BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE CORRECTED APPLICATION FILED BY AUGUSTIN PLAINS RANCH, LLC, FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN IN THE STATE OF NEW MEXICO	**Hearing No. 17-005** **OSE File No. RG-89943 POD1 through POD 37**

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

COMES NOW the Catron County Board of County Commissioners (the Board), by and through undersigned counsel of record, and hereby submits its Reply in Support of Motion for Summary Judgment. This reply responds to the Applicant's *Response to Catron County Motion for Summary Judgment*; *Applicant's Consolidated Response in Opposition to the ELC Protestants' Motion for Summary Judgment; Water Rights Division's (WRD) Response to Catron County Board of County Commissioners' Motion for Summary Judgment;* and *Water Rights Division's Response to the NMELC Protestants' Motion for Summary Judgment.*

The Board's Motion for Summary Judgment raises the question whether the Application, on its face, meets the statutory requirements set forth in §72-12-3.A NMSA. There is no factual dispute as to the actual contents of the Application, which includes a number of Attachments. The question of whether the Application meets the requirements of §72-12-3.A is a matter of law that can be decided based on a motion for summary judgment. The Applicant has not met its burden of proving that the Application meets the statutory requirements and the Application should be dismissed.

In this Reply, the Board addresses specific responses by both the Applicant and the WRD to the Board's Motion for Summary Judgment and also addresses the Applicant's and WRD's

responses to NMELC's Motion for Summary Judgment in regard to the statutory requirements for beneficial use and place of use.

I. The Board does not rely on the Catron County Resolution, the public welfare solely of Catron County, or conservation of water solely within Catron County as the basis for dismissing the Application.

In responding to the Motion for Summary Judgment, the Applicant argues that the Motion should be denied because the Board is relying on its Resolution, which is attached to the Motion, to seek dismissal of the Application. (Applicant's Response at 1-2, 4-5). This is incorrect and misstates the basis for the Motion. The purpose of the discussion of the County's Resolution was to highlight the Board's vested interest in protecting the quantity and quality of water resources within the County and the fact that the Board has some very real concerns about the Application as it presently stands. The Motion certainly did not limit "the public and conservation criteria to just Catron County's public welfare." (*Id.*). The Motion states that the consideration of a facially flawed application "would be contrary to sound public policy and to the conservation of water within Catron County and the State of New Mexico." (Board's Motion at 2-3 (emphasis added)).

The Resolution, which is only discussed in the first paragraph of the introductory section and then briefly mentioned in the section on public policy, is not the legal basis for the Board's Motion. (*Id.* at 1-2, 10). Instead, the Motion is based on the Applicant's continued failure to comply with the provisions of §72-12-3.A NMSA, which sets forth the requirements for an application to appropriate groundwater for beneficial use. (*Id.* at 5). Specifically, the Application fails to identify, with any specificity, an actual end-user for the water or a specific, actual place of use for the water, as required by §72-12-3.A(2) and (6). It is the position of Catron County that, rather than demonstrating an actual beneficial use for 54,000 acre-feet of water annually,

the Applicant is attempting to use the OSE application process to tie-up and then market a vast quantity of groundwater located within Catron County. If successful, the Applicant apparently intends to export the groundwater to other places, as yet unknown, to locations, also unknown, within the Rio Grande basin. As will be addressed below, the Applicant, in its response to the two pending summary judgment motions, has not demonstrated that the Application is in compliance with the statutory requirements for an application for a permit to appropriate groundwater for beneficial use.

II. The Water Code does not guarantee the Applicant a hearing on the merits of the Application simply because the OSE staff has accepted the Application.

Relying on §72-2-16 NMSA and *Derringer v. Turney,* the Applicant claims that "once the application has been accepted for publication by the Office of the State Engineer," the applicant "is entitled to an evidentiary hearing." (Applicant's Response at 3). The Applicant misinterprets the statutory provisions and the holding in *Derringer,* and incorrectly represents the position of the Board.

§72-2-16 states that "[t]he 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 hearing is made within thirty days after receipt by certified mail of the notice of the decision, act or refusal to act." (Emphasis added). The Board agrees that §72-2-16 provides a party one hearing, either before or after the State Engineer takes final action. In this case, it is within the authority of the Hearing Examiner to hold a hearing on the pending motions for summary judgment. The Board does not dispute that. In fact, the Hearing Examiner has set a hearing for December 13, 2017. At the hearing the various Parties will be allowed to present their arguments in support of and opposed to the granting of summary

judgment. The hearing will meet the requirement of §72-2-16 for providing a hearing prior to a decision by the State Engineer as to the issues raised by the motions for summary judgment.

§72-2-16 does not guarantee a hearing on the merits of an application simply because the application has been accepted for publication, as the Applicant argues. If that were true, then no protestant would ever be able to challenge the adequacy of an application, including whether the application, on its face, meets the applicable statutory requirements. Motions for dismissal and summary judgment would never be allowed, which is simply not the case. The first sentence of §72-2-16 states that the State Engineer "may order that a hearing be held" prior to his entering a decision. §72-2-16 does not guarantee any party, whether the applicant or a protestant, the right to a hearing prior to a decision by the State Engineer, much less guarantee the applicant a hearing on the merits of the application.

In *Derringer,* the case relied on by the Applicant, the Court of Appeals stated "[i]n administrative proceedings of the type at issue in this case, the language of the statute does not guarantee either party a right to a hearing before the state engineer enters a decision...Instead, Section 72-2-16 creates a statutory right to a hearing only if two pre-conditions are satisfied: (1) a party must be aggrieved, and (2) the state engineer must have entered an adverse decision without a prior hearing." *Derringer v. Turney,* 2001-NMCA-075, ¶12, 131 N.M. 40. The only time a hearing is required under §72-2-16 is if the State Engineer "enters a decision, acts or refuses to act" without first holding a hearing. A hearing held under §72-2-16, either before or after the decision, addresses the basis for the State Engineer's final decision, whether that be a motion to dismiss, a motion for summary judgment, on the merits, or on some other basis.

The holding in *Derringer* is consistent with both §72-2-16 and §72-12-3(F), which states that "if the state engineer is of the opinion that a 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." If the State Engineer denies a permit under §72-12-3(F) without a hearing, then an applicant, as an aggrieved party, would have the right to request a hearing under §72-2-16 and would be granted a hearing as long as the other requirements of the statute are met.

III. The Applicant failed to respond to the Board's Statement of Material Facts and, as such, the Facts are deemed admitted by the Applicant.

In response to a Motion for Summary Judgment, the opposing party's response "shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the moving party's fact that is disputed. All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted." Rule 1-056.D(2) NMRA.

In responding to the Board's Motion for Summary Judgment, the Applicant did not respond to the Board's Statement of Material Facts. By failing to respond, the Applicant admits that 1) the Application does not identify an actual place or places of use (SMF ¶5); 2) the Application does not identify any specific municipal or commercial sales and does not identify any specific places of use (SMF ¶7; 3) the Application does not identify with any specificity the beneficial use to which the water will be applied as required by §72-12-3.A(2) NMSA (SMF ¶11); 4) the Application does not identify with any specificity the place of the use for which the water is desired §72-12-3.A(2) NMSA (SMF ¶12); 5) the Application on its face does not meet the requirements for an application to appropriate groundwater for beneficial use, as set forth in §72-12-3.A NMSA (SMF ¶13).

IV. The Water Rights Division did not meet its burden to show that there are material facts in dispute that prevent the granting of summary judgment.

The response by WRD includes specific responses to the Board's Statement of Material Facts. For the sake of clarity, references to "the Application" includes the information included on the application form and in the attachments to the form. The basic response by WRD is to "den[y] that the Application is not sufficiently specific to be considered complete for purposes of analysis by the State Engineer" or that the particular statement of fact is not material. However, the WRD does not point to any factual disputes as to the information that is actually contained in the Application. There is no factual dispute about what the Application states regarding the beneficial use, the place of use, and the possible end users of the water. What is in dispute is whether the Application, including the information provided in the attachments, is legally sufficient to meet the statutory requirements for an application to appropriate groundwater set forth in §72-12-3.A.

Rather than identifying a dispute over material facts, WRD's responses go to the legal question of the sufficiency of the information provided by the Applicant. This is exactly the type of legal question that is appropriately answered through summary judgment motions. Rule 1-056.A states that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." It is appropriate to determine, through a motion for summary judgment, whether the Application, on its face and as a matter of law, meets the requirements of §72-12-3.A.

Although the WRD claims that the Application provides sufficient information, in its response to NMELC Protestants' Motion for Summary Judgment, the WRD acknowledges that

there are problems with the current Application. (Water Rights Division's Response to the NMELC Protestants' Motion for Summary Judgment at 2-3). The WRD identifies three things that should be included "in applications such as this...the applicant should state whether 1) the applicant will be the party to place the water to beneficial use, or 2) the applicant has a specific plan to deliver a specific quantity of water to each identified entity that will place the water to beneficial use, and 3) that the applicant can and will place the water to beneficial use." (*Id.*). The basis for the Board's Motion is that this information is required under §72-12-3.A and the information is not included in the Augustin Plains Ranch Application.

V. The Applicant and the Water Rights Division have not demonstrated that the Application meets the requirements of §72-12-3.A.

In responding to the Board's position regarding the information required to be in an application submitted pursuant to Section 72-12-3.A, both the Applicant and the WRD refer to and incorporate their responses to the New Mexico Environmental Law Center (NMELC) Motion for Summary Judgment. This Reply is directed to those arguments.

The question of the sufficiency of the Application must begin with the understanding that "[i]n order for the OSE to authorize diversion and appropriation of water, the OSE must follow statutory procedures." *Carangelo v. Albuquerque-Bern Cnty Water Utility Authority,* 2014-NMCA-032, ¶19, 320 P.3d 492. The statute "creates a procedure by which proposed actions are reviewed in specific ways and for specific purposes." *Id.* The Applicant must disclose "sufficient information to provide notice to interested parties and to allow the determination of likely impairment of others' water rights by any contemplated changes." *Id.*

The proposed use, at the outset, "must comply with statutes that set out the form for applications or notice of its content." *Id.* at ¶21. The applicant has "the burden to fulfill the statutory requirements for completing an adequate application of notice of intent to divert...The

OSE must ascertain whether the statutory requirements are met." *Id.* at 22. Compliance of an application is determined based on the specific requirements of the applicable statutes. *Id.* Section 72-12-3.A is "part of a framework that requires an applicant to describe the proposed actions in detail, including the source and proposed disposition of the water to beneficial use and the potential effects of the proposed actions on other water users." *Id.* at ¶20.

Both the Applicant and WRD argue that, once an application is accepted by the OSE and notice of the application is provided, the sufficiency of the application cannot be questioned. In other words, the decision to accept an application by the OSE staff proves that the application meets the statutory requirements and any further challenge is not allowed. That position is not supported by *Carangelo.* The determination of whether the Application meets the statutory requirements is not based on the acceptance of the application by the staff, no matter how much discussion there has been between the applicant and the staff or how many revisions have been made. The determination as to whether the Application meets the statutory requirements is a legal conclusion that must be based on the specific language of §72-12-3.A compared to the content of the Application. There is nothing in the statute that prevents protestants from questioning the sufficiency of an application based on §72-12-3.A.

The Applicant claims that it is the position of the Protestants, including the NMELC Protestants and the Board, "that an application must contain all of the information necessary to prove that it should be granted. That cannot be true." (Response to NMELC at 1). What is true is that the Application must include the information set forth in §72-12-3.A and it is the Board's position that the Application, in regard to beneficial use and the place of use, does not meet the statutory requirements.

The Applicant claims that simply stating in the application that water will be used for municipal purposes by any one of six municipalities and for commercial sales along the route of a 140 mile pipeline meets the requirement to "designate the beneficial use to which the water will be applied." (Applicant's Response to NMELC Motion at 18). The Applicant also claims that identifying the place of use as being somewhere within seven counties "situated within the geographic boundaries of the Rio Grande Basin" somehow meets the requirement to "designate the place of the use for which the water is desired." (*Id.* at 21). The Applicant claims that, because the boundaries of the seven counties and of the Rio Grande Basin can be identified on a map, and because it identified six municipalities as possible users, along with unidentified customers along a 140 mile pipeline, that is it has provided sufficient information regarding the place of use.

Although the Applicant insists that it intends to "put the full amount of applied-for water to beneficial use within a reasonable time," the fact is that the Applicant does not have one user for the 54,000 acre feet of water that it intends to appropriate. Not one of the six municipalities has indicated that it intends to use the water, let alone agreed to the use of a certain amount of the water. Not one commercial user has provided any indication of an interest in using the water. In fact, the Application does not even identify any commercial users. There is no information about how much water a particular municipality or commercial user is likely to put to beneficial use or the location of such use. This is basic information that needs to be provided in any application. The generalized and non-specific statements regarding beneficial use, end-users, and places of use provided by the Applicant, regardless of how many pages it includes, is so general and broad as to be meaningless in trying to understand how much water will be used by what persons or entities in what particular places.

"A water permit provides the authority to pursue a water right specific to a place and beneficial use." *Carangelo,* 2014-NMCA-032, ¶31 (emphasis added). Rather than identifying a specific place and specific beneficial use-i.e. municipality X intends to put Y AF of water per annum to beneficial use by diverting it at location Z, the Applicant proposes to first find out how much water is available hydrologically, and then go find its users. It is clear that the Applicant will not be putting the water to beneficial use and yet the Applicant claims that it is not required to identify exactly who will be doing so, how much will be used and where it will be used. This turns the very concept of prior appropriation, beneficial use, and the application process on its head.

The Applicant cites to *Mathers v. Texaco, Inc.*, 1966-NMSC-226, 77 N.M. 239, to support the proposition that it need not identify either a specific location or a specific user of the vast amount of water that it is seeking to appropriate. However, the facts in *Mather* are not analogous and the case does not support the Applicant's position. In *Mathers*, Texaco, as the applicant, "expressly specified the particular use for which the water is to be appropriated and the precise lands to which the same is to be applied to accomplish the purpose of such use." 1966-NMSC-226, ¶27. Texaco sought to appropriate 350 AF per year "for the purpose of flooding 1,360 acres of oil-bearing formation in a producing oil field." *Id.* at ¶1. Unlike the Applicant, Texaco provided specific information about the "particular use" and "precise lands" on which the water was to be used. There is nothing in the holding in *Mathers* that supports the Applicant's claim that it does not have to provide specific information about the specific beneficial use in terms of who will be using the water and how much will be used, and the place of use.

Nor does *Albuquerque Land & Irrigation Co. v. Gutierrez,* 1900-NMSC-017, support the Applicant's position that it need not provide information about the location and users of the water. In that case, the question was whether irrigation companies had the right of eminent domain for land needed to build ditches and canals. It does not stand for the proposition that an applicant can appropriate large quantities of water and then, at some time in the future, find the users for the water, as the Applicant proposes to do.

Contrary to the statements made by the Applicant in Section D of the Response, the Board is not arguing that the groundwater should never be appropriated. Nor is the Board claiming that the water is not available to be moved from one location to another. What the Board is claiming is that the Application must meet the specific statutory requirements. As to the public policy argument, it is the position of the Board that it is contrary to public policy to let a flawed application proceed only to have it later overturned after the expenditure of large amounts of time and money by all involved. Considering the very large amount of water that is involved, and the very substantial protests that have been made, it is imperative that the Application, at the outset, include sufficient information so that all the Parties involved understand exactly what is being proposed, including who will be using the water, how much water will actually be used, and where it will be used. This is the basic information needed to comply with §72-12-3.A. There is no authority that allows the State Engineer to accept an application that does not meet the specific requirements of §72-12-3.A based on the assurance of the Applicant that more details and information will be coming at some point in the administrative process.

As discussed above, an application to appropriate groundwater, no matter the quantity of water to be put to beneficial use, must meet the specific requirements of §72-12-3.A. The

Applicant, with the current Application, simply has not met its burden of proving that the requirements have been met.

VI. Two-Stage Hearing Process

The Applicant makes much of the fact that the Board raised questions regarding the proposed two-stage hearing process. The Board is not arguing that a phased approach can never be used. The concern in this case is that the OSE should not be holding a hearing on the hydrology until the Applicant meets the statutory requirements for a permit. The Board also raised the issue because the way in which the two-stage hearing is proposed demonstrates that the Applicant does not have any specific persons, companies, municipalities or other users that intend to put the water to beneficial use. As already discussed above, instead of identifying specific users who will put a specific amount of water in a specific place to beneficial use, the Applicant has provided broad and generalized information about both beneficial use and place of use. Once it is determined, in the first phase, how much water is available for appropriation, the Applicant will go and find those users and, presumably, during the second stage of the process, will provide all of missing information as to beneficial use and place of use. The Applicant has not provided any statutory authority for such a process, particularly in light of the specific language of §72-12-3.A.

VII. Conclusion

The Applicant, rather than providing an application that includes the required information regarding beneficial use and place of use, is proposing to use the State Engineer application process to first find out how much water is available and obtain a decision by the State Engineer on that issue, and then to use that information to market its water rights in the hope of finding users for 54,000 acre feet of water annually. There is no precedent for this approach.

It is within the authority of the State Engineer to decide whether the Application meets the statutory requirements. In regard to the previous Augustin Plains Application, the State Engineer found that the application did not meet the statutory requirements because it did not "identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights or would not be contrary to the conservation of water within the state or would not be detrimental to the public welfare of the state." (Exhibit 1 to NMELC Motion for Summary Judgment, Order Denying Application, ¶8). The State Engineer also found that the prior Application was deficient because it failed to identify which of the listed municipalities would actually use the water to be appropriated. (*Id.* at ¶¶15-16). The State Engineer found that "[c]onsideration of an application that lacks specificity of purpose of the use of water or specificity as to the actual end-user would be contrary to sound public policy." (*Id.* at ¶21). The District Court, on appeal, upheld these findings.

While the Applicant has made some changes to the Application, the fact remains that the current Application suffers from the same problems as the prior one- the failure to identify the specific place of use, the specific end-users, and the amount that a particular end-user will put to beneficial use. The WRD, while opposing the two pending motions for summary judgment, agrees that an applicant such as Augustin Plains Ranch should "have a specific plan to deliver a specific quantity of water to each identified entity that will place the water to beneficial use." (WRD Response to NMELC at 2-3). It is undisputed that the Applicant does not have such a plan and the Application does not include this information. The Application does not meet the statutory requirements for a complete application and it should be denied.

WHEREFORE, the Board requests that the Application be dismissed in its entirety.

Respectfully submitted,

Domenici Law Firm, PC

Pete Domenici, Esq.
Lorraine Hollingsworth, Esq.
320 Gold Ave SW, Suite 1000
Albuquerque, New Mexico 87102
505-883-6250
pdomenici@domenicilaw.com
lhollingsworth@domenicilaw.com

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. mail on all parties identified in the Parties Entitled to Notice, attached hereto.

Lorraine Hollingsworth, Esq.