

The Court inquires whether it has jurisdiction to hear this appeal.

Specifically, the Court asks (1) whether the Order is properly certifiable under Fed. R. Civ. P. 54(b) despite the pending Motion; and (2) whether the certification language in the Order is sufficient to satisfy this court's requirements as set forth in *Stockman's Water*.

PROCEDURAL HISTORY

On January 14, 1983, the district court entered an order

“...that no permit 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 the effluent below the surface of the ground minimizing and (sic) consumption. All subject to further order of the court.” (See Order filed January 14, 1983, Dkt. #641; Attachment 1).

The preliminary injunction on its face contains no findings of irreparable harm as required by Rule 65(b)(1)(A), or a specific finding that the applicant will suffer a specified harm if the injunction is not granted as required by 28 USC 2284(b)(3). See Motion to Quash Preliminary Injunction, or, in the Alternative, for a Three-Judge Panel filed November 1, 2014, Dkt. # 9906. (Hereinafter “Motion”).

The preliminary injunction restrains the state engineer from issuing permits for domestic wells that allow use of the domestic well for outdoor irrigation of

non-commercial trees, lawns, and gardens. The preliminary injunction effectively bans new landscaped yards in the Pojoaque Valley after January 14, 1983 without a finding of the reason for the ban.

There is no proof of service of the 1983 Order on Appellant or her predecessor in title.

The district court granted the State's motion for summary judgment on (September 20, 2012, Dkt. #7757).

Appellant moved the court to reconsider its grant of summary judgment on the basis that the preliminary injunction was being made permanent in the judgment without a hearing. (Motion for Reconsideration, filed October 1, 2012, Dkt. #7775). Appellant moved to quash the preliminary injunction for lack of evidence of irreparable harm. See Defendant Trujillo's motion to quash preliminary injunction dated November 1, 2014, Dkt. # 9906. The motion is pending.

The motion for reconsideration was denied. (Memorandum Opinion and Order filed on April 17, 2013, Dkt. # 7870).

The district court entered its judgment on January 12, 2015. (Dkt. # 9989).

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Appellant's water rights on the Acequia de los Ortiz's date back to 1786.
(Dkt. 9546, August 27, 2014, p. 8).

ARGUMENT

I. The Order Is Properly Certifiable Under Fed. R. Civ. P. 54(b) Despite The Pending Motion.

The Court's jurisdiction to review final decisions of the district courts" is conferred by 28 U.S.C. §1291. See *Waltman v. Georgia-Pacific, LLC*, 590 Fed.Appx. 799 (Cir. 10, 2014). A final decision under § 1291 is one which "ends the litigation on the merits and leaves nothing for the court to do but execute on the judgment." *Id* at pp. 808-809.

The requirement for a final order, known as the "final-judgment rule" is designed to prevent "fragmentary and piecemeal review" of district court rulings, and to "promote efficient judicial administration by reducing the ability of litigants to ... clog the courts through a succession of costly and time-consuming appeals." *Id.* at pp. 808-809. An exception to the "final judgment rule" is a Rule 54(b) certification of an interlocutory order as a final order in suits having multiple claims and/or multiple parties.

A Rule 54(b)¹ certification is deemed to provide the proper foundation for an appeal when it contains three key features: first, the order must stem from a lawsuit that involves multiple claims. An order must be “final” in the sense that it is an ultimate disposition of an individual claim entered in the course of a multiple claims action; second, the order must represent a final decision on at least one of the claims; and, third, the order must include the district court’s express determination “that there is no just reason for delay.” *Stockman’s Water Co. v. Vaca Partners, L.P.*, 425 F.3d 1263, 1265 (Cir. 10, 2005); *Waltman v. Georgia-Pacific*, at pp. 808-809.

The order in this case meets those requirements: 1) there are at least 797² claimants of record in this case. 2) Appellant’s claim has been adjudicated independently of other claims; and 3) paragraph 4 states: “There is no just reason to delay entry of this Domestic Well Order as a final judgment as between the Plaintiff State of New Mexico and the Defendant(s) regarding the elements of the claims of the Defendant(s) adjudicated by this Domestic Well Order.” See

¹ “When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment”

² The claimants of record include 792 Defendant-Objectors to a proposed settlement agreement, plus four Pueblos, plus the USA.

Judgment filed on January 12, 2015, Dkt. # 9989, paragraphs 3 and 4.

The Domestic Well Order in this case includes the district court's reasons for certifying the judgment as final with no just reason for delay by its reference to its Memorandum Opinion and Order, No. 7870.

The standard for review of a district court's Rule 54(b) certification is a *de novo* review because it is a question of law. The district court's determination that there is no just reason for delay is reviewed only for abuse of discretion."

Waltman v. Georgia-Pacific, at p. 808. Thus, the district court must expressly state that a particular order is final and spell out the reasons why an appeal is permissible immediately, and need not await the resolution of all pending issues.

II. The Language in Paragraph 4 Of the Order Is Sufficient to Satisfy This Court's Certification Requirements.

The Domestic Well Order herein complies with the requirement that the district court state its reason(s) for its determination of finality in the judgment. The judgment incorporates by reference the Memorandum and Opinion filed on April 17, 2013, Dkt. #7870. The district court's reasons for certifying finality is contained in its statement: "Furthermore, there is no legal basis to grant Trujillo the right to use water outdoors or in an amount greater than 0.5 acre-feet-per year."

In apparent conflict with the district court's certification of finality is the qualifying language that the judgment is subject to an "*inter se*" phase of the

adjudication and is subject to entry of a final judgment.

In the court's mind, the Order is final. Nothing is going to change. The *inter se* proceedings have not been initiated or scheduled to date. All the elements that define a domestic well water right are determined by the summary judgment so no other element is required. Appellant's claim is adjudicated. It is unjust to obligate her to wait until the court adjudicates the remaining claims before she is allowed to appeal.

The Rule 54(b) certification is valid and proper.

III. The Pending Motion Does Not Deprive the Court of Jurisdiction.

The subject judgment states in its last paragraph:

“IT IS FURTHER ORDERED that defendant(s) are enjoined from any diversion or use of the waters of the Nambe-Pojoaque-Tesuque stream system except in accordance with rights adjudicated in this order or any other order of the court.” (Dkt. #9989).

The judgment grants the State's request for an injunction over Appellant's objection. As such, it is an interlocutory order that grants an injunction that can be appealed pursuant to 28 USC s 1292(a)(1)³. *MAI Basic Four, INC. v. Basis*,

³ “(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, ...or of the judges thereof, **granting**, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.”

Inc., 962 F.2d 978, 981 (Cir. 10 1992)). (“an interlocutory order *expressly* granting or denying injunctive relief fits squarely within the plain language of §1292(a)(1).”), (citing *Tri–State Generation & Transmission Ass’n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir.1989)).

The Domestic Well Order plainly enjoins Appellant from diverting or using water from the N-P-T stream system except in accordance with the rights adjudicated in this order or any other order of the Court. The Order is sufficiently injunctive in character to be appealable under § 1292(a)(1) because it commands explicit action at the present time. *United States V. Gila Valley Irrigation District*, et al.; 31 F.3d 1428 (9th Cir. 1994).

The Court has jurisdiction independent of the pending Motion.

IV. The Judgment is a Practical Final Order.

As the Court notes, the decision on the Motion could modify the judgment. Order, p.1. The district court was aware of that possibility. (see Memorandum Opinion and Order filed on December 30, 2014 Dkt. # 9964, p. 3) when it entered a default judgment on March 23, 2015; Dkt. # 10154 and an Order Adjudicating a Post-1983 Well Water Rights entered on March 23, 2015, Dkt. # 10152. The court is enforcing the preliminary injunction. The default judgment is certified as final. (Dkt. #9964). By these judgments, the district court announces its denial of the

Motion.

The district court's actions are a *de facto* denial of the Motion.

A denial of the motion to quash the preliminary injunction is appealable under §1292(a)(1). *United States V. Gila Valley Irrigation District* 31 F.3d 1428 (Ninth Cir. 1994); *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir.1989).

In making these determinations of finality, the district court should weigh the policy of preventing piecemeal appeals against the inequities that could result from delaying an appeal. *See Stockman's Water Co. v. Vaca Partners*, 425 F.3d 1265-66 (10th Cir. 2005); *Lewis V. Goodrich Company*, 850 F.2d 641 (10TH Cir. 1988.) citing *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 85 S.Ct. 308, 311, 13 L.Ed.2d 199 (1964).

The judgment, the Memorandum Opinion and Order, the affidavit, the preliminary injunction and the Motion attached to the docketing statement herein are prima facie showing of the following:

1. The preliminary injunction violates the Anti-Injunction Act (28 USC §§2283, 2284). (See Motion p. 5; Response to Motions in Support a Partial Final Judgment and Approval the Settlement Agreement filed on January 7, 2015, Dkt. #9973).

2. The preliminary injunction is not supported by requisite findings of irreparable harm. The court does not state its reason for banning trees, lawns and gardens in the Pojoaque Valley after 1983. (See Order January `14, 1983, Dkt. #641).
3. The preliminary injunction is arbitrary by its failure to cite evidence of harm, less irreparable harm. No reason is given for the injunction.
4. The injunction is temporary but Appellant's Domestic Well Order permanently restrains her from using the water for outdoor irrigation. Domestic Well Order, p.2.
5. The Appellant's water rights are reduced from the permitted amount of 3.0 AFY to 0.5 AFY.
6. The Domestic Well Order enforces the preliminary injunction against Appellant although she was not a party at the time the preliminary injunction was entered and did not have notice and an opportunity to present evidence.
7. Appellant is restrained from using her domestic well to irrigate her non-commercial trees, lawn and garden. Order January14, 2015, Dkt. #641.

The preliminary injunction touches every post-1983 judgment by the restraint against outdoor irrigation. The lawfulness of the preliminary injunction is “fundamental to the further conduct of the case” and is a basis for applying the “practical” finality exception. *Albright v. UNUM Life Ins. Co. of Am.*, 59 F.3d 1089, 1093-

94 (10th Cir. 1995); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-54, 85 S. Ct. 308, 311-12, 13 L. Ed. 2d 199 (1964).

If this appeal is dismissed, Appellant will be forced to wait until the district court enters a decision on the Motion or until every claim is adjudicated, whichever comes first. The record in this case does not bode well for a rapid resolution of all claims. Meanwhile, Appellant is denied the 3.0 acre-feet-per year (AFY) that the Legislature of New Mexico intended that she have the right to use, if available, pursuant to the Domestic Well Statute (Section 72-12-1.1 NMSA 1978). She may not plant trees, or a large vegetable garden or a lawn for her small children as she planned to do. See Affidavit filed on December 22, 2009, Dkt. # 6845-5.

The aesthetic value of a landscaped yard is difficult to measure in dollars. An appeal at this time can avoid many appeals at a later time if this appeal results in the recognition that the judgments being entered are void for lack of subject matter jurisdiction⁴ and can be timely corrected in the district court, thereby eliminating the need for an appeal to correct each individual judgment in the appellate court.

⁴ Appellant submits that the single judge court does not have jurisdiction to enjoin the state engineer in this case. See Motion.

In the alternative to applying the final judgment rule if necessary, Appellant is requesting the Court to apply the “practical” finality exception and exercise jurisdiction. Appellant has shown that there exist special circumstances in this case to justify a bypass of the final judgment doctrine with a practical final judgment.

V. CONCLUSION.

For the foregoing reasons, Appellant respectfully requests the Court to find that it has jurisdiction pursuant to 28 USC s1291 and 28 USC s 1292(a)(1) and order as follows: 1) the district court to enter a written decision on the Motion To Quash The Preliminary Injunction, Or In The Alternative, for a Three Judge Panel, supported by findings, before it enters any other judgment, 2) allow this appeal to proceed 3) allow the stay of briefing to remain until the district court enters its written decision on the Motion, 4) and for attorneys fees and costs.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on April 15, 2015, I caused the foregoing Response to be filed electronically through the CM/ECF system which caused parties on the electronic service list to be served as described in the Notice of Electronic Filing.

S/ Lorenzo E. Atencio

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