence of outdoor irrigation to be entered.

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 here the State seeks injunctive relief and Mr. Gossein has objected to the indoor use restriction. Further, 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 and therefore Mr. Gossein has not waived his right to object to the validity of that restriction.**

The State's only other 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 through the applicable administrative process. 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).

Administration of water rights need not await final adjudication so long as the due process rights of individual claimants are protected. *State v. Pecos Valley Artesian Conservancy District*, 99 NM 699 (1983). Further 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). 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. Acceptance of this argument would violate due process and concepts of fundamental fairness because there was no opportunity for objection through the administrative appeals process of the state engineer or in state district court within the time allotted pursuant to §75-6-1 NMSA 1978.

At the time the permit for RG-89217 was issued in 2007, Mr. Gossein's predecessors-in-interest were unable to object because 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. Ct. App. 2005). The indoor use restriction directly involves the question of permitted usage i.e. what purposes of use constitute beneficial use of water. This is a question of legal interpretation of an essential element of the Defendant's water rights claim that is within the exclusive jurisdiction of the federal adjudication court. 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.

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 court's 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. In light of these facts and the recent ruling of the court of appeals we urge the court to dismiss the State's argument and allow his objections to stand for full consideration on their merits.

4. **Christian Gossein can prove beneficial use of 0.7 acre feet of water per year as provided by New Mexico law relating to beneficial use and in accordance with the evidentiary presumptions that have already been entered by the district court; and therefore, an order should be entered adjudicating his water rights in that amount for this case.**

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 (emphasis added) but to provide evidence of his outdoor usage of water to supplement the number for indoor use to get a total measure of his beneficial use of water from Well Rg-89217. Specifically, Defendant has presented the following facts in his affidavit (Exhibit 1) 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 about 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 provided as the measure of indoor use in their Order to Show Cause (doc. 6194) for a total combined

indoor/outdoor beneficial use of 0.7 acre feet per year. Therefore, the court should adjudicate Mr. Gossein's well water rights for Well RG-89217 at 0.7 acre feet of water per annum and eliminate the restriction on outdoor usage per the domestic well statute at §72-12-1.1 NMSA 1978.

5. **In the alternative, if for any reason the court does not permit evidence of outdoor water usage to be considered in establishing the measure of beneficial use from RG-89217, Defendant has diligently developed his well water right and therefore should be permitted the full allotment of water under his permit.**

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 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, and 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 fully 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.

III. CONCLUSION

The record clearly shows that the State Engineer is seeking a court order to enjoin Mr. Gossein from using his water for outdoor irrigation of non-commercial trees, lawn and garden in this subfile proceeding; that the prohibition against outdoor irrigation in his permit violates the domestic well statute; and that the State Engineer acted outside the scope of their legal authority in creating that restriction when there were valid and legal alternative methods of curtailing use and avoiding potential impairment to more senior water users within their administrative powers. Because Mr. Gossein has proven that he has placed 0.7 acre feet of water from his well to beneficial use an order adjudicating his water rights in that amount should be entered and the indoor use restriction should be removed. Finally, if alternatively, the court finds that Mr. Gosssein's evidence of water usage is not sufficient to establish beneficial use of 0.7 acre feet of water from his well, then he has taken all the possible steps needed to show that he diligently developed his water right and therefore he is entitled to his permitted amount of 1.0 acre feet per year subject to continued development of beneficial use of water under New Mexico case law.

IV. PRAYER FOR RELIEF

For the reasons stated herein Mr. Gossein respectfully requests that:

1. His domestic well water right to RG-89217 is adjudicated in the amount of 0.7 acre feet per year,

2. The indoor use restriction should be eliminated; and

3. The court should grant him any other relief that they see fit.

Respectfully submitted,

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