BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE CORRECTED APPLICATION FILED BY AUGUSTIN PLAINS RANCH, LLC., FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN IN THE STATE OF NEW MEXICO	**Hearing No. 17-005** **OSE File No. RG-89943 POD 1 through POD 37**

RESPONSE TO CATRON COUNTY MOTION FOR SUMMARY JUDGMENT

Applicant Augustin Plains Ranch, LLC ("Applicant" or "Augustin") hereby responds in opposition to Catron County Board of County Commissioners' ("Catron County" or "Catron") Motion for Summary Judgement and Memorandum in Support ("Motion" or "Catron MSJ"). Catron County raises many of the same arguments as the ELC Protestants. Those arguments were addressed in Applicant's Consolidated Response in Opposition to the ELC Protestants' Motion for Summary Judgment ("Response to ELC Protestants"), which is hereby incorporated by reference. Augustin provides this separate response to Catron County primarily to address the arguments that were not raised in the ELC Protestants' Motion.

I. Introduction

The Catron County Motion begins with a description of Resolution 024-2012 of the Board of the County of Catron, New Mexico, entitled "Catron County Declaration of *Public Welfare Policy for Retaining Water Use and Conservation in Catron County*" ("Resolution") (emphasis added). Catron MSJ at 1-2, & Ex. 1. Citing its Resolution, Catron County argues that the Applicant should not be allowed a hearing on the merits of the 2014 Application because it

would be detrimental to the public welfare of Catron County, contrary to the conservation of water within Catron County, and contrary to sound public policy. The County also argues points made by the ELC Protestants in their Motion for Summary Judgment, in which the County joins. In addition, the County argues against the Applicant's proposed two-stage hearing procedure.

The Catron Motion's (1) reliance on its Resolution and (2) its limitation of the public welfare and conservation criteria to just Catron County's public welfare and conservation of water just in Catron County, should be rejected. As §72-12-3 (E) provides, it is the "conservation of water *within the state*" and "the public welfare *of the state*" that are at issue, not conservation of water within Catron County only, nor the public welfare of Catron County only (emphasis added). Further, the two-stage hearing procedure proposed by Augustin is within the Hearing Examiner's authority should be adopted.

Approval of the 2014 Application will bring increased prosperity to Catron County and the State of New Mexico, as Augustin's evidence at the hearing on the merits will show. At the moment, no one in Catron County or New Mexico is benefiting from the unused water sitting in the San Augustin aquifer. The construction and operation of wells and laying and operation of a pipeline within and beyond Catron County and the application of water to beneficial use are expected to benefit the economy of Catron County and its citizens and the economy of New Mexico and its citizens.

II. The Catron Motion Should Be Denied

A. The Water Code Requires Denial

The New Mexico Water Code, NMSA 1978, art. 72, provides that an applicant for a groundwater permit is entitled to an evidentiary hearing once the application has been accepted

for publication by the Office of the State Engineer ("OSE"). Catron County seeks to have the OSE deny Augustin such a hearing. Catron County cannot ask for a result forbidden by the Water Code, and its Motion should therefore be denied.

The OSE accepted the 2014 Application and issued notice for publication on August 16, 2016. See Letter from J. Fields to J. Draper and J. Wechsler, August 16, 2016. As a result, NMSA 1978, § 72-12-3(F) and § 72-2-16 (2001) mandate a hearing either before acting on the application or after acting on the application if the applicant requests. There is no alternative- the applicant is guaranteed a hearing by these controlling statutes. *Derringer v. Turney*, 2001-NMSC-075, ¶ 13, 131 N.M. 40, 33 P.3d 40 (§ 72-2-16 guarantees a party one hearing). The OSE rules go a step further and provide that a pre-decision hearing will be held in the case of a protested application. 19.25.2 et seq. NMAC. Yet Catron County insists that Augustin should be denied a hearing.

The hearing requirement of the Water Code is for an evidentiary hearing as set out in § 72-2-17 (1965). It provides that "opportunity shall be afforded all parties to appear and present evidence and argument on all issues involved." § 72-2-17 (B) (1). *See Derringer, supra,* ¶ 15 ("the parties shall be afforded an opportunity 'to appear and present evidence and argument on all issues involved,'" quoting § 72-2-17 (B) (1)). Thus, hearings on motions, for instance, do not satisfy the Water Code hearing requirement. The parties are allowed to be represented by counsel and "may conduct cross-examinations required for a full and true disclosure of the facts." § 72-2-17 (B) (3). These are the statutes that Catron County would have the Hearing Examiner ignore in this case.

Catron County argues that "the State Engineer has the statutory authority to deny an application, with or without a hearing, '[i]f objections or protests have been filed within the time

prescribed in the notice or if the state engineer is of the opinion that the permit should not be issued.'" Catron MSJ at 5, citing § 72-12-3(F). This assertion fails to read § 72-12-3(F) in conjunction with § 72-2-16 and fails to recognize the holding of the New Mexico Court of Appeals in *Derringer* that applicants before the State Engineer are entitled to a hearing. 2001-NMCA-075, ¶ 13 (the "plain language [of § 72-2-16] guarantees an aggrieved party one hearing"). *Cf Lion's Gate Water,* 2009-NMSC-057, ¶¶25-27, 31 (once an application has been accepted for filing and publication, 'the State Engineer must consider the full merits of an application.").

Sections 72-12-3 and 72-2-16's directive to grant Augustin a hearing is consonant with the policy throughout New Mexico law favoring adjudication of disputes on their merits. *E.g.*, *Transamerica Ins. Co. v. Sydow*, 97 N.M. 51, 54, 636 P.2d 322, 325 (Ct. App. 1981) (New Mexico courts "require that the rights of litigants be determined by an adjudication on the merits rather than upon the technicalities of procedure and form").

B. The "Public Welfare of Catron County" Is Not A Permissible Basis On Which To Deny A Hearing

Catron County asserts that it is the County's public welfare that should govern whether the 2014 Application should be dismissed at this stage of the proceeding. Catron MSJ at 2 ("The Board [of Catron County Commissioners] is particularly concerned about public welfare when a proposal is made to export water out of the County"); *id.* at 11 ("the County's public welfare should be safeguarded by the State Engineer when evaluating water rights applications, particularly applications that call for the transfer of water resources outside of the County's boundaries").

This argument is not well-taken for two reasons. First, the public welfare requirement clearly refers to the public welfare of the State of New Mexico as a whole, not the public welfare of some individual part of the State, such as a county. *See* NMSA 1978, § 72-12-3(E)(requiring that an application be "not detrimental to the public welfare *of the state*" (emphasis added)).

Second, the public welfare of the State is primarily a factual issue, not suited to be the basis for a motion to dismiss an application based exclusively on what appears on the face of the application. Indeed, the Scheduling Order entered by the Hearing Examiner in this proceeding lists "Whether granting the application would be detrimental to the public welfare of the state" as the third issue to be resolved as part of the hearing process. Scheduling Order (Aug. 10, 2017) at 5, ¶ 4 (C).

C. "Conservation of Water Within Catron County" Is Not A Permissible Basis On Which To Deny A Hearing

Catron Count also asserts "conservation of water within the Catron County" as a basis for dismissing the 2014 Application. Catron MSJ at 1-2. Again, confining a statewide criterion to Catron County alone is not consistent with the Water Code requirements. NMSA 1978, § 72-12-3(E) provides that an application cannot be granted unless it is determined to be "not contrary to conservation of water *within the state*." Like the public welfare criterion, conservation of water is not an issue that is feasible to determine on the basis of the face of an application. It requires factual presentations at a hearing on the merits. *See* Scheduling Order (Aug. 10, 2017) at 5, ¶ 4 (D)(specifying the fourth issue to be resolved in the hearing process, after availability of water, impairment and public welfare, as "Whether granting the application would be contrary to the conservation of water *within the state*")(emphasis added).

D. "Sound Public Policy" Is Not A Permissible Basis On Which To Deny A Hearing

Catron County takes the position in its Motion that the 2014 Application should be dismissed at this stage of the proceeding, without an evidentiary hearing, because it is "contrary to sound public policy." Catron MSJ at 2-3. Catron County argues essentially, that the application is contrary to the doctrine of prior appropriation. *Id.* at 10-13.

This argument is wrong-headed for several reasons. First, the criteria by which an application must be evaluated are set forth by statute. *See* NMSA 1978, § 72-12-3(E). There is no "sound public policy" criterion in the statute. The Water Code simply does not grant the State Engineer authority to deny an application that otherwise meets the statutory requirements on the basis of public policy. Therefore, Catron County's new criterion cannot be applied as a reason to deny the 2014 Application, either now, without hearing, or at any time.

Second, Catron County is arguing, in essence, that the groundwater applied for should be left in the ground in Catron County. The Constitution, on the other hand, provides that the unappropriated waters of the State shall be "subject to appropriation for beneficial use, in accordance with the laws of the state." N.M. Const. art. XVI, § 2. The essence of the Catron County position is that the waters of the San Augustin basin should not be available for appropriation under the 2014 Application. This is contrary to our Constitution.

Third, it is a fundamental element of the prior appropriation doctrine that water should be available to be moved from where it naturally occurs to where it can be put to a beneficial use. This is the primary distinguishing feature between prior appropriation and the riparian doctrine utilized in the eastern part of the country. For instance, there is statutory authorization to

transport water to the place of use by way of condemnation of intervening rights of way. *See* § 72-1-3 (granting right of eminent domain for the conveyance of water for beneficial use).

The Water Code does not grant the State Engineer authority to deny an application that otherwise meets the statutory requirements on the basis of public policy. *See* NMSA 1978, § 72-12-3(E). To the extent that public policy has any relevance at all, it is because public policy favors consideration of the 2014 Application on its merits. *See Bombach v. Battershell*, 105 N.M. 625, 735 P.2d 1131 (1987). *See* NMSA 1978, § 72-12-3(E).

III. The Hearing Examiner Should Adopt a Two-Stage Hearing Process to Evaluate the 2014 Application

In its 2014 Application, Augustin requested a two-stage hearing process in which the Hearing Examiner would consider the hydrologic issues of water availability and impairment first. *See* Response to ELC Protestants at Response Exhibit O, Attachment 2, pgs. 2-3. Although the current Scheduling Order does not contemplate a two-stage hearing process, Catron County has raised the issue, offering an opportunity for the Hearing Examiner to consider the appropriate procedure.

A. The Proposed Two-Stage Hearing Process Has No Bearing on Whether the Application Is Complete

Catron County argues that Augustin "admits that the Application does not include all of the information mandated by statute." Catron MSJ at 11. Catron County reasons that Augustin's request for a two-stage hearing process amounts to an acknowledgment that the 2014 Application does not "have the required information on the places ad purposes of use of the water." *Id.* at 9. Catron County is mistaken. As discussed in its Response to ELC Protestants, the 2014 Application goes far beyond the information required to be provided pursuant to Section 72-12-3. *See*

Response to ELC Protestants at 13-23; *Mathers v. Texaco, Inc.*, 1966-NMSC-226, ¶ 30, 77 N.M. 239 (noting that the application had been submitted on "forms furnished and prescribed by the State Engineer" and holding that "clearly these statutes do not require forms different from those submitted"); *Colorado v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294, 1321 (Colo. 1987) (en banc) (explaining that dismissal of an application without an evidentiary hearing "based on general information" on the face of the applications penalized the applicants "for following statutory application procedures"). The 2014 Application was accepted because it "is complete in accordance with current statutory and regulatory requirements." Water Rights Division's Response to the NMELC Protestants' Motion for Summary Judgment at 2.

Contrary to Catron County's assertion, Augustin's request for a two-stage hearing process was not related to the extensive information included in the 2014 Application. Rather, as discussed below, Augustin has proposed the two-stage hearing process as a method for managing the hearing in a way that balances the concerns of the Applicant and the Protestants, and allows for an efficient and organized evaluation of the issues.

B. The Hearing Examiner Has Authority to Adopt a Two-Stage Hearing Process

As a threshold issue, Catron County questions whether the Hearing Examiner has the authority to order a two-stage hearing process. It complains that "[Augustin] has not provided any statutory or legal basis for the proposed two stage process." Catron MSJ at 2.

The New Mexico Legislature has granted "broad powers" to the State Engineer to evaluate applications as part of "an exclusive and comprehensive administrative process." *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 24, 147 N.M. 523. Included among the "broad powers" of the State Engineer is the power to conduct and manage hearings in a manner that he deems appropriate. NMSA 1978, §§ 72-2-12, -16, -17. The State Engineer has exercised that authority

in this case by appointing the Hearing Examiner to "regulate all proceedings before him" and "take all measures necessary or proper for the efficient and orderly conduct of the hearing." § 72-2-12.

Pursuant to Section 72-2-12, the State Engineer has adopted rules governing the conduct of hearings. *See* 19.25.2 NMAC. Like the statute, those rules give the Hearing Examiner "power to regulate the proceedings" and to "perform all acts and take all measures necessary to conduct such hearings." 19.25.2.13(A) NMAC. The Hearing Examiner's express authority under the rules includes the power to "establish a procedural schedule for the administrative proceedings," 19.25.2.13(A)(2) NMAC, "identify substantive issues for hearing," 19.25.2.13(A)(3), "ensure that all relevant issues . . . are considered during the evidentiary hearing," 19.25.2.13(A)(10) NMAC, "regulate the conduct and course of the hearing," 19.25.2.13(A)(11), and "to take such other action as may be necessary and appropriate," 19.25.2.13(A)(14). Moreover, the hearing regulations provide that pre-hearing matters, including scheduling, shall be conducted pursuant to the Rules of Civil Procedure. 19.25.2.16(A) NMAC. Rule 1-042 of the Rules of Civil Procedure specifically provides authority for bifurcation: "in furtherance of convenience or to avoid prejudice, or when separate [hearings] will be conducive to expedition and economy, may order a separate [hearing] of . . . any separate issue." NMRA, Rule 1-042(B).

In short, the Water Code and hearing regulations grant ample authority to the Hearing Examiner to bifurcate the hearing to facilitate an "efficient and orderly" consideration of the issues. § 72-2-12. As discussed below, the Hearing Examiner should exercise that authority to bifurcate the hearing as requested by Augustin.

C. Determination of Availability of Water and Impairment Before the Determination of Other Issues Would Constitute a Viable Two-Stage Hearing Process

Catron County attributes an ulterior purpose to Augustin's proposed two-stage process, asserting that Augustin is seeking to bifurcate the hearing so that it can use the decision on the hydrologic issues "to solicit actual users for the water." Catron MSJ at 9. On the contrary, the Hearing Examiner should adopt the two-stage hearing process for two good reasons.

First, "[b]ifurcation is designed to facilitate the expeditious and economical resolution of cases" that involve complex procedural or substantive issues. *State v. Esparza*, 2003-NMCA-075, ¶ 21, 133 N.M. 772 (citing Rule 1-042 NMRA). Thus, trials or hearings "are generally bifurcated based upon a recognition that judicial resources will be preserved if specific issues are separately tried." *State v. Esparza*, 2003-NMCA-075, ¶ 21, 133 N.M. 772 (citing *Bolton v. Bd. of County Comm'rs,* 1994-NMCA-167, 119 N.M. 355). The Hearing Examiner is charged with overseeing an "efficient and orderly" consideration of the issues. § 72-2-12. Bifurcating the hearing as requested by Augustin would provide an efficient and fair process for consideration of the issues and would promote administrative economy. As explained in Attachment 2 to the 2014 Application, adopting a two-stage hearing process would focus the Hearing Examiner and parties on the dispositive hydrologic issues in Stage 1. Rather than the expansive issues currently contemplated, Stage 1 would concentrate on availability of water and impairment, which would involve a manageable analysis, limited set of experts, and narrow discovery.

In *Mendenhall v. Vandeventer,* 1956-NMSC-064, ¶¶ 6-7, 61 N.M. 277, 279, 299 P.2d 457, 458 (1956), our Supreme Court found that bifurcation of issues into two trials was appropriate because the resolution of the first issue had the potential to end the litigation. That same logic applies in the present case. If the State Engineer determines that there is no available water, than

the case will end, and Augustin will be denied a permit. On the other hand, a decision setting the amount of water available for appropriation will facilitate an orderly and fact-based consideration of the remaining issues. Moreover, a recurring concern of the Protestants is possible impairment of their rights. That concern relates to the hydrologic impact of the pumping on existing rights, not to the subsequent delivery and end use of the water. Bifurcating the proceeding will allow those Protestants to address their concerns without having to needlessly expend energy and resources on other issues.

Second, Augustin originally contemplated the two-stage hearing process as a way to address Protestants' concerns. During the hearing on the 2007 Application, the Protestants raised the same desire to know how much water would be allocated to each of the proposed uses and places of use. But, as Augustin explained, that is partly a theoretical exercise until Augustin knows how much water is available for appropriation. This is true because Augustin will adjust its plan based on the permitted amount of water. For example, if Augustin is granted a permit for 30,000 acre feet instead of the 54,000 it has requested, it will have to modify the places of use for both municipal uses and commercial sales. Bifurcating the hearing as requested by Augustin solves this issue. Once Augustin knows the amount of water available without causing impairment, it will adjust its plan and provide additional information to address Catron County's concerns.[1] This process therefore addresses both the Applicant's and Protestants' concerns.

In light of the advantages, it is not surprising that complex water hearings are frequently bifurcated to address discrete hydrological issues separately from the other issues. *E.g., Matter of Board of County Com'rs of County of Arapahoe*, 891 P.2d 952 (Colo. 1995) (bifurcating the case

[1] As Augustin has explained, the information provided in the 2014 Application far exceeds the statutory requirements, and the proposed two-stage hearing process is suggested as a more efficient procedure that would address Catron County's concerns. Augustin's support for this two-stage process should not be viewed as a concession that additional information is needed.

to address the issue of water availability first); *Phelps Dodge Corp. v. Arizona Dept. of Water Resources*, 118 P.3d 1110, 1111 (Ariz. Ct. App. 2005) (bifurcating the case to address instream water rights first); *A&B Irr. Dist. Idaho Conservation League*, 958 P.2d 568, 571 (Idaho 1997) (bifurcating the case to address the issue of whether certain provisions were necessary to define the water rights at issue, or for their efficient administration); *Matter of Beneficial Water Use Permit Numbers 66459-76L, Ciotti: 64988-G76L, Starner*, 923 P.3d 1073, 1075 (Mont. 1996) (bifurcating the case to address the state's authority to engage in water rights proceedings on the Flathead Reservation); *Montana v. Wyoming*, Second Interim Report of the Special Master (Liability Issues) at 3 (2014) (explaining that the case was bifurcated to address liability issues first) (available at https://web.stanford.edu/dept/law/mvn/ (Docket No. 267)). Consistent with that practice, in New Mexico, the State Engineer has bifurcated complex hearings in order to address issues in a logical and efficient matter. In particular, the State Engineer, like the court in *County of Arapahoe*, has bifurcated complex hearings in order to consider the issues of water availability and impairment first.

In sum, consideration of complex projects, such as this one, benefits from a flexible and efficient process that balances the needs of the Applicant and the Protestants. *Lion's Gate Water*, 2009-NMSC-057, ¶ 24 (confirming that one of the purposes of the statutory administrative process is "to protect the rights and interests of water rights applicants"). The two-stage hearing process proposed by Augustin properly reaches this balance, addresses the concerns of the Parties, and would conserve agency and participant resources by allowing the issues to be efficiently decided.

IV. CONCLUSION

For the reasons stated above, the Hearing Examiner should deny the Catron County Motion for Summary Judgment and reject the arguments contained within it.

Respectfully submitted,

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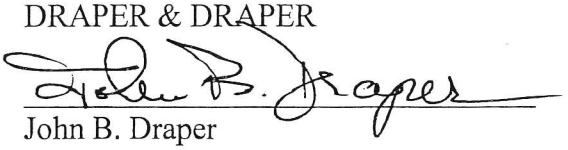
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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2017, a copy of the foregoing Response to Catron County Motion for Summary Judgment was sent via U.S. Mail to all Parties Entitled to Notice as located on the Office of the State Engineer's website, http://www.ose.state.nm.us/HU/AugustinPlains.php, revised 10/20/17.

I further certify that on November 8, 2017, a copy of the foregoing was sent via electronic mail to the following parties:

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