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

STATE OF NEW MEXICO'S RESPONSE TO DEFENDANT CHRISTIAN GOSSEIN'S RULE 59 MOTION FOR A NEW TRIAL AND RULE 60(B)(6) MOTION FOR RECONSIDERATION OF THE SPECIAL MASTER'S ORDER GRANTING SUMMARY JUDGMENT UNDER SUBFILE PM-89217

COMES NOW the Plaintiff State of New Mexico, ex rel. State Engineer ("State") and hereby replies to Defendant Christian Gossein's April 8, 2016 *Rule 59 Motion for New Trial and Rule 60(b)(6) Motion for Reconsideration of the Special Master's Order Granting the State's Motion for Summary Judgment* ("*Gossein Motion*") (No. 10562), and in support thereof, states as follows:

I. Introduction

On January 11, 2016, the State filed its *Motion for Summary Judgment* on the claims of Defendant Christian Gossein under subfile PM-89217 (No. 10438). Defendant Gossein filed his *Response* (No. 10513) on February 2, 2016, and the State filed its *Reply* (No. 10531) on March 4,

2016. Because no issue exists as to material facts, and because summary judgment should be entered as a matter of law, the Special Master granted the State's *Motion*. March 14, 2016 *Order Granting Motion for Summary Judgment on the Claims of Christian Gossein Under Subfile PM-89217* ("Special Master's *Order*") (No. 10538).

Defendant Gossein never filed an objection to the Special Master's *Order* pursuant to Fed. R. Civ. P. 53(f)(2). Two days after the deadline for filing such an objection passed, Defendant Gossein filed instead the instant *Motion* pursuant to Rules 59 and 60(b)(6).

The State requests the Court overrule Defendant Gossein's objections, and adopt the Special Master's *Order*.

II. Neither Rule 59 or Rule 60 Are Applicable, and Defendant's Objection to the Special Master's Order is Untimely

Defendant Gossein failed to make a timely objection to the Special Master's *Order*. This Court has ordered that:

> Rule 53 provides that "[i]n acting on a master's order, report, or recommendations, the court must give the parties notice and an opportunity to be heard." Fed. R. Civ. P. 53(f)(1). To satisfy this notice requirement, the Special Master shall include the following notice in each of his orders, reports and recommendations:
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> > 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 objection 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.**
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> See Fed. R. Civ. P. 53(f)(2) ("A party may file objections to – or a motion to adopt or modify – the master's order, report or recommendations no later than 20 days after a copy is served, unless the court sets a different time.").

June 30, 2008 *Order of Reference* at 5 (N0. 6336) (emphasis added). The instant Special Master's *Order* included that mandated language, including the statement that "[a] party must file any objection with the Clerk of the Court within the twenty-day period if that party wants the District Judge to hear their objections." Special Master's *Order* at 8 (emphasis added). Defendant Gossein failed to object as required by Rule 53(f)(2) and the Court's own June 30, 2008 *Order of Reference*, and instead now bases his *Motion* on Rules 59 and 60 of the Federal Rules of Civil Procedure. Neither work here.

Rule 60(b) provides "[o]n motion and just terms, the court may relieve a party or its legal representative from a final judgment, order or proceeding . . ." Fed. R. Civ. Pro. 60(b) (emphasis added). The Special Master's *Order* here is not a final "judgment, order or proceeding." Indeed, the 10th Circuit Court of Appeals ruled earlier this year with regard to this very case that interlocutory orders of this Court were not final. *State of New Mexico ex rel. State Engineer v. Trujillo*, 813 F.3d 1308 (10th Cir. 2016) ("We lack jurisdiction . . . because the 2015 order is not a final judgment . . ."). There the 10th Circuit was reviewing an order that had been entered by the district judge, and which had adjudicated the Defendant's water right. In the instant matter, Defendant Gossein seeks 60(b) review of an *Order* issued by the Special Master, an *Order* that has not yet been adopted by the Court, and which has not adjudicated the elements of Defendant Gossein's water right. Rule 60(b) is inapplicable here.

Rule 59 provides "[a] motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment." Fed. R. Civ. Pro. 59(e) (emphasis added). As noted above, the Court has not yet adopted the Special Master's *Order*, and has not yet entered an order

adjudicating Defendant Gossein's domestic well water right. As such, Rule 59 also is inapplicable.

Defendant Gossein nevertheless asserts that the grounds for a motion under Rule 59 are those of a motion to reconsider, namely: "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." Gossein *Motion* at 6 (citations omitted). Defendant Gossein's "motion to reconsider" standard is also inapplicable, as he never filed an objection to the Special Master's *Order*, which as discussed above is the exclusive remedy for a party aggrieved by a special master's order, report or recommendations. Moreover, and also as discussed above, the Court has not adopted the Special Master's *Order*, and therefore not "considered" anything in the first instance. There is nothing yet for the Court to *re*consider. A motion to reconsider is therefore not available to Defendant Gossein.

But even for argument's sake, if the court were to apply the grounds for a motion to reconsider that Defendant Gossein identifies, the necessary elements are not met. There has been no change in the controlling law; Defendant Gossein presents no new evidence that was previously unavailable; and as will be discussed below, his assertion that the Special Master made clear error is baseless. There are no grounds for a motion to reconsider, even if that procedural device were available to Defendant Gossein here.

III. The Special Master's Order Was Not Erroneous

In his *Motion* now before the Court, Defendant Gossein argues that the Domestic Well Statute (Section 72-12-1.1) allows for outdoor use, while his permit does not, and that the statute trumps the permit. Gossein *Motion* at pp. 5 to 9. He previously made this same argument before

the Special Master in his *Response*, stating 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." *Response* at 8. Defendant Gossein now claims that the Special Master's *Order* "omitted to provide any analysis of the language contained in Mr. Gossein's permit to see whether it violates the Domestic Well statute." This assertion is not accurate. Indeed, the Special Master addressed Defendant Gossein's argument on that score head-on, stating that "[i]n 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."

Special Master's *Order* at 5. The Special Master is correct, and builds his analysis on a solid foundation of previous orders of this Court, notably the March 30, 2012 *Memorandum Opinion and Order*, which thoroughly quotes and discusses the January 13, 1983 *Order*, the indoor use permit condition on all domestic well permits issued since that time (including Defendant Gossein's), and the Domestic Well Statute itself. No. 7579 at 2, and 3 to 5. The Special Master went on to specifically and expressly note that:

> [T]his 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.) (Vazquez, 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 [Gossein]'s argument, therefore, is not only legally incorrect, it ignores the prior rulings of this Court.

Special Master's *Order* at 5 to 6.

Defendant Gossein nonetheless states his "legal argument is a matter of first impression before this Court and involves a matter of statutory interpretation that has been ignored and mischaracterized by the Special Master's Order." Gossein *Motion* at 4. It is not a matter of first impression, and has not been ignored or mischaracterized by the Special Master. The Court has already ruled against Defendant Gossein's arguments 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).

Nonetheless, Defendant Gossein went on to state: "we have not located any case that has reviewed this particular legal question." Gossein *Motion* at 6. Again, Defendant Gossein is not correct, and as noted above, the Court *in this case* has ruled otherwise on this issue many times now. Most recently, on May 14, 2015, less than a year ago, 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*, 813 F.3d 1308, 1321 (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,* 813 F. 3d. at 1321. 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.*

There is no legal basis for Defendant Gossein to use water outdoors. As a result, and as the Special Master found, the State is entitled to summary judgment as a matter of law.

IV. The Special Master's *Order* Did Not Cosider Evidence of Defendant Gossein's Outdoor Use of Water Because as a Matter of Law His Water Right is Limited to Indoor Use Only

Defendant Gossein states that the Special Master's *Order* "failed to consider evidence of outdoor water usage needed to establish the measure of beneficial use of water from Mr. Gossein's well." Gossein *Motion* at 3. The Special Master's *Order* did not *fail* to consider evidence of outdoor water use, but rather affirmatively found that:

> 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*, _ F.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.) Vazquez, 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 presented 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.

Special Master's *Order* at 6. The Special Master's analysis was spot on. No further analysis was necessary.

V. The Special Master's Did Not Misconstrue Defendant Gossein's Arguments

Defendant Gossein also complains that the Special Master's *Order* was erroneous because "It completely mischaracterized and confused the nature of the arguments provided in the briefing by Mr. Gossein." Gossein *Motion* at 3. Defendant Gossein bases this on his assertion that while the Special Master's *Order* rejected "Defendant's argument that the Domestic Well Statute provides a guarantee of a water right for a maximum statutory amount," Defendant Gossein in fact never made such an argument. Gossein *Motion* at 4. Defendant Gossein states he "in no way argued that he is 'entitled' to a statutory maximum, and in fact asserted that he was only entitled to 0.7 acre feet per year." *Id.* Defendant Gossein is not correct.

On November 12, 2014 Defendant filed a *Subfile Answer* (No. 9918) rejecting the State's proposed Domestic Well Order with respect to subfile PM-89217 stating that "Defendant claims 3.0 AFY pursuant to his permit and Sec. 72-12-1-1 NMSA (1978) . . ." (emphasis added). In the February 18, 2015 *Joint Status Report and Provisional Discovery Plan* at 2 ("*JSR*") (No. 10106), Defendant Gossein again contends that "Defendant's post-1982 domestic well water rights should allow for outdoor water use of their permit quantities of 3.0 acre feet per year."[1] (emphasis added). The State addressed Defendant Gossein's repeatedly asserted claim in its *Motion for Summary Judgment*, stating:

> Defendant Gossein's domestic well permit allows for the diversion of up to 1.0 acre foot of ground water per annum, not 3.0. That said, here the permit limit is irrelevant. The Constitution of the State of New Mexico requires that beneficial use, not a permit, define the quantity of a water right. *See* N.M. Const. Art. 16, § 3.

[1] Defendant Gossein's permit limit is actually 1.0 acre foot per year, not 3.0.

State's *Motion for Summary Judgment* at 3. The Special Master's *Order* addressed Defendant Gossein's claim of "3 AFY", and found for the State, agreeing that "a permit is not a water right", and that Defendant Gossein was not entitled to 3 AFY pursuant to his permit. Special Master's Order at 5.

In short, Defendant Gossein's current assertion that he "in no way argued that he is entitled to a statutory maximum" is not accurate. The Special Master's *Order* did not "mischaracterize or confuse" Defendant Gossein's claims, and properly ruled against them.

VI. The Court Has Already Ruled Many Times on Objections to the January 13, 1983 Injunction

Finally, Defendant Gossein complains that "no consideration was provided by the Special Master as to whether Mr. Gossein has a right to have his objection to the 1983 injunction heard as a matter of procedural due process." Gossein *Motion* at 3. In fact, the Special Master specifically noted Defendant Gossein's argument on this score: "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 . . ." (emphasis added). Special Master *Order* at 3. Far from ignoring Defendant Gossein's argument, the Special Master concluded – as already quoted above – that Defendants objections to the January 13, 1983 injunction were not well taken. Special Master's *Order* at 5. Defendant Gossein's complaint that his objection on that score were not heard has no merit, and should be overruled.

WHEREFORE, Plaintiff the State of New Mexico requests this Court overrule the objections of Defendant Christian Gossein as being untimely, deny his *Motion* for all the reasons stated above, and adopt the Special Master' March 14, 2016 *Order Granting Motion for Summary Judgment on the Claims of Christian Gossein Under Subfile PM-89217*.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on April 25, 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.