

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v.

No. 32,705

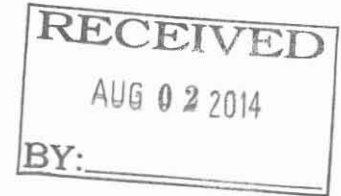
SCOTT A. VERHINES, P.E.,

New Mexico State Engineer-Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants-Appellees.



COURT OF APPEALS OF NEW MEXICO
FILED

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Wendy F. Jones

APPELLEE NEW MEXICO STATE ENGINEER'S
SUPPLEMENTAL BRIEF ON MOOTNESS

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STATEMENT OF COMPLIANCE

Pursuant to this Court's Order dated July 23, 2014, the body of this Supplemental Brief does not exceed five (5) pages in length.

TABLE OF AUTHORITIES

New Mexico Cases

<u>Eldorado at Santa Fe, Inc. v. Cook</u> , 1991-NMCA-117, 13 N.M. 33, 822 P.2d 672	2, 4
<u>Gunaji v. Macias</u> , 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008	1, 3
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I. INTRODUCTION

Appellee, the New Mexico State Engineer (State Engineer) submits this supplemental brief in accordance with the New Mexico Court of Appeal's (Court) Order filed on July 23, 2014. As the Court's Order notes, Appellant Augustin Plains Ranch, LLC (APR) submitted for filing a new application to appropriate water with the State Engineer on July 14, 2014. APR's submission of a new application renders the issue before this Court on appeal moot. There is no longer a live controversy regarding whether APR was entitled to an evidentiary hearing on its original application. As a result, the Court should dismiss the appeal, remand the case to the district court with instructions to vacate its decision and dismiss the case, and direct APR to withdraw its original application.

II. ARGUMENT

A. The Court Should Not Decide Issues That Are Moot

The New Mexico Supreme Court has held that appeals in which the issue presented has become moot should be dismissed. Howell v. Heim, 1994-NMSC-103, ¶ 7, 188 N.M. 500, 882 P.2d 541 (citing Mowrer v. Rusk, 1980-NMSC-113, ¶ 13, 95 N.M. 48, 618 P.2d 886). "A case is moot when no actual controversy exists, and the court cannot grant actual relief." Gunaji v. Macias, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008 (internal quotation marks and citations omitted).

APR's Brief in Chief frames the issue presented on appeal as "whether the district court erred in upholding the State Engineer's refusal to consider the full merits of the application." BIC 1. Specifically, APR contends that under the statutory scheme, the State Engineer was required to hold an evidentiary hearing to allow APR an opportunity to present evidence in support of the application that is the subject of this appeal. BIC 12.

An actual controversy no longer exists as a result of the new application APR submitted for filing with the State Engineer on July 14, 2014, which replaces and supersedes the original application. APR's original application is no longer available for consideration by the State Engineer, since APR has chosen to no longer pursue it as evidenced by submitting for filing a corrected application. 19.27.1.11 NMAC. The State Engineer's decision on the existing application is no longer relevant, since the State Engineer will review APR's new application without regard to his prior decision, just as he would review any new application to appropriate water. Accordingly, the State Engineer's administrative action with respect to the original application is not a live controversy because that application has been replaced. *See Eldorado at Santa Fe, Inc. v. Cook*, 1991-NMCA-117 at ¶¶ 9, 16-17, 13 N.M. 33 at 35, 37, 822 P.2d 672 at 674, 676.

Even if the Court were to decide the appeal in APR's favor, it could not grant APR the relief it seeks since it has chosen to abandon the application that is

the basis for this appeal. A decision by this Court to remand the case to the State Engineer with instructions to hold an evidentiary hearing on the existing application would be pointless, since APR has abandoned the original application and should, in fact, withdraw it.

The Court should dismiss the appeal since the issue has been rendered moot. *See Rio Arriba Cnty. Bd. of Educ. v. Martinez*, 1964-NMSC-227, ¶¶ 9, 12, 74 N.M. 674, 397 P.2d 471 (noting that no appellate relief is available “where the questions involved, either by time or circumstances, have become moot” (internal quotation marks and citation omitted)); *Gunaji*, 2001-NMSC-028, ¶ 9.

B. If the Court Dismisses the Appeal, the District Court Opinion Should be Vacated and APR Directed to Withdraw Its Original Application

The State Engineer respectfully requests that, if the Court dismisses the appeal on the basis of mootness, it remand the case to the district court with instructions to vacate that court’s decision and direct APR to withdraw its application that is the subject of this appeal.

To the extent that the district court’s decision addresses issues that have now been mooted with the submission of new application, its opinion is a prohibited advisory opinion regarding administrative review of a withdrawn application. APR’s new application must proceed through the statutory review process set out in Section 72-12-3, NMSA 1978. The State Engineer’s prior decisions on a different application have no bearing on the review process for the

new application. Since advisory opinions are prohibited, the Court should direct the district court to vacate its opinion on the existing application, dismiss the district court appeal, and remand the original application to the State Engineer for withdrawal. *See* Lion's Gate Water v. D'Antonio, 2009-NMSC-057, ¶¶ 32, 36, 147 N.M. 523, 535-536, 226 P.3d 622, 634-635; Eldorado at Santa Fe, Inc., *supra*.

III. CONCLUSION

For the reasons set forth above, the State Engineer requests that the Court dismiss the appeal, remand the case to the district court with instructions to dismiss the case and vacate its opinion, and direct APR to withdraw the application that is the subject of this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on August 1, 2014, I caused a true and correct copy of Appellee New Mexico State Engineer's Supplemental Brief On Mootness to be served by first-class United States mail, postage prepaid, on the following:

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