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- CV-2018-00026
Judge Matthew G. Reynolds

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

STATE ENGINEER'S CONSOLIDATED REPLY TO RESPONSES TO THE MOTION TO RECONSIDER

The New Mexico State Engineer (State Engineer), by and through his undersigned counsel and pursuant to Rule 1-059(E) NMRA, files this consolidated reply to the responses of Catron County Commissioners' ("Catron"), and the Protestants' represented by the Environmental Law Center ("ELC Protestants") (together, "Protestant Appellees") to the State Engineer's Motion to Reconsider (Motion) the Court's order filed August 23, 2019 (Order). The Protestant Appellees' responses reflexively oppose the Motion but offer no persuasive reason to do so. The Motion should be granted and the Order clarified to ensure that it will be read to be in conformity with New Mexico law.

INTRODUCTION

The Order correctly granted summary judgment rejecting the Augustin Plains Ranch, LLC's (APR) appeal of the State Engineer's August 1, 2018 Order (State Engineer Order). The

State Engineer's Motion requested that the Court modify paragraph 5 of the Order to state: "APR's appeal from the State Engineer's August 1, 2018 Order denying APR's 2014/2016 Application to appropriate groundwater is dismissed." This modification would clarify the Order so that it unambiguously reflects the appropriate relative roles of the district court and the State Engineer in an appeal de novo from a State Engineer act. The Protestant Appellees' opposition to the Motion is insubstantial, in the form of a general assertion that the arguments in the Motion are "much ado about nothing." The responses, however, demonstrate the contrary--that the Motion is well-founded and that the clarifications requested are needed. Catron, for example, concedes that it would be appropriate to clarify the Order to specify that the "2014/2016 Application" is subject of the Order, essentially conceding that the State Engineer's position in the Motion is correct. **Cat. Resp. 5**. The ELC Protestants Response shows that the ELC Protestants are reading the Order in precisely the way that the State Engineer is concerned about as contrary to New Mexico law with regard to the relative roles of the district court and the State Engineer in appeals de novo. The ELC Protestants' Response states that the Order "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." **ELC Resp., P. 6.** The State Engineer's concern about the Order is precisely that it might be read as the ELC Protestants read it in this statement—to "prevent" future applications. Any effort to prevent or control the disposition of future applications before the State Engineer offends two basic principles of New Mexico water law: (1) only the State Engineer, through his exclusive and comprehensive administrative process, has the statutory authority to determine whether or not an application is legally sufficient in the first instance; (2) neither the District Court nor the State Engineer has the authority to prejudge future applications.

In order to maintain a workable process for water rights applications, the role of the district court and the role of the State Engineer must not be blurred. As the responses demonstrate, the Order as it stands blurs these roles. The State Engineer requests that the Court reconsider the Order and amend it to conform to the respective roles for the district courts and the State Engineer that are specified in the New Mexico Water Code. NMSA 1978, §§ 72-1-1 to 72-13-12 (1907, as amended through 2018) ("Water Code").

ARGUMENT

I. THIS COURT IS ACTING AS AN APPELLATE COURT IN THIS CASE AND MAY NOT CONTROL APPLICATIONS BEFORE THE STATE ENGINEER

The State Engineer asks the Court to recognize that its role is to consider the issues on appeal from the State Engineer's decision, which means that its authority is confined to granting or dismissing the appeal. The Court does not have authority to dismiss the underlying application, as that authority is exclusively in the State Engineer. In *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 147 N.M. 523, the New Mexico Supreme Court stated:

> A harmonious reading of the water code with Article XVI, Section 5 limits the district court's scope of appellate review to a de novo consideration of issues within the State Engineer's statutorily defined jurisdiction. This avoids 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 merits of their application***. ***We do not find that such usurpation of the State Engineer's authority and jurisdiction under the water code was the intent of Article XVI, Section 5, Section 72-7-1, or our precedent.***

Id., ¶ 29 (emphasis added). The clear language of our Supreme Court is that district courts cannot turn themselves into the State Engineer on appeals from his decisions. Far from being "much ado about nothing," as the Protestant Appellees suggest, this distinction is very important to carry out

the directives of our legislature. The *Lion's Gate* case was clear that the State Engineer's authority to manage water rights applications is "**exclusive**." *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….") (emphasis added). For this Court to address the ultimate administrative disposition of an application would be a "usurpation of the State Engineer's authority…" *Id.* at ¶ 29.

It is proper for this Court to dismiss the appeal; it is not proper for the Court to act on the application itself. *See also Albuquerque-Bernalillo County Water Util. Auth. v. N.M. State Eng'r*, No. 21,861, mem. op. (Ct. App. Aug. 7, 2013) (non-precedential), ¶ ("We acknowledge that the context and the specific facts of the present case are somewhat distinguishable from *Lion's Gate Water*, but the general principle is consistently applied in both cases. The General purpose of the water code is the grant of broad powers to the State Engineer, especially regarding water rights applications.") (citations omitted). The Order should be clarified to reflect this legal principle.

The ELC Protestants argue "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." **ELC Resp., P. 4**. This is correct, but it does not support the ELC Protestants' conclusion that this "is precisely what this Court did by entering its Order dismissing the Current APR Application." **ELC Resp., P. 4**. The conclusion does not follow. Usurpation of the State Engineer's exclusive authority to manage applications was not in any way required to dispose of the issues ruled upon by the State Engineer. The dismissal of the appeal was entirely sufficient to

dispose of those issues without reaching into the State Engineer's exclusive authority over the management of water rights applications. The Order should be clarified to prevent its being read as the ELC Protesta have read it.

II. THE COURT ISSUING THE ORDER ON THE APPLICATION "WITH PREJUDICE" COULD BE MISREAD TO EXTEND THE USURPATION OF STATE ENGINEER AUTHORITY INTO THE FUTURE, WHICH WOULD BE IMPROPER.

The dismissal of the application "with prejudice" compounds the appearance that the State Engineer's authority is being usurped. Not only does the Order seem to invade the State Engineer's authority over the present application, the phrase "with prejudice" seems to invade the State Engineer's exclusive authority over future applications as well. This appearance also offends *Lion's Gate* and must be corrected. The ELC Protestants demonstrate the problem when they argue that the 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 the that use would occur." **ELC Resp., P. 6**. By this argument, the ELC Protestants clearly illustrate that the Order needs correction, as it can - and undoubtedly will - be misread to constrain future applications for water rights by APR.

Such a constraint would be improper. The State Engineer must be able to act on future applications on a case by case basis. Any other rule is not only a usurpation of State Engineer authority, it also adds an unnecessary layer of litigation to any future APR application, as this case demonstrates. As we know, the ELC Protestants were undeterred by the Court of Appeals and Supreme Court decisions on the first application and moved this Court to reopen the original District Court proceeding when the 2014/2016 application was filed, hoping to prevent the State

Engineer from acting on the application. The Order containing the language "with prejudice" will only result in future protestants trying to bypass State Engineer processes and go directly to district court to claim that any new application has been precluded by the Order. This result is contrary to the spirit of our Supreme Court's decision in *Lions Gate Water*, which clearly did not want the district courts to usurp the State Engineer's "exclusive and comprehensive" administrative process. *See Lion's Gate Water*, 2009-NMSC-057, ¶24.

The State Engineer is already required to follow the statutes and binding precedent to ensure that any future application is legally sufficient. Therefore, it is unnecessary for the Court to dismiss "with prejudice." Judging from the history of this case, the likely effect of including that phrase will be repeated efforts to claim that the Order controls future applications before the State Engineer and precludes State Engineer action on future applications. The Order should be clarified to prevent these wasted efforts.

III. CLARIFYING THAT "THE APPLICATION" MEANS SPECIFICALLY THE "THE 2014/2016 APPLICATION" WILL AVOID FUTURE CONFUSION ABOUT THE REACH OF THE ORDER.

To further clarify that the Order does not intend to usurp State Engineer authority over future applications, the State Engineer requests that the Court specify that it is the State Engineer Order on the 2014/2016 Application that is the subject of its judgment, not all future applications. This will make clear that APR may not attempt to re-file a verbatim copy of the 2014/2016 Application. Catron County does not disagree with this clarification. **Cat. Resp., P. 5**.

The ELC Protestants, however, show in their response why such a clarification is necessary. On one hand the ELC Protestants claim that the clarification need not be done because "the record is clear," presumably that the Order is addressing only the 2014/2016 Application. **ELC Resp., P. 8.** And yet the ELC Protestants then argue inconsistently that the

Order *does* address future applications, asserting that "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." **ELC Resp., P. 6**. By this, the ELC Protestants show that they would like to apply the Court's Order in this case to control all possible future applications by APR. This goal is precluded by New Mexico law. The Order should be clarified to rule it out.

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 October 23, 2019, I electronically filed and served the foregoing State Engineer's Motion to Reconsider via Odyssey File and Serve.

/s/ Maureen C. Dolan
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