STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

AUGUSTIN PLAINS RANCH, LLC,

Appellant,

v.

TOM BLAINE, P.E., New Mexico State Engineer,

Appellee,

and

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.*,

Appellees.

D-728-2018-00026
Judge Matthew G. Reynolds

Appeal from final decision of
New Mexico State Engineer
HU No. 17-005

STATE ENGINEER'S MOTION TO RECONSIDER

The New Mexico State Engineer (State Engineer), by and through his undersigned counsel and pursuant to Rule 1-059(E) NMRA, moves for reconsideration of the Court's Order filed August 23, 2019 (Order). The Order, while correctly granting summary judgment against Augustin Plains Ranch, LLC's (APR) appeal of the State Engineer's August 1, 2018 Order (State Engineer Order), erred in two ways that are contrary to the New Mexico Water Code and the Constitution of New Mexico, and in a third way that could lead to unnecessary future disputes. The State Engineer respectfully requests that the Court reconsider the form of the Order, and amend it to reflect the language proposed below.

INTRODUCTION

This is the second appeal from two separate State Engineer decisions on similar but different, and distinct applications filed by APR for the appropriation of 54,000 acre-feet per year of groundwater from the Rio Grande Underground Water Basin. Importantly, the first

application was incomplete and the second application is complete. The Order states that "[t]he Augustin Plains Ranch's Application to appropriate ground water from the San Agustin Basin is dismissed with prejudice." *See* Paragraph 5 of August 23, 2019 Order, attached as **Exhibit A**. The State Engineer requests that the language of the Order be modified in three ways to clarify the Court's action and bring it into conformity with New Mexico law. First, the language of paragraph 5 of the Order should be changed to reflect that the dismissal is not dismissal of the application, but of the *de novo* appeal of the State Engineer's Order. Second, the phrase "with prejudice" should be removed, as contrary to New Mexico's constitutional provision allowing the appropriation of water in accordance with law. N. M. Const. art. XVI, Sec. 2. Third, and relatedly, the vague reference to an unspecified "Augustin Plains Ranch's Application to appropriate" should be modified to identify with specificity the "2014/2016 Application," which would make clear that APR's ability to file a later application in accordance with law is unimpaired. The State Engineer requests that the Court reconsider the Order and amend the Order by replacing paragraph 5 of the Order with the following: "5. Augustin Plains Ranch's appeal from the State Engineer's August 1, 2018 Order denying APR's 2014/2016 Application to appropriate groundwater is dismissed."

ARGUMENT

I. THE COURT DOES NOT HAVE JURISDICTION TO PERMIT OR DENY AN APPLICATION FOR A NEW APPROPRIATION; ONLY THE STATE ENGINEER HAS THIS AUTHORITY

The Order states that "[t]he Augustin Plains Ranch's Application to appropriate groundwater from the San Augustin Basin is dismissed…." Order, ¶ 5. This language wrongly implies that the Court has the authority to act on an underlying application in an appeal from a State Engineer decision. In a *de novo* appeal from the State Engineer, the district court performs

an appellate review of the State Engineer's decision. It does not invade or replace the State Engineer's permitting authority.

The procedural posture of this case is that the Court has performed a *de novo* review of the State Engineer's decision under N.M. Const. art. XVI, Sec. 5 and NMSA 1978, §72-7-1. The New Mexico Supreme Court has explicitly held that the phrase "*de novo*" does not mean that the Court may make decisions on water rights applications. *Lion's Gate Water v. D'Antonio*, 2009-NMSC-0577, ¶ 30, 147 N.M. 523 ("The purpose of the language contained in Article XVI, Section 5 and the 1971 amendment to Section 72-7-1, providing that appeals are to be *de novo*, as cases originally docketed in the district court, was not to give the judiciary de facto original jurisdiction over water rights applications.") (internal quotations omitted). Under *Lion's Gate Water*, the Court may dismiss the *de novo* appeal of the State Engineer's decision but not the underlying Application made to the State Engineer.

The Order should be modified to reflect this procedural posture and to avoid appearing to interfere in State Engineer administrative processes. *See Id.* at ¶ 24 ("The general purpose of the water code's grant of broad powers to the State Engineer, especially regarding water rights applications, is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive process…"). The *Lion's Gate Water* court was specific that the State Engineer's exclusive and comprehensive administrative process means that the authority of a district court on appeal from a State Engineer decision is confined to the review of the issues actually decided by the State Engineer. *Id.* at ¶ 17. For courts to go beyond that and address the ultimate administrative disposition of an application would be a "usurpation of the State Engineer's authority and jurisdiction under the water code" that was not "the intent of Article XVI, Section 5, Section 72-7-1, or our precedent." *Id.* at ¶ 29.

This holding of *Lion's Gate Water* was discussed in *Albuquerque-Bernalillo County Water Util. Auth. v. N.M State Eng'r*, No. 31,861, mem. op. (Ct. App. Aug. 7, 2013) (non-precedential). In that case, the district court, having rejected the State Engineer's denial of an application, itself attempted to issue a transfer permit that the State Engineer had declined to issue. The New Mexico Court of Appeals stated:

> In *Lion's Gate Water*, our Supreme Court concluded that the district court had exceeded its jurisdiction by examining the merits of an application to appropriate water where the State Engineer's decision reached only the threshold issue of whether water was available for appropriation. *Id.* ¶¶ 28-30. The holding limited the scope of the district court's de novo review to "avoid the 'absurd' and 'unreasonable' result that would ensue if water rights applicants, seeking a more favorable outcome, could transform district courts into general administrators of water rights applications by forcing district courts, rather than the State Engineer, to consider on appeal the [original] merits of their applications." *Id.* ¶ 29. We acknowledge that the context and the specific facts of the present case are some what distinguishable from *Lion's Gate Water*, but the general principle is consistently applied in both cases. *See Id.* ¶ 24 ("The general purpose of the water code [is the] grant of broad powers to the State Engineer, especially regarding water rights applications.").

Albuquerque-Bernalillo County Water Util. Auth. at ¶ 20. The court concluded that "Under the circumstances, allowing the district court to have original jurisdiction to create the appropriate permit conditions "would defeat the administrative process for water rights applications designed and articulated by the legislature." *Id., citing Lion's Gate Water*, ¶ 29. For the same reasons that a district court does not, under *Lion's Gate Water*, have jurisdiction to grant an application and issue a permit, neither does it have jurisdiction to dismiss an application, as the Court has purported to do here. In order to avoid this error, the Court should adopt the State Engineer's proposed language for paragraph 5 of the Order.

II. IT IS CONTRARY TO NEW MEXICO LAW TO PRECLUDE APR FROM FILING A DIFFERENT APPLICATION BY DISMISSING THE APPLICATION WITH PREJUDICE

The Order states: "The Augustin Plains Ranch's Application to appropriate groundwater from the San Augustin Basin is dismissed *with prejudice* (emphasis added)." It is not clear what exactly is being dismissed "with prejudice." If the Court intended, as would be proper, that the phrase "with prejudice" apply precisely to the 2014/2016 application that is the subject of the most recent litigation, then the Order should be amended to refer to that application with specificity, as discussed in Point III below. The lack of specificity in referring to the 2014/2016 application leaves the Order subject to an improper, overly broad reading that the Court's intention was to prevent APR from filing future water rights applications that may be in accordance with New Mexico law.

Unless the Order is modified to avoid this reading, unnecessary litigation is likely. Litigants may read the Order to be a pre-judgment on future applications that may be similar but different. As argued in Point I above, the Court does not have jurisdiction to reach into the State Engineer's exclusive and comprehensive administrative process, whether present or future. Thus, the Court does not have the power the control future administrative decisions about which water rights applications will be accepted by the Water Rights Division of the Office of the State Engineer. Under the separation of powers principle stated in N.M. Const., art. III § 1, the Court cannot constitutionally prevent the State Engineer from accepting a future application by APR, or from granting that application if the State Engineer determines that it meets the legal tests for a valid appropriation of water. *See also Lion's Gate Water*, 2009-NMSC-057.

Water in New Mexico is constitutionally subject to appropriation by the public in accordance with law. *See* N.M. Const., art XVI, § 2. Nothing in that constitutional provision

suggests that an entity may be barred forever from seeking available water if its first attempts are legally flawed or factually insufficient. To the contrary, New Mexico's statutes encourage corrections to water right applications. NMSA 1978, § 72-5-3 (water rights applications that are defective as to form or for other reasons are returned to applicant and a time period allowed for corrections). In general, the statutes provide a path for legally appropriating groundwater that is available for a new appropriation, and do not allow for the blanket denial of applications that meet the requirements contained in Section 72-12-3. *See* NMSA 1978, 72-12-3(C) ("No application shall be accepted by the state engineer unless it is accompanied by all the information required in Subsections A and B of this Section"). Nothing in the statutes supports the notion that applications may be pre-emptively foreclosed. *See* NMSA 1978, 72-12-3(E) (the state engineer shall grant an application for a new appropriation if: (1) there is unappropriated water; (2) it will not cause impairment to existing water rights; (3) is not contrary to conservation and detrimental to the public welfare of the State.). The phrase "with prejudice" could be understood to have the effect of pre-emptively foreclosing future applications, contrary to New Mexico law. It should therefore be removed.

III. THE ORDER'S DESCRIPTION THAT "AUGUSTIN PLAINS RANCH'S APPLICATION TO APPROPRIATE GROUNDWATER FROM THE SAN AUGUSTIN BASIN" IS OVERLY BROAD AND WILL ONLY LEAD TO UNNECESSARY LITIGATON IN THE FUTURE

The State Engineer's proposed form of order was more specific than the broad language in the Order concerning which application was being dismissed. The State Engineer recommended that the Court specify the "2014/2016 Application." In contrast, the Order identifies the "Augustin Plains Ranch's Application to appropriate groundwater from the San Augustin Basin…." *See* State Engineer's Proposed Form of Order, submitted on August 20, 2019, attached as **Exhibit B,** and *see also* **Exhibit A.** The concerns with the Court's dismissal

with prejudice are compounded by the vagueness of the broad language in the Order. The broad language of the Order concerning which application is dismissed with prejudice will likely cause unnecessary litigation over which application it pertains to and whether or not it applies to any future application by APR to appropriate groundwater in the Rio Grande Basin. This ambiguity could easily be avoided by modifying the Order to specify that only the 2014/2016 Application is subject to the Order.

CONCLUSION

For the reasons given above, the State Engineer respectfully requests the Court reconsider the Order. The Order should be withdrawn and substituted with an order that replaces paragraph 5 with the following language: "5. APR's appeal from the State Engineer's August 1, 2018 Order denying Augustin Plains Ranch's 2014/2016 Application to appropriate groundwater is dismissed."

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2019, I electronically filed and served the foregoing State Engineer's Motion to Reconsider via Odyssey File and Serve.

/s/ Maureen C. Dolan
Maureen C. Dolan

STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

AUGUSTIN PLAINS RANCH, LLC,

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TOM BLAINE, P.E.,

New Mexico State Engineer/Appellee,

and

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.*,

Protestants/Appellees.

D-728-CV-2018-00026
Judge Matthew G. Reynolds

Appeal from a decision of the New Mexico State Engineer in OSE Hearing #17-005

FINAL ORDER
GRANTING SUMMARY JUDGMENT
IN FAVOR OF
THE COMMUNITY PROTESTANTS AND THE
CATRON COUNTY BOARD OF COUNTY COMMISSIONERS AND
DISMISSAL WITH PREJUDICE

This matter came before the Court on a *de novo* appeal from the State Engineer's August 1, 2018 summary judgment denial of an application for a groundwater permit filed by Augustin Plains Ranch, LLC. Motions for Summary Judgment were filed by the New Mexico State Engineer, the Augustin Plains Ranch, the protestants represented by the New Mexico Environmental Law Center ("the Community Protestants"), and the Catron County Board of County Commissioners.

The motions for summary judgment filed by the Community Protestants, the Catron County Board of County Commissioners, and the New Mexico State Engineer sought dismissal

EXHIBIT A

of the Augustin Plains Ranch's application to appropriate ground water from the San Agustin Basin that was filed in 2014 and amended in 2016. The motion for summary judgment filed by the Augustin Plains Ranch sought reversal of the State Engineer's order denying the Augustin Plains Ranch's application to appropriate ground water from the San Agustin Basin.

The Court has considered each of the motions, the joinders, responses, and replies filed in connection with each of the motions, and the arguments of counsel pertaining to the motions that were presented at the Court's hearing on June 26, 2019. The Court also has considered the ruling entered by this Court in case #D-728-CV-2012-00008.

THE COURT FINDS THAT:

1. The Court has jurisdiction over this matter; and

2. The Community Protestants and the Catron County Board of County Commissioners are entitled to judgment as a matter of law for the reasons set forth in this Court's Memorandum Decision filed on July 24, 2019, which includes Attachment A, Order on Protestants' Motion for Summary Judgment, filed January 3, 2013 in case D-728-CV-2012-00008, and Attachment B, Memorandum Decision on Motion for Summary Judgment, filed on November 14, 2012, in case D-728-CV-2012-00008.

IT IS THEREFORE ORDERED THAT:

3. The motions for summary judgment filed by the Community Protestants and the Catron County Board of County Commissioners are granted;

4. All other motions for summary judgment are denied as moot; and

5. The Augustin Plains Ranch's Application to appropriate ground water from the San Agustin Basin is dismissed with prejudice.

Dated: August 23, 2019.

Matthew G. Reynolds
District Judge
Seventh Judicial District Court

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STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

AUGUSTIN PLAINS RANCH, LLC,

Appellant,

v.

D-728-CV-2018-00026
Judge Matthew G. Reynolds

TOM BLAINE, P.E.,

New Mexico State Engineer/Appellee,

and

Appeal from a decision of the New Mexico State Engineer in Hearing #17-005

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.*,

Appellees.

ORDER GRANTING SUMMARY JUDGMENT

This matter came before the Court on a *de novo* appeal from the New Mexico State Engineer's ("State Engineer") August 1, 2018 denial of an application for a groundwater permit filed by Augustin Plains Ranch, LLC ("APR") filed in 2014 and amended in 2016 ("APR 2014/2016 Application"). Motions for Summary Judgment were filed by the State Engineer, APR, the protestants represented by the New Mexico Environmental Law Center ("the Community Protestants"), and the Catron County Board of County Commissioners ("Catron County").

The motion for summary judgment filed by the Community Protestants sought dismissal of the APR 2014/2016 Application with prejudice. Catron County's motion for summary judgment requested the Court to affirm the State Engineer's denial of the APR 2014/2016 Application as a matter of law and with prejudice. The State Engineer requested the Court to

enter judgment dismissing the appeal and affirm the State Engineer's denial of the APR 2014/2016 Application because it is speculative and contrary to the New Mexico prior appropriation doctrine. APR's motion for summary judgment moved the Court to remand this matter to the Office of the State Engineer to hold a formal administrative hearing.

The Court has considered each of the motions, joinders, responses, and replies filed in connection with each of the motions, and the arguments of counsel pertaining to the motions that were presented at the Court's hearing on June 26, 2019. The Court also has considered the ruling entered by this Court in case #D-728-CV-2012-00008.

THE COURT FINDS THAT:

1. The Court has jurisdiction over this matter; and

2. The Community Protestants and Catron County are entitled to judgment as a matter of law for the reasons set forth in this Court's Memorandum Decision filed on July 24, 2019, which includes Attachment A, Order on Protestants' Motion for Summary Judgment, filed January 3, 2013 in case D-728-CV-2012-00008, and Attachment B, Memorandum Decision on Motion for Summary Judgment, filed on November 14, 2012, in case D-728-CV-2012-00008.

IT IS THEREFORE ORDERED THAT:

3. The motions for summary judgment filed by the Community Protestants and Catron County are granted;

4. All other motions for summary judgment are denied as moot; and

5. APR's appeal from the State Engineer's August 1, 2018 Order denying the Augustin Plains Ranch's 2014/2016 Application to appropriate groundwater is dismissed with prejudice.

Dated: _____, 2019.

_____
Matthew G. Reynolds
District Judge
Seventh Judicial District Court

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