BEFORE THE STATE ENGINEER

STATE OF NEW MEXICO

IN THE MATTER OF THE APPLICATION AUGUSTIN PLAINS RANCH, LLC FOR A A PERMIT TO APPROPRIATE GROUND WATER IN THE RIO GRANDE UNDER-GROUND WATER BASIN OF NEW MEXICO	)))))	Hearing No. 17-00509-096 OSE File No. RG-89943

THE COMMUNITY PROTESTANTS' RESPONSE IN OPPOSTION TO THE APPLICANT'S EXPEDITED REQUEST FOR A POST-DECISION EVIDENTIARY HEARING

INTRODUCTION

The Protestants represented by the New Mexico Environmental Law Center (collectively "the Community Protestants," who are listed on page 10) hereby respond in opposition to the Expedited Request for a Post-Decision Evidentiary Hearing filed on August 24, 2018 ("APR's Expedited Request") by the Augustin Plains Ranch ("APR").

APR's Expedited Request should be denied for three reasons. First, the State Engineer has already conducted a hearing on the motions for summary judgment that were the basis of the State Engineer's ruling denying APR's Corrected Application to Appropriate Ground Water from the Rio Grande Underground Water Basin ("the Corrected APR Application"). APR therefore is able to appeal the State Engineer's ruling even if the State Engineer does not take any further action.

Second, APR has neither alleged nor demonstrated that there are any facts to be considered in an evidentiary hearing.

Third, the statutory procedure for the State Engineer's consideration of applications to appropriate ground water provides that the State Engineer may make decisions on such applications without holding an evidentiary hearing.

ARGUMENT

I. An evidentiary hearing is not required because the State Engineer conducted a hearing on the motions for summary judgment.

As is indicated in point III below, the State Engineer is not required to conduct an evidentiary hearing either before or after making a decision to deny the Corrected APR Application. However, even assuming for the purposes of argument that the State Engineer is required to conduct a hearing, APR's Expedited Request should be denied because the State Engineer has already conducted a hearing on the motions for summary judgment that were the basis for the State Engineer's ruling denying the Corrected Application.

APR's Expedited Request asserts incorrectly that APR is entitled to "a full evidentiary hearing" based on Section 72-2-16 NMSA 1978 and the Court of Appeals ruling in D'Antonio v. Garcia, 2008-NMCA-139, 145 N.M. 95. In fact, however, neither of those authorities supports APR's allegation.

Section 72-2-16 refers to "a hearing," but it does not indicate that the hearing must be a "full evidentiary hearing." Similarly, the Court of Appeals' ruling in D'Antonio v. Garcia discussed the need for the State Engineer to conduct a hearing, but there is no indication that the hearing must be a "full evidentiary hearing." 2008-NMCA-139, ¶¶8-10, 145 N.M. 98.

Moreover, the Court of Appeals relied in its opinion in D'Antonio v. Garcia on its earlier decision in Derringer v. Turney, 2001-NMCA-075, 131 N.M. 40. In that case, the State Engineer granted a motion for summary judgment without first holding a hearing on the motion. 2001-NMCA-075, ¶12, 131 N.M. 45. The issue for the Court of Appeals on appeal was whether

the State Engineer was required to conduct a post-decision hearing on the summary judgment motion, not whether the State Engineer was required to conduct a "full evidentiary hearing." *Id.*

In this matter, the State Engineer has already conducted a hearing on the motions for summary judgment that were the basis of the State Engineer's order denying the Corrected APR Application. That hearing was held in Reserve on December 13, 2017, and argument was presented during that hearing by counsel for the Community Protestants, counsel for the Catron County Board of County Commissioners ("Catron County"), counsel for APR, and counsel for the State Engineer's Office Water Rights Division. *See* State Engineer Hearing Officer's Report and Recommendation Granting Motions for Summary Judgment accepted and adopted by the State Engineer on July 31, 2018 ("Hearing Officer's Report"), p.1, ¶¶2-7. Moreover, APR has not alleged or demonstrated either during that hearing or in its Expedited Request that it was not given adequate time to present its position concerning the motions for summary judgment.

The only hearing to which APR is arguably entitled is a hearing on the motions for summary judgment, and APR has already had that hearing. For that reason, APR is not entitled to a further hearing. Moreover, because APR has had a hearing, APR can now appeal the State Engineer's ruling denying the Corrected APR Application. There is no need for any further action by the State Engineer before APR can file its appeal.

II. An evidentiary hearing would not be appropriate because APR has not alleged or demonstrated that there are factual issues to be resolved.

In addition, there would be no point to conducting an evidentiary hearing because APR has neither asserted nor demonstrated that there are any factual issues to be resolved nor identified any facts that are in dispute.

The State Engineer determined that the Corrected APR Application should be dismissed in response to motions for summary judgment filed by the Community Protestants and Catron

County. Both the Community Protestants and Catron County asserted that there were material facts that were not in dispute. *See* Community Protestants' September 26, 2016 Memorandum in Support of Motion for Summary Judgment, pages 7-10; Catron County's October 16, 2016 Motion for Summary Judgment and Memorandum in Support, pages 3-5. All of the facts alleged by the Community Protestants and Catron County were based on the language of the Corrected APR Application, and despite having four opportunities to assert that there were facts in dispute, APR has never done so.

APR's first opportunity to assert that there were facts in dispute was in APR's October 30, 2017 response to the Community Protestants' summary judgment motion, which APR titled "Applicant's Consolidated Response in Opposition to the ELC Protestants' Motion for Summary Judgment." Although APR asserted that the Community Protestants' evaluation of the sufficiency of the Corrected APR Application was incorrect, APR never alleged that the Community Protestants had mischaracterized the language in the Corrected APR Application on which the Community Protestants based their summary judgment motion.

APR also could have alleged that there are facts in dispute when APR responded to Catron County's motion for summary judgment. In its November 8, 2017 Response to Catron County Motion for Summary Judgment, however, APR failed to contest any of Catron County's factual allegations. Instead, APR alleged that the State Engineer was required to hold an evidentiary hearing, and endeavored to justify its request for a two-stage hearing procedure.

A third occasion on which APR could have asserted that there were disputed facts was during the hearing on the motions for summary judgment filed by the Community Protestants and Catron County, but APR presented no such allegedly disputed facts. *See* Hearing Officer's Report, p. 4, ¶12.

Finally, APR could have alleged in its Expedited Request that there are disputed issues of fact, but APR has neither alleged nor demonstrated that there are any factual issues to be resolved. Instead, APR has merely alleged that it is entitled to a "full evidentiary hearing" without ever alleging or demonstrating that there are facts in dispute that would be addressed in such a hearing.

III. Alternatively, the State Engineer was not required to conduct an evidentiary hearing before ruling on the Corrected APR Application.

The statutory procedure that governs the State Engineer's evaluation of applications to appropriate ground water does not require the State Engineer to conduct a hearing if he denies such an application. Moreover, the authorities cited by APR in support of its request for a "full evidentiary hearing" do not support APR's position that the State Engineer is required to conduct such a hearing.

A. The New Mexico statute governing consideration of applications to appropriate ground water does not require the State Engineer to conduct an evidentiary hearing.

The Corrected APR Application seeks to appropriate 54,000 acre feet of ground water per year from the Rio Grande Underground Water Basin. *See* Hearing Officer's Report, p.4, ¶14. Appropriation of ground water is subject to Chapter 72, Article 12 NMSA 1978, which applies to "water of underground streams, channels, artesian basins, reservoirs or lakes …." NMSA 1978 §72-12-1. The State Engineer's evaluation of applications to appropriate such waters is governed by Section 72-12-3 NMSA 1978. Section 72-12-3.A requires that any person or entity wishing to appropriate water subject to Chapter 72, Article 12 NMSA 1978 must apply to the State Engineer. Moreover, Section 72-12-3 NMSA 1978 establishes the procedure to be followed by the State Engineer if he denies an application to appropriate ground water. It provides:

> **F.** If objections or protests have been filed within the time prescribed in the notice or if the state engineer is of the opinion that the permit should not be issued, the state engineer may deny the application without a hearing or, before he acts on the application, may order that a hearing be held. He shall notify the applicant of his action by certified mail sent to the address shown in the application.

NMSA 1978 §72-12-3.F.

In this matter, numerous protests were filed within the time prescribed in the notice of the Corrected APR Application. *See* protests filed by Community Protestants and other parties. Moreover, the State Engineer determined that the Corrected APR Application should be denied. *See* Hearing Officer's Report, p. 13. On the basis of those filings and that determination, the State Engineer was authorized by Section 72-12-3.F NMSA 1978 to deny the Corrected APR Application without a hearing. That authorization is particularly applicable in a situation such as this one in which the State Engineer's decision to deny an application to appropriate ground water is based on motions for summary judgment that assert that the application is deficient as a matter of law.

In addition, as the Seventh Judicial District Court recognized when it affirmed the State Engineer's March 20, 2012 Decision denying the application filed by APR in 2008, a determination that the State Engineer is required to conduct an evidentiary hearing would negate Section 72-12-3.F NMSA 1978. *See* Seventh Judicial District Court Memorandum Decision on Motion for Summary Judgment in case number D-728-CV-2012-8, p. 12. As the District Court also pointed out, negating that section would be contrary to the mandate that every part of a statute be given effect. *Id.*, citing Weiland v. Vigil, 90 N.M. 148, 560 P.2d 939 (Ct. App.), *cert. denied*, 90 N.M. 255, 561 P.2d 1348 (1977).

For these reasons, the State Engineer was authorized to deny the Corrected APR Application without conducting an evidentiary hearing.

B. APR's Expedited Request relies on unpersuasive authorities that do not address applications to appropriate ground water.

Section 72-12-3.F NMSA 1978 applies specifically to applications to appropriate ground water. The statute relied upon by APR, on the other hand, applies to all proceedings conducted by the State Engineer. Section 72-2-16 NMSA 1978 makes no distinction between State Engineer proceedings addressing applications to appropriate ground water and State Engineer proceedings addressing applications to appropriate surface water. It provides:

> The state engineer may order that a hearing be held before the state engineer enters a decision, acts or refuses to act. If, without holding a hearing, the state engineer enters a decision, acts or refuses to act, any person aggrieved by the decision, act or refusal to act is entitled to a hearing if a request for a hearing is made in writing within thirty days after receipt by certified mail of notice of the decision, act or refusal to act.

NMSA 1978 §72-2-16.[1]

There is nothing in the language of Section 72-2-16 to indicate that it applies specifically to applications to appropriate ground water. Moreover, when a general statute and a specific statute address the same subject, the more specific statute governs because the more specific statute is considered to be an exception to the more general statute. Production Credit Association v. Williamson, 1988-NMSC-041, ¶5, 107 N.M 212, 213. For that reason, the State Engineer's evaluation of the Corrected APR Application is governed by Section 72-12-3.F NMSA 1978 and not by Section 72-2-16 NMSA 1978.

Moreover, none of the cases cited by APR in its Expedited Request addressed applications to appropriate ground water. The case of D'Antonio v. Garcia, 2008-NMCA-139, 145 N.M. 95 (cited on pages 2-4 of APR's Expedited Request) addressed a diversion of surface water from the Arroyo de los Frijoles into two illegally constructed ponds. 2008-NMCA-139,

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[1] Section 72-2-16 also spells out the procedure to be followed if a hearing is held. *Id.*

¶2, 145 N.M. 97. The application at issue in Lions Gate Water v. D'Antonio, 2009-NMSC-057, 147 N.M. 523 (cited on pages 2-4 of APR's Expedited Request) was an application to appropriate water from the Gila River. 2009-NMSC-057, ¶3, 147 N.M. 525. The case of Derringer v. Turney, 2001-NMCA-075, 131 N.M. 40 (which APR cited on pages 3-4 of its Expedited Request) involved an effort to appropriate the waters of a creek. 2001-NMCA-075, ¶2, 131 N.M. 42. Anthony Water & Sanitation District v. D'Antonio, 2002-NMCA-095, 132 N.M. 683 (cited at pages 4-5 of APR's Expedited Request) concerned whether a District Court had jurisdiction over an appeal from a decision of the State Engineer. 2002-NMCA-095, ¶¶1-3, 132 N.M. 684. Finally, APR's Expedited Request cited the case of Headen v. D'Antonio, 2011-NMCA-58, 149 N.M. 667 (on page 4 of the Expedited Request), but the focus of that case was not whether Mr. Headen was entitled to an evidentiary hearing on his application to transfer his water right. Rather, the focus was whether it was appropriate for Mr. Headen to file a declaratory judgment action to establish the validity of his water right prior to the State Engineer's administrative hearing on Mr. Headen's request to transfer the water right. 2011-NMCA-58, ¶1, 149 N.M. 669.

Thus, none of the precedents cited by APR's Expedited Request establish the procedure to be followed in State Engineer proceedings addressing applications to appropriate ground water. That procedure is governed by Section 72-12-3 NMSA 1978, and subsection 72-12-3.F indicates that the State Engineer is not required to conduct a hearing either before or after he denies an application to appropriate ground water.

CONCLUSION

The State Engineer has already conducted a hearing on the motions for summary judgment filed by the Community Protestants and Catron County that were the basis for the State

Engineer's denial of the Corrected APR Application. Moreover, APR has neither asserted nor demonstrated that there are issues of fact to be considered in such a hearing. Finally, the statute that governs the State Engineer's evaluation of applications to appropriate ground water – Section 72-12-3 – provides that the State Engineer may deny an application to appropriate ground water without a hearing.

APR's Expedited Request therefore should be denied.

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