STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

AUGUSTIN PLAINS RANCH, LLC,

Applicant/Appellant,

v.

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

THE COMMUNITY PROTESTANTS' RESPONSE IN OPPOSITION TO THE STATE ENGINEER'S MOTION TO RECONSIDER

Introduction

The protestants represented by the New Mexico Environmental Law Center ("the Community Protestants," who are listed on page 10 *infra*) hereby oppose the Motion to Reconsider filed by the State Engineer on September 23, 2019. This Court should deny the State Engineer's Motion for the following reasons.

First, the State Engineer's allegation that only the State Engineer has jurisdiction to dismiss the Augustin Plains Ranch's application to appropriate ground water from the San Agustin Basin is not persuasive.

Second, there is no merit to the assertion in the State Engineer's Motion that this Court's dismissal of the Augustin Plains Ranch's application filed in 2014-2016 ("the Current APR

Application") with prejudice could be interpreted to mean that the Augustin Plains Ranch ("APR") can never file another application to appropriate ground water in New Mexico even if that application complies with applicable law.

Third, the record demonstrates that there is no merit to the allegation in the State Engineer's Motion that it is not clear whether this Court's Order entered on August 23, 2019 ("this Court's Order") refers to the Current APR Application or to some other application filed by APR.

Finally, all of the issues presented by the State Engineer's Motion have already been addressed by this Court, and there is no need for this Court to reconsider those issues.

Argument

I. There is no merit to the Motion's allegation that the District Court did not have jurisdiction to dismiss the Augustin Plains Ranch's Current Application.

A. The State Engineer's motion is not supported by the Supreme Court's opinion in the Lion's Gate Water v. D'Antonio case.

The State Engineer's Motion alleges that the Supreme Court's opinion in Lion's Gate Water v. D'Antonio, 2009-NMSC-057, 147 N.M. 523 indicates that this Court lacked jurisdiction to dismiss the Current APR Application to appropriate ground water from the San Agustin Basin. State Engineer's Motion, pages 2-4. However, that is not an accurate reading of the Supreme Court's opinion in that case.

In the Lion's Gate Water case, the State Engineer determined that no water was available for appropriation, and the State Engineer therefore dismissed the application filed by Lion's Gate Water. 2009-NMSC-057, ¶¶3-7, 147 N.M. 525-626. Lion's Gate Water subsequently sought a hearing in District Court on all issues pertaining to its application. 2009-NMSC-057, ¶14, 147 N.M. 528. In response to that request, the Supreme Court determined that the District Court was

limited to consideration of whether water was available for appropriation, and did not have authority to consider secondary issues, such as whether Lion's Gate Water's proposed appropriation would be contrary to conservation of water or contrary to the public welfare. 2009-NMSC-057, ¶¶28-29, 147 N.M. 533-534. The Supreme Court did not, however, indicate in its opinion that a District Court does not have jurisdiction to dismiss an application to appropriate ground water.

In the first place, the Supreme Court's opinion in Lion's Gate Water never addressed whether a District Court has jurisdiction to dismiss an application to appropriate water. Paragraph 30 of that opinion, which is cited by the State Engineer's Motion for the proposition that the District Court does not have such jurisdiction does not state that. Instead, that paragraph indicates that the District Court is not limited to a record review of a ruling by the State Engineer, and is not bound by the standard of review provided by NMRA 1-074:

> Rather, the purpose of that language [contained in *Article XVI, Section 5* of the New Mexico Constitution and the 1971 amendment to *Section 72-7-1 NMSA 1978*] was to simply overrule the holding of *Kelley* [*v. Carlsbad Irrigation District, 1963-NMSC-049, 71 N.M. 464 (1963)*] and to emphasize that district courts are not limited to a record review of the State Engineer's actions or to the standard of review provided under Rule 1-074(R). To that end, the district court can hear new and additional evidence and form its own conclusions based upon that evidence.

2009-NMSC-057, ¶30, 147 N.M. 534.

In the second place, the Supreme Court indicated in its Lion's Gate Water opinion that the District Courts have the authority to enter "judgments, orders, and decrees" that those Courts determine to be necessary to dispose of the issues presented. The Supreme Court stated this in response to Lion's Gate Water's argument that *dicta* in Application of Carlsbad Irrigation District, 1974-NMSC-082, 87 N.M. 149 indicated that District Courts have unlimited jurisdiction when they consider *de novo* appeals from rulings of the State Engineer. The Supreme Court

explained that those Courts do not have unlimited authority to consider all issues, but the Court also made clear that those Courts can enter appropriate "judgments, orders, and decrees". The Court stated:

> The dicta in *Carlsbad Irrigation District* simply emphasizes that the restrictive holding of *Kelley* [*v. Carlsbad Irrigation District, 1963-NMSC-049, 71 N.M. 464 (1963)*] no longer applies **and the district court is not limited to a record review, but is free to find facts, make conclusions of law, and enter such judgments, orders, and decrees that it determines are necessary to dispose of the *issue(s)* decided by the State Engineer.**

2009-NMSC-057, ¶35, 147 N.M. 536, emphasis added.

Thus the Supreme Court has indicated that a District Court that is considering a *de novo* appeal from a decision of the State Engineer has the authority to enter a "judgment, order, or decree" that is necessary to dispose of the issues ruled upon by the State Engineer. That is precisely what this Court did by entering its Order dismissing the Current APR Application. That Order disposed of the issues decided by the State Engineer and the issues pending in APR's appeal of the State Engineer's decision. That Order therefore was an appropriate exercise of this Court's jurisdiction in this matter.

B. The non-precedential decision of the Court of Appeals in the case of Albuquerque/Bernalillo County Water Utility Authority v. New Mexico State Engineer does not support the State Engineer's Motion.

The State Engineer's Motion also is not supported by the Court of Appeals' opinion in Albuquerque/Bernalillo County Water Utility Authority v. New Mexico State Engineer, 2013 N.M. App. Unpub. LEXIS 234 (non-precedential). In that matter, the State Engineer determined that the Albuquerque/Bernalillo County Water Utility Authority ("Water Utility Authority") sought to change the purpose and place of use of water rights that the Water Utility Authority had held for several years. 2013 N.M. App. Unpub. LEXIS 234, ¶2. Although the Water Rights Division of the State Engineer's Office approved the proposed transfer, the State Engineer's

Office Hearing Examiner recommended to the State Engineer that the proposed transfer be denied, and the State Engineer accepted that recommendation. 2013 N.M. App. Unpub. LEXIS 234, ¶¶3-5.

The Water Utility Authority appealed the State Engineer's decision to the District Court, and the District Court granted the Water Utility Authority's application. In its order, the District Court went further and issued to the Water Utility Authority a permit for the proposed transfer and imposed conditions on the permit. 2013 N.M. App. Unpub. LEXIS 234, ¶7. On appeal from the District Court decision, the Court of Appeals reversed, and remanded the matter to the State Engineer with instructions to grant the permit to the Water Utility Authority. 2013 N.M. App. Unpub. LEXIS 234, ¶¶19-20. However, the Court's opinion indicates that the ruling in that matter has no application to this case.

The Court of Appeals pointed out in the Albuquerque/Bernalillo County Water Utility Authority case that the District Court imposed conditions on the Water Utility Authority's permit that had never been considered by the State Engineer, and that the imposition of such conditions remained a matter for the State Engineer:

> In this case, the district court properly ruled on the threshold issue of the validity of the water rights proposed to be transferred. But the State Engineer did not consider the appropriate permit conditions, if any, because it made a threshold determination that the Water [Utility] Authority did not have a valid transferable water right. Any original determination of the appropriate conditions to be placed on the transfer permit presently remain within the State Engineer's original jurisdiction.

2013 N.M. App. Unpub. LEXIS 234, ¶21.

By contrast, in this case, this Court's decision addressed only the issues that had been addressed by the State Engineer. The State Engineer denied the Current APR Application to appropriate ground water from the San Agustin Basin, and this Court dismissed that Application.

Because this Court's decision was limited to the issues that had been considered by the State Engineer, the Albuquerque/Bernalillo County Water Utility Authority decision provides no support for the allegation in the State Engineer's Motion that this Court was precluded from ruling on the Current APR Application.

II. There is no merit to the State Engineer's assertion that this Court's dismissal of the Current APR Application with prejudice will preclude the filing of any other application by APR.

The State Engineer has alleged that this Court should not have dismissed the Current APR Application with prejudice because doing so will bar APR from filing future applications to appropriate water that may comply with applicable law. State Engineer's Motion, pages 5-6. However, the State Engineer's position is unpersuasive for three reasons.

First, a dismissal with prejudice is appropriate when there has been a complete adjudication on the merits. Adams v. United Steelworkers of America, AFL-CIO, 1982-NMSC-014, ¶17, 97 N.M. 369, 373. This Court's ruling dismissing the Current APR Application adjudicated the merits of the Current APR Application completely. This Court ruled that the issues presented by the Current APR Application had already been decided by this Court when it ruled on the Ranch's Application filed in 2007-2008 (the "Original APR Application"), and that the Current APR Application was barred pursuant to the doctrine of collateral estoppel. Thus this Court's Order constituted a complete adjudication of the merits of the Current APR Application.

Second, this Court's dismissal of the Current APR Application with prejudice will only prevent APR from filing another legally insufficient application that fails to identify a specific beneficial use for the water to be appropriated and a specific location where that use would occur. *See* Shovelin v. Central New Mexico Electric Cooperative, Inc., 1993-NMSC-015, ¶10,

115 N.M. 293, 297. There is nothing in this Court's Order to indicate that it would preclude APR from filing a future application that is legally sufficient. The State Engineer has neither cited nor referred to language in this Court's Order that could be read to mean that it would bar the filing of a legally sufficient application by APR, and there is no language in the Order that could be interpreted in that manner.[1]

Finally, contrary to the State Engineer's assertion (State Engineer's Motion, pages 5-6), the New Mexico Constitution does not provide an absolute right to appropriate water. Article XVI, Section 2 of the New Mexico Constitution provides that:

> The unappropriated water of every natural stream, perennial or torrential, with the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, **in accordance with the laws of the state.** Priority of appropriation shall give the better right.

New Mexico Constitution, Article XVI, Section 2 (emphasis added).

Nothing in this Constitutional provision indicates that APR or any other person or entity has an absolute right to appropriate water. This provision indicates only that every person and entity has the right to apply to appropriate water in accordance with the laws of New Mexico, and this Court's dismissal of the Current APR Application does nothing to abrogate that right.

III. There is no merit to the State Engineer's allegation that this Court's Order should be clarified to state that it applies to the Current APR Application.

The State Engineer has asserted in its Motion that this Court must specify that the Order applies to the Current APR Application, but the record in this matter demonstrates that this

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[1] The lack of merit to the State Engineer's position is demonstrated by its ultimate conclusion. The State Engineer alleges that the dismissal with prejudice would preclude the filing of any legally sufficient application by the Ranch. State Engineer's Motion, page 5. Thus, the State Engineer asserts that any legally sufficient application filed by the Ranch would have to be denied even if it sought to appropriate water from an entirely different ground water basin for use in an entirely different area of New Mexico. That is clearly inaccurate.

assertion is not persuasive. The State Engineer entered his Order dismissing the Current APR Application on August 1, 2018, and this matter has been litigated in this Court for more than a year since then. There can be no question about which Application filed by APR has been the subject of that litigation.

IV. This Court has addressed the issues raised by the State Engineer's Motion, and there is no need for this Court to reconsider those issues.

Finally, this Court has already addressed the issues that the State Engineer's Motion has raised. When this Court entered its Order, this Court rejected an alternative form of Order presented to the Court by the State Engineer. That alternative form of Order proposed that this Court dismiss APR's *de novo* appeal to this Court rather than dismissing the Current APR Application. That alternative form of Order also proposed that this Court specify that its Order applied to the Current APR Application. This Court did not accept that form of Order, and there is therefore no need for this Court to revisit those issues now.

Conclusion

The State Engineer's Motion to Reconsider is without merit, and it should be denied for four reasons.

- First, there is no basis for the State Engineer's assertion that this Court lacked jurisdiction to dismiss the Current APR Application.
- Second, this Court properly dismissed the Current APR Application with prejudice.
- Third, there is no need for this Court to revise its Order to indicate that it applies to the Current APR Application.
- Finally, this Court has already addressed the allegations presented by the State Engineer's Motion, and there is no need for this Court to reconsider those allegations.

Dated: October 9, 2019.

NEW MEXICO
ENVIRONMENTAL LAW CENTER

Douglas Meiklejohn
Jonathan Block
Charles de Saillan
Eric Jantz
1405 Luisa Street, Suite #5
Santa Fe, NM 87505
Telephone: (505) 989-9022
Facsimile: (505) 989-3769
Electronic mail: dmeiklejohn@nmelc.org,

Attorneys for the Community Protestants
listed on the following page.

Attorneys for the following Protestants:

Gladys Baca; Robert and Mona Bassett; Patti BearPaw; Sue Berry-Fox; Ann Boulden; Donald and Joan Brooks; Jack Bruton and Bruton Ranch, LLC; Lisa Burroughs and Thomas Betras, Jr.; Charles and Lucy Cloyes; Michael D. Codini, Jr.; Randy Coil; James and Janet Coleman; Terri Cook; Thomas A. Cook; Wildwood Highlands Landowners Association and its members; Randy Cox; Nancy Crowley; Tom Csurilla and Elk Ridge Pass Development Company, LLC and Top of the World Land Company, LLC; Roger and Jeanne Daigger; Michael and Ann Danielson; Bryan and Beverley Dees; John and Eileen Dodds; Louise and Leonard Donahe; Patricia Eberhardt; Roy Farr; Paul and Rose Geasland; Gila Conservation Coalition, Center for Biological Diversity and Gila Watershed Alliance; Mary Rakestraw Greiert; Michael Hasson; Don and Cheryl Hastings; Gary and Carol Hegg; Patricia Henry; Catherine Hill; Eric Hofstetter; Sandy How; M. Ian and Margreet Jenness; Amos Lafon; Marie Lee; Cleda Lenhardt; Rick and Patricia Lindsey; Victoria Linehan; Owen Lorentzen; Mike Loya; Sonia Macdonald; Robert and Susan MacKenzie; Douglas Marable; Thea Marshall; Sam and Kristin McCain; Jeff McGuire; Michael Mideke; Kenneth Mroczek and Janice Przylbyl Mroczek; Peter Naumnik; John Naumnik; Regina Naumnik; Robert Nelson; Veronika Nelson; Walter and Diane Olmstead; Karl Padgett; Max Padget; Leo Padgett; Patricia Padgett; Wanda Parker; Ray and Carol Pittman; John Preston and Patricia Murray Preston; Daniel Rael; Stephanie Randolph; Mary Katherine Ray; Kenneth Rowe; Kevin and Priscilla Ryan; Ray and Kathy Sansom; Christopher Scott Sansom; John and Betty Schaefer; Susan Schudardt; Janice Simmons; Jim Sonnenberg; Anne Sullivan; Margaret and Roger Thompson; Gloria Weinrich; James Wetzig and Maureen M. MacArt; Donald and Margaret Wiltshire; and the following two associations and their members: Homestead Landowners Association and its members, including but not limited to the following: Joseph and Janet Siomiak, Patricia Germain, Bette Dugie, Jonathan Benedict, Michael Murray, John Pohl, Parker Fillion, Barbara Owens; and Abbe Springs Homeowners Association and its members, including but not limited to the following: Raven Reitstetter, Nancy Crowley, Chris and Helen Dossett, Kristin Ekvall, Kenneth and Diana Fry, Albert Goodman, William Gysin, Jeff McGuire, Rozalyn Murphy, Janice Simmons, Ronald Wilson, Paul G. Kotula, Karl and Jane Mears, Thomas and Linda Pampinella, David P. Smith, Carmela L. Warner, Lisa Burroughs, and Tom Betras.

CERTIFICATE OF SERVICE

I certify that on October 9, 2019 copies of the foregoing Response were e-served on the following parties entitled to notice:

Jeffrey J. Wechsler, Esq.
Montgomery & Andrews, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501
jwechsler@montand.com
kolson@montand.com
kluck@montand.com

John Draper, Esq.
Draper & Draper
325 Paseo de Peralta
Santa Fe, NM 87501
john.draper@draperllc.com

Office of the State Engineer
Special Assistant Attorney General
Maureen C. Dolan, Esq.
Gregory Ridgley, Esq.
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-3824
Maureen.dolan@state.nm.us
Owen.kellum@state.nm.us

L. Christopher Lindeen, Esq.
P.O. Box 2508
Santa Fe, NM 876504
(505) 930-0665
lclindeen@gmail.com

Lorraine Hollingsworth, Esq.
Pete Domenici, Esq.
Domenici Law Firm, P.C.
320 Gold Avenue SW, Suite 1000
Albuquerque, NM 87102-3228
(505) 883-6250
lhollingsworth@domenicilaw.com
pdomenici@domenicilaw.com

Veronique Richardson, Esq.
Barnhouse Keegan Solimon & West LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123
vrichardson@indiancountrylaw.com

Tessa Davidson, Esq.
Davidson Law Firm, LLC
P. O. Box 2240
Corrales, NM 87048
(505) 792-3636
ttd@tessadavidson.com

Francine Jaramillo, Esq.
Josett Monette, Esq.
Pueblo of Isleta
P.O. Box 1270
Isleta, NM 87022
(505) 869-9716
General.counsel@isletapueblo.com
Poi09101@isletapueblo.com

Jessica Aberly, Esq.
Aberly Law Firm
2222 Uptown Loop, N.E., #3209
Albuquerque, NM 87110
(505) 977-2273
aberlylaw@swcp.com

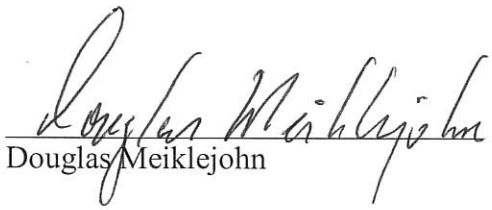
Adren Robert Nance, Esq.
Nance Pato & Strout LLC
P. O. Box 772
Socorro, NM 87801
arden@npslawfirm.com
(575) 838-0911 ext. 801

Coppler Law Firm, P.C.
John L. Appel, Esq.
Frank R. Coppler, Esq.
645 Don Gaspar
Santa Fe, NM 87505
(505) 988-5656
Fax: (505) 988-5704
jappel@coppler.com
fcoppler@coppler.com

A. J. Olsen, Esq.
Jonathan Roehlk, Esq.
Hennighausen & Olsen, LLP
P O Box 1415
Roswell, NM 88202-1415
ajolsen@h2olawyers.com
jroehlk@h2olawyers.com

Daniel G. Moquin, Esq.
Lisa Yellow Eagle, Esq.
Navajo Nation Department of Justice
P.O. Box 2010
Window Rock, Navajo Nation, AZ 86515
(928) 871-7510
dmoquin@nndoj.org
lyelloweagle@nndoj.org

Simeon Herskovits, Esq.
Iris Thornton, Esq.
Advocates for Community and Environment
P.O. Box 1075
El Prado, N.M. 87529-1075
(575) 758-7202
simeon@communityandenvironment.net
iris@communityandenvironment.net



Douglas Meiklejohn