

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

AUG 01 2014

Wendy F. Jones

SUPPLEMENTAL BRIEF OF AUGUSTIN PLAINS RANCH, LLC

APPEAL FROM THE DISTRICT COURT OF CATRON COUNTY

MATTHEW G. REYNOLDS, District Judge

John B. Draper
DRAPER & DRAPER, LLC
325 Paseo de Peralta
Santa Fe, New Mexico 87501
(505) 570-4590

Jeffrey J. Wechsler
Lara Katz
Andrew S. Montgomery
MONTGOMERY & ANDREWS, P.A.
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

Attorneys for Applicant-Appellant
AUGUSTIN PLAINS RANCH, LLC

Appellant Augustin Plains Ranch, LLC (Augustin) respectfully submits this supplemental brief in response to the Court's order of July 23, 2014. The Court has directed the parties to address the effect on the present appeal of a new application tendered by Augustin to the Office of the State Engineer. Specifically, the Court has directed the parties to address whether the new application renders this case moot on the basis that there is no longer a controversy.

In summary, Augustin's tender of a new application does not itself render this appeal moot, but the appeal will become moot if and when the State Engineer accepts the new application pursuant to NMSA 1978, Section 72-12-3 (2001). In view of the possibility that this appeal may soon become moot, Augustin recommends that the oral argument scheduled for August 21, 2014, be vacated. If the State Engineer accepts the new application, Augustin will move promptly to dismiss the appeal pursuant to Rule 12-401(B) NMRA.

A. The New Application Does Not Itself Render this Appeal Moot, but the Appeal Will Become Moot if the State Engineer Accepts the Application

Augustin's central argument on appeal is that the State Engineer denied it the evidentiary hearing to which Augustin is statutorily entitled. Similarly, the relief sought in this appeal is reversal and remand for an evidentiary hearing. [BIC 47; RB 19].

As the Court has noted, Augustin has tendered to the State Engineer a new application to appropriate groundwater. In the new application, Augustin provides additional information and attempts to address the concerns raised by the State Engineer and district court in the decisions below. Although the new application therefore differs in certain respects from the application at issue in this appeal, the general subject matter is the same. Augustin does not claim that it is entitled to more than one evidentiary hearing on the same subject matter. *See Derringer v. Turney*, 2001-NMCA-075, ¶ 15, 131 N.M. 40 (recognizing that Water Code’s “plain language guarantees an aggrieved party one hearing” but “contemplates no more than one hearing”). Rather, if and when Augustin becomes entitled to an evidentiary hearing on the new application, its claim in this appeal that it was erroneously deprived of an evidentiary hearing on the prior application will be moot. *See, e.g., Porter v. Robert Porter & Sons*, 1961-NMSC-010, ¶¶ 17-18, 68 N.M. 97 (“[T]his court will not . . . grant relief that will avail appellant nothing . . .”).

As Augustin has explained in its briefing in this appeal, an applicant seeking to appropriate groundwater becomes entitled to an evidentiary hearing when the State Engineer accepts the application. [BIC 20-23; RB 10-14]. The State Engineer’s acceptance of a tendered application requires that the State Engineer first determine that the application provides the requisite information in

conformance with Section 72-12-3. § 72-12-3(C) (“No application shall be accepted by the state engineer unless it is accompanied by all the information required by Subsections A and B of this section.”). A non-conforming application “shall be returned promptly to the applicant with a statement of the changes required.” 19.27.1.11 NMAC. “Upon receipt of an acceptable application,” the State Engineer directs publication of notice of the application and, if the application is contested, the State Engineer must then conduct an evidentiary hearing. 19.27.1.12, .15 NMAC; *see* §§ 72-12-3(D) - (F); NMSA 1978, § 72-2-16 (1973), § 72-2-17 (1965).

Augustin tendered its new application to the State Engineer on July 14, 2014. Augustin’s understanding is that the Water Rights Division of the Office of the State Engineer ordinarily decides whether to accept or reject an application to appropriate groundwater within four to six weeks after tender. Augustin thus anticipates that the State Engineer’s determination whether to accept the new application will be made imminently. To the best of Augustin’s knowledge, however, the State Engineer has not yet made that determination. In sum, this appeal is not presently moot, but Augustin anticipates that it may become moot in the near future.

B. The Oral Argument Should Be Vacated in the Interest of Judicial Economy


The possibility that this case may become moot in the near future raises the question of whether oral argument or other proceedings should be conducted in this Court pending a decision by the State Engineer to accept or reject Augustin's new application. Augustin had anticipated, before it received this Court's order of July 23, 2014, that it would file a motion in early August requesting either (1) voluntary dismissal of the appeal if the State Engineer accepted the new application, or (2) vacatur of the currently scheduled oral argument if the State Engineer's decision whether to accept the application was still pending.

Pending a decision by the State Engineer on whether to accept Augustin's new application, Augustin requests that the Court vacate the oral argument currently scheduled for August 21, 2014. Doing so would avoid the waste of the Court's and the parties' time and effort that might result if oral argument is heard but the case becomes moot either shortly before or after the argument. Augustin's intention remains to move for voluntary dismissal of this appeal in the event of a decision by the State Engineer to accept the new application. In the event that the State Engineer decides to reject Augustin's new application, Augustin proposes to promptly notify this Court that a controversy remains, and in that event it would request that a new date be set for oral argument. No party would be prejudiced by this approach.

Respectfully submitted,

John B. Draper
DRAPER & DRAPER, LLC
325 Paseo de Peralta
Santa Fe, New Mexico 87501
(505) 570-4590

MONTGOMERY & ANDREWS, P.A.



Jeffrey J. Wechsler
Lara Katz
Andrew S. Montgomery
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873

Attorneys for Applicant-Appellant
AUGUSTIN PLAINS RANCH, LLC

CERTIFICATE OF SERVICE

I certify that on August 1, 2014, I caused a true copy of this *Supplemental Brief of Augustin Plains Ranch, LLC* to be served by first-class United States mail, postage prepaid, on the following:

Mr. L. Christopher Lindeen
Mr. Jonathan E. Sperber
Ms. Tracy Hofmann
Special Assistant Attorneys General
Post Office Box 25102
Santa Fe, NM 87504-5102

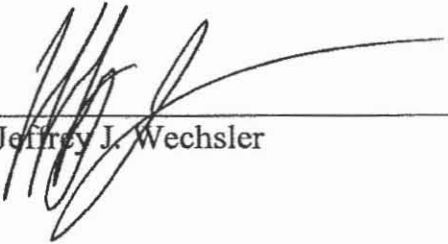
Mr. Peter Thomas White
Sena Plaza, Suite 50
125 East Palace Avenue
Santa Fe, NM 87501

Mr. Ron Shortes
Post Office Box 533
Pie Town, NM 87827

Mr. R. Bruce Frederick
Mr. Douglas Meiklejohn
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87505

Mr. James C. Brockmann
Mr. Seth Fullerton
Stein & Brockmann, P.A.
Post Office Box 2067
Santa Fe, NM 87504

Mr. George Chandler
Chandler Law of Los Alamos
1208 9th Street
Los Alamos, NM 87544



Jeffrey J. Wechsler