

CASE NO. 15-2047

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

STATE OF NEW MEXICO, ex rel. S.E.
Reynolds, State Engineer,

Plaintiff – Appellee,

UNITED STATES OF AMERICA,

Plaintiff - Intervenor

v.

ELISA TRUJILLO, et al.,

Defendants – Appellants.

On Appeal from the United States District Court
For the District of New Mexico
The Honorable Judge William P. Johnson
D.C. No. 6:66-CV-006639-WJ-WPL

APPELLEE STATE OF NEW MEXICO’S BRIEF-IN-CHIEF

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Oral Argument Is Not Requested

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PRIOR OR RELATED APPEALS

There have been prior appeals in this case, but none related to the appeal of the issues of fact and law presented by the individual subfile order which is the subject of the instant matter.

JURISDICTIONAL STATEMENT

The State is dissatisfied with the Appellant-Defendant Elisa Trujillo's ("Trujillo") jurisdictional statement because it is not complete, and presents bases for jurisdiction to which the State has not had the opportunity to respond. Additionally, it presents bases for jurisdiction which are not accurate, and with which the State does not agree. This Court does not have jurisdiction based on "concurrent jurisdiction," as Trujillo suggests in her *Opening Brief* at 13. Moreover, Trujillo's statements regarding *inter se* are not correct and not relevant. *Id.* For that reason, the State presents this additional jurisdictional statement. Fed. R. App. P. 28(b)(1).

On March 27, 2015, this Court entered its *Order for Brief Re: Jurisdiction* (No. 01019406401) identifying two possible jurisdictional defects in the appeal by Trujillo of the district court's January 12, 2015 *Order Adjudicating Post-1982 Domestic Well Water Rights* ("January 12, 2015 Order"): 1) a motion filed by Trujillo apparently related to issues adjudicated in the January 12, 2015 *Order* being

appealed from remains pending in the district court; and 2) the district court did not articulate the reasons supporting its determination of “finality” and “no just reason for delay” included in the January 12, 2015 *Order*. This Court suspended briefing on the merits, and ordered that Trujillo file a memorandum brief addressing the two possible defects.

These appellate jurisdictional issues were briefed by both the Appellee-Plaintiff State of New Mexico (“State”) and Trujillo pursuant to the Court’s *Order for Brief Re: Jurisdiction*. See April 15, 2015 *Appellant’s Response to Order for Brief: re Jurisdiction* (No. 01019415575) and May 11, 2015 *Plaintiff-Appellee State of New Mexico’s Response to Defendant-Appellant’s Response to Order for Brief Re: Jurisdiction* (No. 01019429393). The Court subsequently reserved judgment on the issues it had identified, and reserved judgment also on the additional jurisdictional bases identified by Trujillo in her *Appellant’s Response to Order for Brief: re Jurisdiction*, and referred them to the panel of judges that will be assigned to consider the merits of this appeal. May 14, 2015 *Order* (No. 01019431221).

The first jurisdictional issue was rendered moot when, on May 29, 2015, the district court ruled on the motion filed by Trujillo apparently related to issues adjudicated in the January 12, 2015 *Order* (namely, Trujillo’s November 1, 2014

Motion To Quash The Preliminary Injunction, or In The Alternative, for a Three Judge Panel (No. 9906)), resolving the first of the two jurisdictional issues identified by the Court. See *Memorandum Opinion and Order* (No. 10204).

With regard to the second of the two issues, the State does not dispute that this Court has jurisdiction to review the January 15, 2015 *Order* adjudicating Trujillo's domestic well water right as a final order pursuant to 28 U.S.C. § 1291. See *Appellant's Response to Order for Brief: re Jurisdiction* at 10-12.

However, in *Appellant's Response to Order for Brief: re Jurisdiction*, Trujillo additionally alleges three further bases for jurisdiction not previously identified by her. The State had not responded to these in its *Response to Defendant-Appellant's Response to Order for Brief Re: Jurisdiction*, as the decision on Trujillo's then pending *Motion To Quash The Preliminary Injunction, or In The Alternative, for a Three Judge Panel* could have affected the January 12, 2015 *Order*, depriving this Court of jurisdiction at that time. Those three additional jurisdictional bases identified by Trujillo were: (1) that the January 12, 2015 *Order* being appealed from granted an injunction, making it appealable pursuant to 28 USC § 1292(c)(2); (2) that the January 12, 2015 *Order* met the terms of the pragmatic finality exception; and (3) that the district court's denial of her *Motion To Quash The Preliminary Injunction, or In The Alternative, for a Three Judge Panel* creates jurisdiction

pursuant to 28 U.S.C. 1292(c)(2). There is no merit to her arguments. The practical finality exception provides that a court may assume jurisdiction “where the danger of injustice by delaying appellate review outweighs the inconvenience and costs of piecemeal review.” *Albright v. U.N.U.M. Life Ins. Co. of America*, 59 F.3d 1089, 1093-94 (citations omitted). However, the “the practical finality exception has lived a checkered life in both our court and the United States Supreme Court.” *Id.* (quoting *Bender v. Clark*, 744 F.2d 1424, 1427 (10th Cir. 1984)). The exception is used very sparingly and is applied in only unique or exceptional circumstances. *Id.*

In the instant matter, Trujillo attempts to invoke the practical finality exception for review, not of the January 12, 2015 *Order* being appealed from, but rather of the district court’s January 13, 1983 *Order*, an injunction requiring the State Engineer to limit all future domestic well permits issued in the Nambe-Pojoaque-Tesuque stream system (“NPT”) to indoor use only, that has been the law of the case for over thirty years. Indeed, Trujillo’s permit and associated water right date back to 1985, and as such, she and her predecessors-in-interest have been under the indoor use limitation for almost as long as the 1983 Injunction has been in place. The notion that an immediate appeal is warranted by an immediate “danger of injustice” is false. The practical finality exception is not a jurisdictional

basis for Trujillo's appeal.

Trujillo's argument that this Court has jurisdiction pursuant to 28 USC § 1292(c)(2) due to the presence of the word "enjoin" in the district court *Order* is also not well taken. The language in the *Order* being appealed from states:

Defendant(s) are enjoined from any diversion or use of the waters of the Nambe-Pojoaque-Tesuque stream system except in accordance with the rights adjudicated in this order or any other order of the court.

Order at 3 (emphasis added). This is not an injunction; it is simply a restatement of New Mexico water law. See e.g., NMSA 1978 § 72-5-39:

No person shall use the public waters of the state of New Mexico except in accordance with the laws of the state of New Mexico. No person shall divert water or apply water to land without having a valid water right to do so, or apply it to purposes for which no valid water right exists.

See also, NMSA 1978 § 72-2-18 ("When a person, pursuant to a finding of fact, violates . . . an order entered by a court adjudicating a water right, the state engineer may, in addition to any other remedies available under law, issue a compliance order stating with reasonable specificity the nature of the violation and requiring compliance within a specified time period"). The language Trujillo relies upon to claim jurisdiction pursuant to Section 1292(c)(2) merely describes the state of the law.

That the district court did not grant some additional "injunctive relief" to what

is already provided for by New Mexico's statutes is supported by the fact that the elements of injunctive relief were never pled before the district court. See *Roda Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009) ("To obtain a preliminary injunction, the moving party must demonstrate four factors: (1) likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest.") *Id.* (citations omitted). In the instant matter, the district court was simply recognizing a special statutory characteristic of New Mexico water law, that a person must have a water right to divert and use water. There is no injunctive relief granted by the January 12, 2015 *Order* being appealed from, and consequently Trujillo has no jurisdictional basis for her appeal pursuant to 28 U.S.C. 1292(c)(2).

Finally, Trujillo argues both in her *Appellant's Response to Order for Brief Re: Jurisdiction* at 9, and in her *Appellant's Opening Brief* at 14 (No. 01019451583), that the Court also has jurisdiction over this appeal pursuant to 28 U.S.C. 1292 because the district court denied her above identified *Motion To Quash The Preliminary Injunction, or In The Alternative, for a Three Judge Panel*. The district court entered its *Memorandum Opinion and Order* denying that *Motion* on May 29, 2015. Trujillo has never filed a notice of an appeal of that *Order*. The time for

appeal of that *Memorandum Opinion and Order* has passed. Moreover, as will be discussed in detail, *supra*, the issues presented by Trujillo's *Motion To Quash The Preliminary Injunction, or In The Alternative, for a Three Judge Panel* are moot.

STATEMENT OF APPLICABLE STANDARD OF REVIEW

The State is dissatisfied with Trujillo's statement of the applicable standard of review because it is not complete. For that reason, the State presents this statement of the applicable standard of review. Fed. R. App. P. 28(b)(4).

A grant or denial of summary judgment is reviewed de novo, applying the same legal standard used by the district court. *Harrison v. Wahatoyas, L.L.C.*, 253 F.3d 552, 557 (10th Cir. 2001) (citing *Kaul v. Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996) (citation omitted). That standard is set forth in Fed.R.Civ.P. 56(c): Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Id.* The purpose of a summary judgment motion, unlike that of a motion to dismiss, is to determine whether there is evidence to support a party's factual claims. *Id.* Unsupported conclusory allegations thus do not create a genuine issue of fact. *Id.* See also, *United States v. Simons*, 129 F.3d 1386, 1388-89 (10th Cir. 1997) (citing *Allen v. Muskogee, Okla.*, 119 F.3d 837, 843-44

(10th Cir. 1997). To withstand summary judgment, the nonmoving party “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 558 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (quoting Fed.R.Civ.P. 56(e))).

The burden of proof with respect to quantifying a water right in a stream system adjudication falls squarely on a defendant, or the owner of the water right. *See e.g., Pecos Valley Artesian Conservancy Dist. v. Peters*, 54 N.M. 148, 152-153, 193 P.2d 418, 422-423 (1948).

STATEMENT OF THE ISSUES PRESENTED

The State is dissatisfied with Trujillo’s statement of the issues presented because it is not complete, and includes issues that are not presented by Trujillo’s appeal. For that reason, the State presents this statement of the issues presented. Fed. R. App. P. 28(b)(2). The sole issue presented by this appeal is whether there is no genuine dispute of material fact, and the State is entitled to summary judgment as a matter of law that the amount of Trujillo’s domestic use water right does not exceed 0.5 acre-feet per year limited to indoor use only.

STATEMENT OF THE CASE

The State is dissatisfied with the Trujillo’s statement of the case because it is incomplete and not accurate. For that reason, the State presents this additional

statement of the case. Fed. R. App. P. 28(b)(3). This appeal arises out of the general stream system adjudication of all water rights within the NPT, styled as *State of New Mexico ex rel. State Engineer v. R. Lee Aamodt, et al.* (“Aamodt”). 1966 *Complaint* (Doc. No. 7339, filed 4/20/66) (NM App. 000001)¹; see also, NMSA 1978, §§ 72-4-15 (1907), -17 (1965). There are approximately three thousand water right claimants in the NPT who have to date been named defendants in this matter. The relief sought with regard to these three thousand defendants includes that the district court determine and define the water rights of each of the several defendants and enter its decree stating:

- a. The water right adjudged each party.
- b. The source, priority, amount, purpose, periods, and place of use of each right.
- c. The specific tracts of land to which the water right for irrigation is appurtenant.
- d. Such other matters as may be necessary to define a particular right and its priority.

Complaint at 9 (NM App. 000009); NMSA 1978 § 72-4-19 (1907). No full or partial final judgment or decree has been entered in this matter, and the case remains active and ongoing.

¹ References to documents in the Appellant’s Appendix are to “Aplt. App.” References to documents in the State’s Supplemental Appendix are to “NM App.”

A. The History of the January 12, 2015 *Order*

The State here provides a detailed summary of the previous filings regarding Trujillo's domestic well water right claim to provide this Court with the context in which the district court granted summary judgment to the State, and ultimately entered the January 12, 2015 *Order* adjudicating Trujillo's domestic well water right. On January 13, 1983, the district court, after having heard oral argument, granted a motion by the Plaintiff-Interveners United States and the four Pueblos of Nambe, Pojoaque, Tesuque and San Ildefonso for an injunction and ordered 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.

Order (No. 641) (Aplt. App. 000013) ("1983 Injunction"). Two years later, on March 15, 1985, the Office of the State Engineer issued Trujillo's predecessor-in-interest a domestic well permit numbered RG-43319, with the following condition:

Use shall be limited to household and/or drinking and sanitary purposes; water shall be conveyed from the well to the place of use in a closed conduit and the effluent returned to the underground so that it will not appear on the surface. No irrigation of lawns, gardens or trees or use in any type of pool or pond is authorized under this permit.

June 16, 2011 Ex. 2A and 2B (No. 7403-1 and 2) (NM App. 000080 and 000081).

Neither Trujillo nor her predecessor-in-interest ever appealed the indoor use restriction contained in permit number RG-43319 through the Office of the State Engineer's administrative processes.

Trujillo's was one of hundreds of permits issued after January 13, 1983 in the NPT containing the indoor use restriction. Those permits and their resulting wells are alternatively characterized as being "post-moratorium" or "post-1982." On December 11, 2006, the district court issued its *Order to Show Cause*, imposing on all claimants of post-1982 domestic well water rights an obligation to show cause:

1. Why the claimant's water rights under a post-1982 domestic well permit should not be adjudicated in the quantity of 0.5 acre feet per annum, and
2. Why the claimant's water rights under a post-1982 well permit should not otherwise be adjudicated consistent with the terms of the domestic well permit.

Order to Show Cause (No. 6194) (NM App. 000010). Six months later, on June 14, 2007, the Court entered its *Procedural and Scheduling Order for the Adjudication of Water Rights Under Domestic Wells Permitted After January 13, 1983* (No. 6239) (Aplt. App. 000033), requiring each defendant be served with a packet that includes a proposed domestic well order that describes the post-1982 domestic well water rights of the Defendant and the Court's *Order to Show Cause*.

On or about September 18, 2008, Trujillo was served with a packet containing

a proposed domestic well order and the Court's *Order to Show Cause*, as required by the Court. See State's *Fifth Motion to Join Additional Parties Defendant* (No. 6389) (NM App. 000013). The substantive elements of the water right described in the proposed domestic well order sent her are as follows:

Purpose: Domestic use for One Household pursuant to NMSA § 72-12-1 and -1.1

State Engineer File No.: RG-43319

Priority: 03/13/1985

Source of Water: Underground waters of the Rio Grande Underground Water Basin.

Point of Diversion: Well No. RG-43319 Location: X= 572,141 Y= 1,769,893 on the New Mexico State Plane Coordinate System, Central Zone, 1927 N.A.D.

Place of Use: Within the property owned by the Defendant(s) served by the well

Amount of water: Not to exceed a diversion and consumption of 0.5 acre feet per year from the well described above unless a more restrictive diversion limit applies pursuant to court order, covenant or ordinance.

Other Conditions: Use shall be limited strictly to household, drinking and sanitary purposes; water shall be conveyed from the well to the place of use closed conduit and the effluent returned to the underground so that it will not appear on the surface. No irrigation of lawns, gardens, trees or use in any type of pool or pond is authorized. All other conditions of State Engineer Permit No. RG-43319 for the above described well are also incorporated herein.

Shortly thereafter, on November 20, 2008, Defendant returned a *Request for*

Consultation Form to the State, indicating she disagreed with the proposed domestic well order.

During the consultations which followed, the State and Trujillo were unable to come to agreement as to the terms of her Order, and pursuant to the district court's *Scheduling and Procedural Order*, on April 29, 2009, the State served Trujillo with a *Notice That the Consultation Period Had Ended* (No. 6644) (NM App. 000018). On May 18, 2009, Trujillo timely filed her *Subfile Answer* (No. 6679) (NM App. 000021), as required by the Court's *Scheduling and Procedural Order*, rejecting the State's proposed domestic well order with respect to subfile PM-43319. Trujillo's *Subfile Answer* rejected the substantive elements of the State's proposed determination of her water rights in this subfile only as to: 1) the amount of water; and 2) the condition limiting the use of water to indoor use only. *Id.* She did not, however, contest the remaining elements of purpose of use, priority, source of water, point of diversion or place of use. *Id.*

During the course of discovery, Trujillo failed to produce any evidence to show cause why the terms of her permit limiting her to indoor water use should not apply, or why her water right should not be adjudged in the amount of 0.5 acre feet per year. Following discovery, on November 6, 2009, the State filed its *Motion for Summary Judgment Regarding the Claims of Elisa Trujillo Under Subfile*

PM-43319 (No. 6824) (NM App. 000023), asserting that there were no disputed issues of material fact and the State was entitled to summary judgment as a matter of law. The State's *Motion* was fully briefed, on January 19, 2010 the Special Master heard oral argument on the *Motion* and supplemental briefing on the issue of burden of proof was allowed, after which the Special Master granted summary judgment. He found that "Defendant Trujillo bears the burden of proving the right she claims to hold," that she "does not tender any evidence of her own permissible indoor use of water," and her rights under subfile PM-43319 are controlled by the permit language which expressly restricts the permittee in the use of water through a specific condition of approval to indoor use only. *Order Granting Motion for Summary Judgment Regarding the Claims of Elisa Trujillo Under Subfile PM-43319* at pp. 3,7-8 (No. 6917) (Aplt. App. 000042). With regard to the only evidence offered as to the amount of Trujillo's water right, the Special Master observed that:

In its Motion the State tendered the affidavit of John Longworth, P.E., Chief of the State Engineer Water Use and Conservation Bureau. Mr. Longworth testifies in his affidavit to indoor use, based on Census Track data and State Engineer Technical Report 52, of 0.4 acre-feet per year per household. Mr. Longworth bases his opinion on his training as a professional engineer and as an expert in water use quantification.

(No. 6917 at 8) (Aplt. App. 000050). The Special Master concluded "Defendant Trujillo has failed to provide any evidence to rebut the Longworth affidavit," and concluded that:

Because Plaintiff the State of New Mexico has presented sufficient evidence in support of its motion for summary judgment, because Defendant Trujillo has failed to come forward with competent material facts quantifying her own permissible uses of water under subfile PM-43319, and because no material facts are in dispute with respect to Defendant Trujillo's beneficial use, the motion for summary judgment should be granted.

(No. 6917 at 9 and 11) (Aplt. App. 000051 and 000053).

On March 18, 2010, Trujillo objected to the Special Master's *Order* granting the State's *Motion*, arguing variously that the State's evidence did not support a grant of summary judgment, she was entitled to a trial on the merits, statutory adjudication procedures had not been followed, and she had been denied due process and equal protection of the law. On April 9, 2010, the State filed its response, and with the filing of Trujillo's reply on April 19, 2010, Trujillo's *Motion* was fully briefed. See *State's Response to Elisa Trujillo's Objection to Special Master's Order Regarding Subfile PM-43319* (No. 6953); *Defendant Trujillo's Reply on Objections to Special Master's Order Regarding Claims of Elisa Trujillo Under Subfile PM 43319* (No. 6958); and *Defendant Trujillo's Completion Notice for Motion Packet* (No. 6959) (NM App. 000047).

While her *Objection* to the Special Master's *Order* was pending, on February 22, 2010 Trujillo filed another motion, this one characterized as her *Motion for Relief from Order* (No. 6914) (NM App. 000035). This *Motion* did not directly

address the Special Master's February 9, 2009 *Order* granting the State's *Motion for Summary Judgment*; instead, it brought a collateral attack on the Court's 1983 Injunction. (No. 6914 at 11) (NM App. 000046). On March 19, 2010, the State responded that the 1983 Injunction did not enjoin Trujillo, and that her water right was limited by the terms of her permit. *State of New Mexico's Response to Defendant Elisa Trujillo's Motion for Relief from Order* at 5-7 (No. 6938). On June 29, 2010, the Special Master filed his *Recommendation to Deny Defendant Elisa Trujillo's Motion for Relief from Order*, finding that the 1983 Injunction enjoined the State Engineer, not Trujillo; that it was the permit conditions which constrained Trujillo from using water outside; and that Defendant Trujillo's predecessor-in-interest never challenged the conditions of the permit:

Only after Defendant Trujillo was joined in the adjudication, and when she filed her Subfile Answer on May 15, 2009, did any holder of the permit challenge, for the first time, any limitations imposed by specific condition of approval No. 8 and, indirectly, the January 1983 Order.

No. 7011 at 2-3 (NM App. 000050-51).

Undeterred, on July 15, 2010, Trujillo filed her *Appeal of the Recommendation of Special Master to Deny Defendant Elisa Trujillo's Motion for Relief from Order* (No. 7020) (NM App. 000006). Trujillo's Appeal argued that the district court was without subject matter jurisdiction, that it did not have personal jurisdiction over Trujillo, and that the 1983 Injunction deprived her of her real

property without due process of law. She also attempted to introduce a fact question by submitting the affidavit of her mother testifying to a quantity of water allegedly diverted from the well for irrigation purposes.

On June 2, 2011, the district court issued its *Memorandum Opinion and Order* (No. 7398) (NM App. 000059), agreeing with the Special Master's *Recommendations*, denying Trujillo's *Motion for Relief from Order*, and overruling her Appeal. The district court noted that Trujillo sought relief from the 1983 Injunction pursuant to Fed. R. Civ. P. 60(b), "[h]owever, 'Rule 60(b) only applies to final orders or judgments.'" (No. 7398 at 1- 2) (NM App. 000060-61) (citations omitted). "The January 13, 1983 Order is not a 'final' order," the district court noted, observing that "[a] final decision is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (No. 7398 at 2) (NM App. 000061) (citations omitted). "The Court," it said, "has not yet entered a final decision regarding Trujillo's claims." *Id.*

Trujillo did not appeal the district court's denial of her *Motion for Relief from Order*. Instead, on June 16, 2011, almost immediately after the district court denied her *Motion for Relief from Order*, Trujillo filed another very similar motion, titled *Defendant Elisa Trujillo's Motion to Quash Preliminary Injunction* (No. 7403) (NM App. 000063), arguing that the district court should quash its preliminary injunction

on due process, equal protection and jurisdictional grounds.

On March 30, 2012, the district court denied Trujillo's *Motion to Quash*, ruling it was "essentially a motion to reconsider," and she had failed to meet the standard for such a motion. *Memorandum Opinion and Order* at 5 (No. 7579) (NM App. 000082). The district court also found that Trujillo's due process, equal protection and jurisdictional arguments against the 1983 Injunction failed because she had not demonstrated that she had a protectable property interest, the 1983 Injunction was facially neutral and the district court had subject matter jurisdiction "because the United States is a plaintiff in this case," respectively. (No. 7579 at 7, 9 and 11) (NM App. 000089, 000091 and 000093). Trujillo did not appeal the district court's denial of her *Motion to Quash*.

Finally, on September 20, 2012, the district court overruled Trujillo's objections to the Special Master's February 26, 2010 *Order Granting Motion for Summary Judgment Regarding the Claims of Elisa Trujillo Under Subfile PM-43319*, and granted the State's *Motion for Summary Judgment*. *Memorandum Opinion and Order* (No. 7757) (NM App. 000093). It held that "a permit is not a water right and Trujillo does not cite any authority, nor did the Court find any authority, for the proposition that a permit to appropriate water is a perfected property right." (No. 7757 at 6) (NM App. 000098). It restated the law that a

water right for a domestic well in New Mexico is limited to the quantity of water beneficially used, as opposed to the permit amount of three acre feet per year. *Id.* The district court further correctly applied the law of the State of New Mexico and held that the amount of Trujillo's beneficial use was based on the district court's *Order to Show Cause*, and that the quantity of water beneficially used from a domestic well when water from that well can be used for both indoor and outdoor purposes, is typically on the order of 0.5 acre-feet per year state wide, or substantially less:

The State pointed to the Water Master Report filed in this case which includes meter readings for over 300 post-1982 domestic wells. The owners of the wells in the Water Master Report had entered into a settlement agreement which allowed them to divert 0.7 acre feet per year for both indoor and outdoor use of water. The meter records for those wells showed an average use of 0.3 acre-feet per year. Because there were no objections to the State's motion and for good cause shown, the Court ordered claimants of unadjudicated water rights under post-1982 well permits to show cause why the water right quantity for post-1982 well permits should not be adjudicated as 0.5 acre-feet per year consistent with the terms of the domestic well permit.

(No. 7757 at 9-10) (NM App. 000102-103) (citations omitted). The district court then rejected the affidavit submitted by Trujillo describing her outdoor uses of water for irrigation purposes:

First, because the affidavit does not quantify the amount of water used indoors, it does not show that she beneficially used more than 0.5 acre-feet per year. Second, the statement in the affidavit that Trujillo and her mother irrigated the property is unavailing because Trujillo's permit does not permit any irrigation. Illegal use of water does not

create a water right because the “statutory manner of securing such rights is exclusive.” *New Mexico v. Dority*, 55 N.M. 12, 19 (1950).

(No. 7757 at 10) (NM App. 000103). The district court concluded that the adjudication of Trujillo’s domestic well water right claim is consistent with adjudication statutes, that the permit condition arising from the 1983 Injunction limiting her to indoor water use does not cause her to be denied due process and equal protection of the law, and that “Trujillo has not shown that there is a genuine issue of material fact regarding whether she has beneficially used more than 0.5 acre-feet of water per year indoors.” (No. 7757 at 13) (NM App. 000106).

On October 1, 2012, Trujillo moved the district court to reconsider its grant of summary judgment. *Defendant Trujillo’s Motion for Reconsideration* (No. 7775) (NM App. 000106). On October 18, 2012 the State filed its *Response to Defendant Elisa Trujillo’s Motion for Reconsideration Regarding Subfile PM-43319* (No. 7780) (NM App. 000113), pointing out that Trujillo had failed to recite the standard for a motion to reconsider, had failed to meet that standard, and that her *Motion* consisted almost entirely of misstatements regarding the Pueblos, their water rights, and the 1983 Injunction. On October 29, 2012 Trujillo filed her *Reply* (No. 7781) (NM App. 000123), and on October 30, 2012, her *Completion Notice for Motion Package* (No. 7782) (NM App. 000127). On April 17, 2013, the district court entered its *Memorandum Opinion and Order* agreeing with the State, and denied

Trujillo's *Motion for Reconsideration*, ruling that:

The Court will deny Trujillo's motion to reconsider because Trujillo has not shown there are any grounds warranting a motion to reconsider. Trujillo has not pointed to any intervening change in the controlling law. Nor has she identified any new evidence that was previously unavailable.

(No. 7870 at 4) (NM App. 000132). The district court reiterated that the amount of Trujillo's water was based on her actual beneficial use of water, not the permit limit:

Furthermore, granting Trujillo's request, that the Court adjudge her the right to divert "the 3.0 [acre-feet per year] amount permitted by the office of the State Engineer's permit" and for outdoor use, would be contrary to state law. Trujillo contends the Court should adjudge her the right to use 3.0 acre feet of water per year as reflected in her permit. However, New Mexico law is clear that a water right is based on the amount of water beneficially used, not on the amount permitted.

(No. 7870 at 5) (NM App. 000133) (citing, *inter alia*, N.M. Const. Art. XVI, § 3 ("Beneficial use shall be the basis, the measure and the limit of the right to use water.")). And with regard to Trujillo's complaints about the indoor use restriction on her water right, the district court added:

Trujillo also contends the Court should adjudge her the right to use water outside 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.

(No. 7870 at 6) (NM App. 000134) (citing *New Mexico v. Dority*, 55 N.M. 12, 19

(1950)).

Pursuant to its September 20, 2012 *Memorandum Opinion and Order*, granting the State’ *Motion for Summary Judgment*, and its April 17, 2013 *Memorandum Opinion and Order* denying Trujillo’s *Motion for Reconsideration*, on January 12, 2015, the district court entered the *Order Adjudicating Post-1982 Domestic Well Rights* (No. 9989) (Aplt. App. 000143) from which this appeal is taken.

B. Trujillo’s Misrepresentations of Fact and Law

In her *Opening Brief*, Trujillo makes numerous misstatements of law and mischaracterizes numerous facts. She commences her “Statement of the Case” by incorrectly stating “[t]his is an appeal of a summary judgment entered on February 26, 2010.” *Opening Brief* at 4. It is not. It is expressly and solely the appeal of the district court’s January 12, 2015 *Order* adjudicating Trujillo’s domestic well water right. See March 12, 2015 *Notice of Appeal* (No. 10122). Continuing in this vein, Trujillo also incorrectly states that “Trujillo appeals the denial of her motion to quash the preliminary injunction that underlies the prohibition against outdoor irrigation contained in her permit as Condition 8.” *Opening Brief* at 13. Based upon the relief requested, Trujillo also seems to believe she is appealing the 1983 Injunction, the “procedure for approving and adopting the proposed settlement

agreement,” and the district court’s denial of her “motion to dismiss the Intervener Plaintiffs or realign them as defendants.” *Id.* at 33. Trujillo has not noticed the appeal of any of these, and the time to file such notices of appeal has passed. Trujillo has appealed only the January 12, 2015 *Order* adjudicating her domestic well water right.

Trujillo states, without citation to the record, or authority of any kind, that “Circa 2000, Plaintiff and the Intervener Plaintiffs met in secret behind closed door and agreed on a two pronged plan that divests Trujillo, as domestic well owner, of most of her water rights.” *Opening Brief* at 5. She goes on to allege that the “plan” is part of the *Aamodt* Settlement Agreement, discussed *supra*. This is not correct, and Trujillo provides no support for these statements.

Trujillo then goes on to seriously mischaracterize the process by which the district court adjudicated her domestic well water right. She states that claimants have “historically proved their claim by presenting their permit,” and that such is the law of the case. *Opening Brief* at 8. These statements are not correct. The procedures adopted by the district court allow that a claimant’s water right shall be based on beneficial use, and provide the opportunity for the claimant to present evidence of the amount of that beneficial use. See *Procedural and Scheduling Order for the Adjudication of Water Rights Under Domestic Wells Permitted After*

January 13, 1983 (No. 6239). The district court in no way has allowed a claimant to prove their claim by “presenting the permit.” Indeed, as discussed fully above, the district court has done exactly the opposite, and has expressly declined to adjudicate the amount of a claimant’s water right in the maximum amount of the permit, and has consistently based it instead upon their beneficial use.

Trujillo also makes serious allegations with regard to coercion on the part of the State, again without support in the record. Specifically she states that “she was asked to sign the proposed stipulation and judgment or be sued . . . [and] was reminded of the high cost of litigation.” *Opening Brief* at 6. She adds later that “as promised, the Plaintiff parties have been relentless in suing her.” *Id.* at 7. Trujillo is not correct. She has been made a party to this case solely as a result of the statutes under which this adjudication of the NPT was brought. NMSA 1978, 72-4-17 (“In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants so far as they can be ascertained, with reasonable diligence, shall be made parties.”). There has been no coercion.

SUMMARY OF ARGUMENT

In her *Subfile Answer*, Trujillo objects only to the district court’s determination of her water rights as to: 1) the amount of water; and 2) the condition

limiting the use of water to indoor use only. She did not dispute the determination of any of the other elements of her water right.

Trujillo's post-moratorium domestic well water right is based upon a permit which expressly limited her use of water to indoor use only. Under New Mexico law, the amount of a water right is based upon actual historical beneficial use of water. Trujillo offered no evidence as to what that amount was. The State presented evidence to support the Court's evidentiary presumption that the amount of beneficial use for indoor use from a domestic well in the NPT is not more than 0.5 acre-feet per year providing the affidavit of its expert, John Longworth and numerous Water Master Reports filed in the case. Trujillo did not establish any genuine issues of material fact regarding any of the elements of her post-moratorium domestic well water right, and the State is entitled to judgment as a matter of law.

In her Brief Trujillo also repeatedly challenges the *Aamodt* Settlement Agreement and the proposed adjudication of the four Pueblos' water rights. Not only are these not relevant to the adjudication of Trujillo's post-moratorium domestic well water right, but the *Aamodt* Settlement Agreement and the water rights of the four Plaintiff-Intervenor Pueblos' are both squarely before the district court at this time. No order, much less final order has been entered with regard to either, and they are not ripe for appeal.

Trujillo's Brief also objects to and seeks relief from the 1983 Injunction in this appeal from the order defining her domestic water right. This issue is also outside the scope of this appeal. Trujillo's water right is limited to indoor use by the terms of her permit, not by the 1983 Injunction. Even if this court were to order the lifting of the 1983 Injunction, Trujillo's water right would still be limited to indoor use only, under the terms of the permit under which she developed her water right. Trujillo's objections to the 1983 Injunction are irrelevant and do not raise a dispute of material fact.

ARGUMENT

I. There Were No Issues of Material Fact and The State Was Entitled to Judgment as Matter of Law Regarding Trujillo's Post-Moratorium Domestic Well Water Right

The district court granted summary judgment to the State because Trujillo failed to present any evidence of the amount of her own water use under permit RG-43319, or any evidence as to why her use was not legally limited by the terms of her permit to indoor use only. Trujillo presents various arguments attempting to excuse her failure to come forth with evidence of the amount of her post-moratorium domestic well water use. In particular, Trujillo complains she was not notified she had to keep meter records, that she did present evidence of outdoor use, that the district court has historically allowed claimants to prove their water rights with

permits, that the State's evidence of her water use is inadequate, and that absent evidence of impairment to another party she is entitled to be adjudicated the permit limit. *Opening Brief* at 8, 14 and 29. As discussed below, none of these assertions raise an issue of material fact. Trujillo's post-moratorium domestic well water right is limited to indoor use by the terms of her permit, and the amount of her water right is based upon her beneficial use and is not more than 0.5 acre-feet per year.

A. Trujillo's Post-Moratorium Domestic Well Water Right is Limited to Indoor Use by the Terms of Her Permit

Trujillo's post-moratorium domestic well water right is limited to indoor use by the terms of her permit. On March 15, 1985, the State Engineer issued Trujillo's predecessor-in-interest a domestic well permit numbered RG-43319. In accordance with the 1983 Injunction, the permit contained a limitation to indoor use only. Trujillo admits this, stating:

The State Engineer issued a permit in 1985 to Trujillo's predecessor in title, to divert and use for domestic purposes, up to 3.0 AFY with a condition that the domestic well not be used for outdoor irrigation.

Appellant's Opening Brief at 5. Neither she nor her predecessor-in-interest ever pursued their administrative remedies to appeal the indoor use restriction contained in permit number RG-43319 within thirty days through the statutory process for appealing State Engineer decisions provided by NMSA 1978 Section 72-2-16 and NMSA 1978 Section 72-7-1. 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-43319 became conclusive in 1985.

The action of the Office of the State Engineer in issuing permit RG-43319 is final and is not subject to review by this Court. The district court correctly found that Trujillo’s water right is limited by the terms of her permit to indoor use only as a matter of law.

B. The Amount of Trujillo’s Post-Moratorium Domestic Well Water Right Is Based Upon Her Historical Beneficial Use, and Is Not More Than 0.5 Acre-Feet Per Year

No issue of material fact exists regarding the quantity of Trujillo’s domestic well water right, as Trujillo failed to present any evidence of the amount of her beneficial use of water under permit RG-43319. Trujillo nonetheless claims she is entitled not to the amount of her beneficial use of water under the permit, but rather to the 3.0 acre-feet per year limit of the permit. She alleges that she “perfected” that 3.0 acre-feet per year right by filing her well record; that no other party would be impaired if she were to use 3.0 acre feet per year; and that adjudicating any amount less than the 3.0 acre-feet per year permit limit would amount to a taking without due

process. *Appellant's Opening Brief* at 8, 15, 29. However, New Mexico law is abundantly clear that a permit is not a water right. Indeed, the New Mexico Constitution expressly provides that:

Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

N.M. Const. Art. XVI, § 3. Applying the law, the district court found that:

A permit is not a water right and Trujillo does not cite any authority, nor did the Court find any authority, for the proposition that a permit to appropriate water is a perfected property right. “A water permit is an inchoate right, and is the necessary first step in obtaining a water right. It is the authority to pursue a water right – a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state’s water in a particular place and to a particular beneficial use under conditions where the rights of other appropriators will not be impaired.” *Hanson v. Turney*, 136 N.M. 1, 3 (Ct. App. 2004) (language in New Mexico water statutes “is compelling evidence 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”); see also N.M. Stat. Ann. § 72-12-8 (distinguishing an “owner of a water right” from a “holder of a permit”).

(No. 7757 at 6) (NM App. 000098). The district court observed that not only had it already addressed the issue of whether a water right for a domestic well in New Mexico is limited to the quantity of water beneficially used, as opposed to the permitted amount of three acre feet per year, in the Zuni River Basin Adjudication the district court had also stated:

New Mexico law is clear on the subject. The constitutional provision and statutes . . . as well as abundant case law clearly state that beneficial use defines the extent of a water right. This fundamental principle is

applicable to all appropriations of public waters. Only by applying water to beneficial use can an appropriator acquire a perfected right to that water.

Id. (citing *United States v. A & R Productions, et al.*, No. 01cv72, Doc. No. 733 at 4, filed June 15, 2006 (N.N.M.) (Black, J.) (citations and quotation marks omitted). It correctly restated the law that a water right for a domestic well in New Mexico is limited to the quantity of water beneficially used, as opposed to the permit amount of three acre feet per year. *Id.*

The district court expressly gave Trujillo the opportunity to produce evidence regarding her water use in requiring her to show cause why her water rights under a post-1982 domestic well permit should not be adjudicated in the quantity of 0.5 acre feet per annum. In granting summary judgment, it found that Trujillo had offered no evidence of her own beneficial use of water under permit RG-43319, and that the State had offered evidence in the form of the affidavit of John Longworth. *Id.* In addition, the district court noted that the amount of Trujillo's beneficial use was based on the evidentiary presumption in the district court's *Order to Show Cause* that the quantity of water beneficially used from a domestic well, when water from that well can be used for both indoor and outdoor purposes, is typically 0.5 acre-feet per year state wide, or substantially less:

The State pointed to the Water Master Report filed in this case which includes meter readings for over 300 post-1982 domestic wells. The owners of the wells in the Water Master Report had entered into a

settlement agreement which allowed them to divert 0.7 acre feet per year for both indoor and outdoor use of water. The meter records for those wells showed an average use of 0.3 acre-feet per year. Because there were no objections to the State's motion and for good cause shown, the Court ordered claimants of unadjudicated water rights under post-1982 well permits to show cause why the water right quantity for post-1982 well permits should not be adjudicated as 0.5 acre-feet per year consistent with the terms of the domestic well permit.

(No. 7757 at 9-10) (NM App. 000101-000102) (citations omitted).

The district court also found that the affidavit of Trujillo's mother, which purported to testify to an amount of outdoor irrigation use, did not raise an issue of material fact. (No. 7757 at 10) (NM App. 000102). The district court rejected the affidavit "because the affidavit does not quantify the amount of water used indoors," it does not show that she beneficially used more than 0.5 acre-feet per year, and "proof" that "Trujillo and her mother irrigated the property is unavailing because Trujillo's permit does not permit any irrigation." *Id.* "Illegal use of water does not create a water right." *Id.*

Trujillo complains that she "has not kept usage records because the State Engineer did not require it." *Appellant's Opening Brief* at 8. "To require that data at this point," she claims, "is lacking in adequate notice." *Id.* Trujillo fails to cite any authority for the proposition that she is excused from presenting evidence in support of her water right claim for any reason. Indeed, the litigation of Trujillo's water right claim dates back to 2008, and as such, Trujillo has had notice for over

seven years to develop usage records to establish the amount of her beneficial use.

In fact, as the Special Master observed, not only has Trujillo failed to provide metering or usage records of any kind, Trujillo also failed to provide evidence of her household's indoor use "even indirectly, such as by showing how water was used or by explaining the number of persons in her household." *Order Granting Motion for Summary Judgment Regarding the Claims of Elisa Trujillo Under Subfile PM-43319* (No. 6917 at 9-10) (Aplt. App. 000051-52).

Trujillo additionally argues that because her "expert" hydrologist states "the Pojoaque Basin contains sufficient groundwater to service all domestic wells without impairing existing water rights," she is thereby entitled to 3.0 AFY of groundwater. *Appellant's Opening Brief* at 29. Setting aside for a moment the question of whether or not the conclusions of Trujillo's "expert" hydrologist are before the court when they were not part of the record on summary judgment in the district court, a supply analysis is not relevant to the evidence of the amount of water of her water right. As observed repeatedly above, "[b]eneficial use shall be the basis, the measure and the limit of the right to the use of water." N.M. Const. Art. XVI, § 3. Trujillo has presented no evidence of her actual beneficial use of water under permit number RG-43319. No issue of material fact exists and the district court was correct in granting the State summary judgment as a matter of law.

Finally, Trujillo argues that there was an unlawful taking, and she “was deprived of the beneficial use of 2.5 AFY without Due Process of Law and without just compensation.” *Appellant’s Opening Brief* at 15. As discussed above, Trujillo has offered no evidence that she ever beneficially used more than .05 acre-feet per year, the necessary basis for establishing a water right under New Mexico law. A permit alone, without beneficial use, is not a vested water right, and Trujillo offers no legal authority to support this argument. As the district court found, “Trujillo does not cite any authority, nor did the Court find any authority, for the proposition that a permit to appropriate water is a perfected property right.” Without a property right, there cannot be a taking.

There is no issue of material fact, and Plaintiff was entitled to judgment as a matter of law that Defendant’s post-1982 domestic well right should be adjudicated an amount of water not to exceed a diversion and consumption of 0.5 acre feet per year from the well unless a more restrictive diversion limit applies pursuant to court order, covenant or ordinance.

II. The Aamodt Settlement Agreement and the Adjudication of the Pueblos’ Water Rights Are Presently Before the District Court

Although Trujillo’s March 12, 2015 *Notice of Appeal* expressly provided notice of an appeal only as to the “final judgment entered in this action on the 12th day of January, 2015” adjudicating her own domestic well water rights, *Appellant’s*

Opening Brief nonetheless repeatedly challenges the *Aamodt* Settlement Agreement and the adjudication of the four Pueblos' water rights. See e.g., *Appellant's Opening Brief* at 33 ("The procedure for approving and adopting the proposed settlement agreement violates Appellant Trujillo's right to Equal Protection of the Law by its use of a double standard of law for administering water rights for the Pueblos and Trujillo"). Neither the *Aamodt* Settlement Agreement or the Pueblo water rights are relevant to the adjudication of Trujillo's domestic well water rights, which, as discussed above, are based solely and entirely on her own beneficial use of water. Moreover, all issues associated with both the *Aamodt* Settlement Agreement and the Pueblos' water rights are presently before the district court, and not yet ripe for appeal.

On December 16, 2013, the district court entered its *Order to Show Cause and Notice of Proceeding to Approve Settlement Agreement and Enter Proposed Partial Final Judgment and Decree on the Water Rights of the Pueblos of Tesuque, Pojoaque, Nambe and San Ildefonso*. (No. 8035). The district court ordered all persons claiming water rights in the NPT to show cause why the district court should not approve the Settlement Agreement and enter the proposed Partial Final Judgment and Decree adjudicating the Pueblos' water rights. *Id.* at 2. The deadline for filing objections to the Settlement Agreement and Proposed Decree was

April 7, 2014. *Id.* at 2. Approximately 800 objections were filed, and on August 8, 2014, the district court entered its *Case Management and Service Order* (No. 9506), governing the briefing of those approximately 800 objections. By February 4, 2015, the objections had been fully briefed, and all matters associated with the *Aamodt Settlement Agreement* and the water rights of the Plaintiff-Intervenor Pueblos of Nambe, Pojoaque, Tesuque and San Ildefonso were squarely before the district court. See November 6, 2014 *Memorandum of Points and Authorities in Support of Entry of Final Judgment and Decree* (No. 9910); November 6, 2014 *The Rio de Tesuque Associations, Inc.’s Memorandum in Support of Settlement Agreement and Entry of Partial Final Decree on the Pueblo Rights* (No. 9911); November 6, 2014 *Certain Non-Pueblo Defendants’ Memorandum in Support of Entry of Partial Final Judgment and Decree Incorporating Settlement Agreement and Adjudicating Pueblos’ Water Rights* (No. 9912); November 6, 2015 *State of New Mexico, Santa Fe County and City of Santa Fe’s Joint Memorandum in Support of Settlement* (No. 9913); January 5, 2015 *Response in Opposition to Motion to Approve Settlement Agreement and Entry of Proposed Partial Final Judgment and Decree* (No. 9972); January 7, 2015 *Objectors’ Response to Motions in Support of Entry of a Partial Final Judgment and Decree* (No. 9973); February 4, 2015 *Certain Non-Pueblo Defendants’ Reply Memorandum in Support of Entry of Partial Final*

Judgment and Decree (No. 10010); February 4, 2015 *Plaintiff-in-Intervention the United States, Pueblo de Nambe, Pueblo de Pojoaque, Pueblo de San Ildefonso, and Pueblo de Tesuque's Memorandum Reply Brief in Support of Approval of the Settlement Agreement and Entry of Partial Final Judgment and Decree and Interim Administrative Order* (No. 10011); February 4, 2015 *State of New Mexico, Santa Fe County and City of Santa Fe's Joint Reply to Response to Memorandum in Support of Settlement* (No. 10012). There they remain, as the district court has so far not acted on those briefs, and they currently remain pending.

Trujillo herself acknowledges that the Settlement Agreement and the water rights of the four Pueblos are presently before the district court, stating that: “[t]he Plaintiff parties have filed a motion for partial final decree [on the Pueblo water rights] to, *inter alia*, approve the settlement agreement and make it a final order of the court.” *Appellant's Opening Brief* at 8 (emphasis added). The unavoidable corollary, of course, is that there is presently no final order of the district court with regard the *Aamodt* Settlement Agreement or the Pueblo water rights.

“The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . .” 28 U.S.C. § 1291 (emphasis added). This Court does not presently have jurisdiction to hear issues associated with either the *Aamodt* Settlement Agreement or the water rights of the

Plaintiff-Intervenor Pueblos, as those matters are currently and unambiguously pending before the district court. Not only is there no “final decision,” there is no decision at all, as the district court has not yet ruled on the briefs. Trujillo’s arguments and requests for relief regarding the Aamodt Settlement Agreement and the water rights of the Pueblos of Nambe, Pojoaque, Tesuque and San Ildefonso should therefore be disregarded.

III. Trujillo’s Objections to the January 13, 1983 Injunction Are Moot

Appellant’s Opening Brief devotes much of its length objecting to and seeking relief from the 1983 Injunction. Trujillo complains that “[t]he preliminary injunction entered on January 14 [sic], 1983 deprives Appellant Trujillo of the beneficial use of her domestic well for outdoor irrigation without Due Process of Law and is otherwise in violation of the Federal Anti-Injunction Act and should be quashed” (*Appellant’s Opening Brief* at 33); the 1983 Injunction violates the Anti-Injunction Act, 28 U.S.C. § 2283 (*Appellant’s Opening Brief* at 14, 19-22); a three judge panel was not convened to decide the matter of the injunction as required by 28 U.S.C. § 2284(b) (*Appellant’s Opening Brief* at 22); the district court lacked subject matter jurisdiction to enter the 1983 Injunction (*Appellant’s Opening Brief* at 23); no irreparable harm was proven in support of the 1983 Injunction (*Appellant’s*

Opening Brief at 21, 23); and the 1983 Injunction does not state why it was entered (*Appellant's Opening Brief* at 31).

However, the January 12, 2015 *Order* being appealed from did not limit Trujillo's water right to indoor use only because of the 1983 Injunction. As already discussed, *infra* at 31-33, her post-moratorium domestic well water right is limited to indoor use solely due by the terms of her permit. In 1985, the State Engineer issued Trujillo's predecessor-in-interest a domestic well permit which included a condition limiting it to indoor use only. Neither Trujillo nor her predecessor-in-interest objected to the action of the State Engineer, nor requested a hearing within thirty days as required by NMSA 1978 Section 72-2-16. Neither Trujillo nor her predecessor-in-interest pursued an appeal of the State Engineer's actions to State district court, as required by NMSA 1978 Section 72-7-1 (A). Such an appeal 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-43319 became conclusive in 1985.

For that reason, the 1983 Injunction is not relevant to Trujillo's appeal of the district court's *Order* adjudicating her domestic well water right. If this Court were

to overturn the 1983 Injunction as Trujillo requests, Trujillo's permit condition would still remain and her water right would continue to be limited to indoor use only. Her many objections to the 1983 Injunction are therefore moot. See *Knox v. Service Employees*, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012) (A case becomes moot when it is impossible for a court to grant any effectual relief whatever to the prevailing party).

Moreover, the 1983 Injunction is not the subject of Trujillo's appeal. Trujillo's *Notice of Appeal* did not identify the January 13, 1983 *Order* of the district court, although Trujillo has challenged the Injunction before the district court three times. See Trujillo's February 22, 2010 *Motion for Relief from Order* (No. 6914) (NM App. 000035); June 16, 2011 *Motion to Quash Preliminary Injunction* (No. 7403) (NM App. 000063); and November 1, 2014 *Motion to Quash the Preliminary Injunction Or, Alternatively, for Three Judge Court* (No. 9906) (Aplt. App. 000131). The district court denied each of those challenges. See June 2, 2011 *Memorandum Opinion and Order* (No. 7398) (NM App. 000059)(denying Trujillo's *Motion for Relief from Order*); March 30, 2012 *Memorandum Opinion and Order* (No. 7579) (NM App. 000082) (denying Trujillo's *Motion to Quash Preliminary Injunction*); and May 29, 2015 *Memorandum Opinion and Order* (No. 10204) (Aplt. App. 000147) (denying Trujillo's *Motion to Quash the Preliminary Injunction Or, Alternatively,*

for Three Judge Court). Trujillo has appealed none of them. The time for appealing those actions by the district court has passed.

CONCLUSION

Trujillo's Brief asserts numerous irrelevant bases for appeal, but the only issues before the Court on this appeal are the determination of two of the elements her water rights: 1) the amount of water; and 2) the condition limiting the use of water to indoor use only. Trujillo's post-moratorium domestic well right is a permitted water right, and is limited to indoor use pursuant to the conditions of her permit. The amount of her water right is based on her historical beneficial use of water, and Trujillo failed to offer any evidence as to what that amount was. The State did present evidence that the amount of her beneficial use was not more than 0.5 acre-feet per year, based on the affidavit of John Longworth and numerous Water Master Reports filed in the case. As such, there are no genuine issues of material fact regarding any of the elements of Trujillo's post-moratorium domestic well water right, and the State is entitled to judgment as a matter of law.

WHEREFORE, for all the reasons discussed above, Appellee-Plaintiff State of New Mexico respectfully requests this Court dismiss, or in the alternative deny Appellant-Defendant Trujillo's appeal.

/s/ Gregory C. Ridgley

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing APPELLEE STATE OF NEW MEXICO'S BRIEF-IN-CHIEF filed on this 31st day of August, 2015, complies with the following:

Cir. R. 25.3 and of the 10TH CIRCUIT COURT OF APPEALS CM/ECF USER'S MANUAL Section II, I.

A. As required by 10th Cir. R. 25.5 and Fed. R. App. P. 25(a)(5), all required privacy redactions have been made.

B. Any hard copies of the Brief-in-Chief required to be submitted to the Clerk's office are exact copies of the CM/ECF filing.

C. The Supplemental Appendix was scanned for viruses with the most recent version of McAfee VirusScan Enterprise, an anti-virus scanning program (version 8.8.0 (8.8.0.777), and the date of the most recent update was August 27, 2015), and McAfee Anti-Spyware Enterprise, and according to said programs is free of viruses.

Date: August 31, 2015

/s/ Edward Charles Bagley

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because:

[X] this brief contains **10,802** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), or

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Date: August 31, 2015

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 31, 2015, 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.

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