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

REPLY TO RESPONSE TO 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 hereby replies to Defendant Gossein's *Response* (No. 10513) to the State's January 11, 2016 *Motion and Memorandum for Summary Judgment on the Claims of Christian Gossein Under Subfile RG-89217* (No. 10438), and in support thereof, states as follows:

I. Introduction

There are no disputed issues of material fact, as Defendant Gossein agrees with the material facts recited by the State in its *Motion for Summary Judgment*, and further admits that 0.5 acre feet per year is a sufficient measure for his indoor usage. Defendant Gossein does present several arguments of law that he is entitled to use water outdoors, despite the indoor use restriction contained in his permit, but these arguments are not well taken and most have been previously

rejected by this Court. Consequently, the State is entitled to summary judgment as a matter of law.

II. There Are No Disputed Issues of Material Fact

There are no disputed issues of material fact. Defendant Gossein "agrees with the State's summary of uncontested facts in paragraphs 1-5," namely that his permit is limited to indoor use only for up to one (1.0) acre foot of ground water per annum for one household, and that neither he nor any predecessor in interest ever appealed those limitations through the Office of the State Engineer administrative processes. *Response* at 2. Defendant Gossein additionally states that he "does not dispute that 0.5 acre feet is a sufficient measure of his indoor usage." *Id.* at 11.

Defendant Gossein makes a number of representations in the affidavit attached to his *Response* regarding his outdoor use of water. These are not relevant, as Defendant Gossein's admits the terms of his permit limit him to indoor use only.

Defendant Gossein also makes a number of arguments related to the shifting of the burden of proof and evidentiary presumptions. *See, e.g.*, *Response* at 4 ("It is impermissible for a Court to establish a greater evidentiary burden to be imposed at summary judgment . . .). These are of no relevance, as Defendant Gossein has admitted all material facts.

III. Plaintiff is Entitled to Summary Judgment as a Matter of Law

Despite admitting that the terms of his permit limit him to indoor use only, Defendant Gossein nevertheless makes a number of legal arguments in support of the notion that he is entitled to use water outdoors. Defendant claims that the indoor use restriction on his permit is void; the *Mendenhall* doctrine allows him to use water outside so long as he is diligent about applying it to beneficial use; his illegal use of water outdoors creates a water right; and that he timely objected to

the indoor use limitation contained in his permit by filing a subfile answer in this proceeding. These arguments are not well taken because they are not supported by the facts or the law. Indeed, the Court has already ruled against most of them in the context of other subfiles, some on multiple occasions. See July 22, 2013 *Memorandum Opinion and Order* (No. 7905); April 17, 2013 *Memorandum Opinion and Order* (No. 7870); September 20, 2012 *Memorandum Opinion and Order* (7757); March 30, 2012 *Memorandum Opinion and Order* (No. 7579); June 2, 2011 *Memorandum Opinion and Order* (No. 7398); June 29, 2010 *Recommendation of Special Master to Deny Defendant Elisa Trujillo's Motion for Relief from Order Regarding Subfile PM-43319* (No. 7011); February 26, 2010 *Order Granting Motion for Summary judgment Regarding the Claims of Elisa Trujillo Under Subfile PM-43319* (No. 6917); and November 18, 2003 *Order* (No. 6078). There is no legal basis for Defendant Gossein to use water outdoors. As a result, the State is entitled to summary judgment as a matter of law.

A. The Indoor Use Restriction on Defendant Gossein's Permit is Not Void

Although Defendant Gossein admits his permit contains an indoor use restriction, he asserts this limitation is void. Defendant Gossein contends that because "the January 13, 1983 Order (doc. 641) completely prohibits any outdoor irrigation whatsoever in any domestic well permit issued after January 13, 1983, [it is] in direct contravention to the plain and unambiguous language of the domestic well statute," which he alleges does allow outdoor irrigation. *Id.* Consequently, Defendant claims that "the [resulting] indoor use restriction in his permit . . . constitutes 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." *Response* at 7. In short, Defendant Gossein alleges that the Domestic Well Statute (Section 72-12-1.1) allows for outdoor use, his permit does not, and the

statute trumps the permit. Defendant Gossein is not correct, and the Court has now ruled otherwise on this issue. Most recently, on May 14, 2015, the Court found that the indoor use permit condition is entirely consistent with New Mexico law:

> The Court has previously addressed the issue of whether the State Engineer may limit the amount of water available through a domestic well permit when it ruled on the Motion to Quash Preliminary Injunction, Doc. 7403, filed by Mr. Atencio. Previously, Mr. Atencio argued that the Domestic Well Statute entitled his client to the use of one acre foot of water per year for irrigation. The Court summarized New Mexico water law based on its review of the New Mexico Constitution, New Mexico Statutes, the New Mexico Administrative Code, and New Mexico case law. *See* Mem. Op. and Order at 3-5 Doc. 7579 (Vazquez, J.). New Mexico water law allows the Court to impose limits on permits issued by the State pursuant to the Domestic Well Statute.

Memorandum Opinion and Order Overruling Objections to Special Master's Orders at 7 (No. 10188) (emphasis added). The Court went on to note:

> The New Mexico legislature has granted the State Engineer broad powers to implement and enforce the water law administered by him. *See Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 24. Under New Mexico's water code, the State Engineer may adopt regulations and codes to implement and enforce any provisions of law administered by him . . . this provision is to be liberally construed." N.M. Stat. Ann. § 72-2-8(A). "Any regulations, code or order issued by the state engineer is presumed to be in proper implementation of the provisions of the water laws administered by him." N.M.Stat.Ann. § 72-2-8(H).
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> In 1966, the State Engineer issued "Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Groundwater in New Mexico," SE-66-1, which were amended on January 6, 1983, one week before entry of the 1983 Order [Preliminary Injunction]. Article 1-15.8 states that the "amount and uses of water permitted [under the Domestic Well Statute] are subject to such limitations as may be imposed by the courts." Amendment to SE-66-1, Art. 1-15.8. In August 2006, the State Engineer repealed SE-66-1 and promulgated new regulations regarding permits issued under the Domestic Well Statute. *See* N.M.A.C. § 19.27.5.1 – 18. The 2006 regulations retained the rule that the amount and uses of water permitted under the Domestic Well Statute may be limited by court order and set forth additional provisions under which the amount and uses of water permitted by the Domestic Well Statute may be limited. *See* N.M.A.C. § 19.27.5.9(D) (The "amount and uses of water permitted [under the Domestic Well Statute] are subject to such additional or more restrictive limitations imposed by a court, or by lawful municipal or county ordinance.")

Id. at 7 (citing Mem. Op. & Order at 4-5, Doc. 7579 (Vazquez, J.)).

The United States Court of Appeals for the Tenth Circuit has recently affirmed this Court's rulings on the validity of the indoor use restriction. *State of New Mexico ex rel. State Engineer v. Trujillo*, --- F.3d ---, 2015 WL 683831 (10th Cir. Feb. 19, 2016). Another Defendant, Elisa Trujillo, had appealed this Court's order finding that her particular water right was limited to indoor use because of the restriction contained in her permit – the identical permit restriction contained in Defendant Gossein's permit. *Notice of Appeal* (No. 10122) (March 12, 2015). The Tenth Circuit held that "[h]er 31-year-old water permit forecloses any contention that she is entitled to irrigate her land." *Trujillo*, -- F. 3d. --, 2016 WL at * 8. Similarly, in the instant case, Defendant Gossein's 9-year-old permit, and its identical indoor use limitation, forecloses any contention that he is entitled to use water outdoors. *Id.*

B. Defendant Gossein's Illegal Use of Water Outdoors Does Not Create a Water Right

Defendant Gossein nonetheless asserts that "outdoor usage from the well, which [he] 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." *Response* at 11. Again, Defendant Gossein is not correct. This Court has held that outdoor use from a well limited to indoor use is not to be taken into account when quantifying the amount of a water right:

> Trujillo also contends that the Court should adjudicate her the right to use water outdoors for irrigation. Trujillo alleged that she and her predecessor-in-interest have used water outdoors for irrigation. Her permit, however, did not allow any irrigation. The illegal use of water does not create a water right. *See New Mexico v. Dority*, 55 N.M. 12, 19 (1950).

Memorandum Opinion and Order at 6 (No. 7870) (April 17, 2013) (emphasis added

C. Neither Defendant Gossein nor His Predecessor-in-Interest Ever Objected to the Terms of His Permit

As noted above, Defendant Gossein admits the State's undisputed material fact number 5, that "[n]either Defendant Gossein, nor any of his predecessors-in-interest, ever appealed the indoor use restriction contained in permit RG-89217 . . . through the Office of State Engineer administrative processes." He nevertheless claims that he "has lodged a valid objection to the indoor use restriction" by "disclosing his objection in his subfile answer." *Response* at 16-17. It is not clear what he means by a "valid objection," but his subfile answer is not sufficient to remove the indoor use limitation from his permit. *See* N.M. Stat. Ann. §§ 72-2-16, 72-2-1 (1997). For this, Defendant Gossein was required to request a hearing on his permit's indoor use restriction before the State Engineer. N.M. Stat. Ann. § 72-7-1 (1997). Defendant Gossein admits he has never done this. *Response* at 2.

Moreover, Defendant Gossein's *Subfile Answer* (No. 9918) was not filed until November 12, 2014, seven years after the permit was issued on April 27, 2007. As noted in the State's *Motion and Memorandum*, 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. If an appeal is not timely taken, the 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. Defendant Gossein's action seven years later in filing his subfile answer is not just procedurally incorrect, as described above, it is untimely.

Defendant Gossein further alleges that he could not request a hearing or pursue an appeal because "the state engineer and the 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." *Response* at 16. It did not. While Defendant Gossein is correct that this Court has sole jurisdiction to adjudicate his water right, a permit is not a water right. *See e.g.* May 14, 2015 *Memorandum Opinion and Order Overruling Objections to Special Master's Orders* at 5-6 (No. 10188); *see also State v. Trujillo*, 2015 WL 683831 at * 8 (citing *Hanson v. Turney*, 136 N.M. 1, 94 P.3d 1, 4-5 (N.M. Ct. App. 2004)). A water right can only be developed by application of water to beneficial use. *Id.* This neither Defendant Gossein nor his predecessor-in-interest could do until they had a permit. The New Mexico State Engineer has jurisdiction to issue domestic well permits. N.M. Stat. Ann. § 72-12-1.1 (1994). Contrary to Defendant Gosein's assertions, the State Engineer also unquestionably had and has jurisdiction to hear and rule upon objections to permit conditions.

D. *Mendenhall* Does Not Apply Here

Defendant Gossein argues *State ex rel. Reynolds v. Mendenhall* allows him to use water outside so long as he has been diligent about applying it to beneficial use, despite the indoor use limitation in his permit. *Response* at 3. *Mendenhall* does not stand for that. *Mendenhall* instead presents the question, "[d]oes a landowner who lawfully initiates the development of an underground water right . . . acquire a water right with a priority date as of the beginning of his work notwithstanding the fact that the lands involved were put into a declared artesian basin before work was completed and water put to beneficial use on the ground?" *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 468, 362 P.2d 998, 999 (N.M. 1961) (emphasis added). The *Mendenhall* Court emphasized "[t]his is the only question presented in this appeal." *Id.* In the instant case, the groundwater basin had been declared long before Defendant Gossein's

predecessor-in-interest initiated the development of his water right. Indeed, it was because the basin had already been declared that Defendant Gossein's predecessor-in-interest had to obtain a permit before applying water to beneficial use. *Mendenhall* simply does not apply here.

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.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 4, 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.