BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE APPLICATION OF AUGUSTIN PLAINS RANCH, LLC FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN IN NEW MEXICO

Hearing No. 17-005
OSE FILE NO. RG-89943

PROTESTANT WILDEARTH GUARDIANS' REPLY TO APPLICANT'S AND WATER RIGHTS DIVISION'S RESPONSES TO THE COMMUNITY PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

Protestant WildEarth Guardians ("Guardians"), by and through undersigned counsel, hereby files this Reply in support of the Community Protestants' Motion for Summary Judgment and in response to the Responses filed by the Applicant Augustin Plains Ranch ("APR") and the Water Rights Division ("WRD").

INTRODUCTION

Community Protestants, through the New Mexico Environmental Law Center ("NMELC") moved for summary judgment on two alternative grounds: (1) that the current Application[1] is invalid on its face because it fails to set forth all of the information required by statute; and (2) that because the current Application is substantially similar to the application filed in 2007/2008,[2] and both the State Engineer and Seventh Judicial District Court found the prior application inadequate on its face, the current application is also facially invalid. NMELC Motion at 1-2. Guardians specifically addresses APRs and WRD's responses related to the first ground for summary judgment—that the current Application is facially invalid—and hereby adopts all of the Community Protests' arguments in their Memorandum in Support of Their

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[1] The "current Application" refers to APR's 2014 Application to appropriate groundwater at issue in this proceeding.
[2] The 2007/2008 Application will be referred to hereafter as the "prior Application."

Motion for Summary Judgment and their Reply Brief related to the second alternative ground for summary judgment.

ARGUMENT

I. The Application is Facially Deficient Because It Lacks an Adequate Description of Both the Beneficial Use to Which the Water Will Be Applied and the Place of Use.

The question at issue here is whether the descriptions of beneficial use and place of use in the current Application are sufficiently specific to comply with the requirements of NMSA 1978 § 72-12-3.A(2,6). *See also* WRD Response at 7 (acknowledging same). An application to appropriate groundwater must include, *inter alia*, "the beneficial use to which the water will be applied" and "the place of use for which the water is desired." *Id.* With respect to beneficial use, the Application states that "[t]he water will be put to use by municipal, industrial and other users along the pipeline route . . .," and "[t]he water used for bulk sales will be put to use by limited municipal and investor-owned utilities, commercial enterprises, and governmental agencies in part of" seven counties. Application at 3. For place of use, the Application provides only generalized descriptions of the service areas in six municipalities that may use the appropriated water for municipal purposes, along with an intent to conduct commercial water sales in "parts" of seven counties. Application, Attachment 2, Section III.5.A-B. Consideration of relevant case law and the State Engineer's March 2012 Order denying the prior Application shows that these descriptions in the current Application are not sufficient to withstand summary judgment.

In its decision on the prior Application, the Seventh Judicial District Court addressed the issue of the level of specificity requisite for an application to appropriate groundwater in *Augustin Plains Ranch v. Verhines*, Case No. D-728-CV-2012-008 (stating the issue as "a dispute as to whether the statute requires specificity, and if so, whether the amended application

meets the statutory specificity requirement.").[3] *See* Exhibit 3 to NMELC's Motion (*Verhines* decision). There, the Court recognized legislative intent as to the specificity of an application to appropriate groundwater was "not clear" from a plain reading of Sections 72-12-3.A(2) and (6), and used the canons of statutory construction to construe the Legislature's intent with respect to "the level of specificity mandated" by the statute. *Verhines* at 16. The Court unequivocally rejected APR's argument that identifying the specific beneficial use and definite place of use in a groundwater application is not required until later in the process when this information would be developed through an evidentiary hearing. *Id.* at 17-18. Instead, the Court read *in pari materia* the various subsections of Section 72-12-3 and concluded that "the underground water permitting statute calls for specificity of beneficial use and place of use" in an application beyond the general level of information that APR had provided in the challenged Application. *Id.* at 18. The Court's conclusion was consistent with precedent where "New Mexico courts have long considered specificity to be a statutory requirement for an underground water permit." *Id.* at 19 (citing cases on this point).

With this interpretation of the statute's requisite level of specificity in mind, the Court found the prior Application's eleven proposed uses across seven counties too vague to allow the State Engineer "to perform his statutory duty of determining whether the grant the application and issue a permit."[4] *Id.* at 17-18. In finding the Application "invalid for lack of clarity," the Court contrasted the Application's outline of "general potential uses and places of use [without] describing what actually *is* to be the and place of use" with "the history and purpose of the underground water permitting statute [] underscor[ing] the requirement of an actual, specific plan

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[3] *See Verhines* at 2-10 for a history of the administrative and judicial proceedings associated with the prior Application.

[4] The State Engineer made a similar finding in his Order denying the prior Application. *See* Exhibit 1 to NMELC's Motion at ¶ 8 (State Engineer's March 2012 Order).

to be outlined in an application." *Id.* at 21 (emphasis in original). Thus, *Verhines* stands for the principle that an application to appropriate groundwater must "specify beneficial uses and places of use" beyond general labels of beneficial uses and contemplating "large swaths of New Mexico for its possible places of use."[5] *Id.* at 20. Yet, the latter types of statements are exactly the types of statements APR makes in the current Application for beneficial use and place of use, which should lead to dismissal of the current Application for lack of the requisite specificity relating to beneficial use and place of use.

The current Application suffers from the same lack of specificity the Court found insufficient in *Verhines*. Although the current Application has reduced the number of possible uses from eleven to two—municipal and commercial—it still lacks the requisite specificity that the State Engineer needs to evaluate whether the asserted municipal and commercial use of the applied-for water will be beneficial.[6] "In order to evaluate beneficial use, the State Engineer must assess the quantity, place of use, and purpose to which water has actually been applied." *Verhines* at 18 (*quoting Tri-State Generation and Transmission Ass'n v. D'Antonio*, 2011-NMCA-015 ¶ 13, rev'd on other grounds); *see also State ex rel. Martinez v. McDermett*, 1995-NMCA-060 ¶ 10 (defining beneficial use and holding that "[a]n intended future use is not

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[5] Moreover, with regard to the issue of specificity in a ground water application, *Verhines* further determined that "not only does the underground water permitting statute require specificity, the constitutional mandate of beneficial use as the basis of a water right requires specificity of the actual place and use of water, along with the other definite elements required to create a water right." *Verhines* at 27.

[6] APR argues that these uses "are long recognized as beneficial uses in New Mexico" and cites to two cases purportedly recognizing the sale of water as a beneficial use. APR Resp. at 17-18. However, neither of these cases relate to the issue of whether claiming municipal and commercial water uses in a groundwater application is sufficiently specific to satisfy Section 72-12-13.A(2)'s requirement that an application describe the beneficial use to which the water will be applied. *Trujillo v. CS Cattle Co.*, 1990-NMSC-037, is a contract case wherein property owners sued a vendor for breach of contract over appurtenant water rights. In *Curry v. Pondera County Cana & Reservoir Co.*, 370 P.3d 440 (Mont. 2016), the sale of water was considered a beneficial use for water rights developed under the Carey Land Act.

sufficient to establish beneficial use if the water is not put to actual use within a reasonable span of time."). Here, APR has merely provided the types of uses envisioned for the groundwater it seeks to appropriate, without providing specific information that would allow the State Engineer to assess whether these uses will be beneficial, which renders the current Application facially invalid.[7]

Even if the mere listing of two types of water uses could be considered sufficiently specific under Section 72-12-3.A(2), the Application's failure to state with specificity the place of use of the water as required by Section 72-12-3.A(6) is fatal to the validity of the Application. In its response brief, APR admits that it has not designated places of use with specificity, asserting that the Application identifies "the general places of use as areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties situated within the geographic boundaries of the Rio Grande Basin." APR Resp. at 21. APR argues that designating a place of use as somewhere within the boundaries of seven counties, and using statutory definitions of county boundaries for place of use, is "sufficient" because knowing county boundaries "provides sufficient information to allow interested parties to identify the legal subdivision where the water will be put to use." *Id.* at 21-22. In *Verhines*, APR made the same argument about county boundaries being "definite enough" for the interested public to figure out where the water would be used,[8] but the Court rejected that argument on the ground that listing "large swaths of New Mexico for its possible places of use" lacked the requisite specificity for an application to

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[7] Although WRD characterizes the current Application as providing "greater specificity" with respect to purposes and places of use, WRD makes this statement in the context of arguing that the current Application is "different from" the prior Application. WRD Resp. at 4-5. WRD does not argue that these revisions to the current Application are specific enough to allow the State Engineer to provide the determinations required by Section 72-12-3.E.

[8] The prior Application listed the place of use as the same seven counties listed in the current Application. *Compare Verhines* at 4 (quoting places of use listed in Section B, Attachment B of prior Application) *with* Application at 3 and APR Resp. at 21.

appropriate groundwater.[9] *Verhines* at 15-16, 20. Although the current Application also includes as places of use several municipal water service areas and the route of the proposed pipeline that will convey the groundwater, Application Attachment 2 and Exhibit D, these general designations of large areas within which the water may be used are analogous to the county designation that *Verhines* found to be too vague to comply with Section 72-12-3.A(6). Accordingly, the State Engineer should dismiss the Application.

II. Because the Application Lacks the Requisite Specificity Relating to Beneficial Use and Place of Use, the Public is Deprived of Meaningful Information Necessary for Fully Informed Decisions Regarding the Application's Effects on Their Interests.

In the first instance, *Verhines* determined that an application to appropriate groundwater must designate with specificity the beneficial use to which the water will be put and the place of use so that the State Engineer can "perform his statutory duty of determining whether to grant the application and issue a permit." *Verhines* at 17-18. This holding was based on part on the specific language used in Section 72-12-13.D's standing requirement for protestants. *Id.* at 18-19. For an entity protesting a groundwater application on the grounds that the application "will be contrary to the conservation of water within the state or detrimental to the public welfare of the state," the party will have standing if it can show that it will be "substantially and specifically affected by the granting of the application." NMSA 1978 ¶ 72-12-13.D. *Verhines* recognized that "[i]t would be anomalous for an applicant to be allowed to give general statements of intent to appropriate water for beneficial use yet require specificity for objectors." *Verhines* at 18-19. Yet this is exactly the posture that Guardians and other protestants will be in here if the State

[9] Moreover, the State Engineer found that considering an application that lacked "specificity as to the actual end-user of the water would be contrary to sound public policy." NMELC Exhibit 1 at ¶ 21.

Engineer does not dismiss the current Application, which includes only "general statements" relating to beneficial use and place of use.

The vagueness of the Application violates the due process rights of Guardians and other protestants objecting to the Application on the bases that it will be contrary to the conservation of water or detrimental to the public welfare. Without specific information in the Application relating to beneficial use and place of use, interested parties are denied the complete set of facts necessary to make an informed decision about whether and how their interests may be affected by the Application. The State Engineer recognized this due process problem in the context of the prior Application, noting that a vague application could preclude an interested party from filing a "sufficiently specific protest." NMELC Exhibit 4 at 32-33 (State Engineer's Answer Brief in *Verhines* appeal). Accordingly, the State Engineer should not condone the double standard of recognizing as facially valid an application that includes only general statements as to beneficial use and place of use while requiring Guardians and other protestants to demonstrate that they are "specifically affected" based on these vague generalizations in the Application.

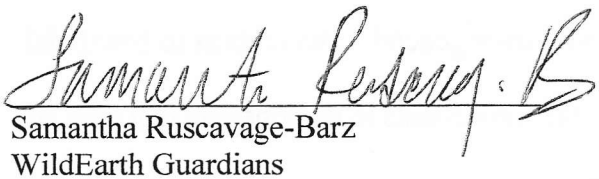
APR misconstrues the Community Protestants' due process/notice argument as grounded in the adequacy of the procedure used to provide the public with notice of the Application and the opportunity to protest, and responds that notice of the Application and protest period was sufficient. Applicant's Resp. at 37-41. However, the Community Protestants' due process argument is not based on a failure to follow the procedure for notice publication in Section 72-12-13.D, nor are they claiming that they failed to receive notice of the Application or protest period deadlines. *See* NMELC Motion at 15-18. Rather, the Community Protestants are arguing that they did not receive "meaningful" notice so as to protect their rights. *Id.* at 15. For the notice to be meaningful, the Application must include information with sufficient specificity to allow an

interested party to make an informed decision as to whether and how the party will be affected by the Application, and provide sufficient bases for any objections. *Id.* at 16. Filing a protest based on incomplete information could lead to dismissal of the protest before all of the relevant information is made available to the protestant. Such a result constitutes denial of procedural due process to protestants.

CONCLUSION

For the foregoing reasons, and for the reasons articulated in NMELC's motion and reply, the State Engineer should dismiss the Application as facially invalid.

Respectfully submitted on this 4th day of December, 2017,



Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, New Mexico 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org

Attorney for Protestant WildEarth Guardians

CERTIFICATE OF SERVICE

I certify that a copy of this REPLY was sent via first class mail on December 4, 2017, to the parties entitled to notice as listed on the OSE's website for this matter at http://www.ose.state.nm.us/HU/AugustinPlains.php (revised 11/17/17) (last visited December 1, 2017).

Samantha Ruscavage-Barz