IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*
State Engineer,
Plaintiff,

v. No. Civ. 66-06639 WJ/WPL

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.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT ON THE CLAIMS OF CHRISTIAN GOSSEIN UNDER SUBFILE PM-89217 [DOC. NO. 10438]

THIS MATTER is before the Special Master pursuant to Fed. R. Civ. P. 53 and the Order of Reference [Doc. No. 6336], as amended [Doc. No. 7736].

On January 11, 2016, Plaintiff the State of New Mexico filed a Motion for Summary Judgment on the Claims of Defendant Christian Gossein Under Subfile PM-89217 [Doc. No. 10438]. Defendant Gossein filed a response on February 2, 2016 [Doc. No. 10513]. Plaintiff the State filed a reply on March 4, 2016 [Doc. No. 10531]. The motion is now fully briefed. Because no genuine issues exist to as material facts, and because summary judgment should be entered as a

matter of law, the motion will be **granted**.

Background

On January 13, 1983, the Court issued an Order which henceforth limited all domestic well permits to indoor use only, with no quantity limitation [Doc. No. 641]. The State Engineer, after January 13, 1983, included an indoor use restriction on all domestic well permits it issued, pursuant to the Court's 1983 Order.[1]

On December 11, 2006, the Court issued an Order to Show Cause concerning post-1982 domestic wells, presumptively limiting the quantity of a post-1982 domestic well water right to 0.5 acre-feet per year. Order to Show Cause, December 11, 2006 [Doc. No. 6194]. With those two orders, then, the Court limited the water right under a post-1982 domestic well to indoor use only, and to a quantity of 0.5 acre-feet per year, unless a defendant could demonstrate greater use. The Order to Show Cause also created a presumption that the adjudication of a domestic well right should be consistent with the terms of the domestic well permit.

On April 27, 2007 the State Engineer issued a new a domestic well permit to Defendant Gossein's predecessor-in-interest, permit RG-89217, conforming with the indoor use restriction of the Court's 1983 Order. By then both the indoor use restriction and quantity limitation presumption were in place and a matter of public record.

On February 22, 2013 Defendant Gossein filed a change of ownership form with the State Engineer, identifying himself as the successor-in-interest to the claimed rights under permit RG-

[1] More permissive uses of water were subsequently allowed for domestic well permits in certain instances, but these are not relevant to the issues presented in the motion. *See* Order Adopting Post-1982 Well Settlement Agreement October 4, 1999 [Doc. No. 5549].

89217. Neither Defendant Gossein, nor any prior owners of his right, ever challenged the indoor use restriction of the permit, until Defendant Gossein was joined in the adjudication.

Although permit RG-89217 allows for use of up to 1.0 acre-feet of water per year, in its motion Plaintiff the State asks the Court to limit Defendant Gossein to the presumptive use of 0.5 acre-feet per year of the Order to Show Cause.

Defendant Gossein "does not dispute that 0.5 acre feet [per year] is a sufficient measure of his indoor usage." Response at 11. Defendant Gossein, however, maintains that he has used water from his domestic well to irrigate outdoors when he obtained insufficient water from his adjudicated surface water irrigation right. *See* Affidavit [Doc. No. 10529-1].[2] Defendant Gossein also argues that the 1983 injunction is illegal because it violates the New Mexico Domestic Well Statute, N.M.S.A. 1978, § 72-12-1, and that he should have more time to "develop" his domestic well right pursuant to the doctrine set out in *State ex. rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998 (N.M. 1961).

Discussion

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 favorable to the

[2] "I use water from that well... to supplement my outdoor irrigation of non-commercial trees lawn and garden when needed... In a normal year, the Trujillo Ditch does not run year-round, and I sometimes use water from the well to irrigate my trees during those months that it does not run... I also have to use well water to irrigate my property at times when the head gate at the river is clogged up with sediment because of flash flooding."

nonmoving 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 nonmoving party's case." *Celotex*, 477 U.S. at 325. Once the movant meets this burden, Rule 56(e) "requires the nonmoving 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).

Although the material submitted by the parties in support of and in opposition to the motion must be construed liberally in favor of the party opposing the motion, *Pittsburg & Midway Coal Min. Co. v. Yazzie,* 909 F.2d 1387, 1427 (10th Cir. 1990), the burden on the moving party may be discharged by demonstrating to the court that there is an absence of evidence to support the nonmoving party's case, *Celotex*, 477 U.S. at 325. In such a situation, the moving party is entitled to judgment as a matter of law "because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." *Celotex*, 477 U.S. at 322.

The burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the user of the water right. *See, e.g., Pecos Valley Artesian Conservancy Dist. v. Peters*, 1948-NMSC-022, 52 N.M. 148, 152-153, 193 P.2d 418, 422-423

(1948).

I. The Court's indoor use restriction of 1983 is not illegal and is not contrary to New Mexico law.

In a collateral attack on the 1983 injunction, Defendant Gossein claims that the injunction is contrary to the New Mexico Domestic Well Statute, N.M.S.A. 1978, § 72-12-1, which guarantees him a water right for outdoor irrigation, and is therefore illegal. This is incorrect.

Reduced to its essentials, Defendant's argument is that the Domestic Well Statute provides a guarantee of a water right for a maximum statutory amount and for all uses allowed under the statute, which cannot be taken away by the Court's 1983 injunction. The statute, however, provides no such guarantee, and only commands that the State Engineer issue a domestic well permit to all applicants, without a prior finding that "senior water rights will not be impaired before issuing a permit for a new appropriation." *State of New Mexico v. Aamodt*, No. Civ. 66-6639 MV/WPL, [Doc. No. 7579], filed March 30, 2012 (D.N.M.) (Vázquez, J.).

It is well established that a permit is not a water right. *See, e.g., State of New Mexico v. Trujillo*, ___ Fd.3d____, 2016 WL 683831 *8 (10th Cir. 2016) (the "argument that a permit alone creates water rights contradicts New Mexico law"). It is, at best, the necessary first step in obtaining a water right. *State of New Mexico v. Aamodt*, No. Civ. 66-6639 MV/WPL [Doc. No. 7757], filed September 20, 2012 (D.N.M.) (Vázquez, J.) at 6, *citing Hanson v. Turney*, 2004-NMCA-069, 136 N.M. 1, 94 P.3d. 1 (N.M. Ct. App. 2004). Moreover, this Court has at least twice ruled that a court-imposed restriction on a domestic well permit is lawful. *See, e.g., State of New Mexico v. Aamodt*, No. Civ. 66-6639 MV/WPL, [Doc. No. 7579], filed March 30, 2012 (D.N.M.) (Vázquez, J.); *State*

of New Mexico v. Aamodt, No. Civ. 66-6639 WJ/WPL, [Doc. No. 10188], filed March 14, 2015 (D.N.M.) (Johnson, J.) (reviewing the history of the State Engineer's authority to limit permits issued under the Domestic Well Statute to conform to court order). Defendant's argument, therefore, is not only legally incorrect, it ignores the prior rulings of this Court.

II. Defendant Gossein's use of his domestic well to irrigate outdoors is illegal, and does not create an issue of material fact.

While conceding that 0.5 acre-feet is a sufficient and proper amount for his indoor domestic use, and while not presenting any evidence whatsoever of any indoor use exceeding 0.5 acre-feet, Defendant Gossein maintains that he uses his domestic well for outdoor uses, and that there is thus an issue of fact on whether he should be adjudicated a domestic well right in excess of the presumptive amount of the Order to Show Cause. Defendant errs.

Defendant's outdoor use of water contrary to the terms of his permit is an illegal use. Defendant's post-1982 permit "forecloses any contention that [he] is allowed to irrigate [his] land." *See, e.g., State of New Mexico v. Trujillo,* __ Fd.3d___, 2016 WL 683831 *8 (10th Cir. 2016). An illegal use of water does not create a water right, and cannot support a claim to a water right. *See State of New Mexico v. Aamodt*, No. Civ. 66-6639 MV/WPL, [Doc. No. 7870], filed April 17, 2013 (D.N.M.) (Vázquez, J.) *citing New Mexico v. Dority*, 1950-NMSC-066, 55 N.M. 12, 225 P.2d 1007 (N.M. 1950). Absent some evidence, which is not present in any of the pleadings, that Defendant Gossein is legally allowed to divert some of his claimed surface irrigation right from his well, Defendant's affidavit testimony that he uses his well for outdoor irrigation is testimony of an illegal use which does not create an issue of fact.

III. Defendant's *Mendenhall* argument is misplaced.

Defendant's argument that he should be allowed to further develop his water right for outdoor irrigation use, pursuant to *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998 (N.M. 1961), is wide of the mark for at least two reasons. First, the *Mendenhall* doctrine stands for the proposition that an appropriator, who initiated but did not complete a diversion prior to the declaration of a basin by the State Engineer, to "have acquired a valid water right with priority date as of the commencement of the work, since he had developed the water for beneficial use with reasonable diligence." *McBee v. Reynolds*, 1965-NMSC-007 ¶ 2, 74 N.M. 783, 399 P.2d 110 (N.M. 1965). Defendant cites no case, and research has not located any, where the doctrine has been extended to allow a domestic well claimant time to increase or "develop" the claimed right in the future.

Second, the thrust of the Defendant's argument is to seek to apply the doctrine to allow him to use his well to irrigate outdoors. Response at 19 ("since [Defendant] 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"). Defendant's seeking to use his domestic well permit to irrigate outdoors, as discussed herein, is precluded as a matter of law. Simply stated, the *Mendenhall* doctrine has no place in this particular instance.

Conclusion

Defendant has not demonstrated any disputed material fact with respect to beneficial indoor use of water beyond the 0.5 acre-foot per year that is presumptively sufficient under the Court's

Order to Show Cause. Indeed, Defendant concedes that this amount is a sufficient measure of his indoor usage. Summary judgment is therefore proper on the quantity of water to be adjudicated to Defendant under his domestic well permit. In addition, Defendant's legal arguments with respect to the Court's indoor use restriction, which is reflected in his permit, and attempt to gain more time to "develop" his right, are in error.

THEREFORE,

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment on the Claims of Defendant Christian Gossein Under Subfile PM-89217 [Doc. No. 10438] be, and hereby is, **granted**.

> **THE PARTIES ARE NOTIFIED THAT WITHIN 20 DAYS OF SERVICE** of a copy of this order, report, or recommendations, they may file written objections with the Clerk of the Court pursuant to Federal Rule of Civil Procedure 53(f)(2). **A party must file any objections with the Clerk of the Court within the twenty-day period if that party wants the District Judge to hear their objections. If no objections are filed within the twenty-day period, the District Judge may adopt the order, report or recommendations in whole**.

IT IS SO ORDERED.

/s/ Pierre Levy
Pierre Levy, Special Master

March 14, 2016

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.

/s/ Pierre Levy
Pierre Levy