IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v. **No. 32,705**

NEW MEXICO STATE ENGINEER SCOTT A. VERHINES, P.E.,

Appellee.

and

KOKOPELLI RANCH, LLC et al.,

Protestants-Appellees.

CUCHILLO VALLEY COMMUNITY DITCH ASSOCIATION'S ANSWER BRIEF

Appeal from the District Court of Catron County
Matthew G. Reynolds, District Judge

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September 13, 2013

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Rules of Procedure

State Engineer Surface Water Regulations

Attorney General Opinions

United States Supreme Court

Other State Court Cases

Other State Statute

Other Authority

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CUCHILLO VALLEY COMMUNITY DITCH ASSOCIATION'S ANSWER BRIEF

The Cuchillo Valley Community Ditch Association (Cuchillo Ditch) files this Answer Brief pursuant to Rule 12-213(B) NMRA. Augustin Plains Ranch, LLC, (Augustin Ranch) filed an Amended Application for Permit to Appropriate Groundwater in the Rio Grande Underground Water Basin (Application) with the New Mexico State Engineer on May 5, 2008. [State Engineer Administrative Record Proper (ARP) at 68-70]. The Cuchillo Ditch filed a timely protest to the Application pursuant to NMSA 1978, §

72-12-3(D) (2001) (all political subdivisions of the state have standing to file protests). Augustin Ranch's Brief in Chief states that its Application was filed pursuant to NMSA 1978, § 72-12-3 (2001), and State Engineer Surface Water Regulation § 19.27.1.11 NMAC. The Cuchillo Ditch asserts that the State Engineer did not have statutory authority under Section 72-12-3 or jurisdiction under the New Mexico Constitution, Article XVI, §§ 2 and 3, to act on the Augustin Ranch Application.

SUPPLEMENT TO SUMMARY OF PROCEEDNGS

On February 11, 2011, Motions to Dismiss the Augustin Ranch Application were filed by a group of approximately 80 protestants represented by the New Mexico Environmental Law Center (Law Center) [ARP 337-55] and the Middle Rio Grande Conservancy District (MRGCD) [ARP 389-94]. Exhibit 1 attached to the Law Center's motion to dismiss was a copy of the State Engineer's February 8, 2011, Order Denying Berrendo, LLC's Applications for Permit to Change Purpose and Place of Use of Groundwater in the Fort Sumner Underground Water Basin. [ARP 395-99]. The Order Denying Applications states that: "Consideration of an application that lacks specificity of purpose of the use of water or specificity as to the actual end-user of water would be contrary to sound public policy." [ARP 398]

On March 4, 2011, Cuchillo Ditch filed its Joinder in Motions to Dismiss. [ARP 450]. Cuchillo Ditch also filed on May 12, 2011, a Reply to the Water Right Division's Response to Motion to Dismiss. [ARP 584-86]. The Cuchillo Ditch's Reply stated that the State Engineer did not have statutory authority or jurisdiction to consider the Application. In support of this assertion Cuchillo Ditch attached copies of the State Engineer Order of Dismissal of Robert Crenshaw's Application for Permit to Change Place and Purpose of Use of Groundwater in the Tularosa Underground Water. The State Engineer Order dismissed the application because: "The proposed place of use has not been adequately described." [ARP 587]. The Reply also attached the District Court's Order Affirming State Engineer and Dismissing Appeal. The Court Order stated that "the State Engineer had no statutory authority under NMSA 1978, §§ 72-12-3 and 72-12-7 (1985) or authority under the New Mexico Constitution, Article XVI, section 3, to act on Crenshaw water right application because it failed to state the place of beneficial use of water. The State Engineer lacked subject matter jurisdiction to act on the Application, and, therefore, this court also lacks jurisdiction to act on it." [ARP 590].

Augustin Ranch filed a consolidated Response to Motions to Dismiss (Response) on April 15, 2011. [ARP 521]. Augustin Ranch's Response sets

forth its objectives in filing the Application. The Response refers to the "Augustin Project" which "seeks to provide . . . a new, and much needed, supply of water" . . . "to growing communities in the Middle Rio Grande." [ARP 527, 549]. The Response states that it is important for the State Engineer "to evaluate innovative and non-conventional projects on their merits." [ARP 548].

On March 30, 2012, the State Engineer entered an Order Denying the Application filed by Augustin Ranch. [ARP 659]. The Order found that: "Consideration of an application that lacks specificity of purpose of use of water or specificity as to the actual end-user would be contrary to sound public policy." [ARP 662, findings 21]. Although the State Engineer's Order concluded there was subject matter jurisdiction, it denied the Application based on "sound public policy." [ARP 660]. Augustin Ranch did not a request a post-decision hearing pursuant to NMSA 1978, § 72-2-16 (1973). Because it did not request a post-decision hearing pursuant to Section 72-2-16, it did not preserve for appeal its procedural due process claim and the public policy issue for appeal.

ARGUMENT

POINT I. AUGUSTIN RANCH'S APPLICATION FOR THE "AUGUSTIN PROJECT" WOULD VIOLATE THE NEW MEXICO CONSTITUTION BY CREATING PRIVATE RIGHTS INO THE CORPUS OF PUBLIC GROUND WATER

The "Augustin Project" would radically change New Mexico law governing the administration of water rights in the middle Rio Grande. The Application would create private ownership rights in groundwater as a resource based merely on the construction of wells and a pipeline to convey water to the Rio Grande. The New Mexico Constitution states that: "The unappropriated water . . . within the state of New Mexico, is hereby declared to belong to the public to be subject to appropriation for beneficial use . . .."). N.M. Const. art. XVI, § 2. NMSA 1978, 72-12-1 (2003), states that the water of underground basins, having reasonably ascertainable boundaries, is declared to belong to the public.

By owning ground water as a resource the Augustin Project would control where and how water would be beneficially used based on contracts to lease water or sell water rights to potential water users in the middle Rio Grande. The Augustin Project would circumvent the State Engineer's statutory duty to administer water rights to protect prior water rights.

POINT II. THE STATE ENGINEER DID NOT HAVE STATUTORY AUTHORITY OR JURISDICTION TO ACT ON THE AUGUSTIN RANCH APPLICATION BECAUSE THE APPLICATION DID NOT SPECIFY PLACE OR PURPOSE OF USE OF WATER

Augustin Ranch's Response to the motions to dismiss stated that the scope of the State Engineer's authority to accept or reject a valid application to appropriate groundwater is defined in its entirety by Section 72-12-3(A). [ARP 535]. It states that the State Engineer lacks authority to deny an application that otherwise meets its statutory requirements. [ARP 546]. The primary question for the State Engineer is whether the Application filed by Augustin Ranch satisfied the statutory criteria set forth in Section 72-12-3(A). [ARP 535]. The Response also stated that the question presented to the State Engineer was whether the Application filed by Augustin Ranch was "sufficient to give notice" "to those who could potentially be affected by the appropriation." [ARP 540, 551]. Augustin Ranch's Response agreed with the protestants that the standard for reviewing State Engineer action denying its Application should be the same as that applied by courts to motions to dismiss under Rule 1-012(B)(6). [ARP 532].

Cuchillo Ditch contends that the State Engineer did not have statutory authority to act on the Augustin Ranch Application because it "lacks specificity of purpose of the use of water or specificity as to the actual end-

user of the water." Because the State Engineer did not have statutory authority or jurisdiction to act on the Application for the reasons set forth below in the Argument below, this Court does not need to consider whether the State Engineer denied Augustin Ranch due process to a post-decision evidentiary hearing.

A. An Appropriation of Water Consists of Three Essential Elements the Most Critical One Being a "Fixed and Definite Purpose" of Use

Three essential facts must exist in order to perfect a valid appropriation of water: the intent to appropriate water, a diversion of water, and a beneficial use. These three facts must coincide to complete an appropriation. *Harkey v. Smith*, 31 N.M. 521, 525, 247 P. 550, 551 (1926); *State ex rel. Reynolds v. Miranda*, 83 N.M. 443, 444, 493 P.2d 409, 411 (1972) (man-made diversion, intent to apply, and actual application of water to a beneficial use are necessary to claim a water right).

The initiation of an appropriation is established by the commencement of works to divert water with the intent to appropriate it for a beneficial use. The mere physical diversion of water, without the intent to appropriate, does not initiate an appropriation of water. *State ex rel. Martinez v. McDermett*, 120 N.M. 327, 331, 901 P.2d 745, 749 (Ct. App. 1995) (diversion alone is not beneficial use); *Powers v. Switzer*, 21 Mont. 523, 55 P. 32, 35 (1898).

"Embedded in the New Mexico Constitution are some basic and universal principals of prior appropriation. These include the right to appropriate public waters for beneficial use, one of the defining features of prior appropriation." *Bounds v. State of New Mexico ex rel. State Engineer*, Sup. Ct. Doc. No. 32,713 and 32,717, Slip Op. at ¶ 19 (July 25, 2013). The New Mexico Supreme Court warned that if the mere diversion of water, without the requisite intent to appropriate could initiate a valid appropriation, then:

> . . . the first person who diverts the water from the stream, may have a monopoly of all the water of any stream by simply making this ditch large enough to conduct it from the usual channel.

Millheiser v. Long, 10 N.M. 99, 116, 61 P. 111, 117 (1900).

It is the general policy of the law of appropriation in the western United States that no one should be able to get control of any part of the public waters for "mere future speculative profit or advantage." *Toohey v. Campbell*, 24 Mont. 13, 60 P. 396, 397 (1900); *New Mercer Ditch Co. v. Armstrong*, 21 Colo. 357, 40 P. 989, 992 (1895); *Scherck v. Nichols*, 55 Wyo. 4, 95 P.2d 74, 78-79 (1939). The Colorado Supreme Court held in *City and County of Denver v. Northern Colorado Water Conservancy Dist.*, 130 Colo. 375, 276 P.2d 992, 1008 (1954), that:

> A claim for mere speculative purposes by parties having no expectation themselves of actually constructing works and applying the waters to some useful purpose gives them no rights against subsequent appropriations made in good faith.

Thus, an essential element of a valid appropriation of water is the bona fide intent of the appropriator "'to apply the water to some beneficial use or purpose.'" *Millheiser v. Long*, 10 N.M. at 106, 61 P. at 113-14, *quoting*, C. Kinney, Treatise on Law of Irrigation at 246-47 (1894). The United States Supreme Court held in an interstate water case that a valid intent to appropriate water requires a "fixed and definite purpose." An appropriation does not take priority by relation as of a time anterior to the existence of such a purpose." *Wyoming v. Colorado*, 259 U.S. 419, 495 (1922). [1]

B. A Statutorily Valid Application to Appropriate Water Must State the Essential Facts of Intent, Diversion, and Beneficial Use

The essential elements of an appropriation of water also apply to applications for permits to appropriate or change water rights. The Court of

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[1] *Compare with High Plains*, *supra* at 10-11, 120 P.2d 719 n.4, *quoting*, Colo. Stat. Ann. § 37-92-103(3)(a) which states that " 'Appropriation' means the application of a specific portion of the waters of the state to a beneficial use ... but no appropriation of water ... shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation . . . ."

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Appeals held that a water permit is an inchoate right; a necessary first step in obtaining a water right. *Hanson v. Turney*, 2004-NMCA-069, 136 N.M. 1, 94 P.3d 1. The Court's opinion, quoting from *Green River Dev. Co. v. FMC Corp.*, 660 P.2d 339, 348 (Wyo. 1983), stated that a permit is:

> "It is the authority to pursue a water right – a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state's water in a particular place and to a specific beneficial use under the conditions where the rights of other appropriators will not be impaired."

Hanson, 2004-NMSC-069, ¶ 9 (emphases added).

Although an application may be filed by one person for the future use of another and upon lands which the applicant does not own, the water filed upon must be for use upon "certain lands then definitely had in mind . . . ." *In re Water Rights of Deschutes River and Tributaries*, 134 Or. 625, 286 P. 563, 574 (1930). The control of any waters for mere speculative profit or advantage should not be possible if the State Engineer does his duty. *Scherck v. Nichols*, 95 P.2d at 78-79. These principles also apply to applications for permits to appropriate or use groundwater.

In *High Plains A & M, LLC, v. Southeastern Colorado Water Conservancy Dist.*, 120 P.3d 710 (Colo. 2005), High Plains, a private water investment company, appealed from the water court's dismissal of its

application to change irrigation water rights to "all beneficial uses" including over fifty proposed uses in any of twenty-eight Colorado counties. *Id.* 120 P.3d at 715. The water court found that the change application was "so expansive and nebulous" that there was "no way to determine" whether vested water rights would be injured or to determine if there would actually be a new beneficial use of water. *Id.*

The Colorado Supreme Court affirmed the dismissal of the application. It stated that a "basic predicate" for an application to change the place of use of a water right is "a sufficiently described actual beneficial use to be made at an identified location or locations . . . ." *Id.* 120 P.3d at 720. The opinion also stated that: "A guess that a transferred priority might eventually be put to beneficial use is not what the Colorado Constitution or the General Assembly envisioned as the triggering predicate for continuing an appropriation under a change of water right decree." *Id.* 120 P.3d at 721. The General Assembly did not intend that courts and potential opposers be burdened with change applications "premised on conjecture." Applicants for a change of water right must expect "full scrutiny of their applications by opposers and compliance with applicable procedures and substantive laws." *Id.* 120 P.3d at 722.

In *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 417-18, 594 P.2d 566, 568-69 (1979), the Colorado Supreme Court affirmed the denial of a conditional water decree because the applicant had no contractual commitments from any prospective beneficial users of the water. The right to appropriate water is for use, not merely for profit. Colorado's Constitution and statutes give no right "for the anticipated future use of water of others not in privity of contract, in any agency relationship with the developer regarding that use." *Id.*594 P.2d at 568-69.

C. Supreme Court Decision in *Lion's Gate* Supports the State Engineer's Decision Not to Hear Evidence on Augustin Ranch's Application

The Augustin Ranch Brief in Chief relies on the ruling in *Lion's Gate Water* that "the State Engineer 'shall' summarily reject water rights applications upon a determination that water is unavailable for appropriation . . . ." Brief in Chief at 19, *quoting*, *Lion's Gate Water v. John D'Antonio, State Engineer,* 2009-NMSC-057, ¶ 25, 147 N.M. 523, 226 P.3d 622. The Brief also states that the "State Engineer must proceed to conduct a Section 72-5-6 hearing" and "consider application on its merits upon determining that unappropriated water is available" *Id., citing, Lion's Gate Water,* 2009-NMSC-057, ¶ 32. The Supreme Court's opinion, however, did not hold that the State Engineer was jurisdictionally limited to decide as a "dispositive,

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threshold issue" only whether there was unappropriated water. It does not prohibit the State Engineer from deciding other threshold legal issues without an evidentiary hearing.

Cuchillo Ditch asserts that the State Engineer's action denying the Augustin Ranch Application was not only consistent with but supported by the Supreme Court's decision in the *Lion's Gate*. NMSA 1978, § 72-12-3(E) (2001), requires the State Engineer to approve an application for use of underground water if he or she "finds" that there is unappropriated waters.

In *Lion's Gate* the State Engineer granted a motion for summary judgment denying the application on the ground that there was no unappropriated water was available for appropriation. On appeal, the Supreme Court held that an evidentiary hearing was not required. The State Engineer's action the Court's decision were based on the Decree of the United States Supreme Court in *Arizona v. California*, 376 U.S. 340, 348 (1964). The Decree enjoined the State of New Mexico from "permitting the diversion of water from the Gila River" except as provided by the Decree. *Lion's Gate Water*, 2009-NMSC-057, ¶ 4. In 1967 all water rights in the Gila River stream system were adjudicated by the final Judgment and Decree entered in *New Mexico ex rel. Reynolds v. Anderson*, Grant County Cause No. 16290. This statutory adjudication suit was filed pursuant to the

1964 Decree. *Lion's Gate Water,* 2009-NMSC-057, ¶ 5. The State Engineer, therefore, could not permit any new appropriation of water after 1967 without violating the Supreme Court's 1964 Decree. *Lion's Gate's* application had to be denied.

D. The Water Statutes, State Engineer Regulations, and the Application Form Require the Place and Purpose of Use to Be Described

Section 72-12-3(C) states that no application shall be accepted by the State Engineer unless it is accompanied by all the information required in Section 72-12-3(A). Section 72-12-3(A) states that the applicant "shall designate" "(2) the beneficial use to which the water will be applied" and "(6) the place of the use for which the water is desired." Augustin Ranch's Application designates as the place of use anywhere in the Middle Rio Grande basin and the purpose of use as numerous possible beneficial uses including "replacement and augmentation" which may facilitate the use of water but are not beneficial uses. Augustin Ranch's Application did not satisfy the requirements of subsections 72-12-3(A) and (C) because it "lacks specificity" of the "purpose of the use of water" or the "actual end-user of the water." *See* State Engineer's Order Denying the Application. [ARP 662, finding 21].

The State Engineer's "Rules and Regulations Governing Drilling of Wells and Appropriation and Use of Ground Water in New Mexico" (1966), Regulation § 19.27.1.11, Article 1-4, states that: "applications tendered must conform to the requirements of the statutes and rules and regulations of the State Engineer." Article 2-2 states that approval of a change in place or purpose of use will be granted only after "proper application is made." Article 2-5 states that: "Where the use is for other than irrigation, the place of use shall be described by legal subdivision." (Emphasis added.) The Augustin Ranch Application does not comply with State Engineer Regulation § 19.27.1 because its Application does not describe the place of use, except for the irrigation of lands owned by Augustin Ranch.

E. Augustin Ranch's Application Does Not Give Constitutionally Adequate Notice to Water Right Owners Who May Be Impaired

In conjunction with any determination as to whether the State Engineer had statutory authority to act on the Augustin Ranch Application this Court should also consider whether the Application and its published notice gave constitutionally adequate notice to water right owners who may be adversely affected if the Application were approved. Article II, §18 of the New Mexico Constitution and the Fourteenth Amendment of the United States Constitution guarantee due process of law. With regards to property

rights, the United States Supreme Court stated that: "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The due process requirements of fairness and reasonableness as stated in *Mullane* are echoed in New Mexico case law. Administrative agencies must conform to the requirements of due process of law. *Uhden v. New Mexico Oil Conservation Comm'n*, 112 N.M. 528, 530, 817 P.2d 721, 723 (1991).

The purpose of publishing a notice of an application is to ensure that the water right permit requested by an application will not impair existing water rights. *City of Roswell v. Berry*, 80 N.M. 110, 113, 452 P.2d 179, 182 (1969). The notice must provide a base of information sufficient to allow the public to make a threshold determination that there may be potential harm. Due process requires notice to parties so that those who may be harmed or affected by the proposed use of water may be heard. *City of Albuquerque v. Reynolds*, 71 N.M. 428, 434, 379 P.2d 73, 77 (1962). "In the absence of adequate public notice, comment, and opportunity to protest, the State

Engineer cannot fully evaluate impacts on existing water rights, public welfare, and water conservation."

In 1994 the Attorney General issued an Opinion stating that: "The statutes require that a complete analysis occur *at the time* the new appropriation is approved so that the requisite findings can be made at the time the permit is issued." 1994 Op. Att'y Gen. No. 94-07 at 7 (emphasis in original). The Opinion concluded that: "The State Engineer's water right dedication practice and procedure are illegal because they prelude complete evaluation at the time the permit is approved of whether issuance of the permit will at any time in the future impair existing rights, be detrimental to public welfare, or be contrary to conservation." *Id.* No. 94-07 at 3 (emphasis added).

Augustin Ranch's Response to the motions to dismiss its application stated that: "The [State Engineer's water right dedication] program was found invalid because the State Engineer was accepting and granting such applications in the absence of the information required by statute." [ARP 515]. The same due process failure would exist if Augustin Ranch's Application were granted.

Furthermore, failure to give adequate notice renders the subsequent acts of an administrative agency void. *Nesbit v. City of Albuquerque*, 91

N.M. 455, 575 P.2d 1340 (1977). Notice must be detailed and sufficient to inform the public about the nature of the administrative proceedings. "If notice is insufficient, ambiguous, misleading or unintelligible to the average citizen, it is inadequate to fulfill the statutory purpose of informing interested persons . . . ." *Id.* 91 N.M. at 459, 575 P.2d at 1344.

In *Eldorado at Santa Fe, Inc. v. Cook*, 113 N.M. 33, 822 P.2d 672, *cert. denied,* 113 N.M. 1, 820 P.2d 435 (1991), the petitioners who challenged the State Engineer's permit to Eldorado asserted that the published legal description of the applied for move-to well location was erroneous because the notice located the move-to well in the wrong land grant and section. They also asserted that the errors were substantive and that the substantive errors in the published notice rendered the State Engineer's approval of the application void or voidable. *Id.* 113 N.M. at 37, 822 P.2d at 676. The Court of Appeals ruled that the petitioners were entitled to notice and an opportunity to be heard; the failure to follow statutory procedures violated petitioners' due process rights; and the State Engineer, therefore, lacked jurisdiction to grant Eldorado's application and rendered void all subsequent acts of the State Engineer. *Id.* 113 N.M. at 37-38, 822 P.2d at 676-77. The Supreme Court's decision was "mandated by

constitutional due process requirements." *Id.* 113 N.M. at 36, 822 P.2d at 675.

CONCLUSION

The Court of Appeals should affirm the District Court's decision and order affirming the State Engineer's Order Denying Application filed by Augustin Plains Ranch, LLC.

Dated: September 13, 2013

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