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	)	**NO. 66cv6639 WJ/WPL**
UNITED STATES OF AMERICA, PUEBLO DE NAMBE, PUEBLO DE POJOAQUE, PUEBLO DE SAN ILDEFONSO, and PUEBLO DE TESUQUE,	)	
Plaintiffs-in-Intervention.	)	

REPLY TO RESPONSES TO APPLICATION FOR ORDER TO SHOW CAUSE

The State of New Mexico on the relation of the State Engineer ("State"), pursuant to the Special Master's February 5, 2015 *Order Setting Deadline for Filing Responses to Plaintiff the State of New Mexico's Application for Order to Show Cause* ("*Order Setting Deadlines*") (No. 10014), hereby replies to all Responses to its December 19, 2014 *Application for Order to Show Cause* (No. 9960), and states as follows:

On December 19, 2014, the State filed its *Application for Order to Show Cause*. No timely response was filed. However, before the Court acted on the State's *Application*, various *pro se* parties began filing untimely responses. On February 5, 2015, the Special Master set a briefing schedule, stating that he would consider responses by *pro se* parties that were filed on or before February 11, 2015. *Order Setting Deadlines* at 2.

By the February 11, 2015 deadline, *pro se* parties had filed in all a total of eighty-one (81) *Responses*, identified in the appendix, attached hereto as Exhibit A. In many cases, *pro se* parties filed more than one Response. *See e.g.*, February 5, 2015 *Pre-Basin Well Owners Response to New Mexico State Engineer Motion for Order to Show Cause* (No. 10037) filed by Beth Gonzales, and February 5, 2015 *Pre-Basin Well Owners Response to New Mexico State Engineer Motion for Order to Show Cause*, also filed by Beth Gonzales (No. 10038). The *pro se* Respondents make no assertion that they themselves are pre-basin well claimants, or that they themselves would be affected by the proposed Order to Show Cause. Indeed, their *Responses* suggest otherwise, complaining that it is not possible to determine whether or not "affected persons" are aware of the State's *Application*. *Responses* at 2. As such, the *pro se* Respondents in all likelihood have no standing to oppose the State's *Application*. See *City of Colo. Springs v. Climax Molybdenum*, 587 F.3d 1071, 1071 (CO 2009) (A proposed intervenor may not establish piggyback standing where the existing parties in the suit are not seeking judicial resolution of an active dispute among them). Their arguments on this issue should be disregarded. However, the parties who will be served with the Order to Show Cause will have an opportunity to make all these same objections, in response to the Order to Show Cause. They are not being denied an opportunity to be heard. Rather, service of the Order to Show Cause on the pre-basin well claimant is intended to initiate a proceeding in which pre-basin well owners will receive full due process and an opportunity to respond and present any evidence or argument in support of their water right claims.

All eighty-one *Responses* appear to be form responses, identical in every respect, except for the name of the *pro se* party filing the document. All complain that the proposed Order to

Show Cause would reduce pre-basin domestic well water rights and that the State Engineer "has completely failed to identify and provide information as to which wells this would apply to."

These objections fail to recognize the Court's existing procedural order. The Court's August 2, 2012 *Procedural and Scheduling Order for the Adjudication of Water Rights for Domestic Wells, Including Pre-Basin Domestic Wells or Permitted Prior to This Court's Order of January 13, 1983* ("Domestic Well Procedural Order") at 2 (No, 7736), which governs this portion of the lawsuit, provides that "[f]rom the date of entry of this Scheduling and Procedural Order, the State may begin filing motions to join water rights claimants as their ownership information and well locations are confirmed." The State is currently in the process of investigating and identifying all pre-basin water right claimants, and wells, that the proposed Order to Show Cause would apply to. The vast majority of pre-basin wells – over four hundred in number – were identified in the original hydrographic survey conducted in the early nineteen-sixties, and have already been adjudicated by the Court in orders entered in the 1960s and 1970s. The State now is only identifying any remaining pre-basin wells that have not yet been adjudicated. As ownership information and locations are confirmed, the State will begin filing motions to join.

Second, the Order to Show Cause the State has applied for under the Domestic Well Procedural Order does not "reduce" pre-basin domestic well water rights. On the contrary, as this Court has previously ruled, the State of New Mexico's constitutional measure of beneficial use determines the amount of water for a domestic well water right:

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

September 20, 2012 *Memorandum Opinion and Order* at p. 7 (No. 7757) (citing *U.S. v. A & R Productions*, No. 01cv72, Doc. No. 733 at 4, filed June 15, 2006 (D.N.M.) (Black, J.) (citations and quotation marks omitted).

With regard to the quantity, the Court has already found that the evidentiary presumption of 0.7 acre feet per year of beneficial use from a domestic well is reasonable and supported by a variety of sources already in the record in this case, including actual meter readings:

> The State pointed to the Water Master Report filed in this case which includes meter readings for over 300 post-1982 domestic wells. (See Doc. No. 6127, filed April 25, 2005). 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. (See Doc. No. 6186 at 3).

September 20, 2012 *Memorandum Opinion and Order* at p. 10 (No. 7757). The amount of 0.7 in the proposed Order to Show Cause is only an evidentiary presumption that the quantity being beneficially used by a pre-basin well is 0.7 acre feet, based upon the Court's findings, cited immediately above; if the claimant is using more, the procedures adopted by the Court allow for the adjudication of that greater amount. Indeed, the State's December 19, 2014 *Application for Order to Show Cause* specifically provides that those who claim an amount greater than that proposed in the Order to Show Cause can "present evidence and have their claims heard." No. 9960 at 1. Those claimants with no objection to the Order to Show Cause can have their water rights adjudicated based on the evidentiary presumption of 0.7 acre feet per year without any need for further interaction with the State or the Court.

In sum, the State is not seeking to "reduce" the amount of water rights from pre-basin wells. In the absence of metering records or other evidence of actual beneficial use, the State

simply proposes the Court adopt a generous evidentiary presumption by way of an Order to Show Cause that offers more than twice the average amount of water used from domestic wells in the basin.

WHEREFORE, the State requests the Court deny the eighty-one (81) *pro se Responses*, and grant the State's *Application for Order to Show Cause*.

RESPECTFULLY SUBMITTED

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on February 25, 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.