FILED
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Catron County
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STATE OF NEW MEXICO
CATRON COUNTY
SEVENTH JUDICIAL DISTRICT

AUGUSTIN PLAINS RANCH, LLC

Applicant/Appellant,

v. **Dist. Ct. No. D-728-CV-2018-00026**

TOM BLAINE, P.E.,

New Mexico State Engineer/Appellee, **Appeal from a decision of the New Mexico State Engineer in OSE Hearing #17-005**

and

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.*,

Protestants/Appellees.

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS' RESPONSE TO STATE ENGINEER'S MOTION TO RECONSIDER

The Catron County Board of County Commissioners (the Board), by and through its undersigned counsel of record, hereby provides the following response to the State Engineer's Motion to Reconsider.

The Court entered its Final Order Granting Summary Judgment on August 23, 2019. Paragraph 5 of the Final Order states:

> The Augustin Plains Ranch's Application to appropriate groundwater from the San Augustin Basin is dismissed with prejudice.

The State Engineer is requesting that the Court change the language of Paragraph 5 as follows, which is shown in strikeout/underline for ease of comparison:

> ~~The~~ Augustin Plains Ranch's ~~Application~~ appeal from the State Engineer's August 1, 2018 Order denying APR's 2014/2016 Application to appropriate groundwater ~~from the San Augustin Basin~~ is dismissed ~~with prejudice~~.

The Board does not believe that the Final Order needs to be amended. The Order already refers to the "Augustin Plains Ranch's application…that was filed in 2014 and amended in 2016." However, in order to provide further clarity, the Board would reluctantly agree to amending the Order to include the reference to "2014/2016" so that Paragraph 5 would read as follows:

> The Augustin Plains Ranch's 2014/2016 Application to appropriate groundwater from the San Augustin Basin is dismissed with prejudice.

The Board does not, however, agree with the additional changes proposed by the State Engineer, including deleting the words "with prejudice." The State Engineer has not provided a basis for making the additional changes and the Motion to Reconsider should be denied except for the possibility of the limited change already discussed.

In regard to the first argument made by the State Engineer, the Court's denial of the 2014/2016 Application does not invade the authority of the State Engineer and it is unclear why this concern is being raised. The State Engineer, in the proceeding below, dismissed APR's Application, as did the Court in the Final Order. The State Engineer incorrectly interprets the *Lion's Gate* decision to mean that "the Court may dismiss the *de novo* appeal of the State Engineer's decision but not the underlying Application made to the State Engineer." (Motion to Reconsider at 3). Such a reading of *Lion's Gate* greatly overstates the holding and is not consistent with other holdings of the New Mexico appellate courts. There is nothing in the discussion or holding of *Lion's Gate* that supports a conclusion that the district court may not dismiss an application that does not meet the basic legal requirements of New Mexico water law.

In *Santa Fe Water Res. Alliance v. D'Antonio,* on *de novo* appeal from the State Engineer, the district court "held a bench trial in June, 2013, and afterward the court issued its own detailed findings of fact and conclusions of law reversing the hearing examiner's decision

and granting the Applicant's petition in whole." 2016-NMCA-035, ¶5, 369 P.3d 12 (emphasis added). On appeal, the only issue raised by the State Engineer was the imposition of costs. The State Engineer did not appeal the district court's order granting the applicant's petition to change the point of diversion of water rights. That failure to appeal the district court's substantive ruling undermines the current position being taken by the State Engineer. In addressing the question of costs, the Court of Appeals explained that "while the water code provides a comprehensive administrative scheme that limits the scope of a district court's review in crucial respects, the overall intent of Article XVI, Section 5 of the State constitution and Section 72-7-1 was to make clear that the Engineer's decision is entitled to no deference whatsoever. By making express provision for the district court to take new evidence, the Legislature intended Section 72-7-1 to place the Engineer in the same position as the appellant; the Engineer must participate in the district court proceedings, challenge the appellant's evidence and argument and even offer his own evidence and argument in defense of his decision below." *Id.* at ¶26. The Court of Appeals did not question the district court's ability to reverse the State Engineer's decision and direct that the application be granted.

In *Carangelo v. Albuquerque-Bern. Cnty Water Util. Auth.,* the Court of Appeals reviewed the decision by the State Engineer and by the District Court regarding a permit issued to the City of Albuquerque. After extensive analysis, the Court reversed the district court's approval of the permit and remanded to the "OSE to reissue the proper Permit." 2-14-NMCA-032, ¶94, 320 P.3d 492. Thus, the Court of Appeals made a specific determination as to whether or not a permit should be issued. If the State Engineer's current argument were correct, then the action of the Court of Appeals would be incorrect, which it clearly is not. Additionally, §72-7-3 specifically states that the "decision of the district court shall be binding on the state engineer

who shall thereafter act in accordance with such decision" unless the decision is appealed. There is nothing in the statute that limits the scope of the decision of the district court as long as it is in compliance with the limitations of *Lion's Gate,* which only goes to the issues that may be presented to the district court, not the actual decision that the Court may make. In both *Santa Fe Water Resources Alliance* and *Carangelo,* the district court and the Court of Appeals made substantive legal decisions about applications and directed the State Engineer to comply with those decisions, which is no different than what the Court has done in this case.

The current case is distinguishable from *Lion's Gate* because, in the current case, the only issues considered and decided by this Court were issues that were raised in the administrative process and, based on those issues, the Court determined that the Application must be dismissed as a matter of law. There is nothing in the Final Order that supports a conclusion that the Court is "appearing to interfere in State Engineer administrative processes." (Motion to Reconsider at 3). The Court did not examine the merits of the application beyond the decision made by the State Engineer, as was done in *Lion's Gate*, nor did the Court reject the Engineer's denial of the permit and then attempt to create the appropriate permit conditions, as happened in *Albuquerque-Bern. Cty. Water Util. Auth. V. NM State Eng'r*, cited by the State Engineer on page 4 of the Motion to Reconsider. Contrary to the argument made by the State Engineer, it was not an error for the Court to dismiss the Application based on the analysis set forth by the Court in its July 24, 2019 Memorandum Decision.

As to the question of dismissal with prejudice, the State Engineer appears to concede that, if the phrase "with prejudice" applies "to the 2014/2016 application that is the subject of the most recent litigation," then the phrase "with prejudice" is acceptable. (Motion to Reconsider at 5). The phrase "with prejudice" makes it clear that the Court has reached a final decision on the

merits of this application for purposes of collateral estoppel and res judicata. Res judicata applies when "(1) there is a final judgment in an earlier action, (2) the earlier judgment was on the merits, (3) the parties in the two suits are the same, and (4) the cause of action is the same in both suits." *Potter v. Pierce,* 2015-NMSC-002, ¶10, 342 P.3d 54. Collateral estoppel prevents the "re-litigation of ultimate facts or issues actually and necessarily decided in a prior suit." *Shovelin v. Central New Mexico Elec. Co-op,* 1993-NMSC-015, ¶12, 115 N.M. 293. Rather than causing future confusion, the Final Order dismissing the application with prejudice will serve to prevent the Applicant from simply re-filing the same application with the hope of getting a more sympathetic hearing.

If the Court determines that some additional clarity needs to be provided, the only change that should be made to the Final Order is to add "2014/2016" to Paragraph 5, as shown above. The Board requests that the other changes proposed by the State Engineer be denied.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was served on all counsel of record via the Court's electronic filing system on the 8th day of October, 2019.

/s/ Lorraine Hollingsworth
Lorraine Hollingsworth, Esq.