

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Augustin Plains Ranch, LLC,

Applicant-Appellant,

v.

Case No. 32,705

Scott A. Verhines, P.E.,

COURT OF APPEALS OF NEW MEXICO  
FILED

New Mexico State Engineer-Appellee,

AUG 01 2014

and,

Wendy F. Jones

Kokopelli Ranch *et al.*,

Protestant-Appellees.

**SUPPLEMENTAL BRIEF OF PROTESTANT-APPELLEES  
DEMONSTRATING THAT THIS APPEAL IS NOT MOOT**

The Protestant-Appellees (“Protestants”) submit this supplemental brief pursuant to the Court’s July 23, 2014, Order, which the Court issued after learning that the Augustin Plains Ranch, LLC (“the Ranch”) filed “a new application with the Office of the State Engineer” (“OSE”).<sup>1</sup> The relevant parts of the Ranch’s “new” application are attached to this brief: Exhibit A is the application form and Exhibit B is “Attachment 2” to the application. The Order requires “the parties [to]

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<sup>1</sup> The administrative status of the new and old applications is unclear. The Ranch has not withdrawn the old application, and the OSE has authority to summarily dismiss the new application without publication or hearing. NMSA 1978, § 72-12-3(C) and (F) (2001).

file supplemental simultaneous briefs ... [that] address whether the new application renders this case moot because there is no longer a controversy.”

This appeal is not moot. As the Exhibits A and B show, the “new” application is not new. It is in all material respects identical to the application under appeal (“old application”). Both the new and old applications request to appropriate 54,000 acre feet of groundwater per year via 37 deep wells in Catron County; both request a permit to appropriate this water for virtually any purpose any place in one or all of seven New Mexico counties; and both call for a pipeline from Catron County to Santa Fe County. Exhibit A 1-3; Exhibit B 1-4. Thus, a controversy among the parties still exists, one which this appeal can completely resolve.

## **ARGUMENT**

### **I. THE RANCH’S NEW APPLICATION DOES NOT RENDER THIS APPEAL MOOT OR JUSTIFY DISMISSAL.**

This appeal will decide whether the State Engineer properly denied the Ranch’s application to appropriate 54,000 acre feet of underground water from 37 wells located on its property in Catron County. The Ranch proposes to pipe water from Catron County to Santa Fe to serve any future need for water that might arise in seven New Mexico counties. AB 1-2, 13-15. Protestants filed a motion to dismiss the application, alleging that it was impermissibly vague and thus failed to

show an actual intent to appropriate water. The State Engineer granted the motion after conducting a hearing. AB 2-5.

The district court upheld the State Engineer's denial on summary judgment. The court held that the Ranch's application was invalid on its face, because the application failed to designate a particular purpose or place of beneficial use. AB 6-13. This violated statutory application requirements, but it also violated fundamental principles of prior appropriation, including beneficial use and public ownership of unappropriated water. AB 6-13. The Ranch appealed on the merits and also claimed denial of due process. The issues have been fully briefed and oral argument is scheduled for August 21.

This appeal is not moot and should not be dismissed. An appeal is moot only if there is "no actual controversy ... for which a ruling by the court will grant relief ...." *Republican Party v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶10, 283 P.3d 853. Moreover, the Court may "review moot cases that present issues of substantial public interest or which are capable of repetition yet evade review." *Gunaji v. Macias*, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008. "It is sufficient that the issue be capable of repetition in some future lawsuit; the identity of the parties is irrelevant." 2001-NMSC-028, ¶11.

The Ranch's "new" and old applications are materially identical, and therefore, they give rise to the same legal controversy. Other applications have

presented this same controversy, and it will continue to arise in future applications until finally resolved judicially. *See, e.g.*, Exhibit C 3-4 (“Berrendo” application denied by State Engineer for failure to designate a particular beneficial use). This Court can resolve the controversy and grant Protestants complete relief by declaring that all applications to appropriate public water must designate the actual places where the requested water will be used and the intended purposes of use.

This is an issue of great public interest. “Water has constitutional significance” in New Mexico, *Bybee v. City of Albuquerque*, 1995-NMCA-061, ¶ 10, 120 N.M. 17, 896 P.2d 116, and the State Engineer is the trustee responsible for administering public water. AB 12-13. Protestants maintain that all applications to appropriate public water must designate a definite place and purpose of use, not mere possibilities. This is required to demonstrate the requisite intent to appropriate, provide meaningful public notice, and justify relating priority back to the filing of the application.

“An authoritative determination” on the level of specificity required in applications to appropriate public water is needed to guide the State Engineer, applicants, and the public. *Mowrer v. Rusk*, 1980-NMSC-113, ¶13, 95 N.M. 48, 618 P.2d 886. A determination by this Court that the Ranch’s application is unlawfully vague will enable the OSE to reject similar applications without

hearing, thus saving tens of thousands of dollars in notice and hearing costs.<sup>2</sup> This would also help guide investors by clarifying basic legal requirements regarding the appropriation of water in New Mexico.<sup>3</sup> *Young & Norton v. Hinderlider*, 1910-NMSC-061, ¶24, 15 N.M. 666, 110 P. 1045 (public interest requires protecting investors “against making worthless investments in New Mexico.”) Finally, a ruling for Protestants would prevent those who have no present need for water from monopolizing an essential public resource, thus keeping public water available for appropriation by those who have actual present needs for water. AB 9-11.

### **Conclusion**

The Ranch’s “new” application does not render this appeal moot. It presents the same controversy and demonstrates that the issues in this appeal are capable of repetition yet evading review. WHEREFORE, Protestants respectfully request the Court to determine that the “new” application does not render this appeal moot, hold oral argument on August 21, and decide this appeal.

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<sup>2</sup> The Ranch’s old application drew over 900 protestants, each of whom OSE had to serve notice by certified mail. NMSA 1978, § 72-2-17(A)(1965).

<sup>3</sup> The Ranch’s investors have allegedly invested over three million dollars in an application that the State Engineer and district court deemed facially invalid.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER

By:   
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**CERTIFICATE OF SERVICE:** I certify that I mailed a copy of the foregoing paper on the **August 1, 2014**, to the following parties' attorneys:

|  |  |  |
|--|--|--|
| John B. Draper, Esq.<br>Jeffrey J. Wechsler, Esq.<br>Montgomery & Andrews, P.A.<br>P. O. Box 2307<br>Santa Fe, New Mexico 87504<br><br><i>Attorneys for Augustin Plains Ranch, LLC</i> | DL Sanders, Esq.<br>Jonathan E. Sperber, Esq.<br>Office of the State Engineer<br>P.O. Box 25102<br>Santa Fe, NM 87504-5102<br><br><i>Attorney for the State Engineer</i> | Ron Shortes<br>P. O. Box 533<br>Pie Town, NM 87827<br><br><i>Attorney for multiple parties</i>   |
| Peter Thomas White<br>Sena Plaza, Suite 50<br>125 East Palace Avenue<br>Santa Fe, NM 87501<br><br><i>Attorney for Cuchillo Valley and Luna Community Ditches</i>                       | James C. Brockman<br>STEIN and BROCKMAN, P.A.<br>500 Don Gaspar Avenue<br>Santa Fe, NM 87501<br><br><i>Attorneys for Last Chance Water Company</i>                       | George Chandler<br>Chandler Law of Alamos<br>1208 9th Sheet,<br>Los Alamos, NM 87544<br><br><i>Attorney for Monticello Community Ditch Association</i> |

  
R. Bruce Frederick

File No. \_\_\_\_\_



### NEW MEXICO OFFICE OF THE STATE ENGINEER

#### APPLICATION FOR PERMIT TO APPROPRIATE

(check applicable boxes):



For fees, see State Engineer website: <http://www.ose.state.nm.us/>

|  |
|--|
| <input type="checkbox"/> Application to Appropriate Surface Water (72-5-1)                         |
| <input checked="" type="checkbox"/> Application to Appropriate Groundwater (72-12-3)               |
| <input type="checkbox"/> Temporary Request – Requested Start Date: _____ Requested End Date: _____ |

#### 1. APPLICANT(S)

|   |   |
|---|---|
| Name: Augustin Plains Ranch LLC   |   |
| Contact or Agent:<br>Michel Jichlinski<br>c/o Draper & Draper LLC                           | -or- Michel Jichlinski<br>c/o Montgomery & Andrews, P.A.                            |
| Mailing Address: 325 Paseo de Peralta   | Mailing Address: 325 Paseo de Peralta   |
| City: Santa Fe  | City: Santa Fe  |
| State: NM Zip Code: 87501   | State: NM Zip Code: 87501   |
| Phone: (505) 570-4590 (Draper & Draper)<br>___ Home ___ Cell                                | Phone: (505) 986-2637 (M&A)<br>___ Home ___ Cell                                    |
| Phone (Work): _____   | Phone (Work): _____   |
| E-mail (optional): <a href="mailto:john.draper@draperllc.com">john.draper@draperllc.com</a> | E-mail (optional): <a href="mailto:jwechsler@montand.com">jwechsler@montand.com</a> |

#### 2. PURPOSE OF USE AND AMOUNT OF WATER

|  |  |
|--|--|
| <input type="checkbox"/> Domestic <input type="checkbox"/> Livestock <input type="checkbox"/> Irrigation<br><input checked="" type="checkbox"/> Municipal <input checked="" type="checkbox"/> Industrial <input checked="" type="checkbox"/> Commercial<br><input checked="" type="checkbox"/> Other Use (specify): <u>Offset of surface water depletions, replacement, sale, and/or lease</u> | Amount of Water (acre-feet per annum): if more details are needed, type "See Comments" in "Other" field below, and explain in Additional Statements Section.<br><br>Diversion: <u>54,000</u><br>Consumptive Use: <u>54,000</u><br>Other (include units): _____ |
| Describe a specific use if applicable (i.e. sand & gravel washing, dairy etc): _____   |  |

|                               |  |   |  |
|-------------------------------|--|---|--|
| FOR OSE INTERNAL USE          |  | Application for Permit, Form wr-05, Rev 4/12/12 |  |
| File Number:                  |  | Trn Number:                                     |  |
| Trans Description (optional): |  |   |  |
| Sub-Basin:                    |  |   |  |
| PCW/LOG Due Date:             |  | PBU Due Date:                                   |  |

2014 JUL 14 PM 3:52

OFFICE OF STATE ENGINEER SANTA FE, NEW MEXICO



**3. COUNTY WHERE WATER RIGHT WILL BE USED**

Parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties. Please see Attachment for additional detail.

**4. POINT(S) OF DIVERSION (POD)**

Surface POD OR  Ground Water POD (Well)

Name of ditch, acequia, or spring:

Stream or water course:

Tributary of:

If application proposes a new point of diversion involving a diversion dam, storage dam, main canal, and/or pipeline, complete Attachment 2.  Check here if Attachment 2 is included in this application packet.

POD Location Required: Coordinate location must be reported in NM State Plane (NAD 83), UTM (NAD 83), or Latitude/Longitude (Lat/Long - WGS84).

District II (Roswell) and District VII (Cimarron) customers, provide a PLSS location in addition to above.

NM State Plane (NAD83) (FEET)  UTM (NAD83) (METERS)  Lat/Long (WGS84)(to the nearest 1/10<sup>th</sup> of second)  
 NM West Zone  Zone 12N  
 NM East Zone  Zone 13N  
 NM Central Zone

| POD Number: | X or Easting or Longitude: | Y or Northing or Latitude: | Provide if known:<br>-Public Land Survey System (PLSS)<br>(Quarters or Halves, Section, Township, Range) OR<br>-Hydrographic Survey Map & Tract; OR<br>-Lot, Block & Subdivision; OR<br>-Land Grant Name |
|-------------|----------------------------|----------------------------|--|
| 1           | 107 43 13.037              | 34 13 29.779               | T1S R9W S13 SW NE NE   |
| 2           | 107 43 12.778              | 34 12 58.958               | T1S R9W S13 NW SE SE   |
| 3           | 107 43 47.907              | 34 12 58.177               | T1S R9W S13 NE SW SW   |
| 4           | 107 43 13.644              | 34 12 35.848               | T1S R9W S24 SW NE NE   |
| 5           | 107 43 47.142              | 34 12 36.275               | T1S R9W S24 SE NW NW   |

NOTE: If more PODS need to be described, complete form WR-08 (Attachment 1 – POD Descriptions)

Additional POD descriptions are attached:  Yes  No If yes, how many 32 ?

Point of Diversion is on Land Owned by: Applicant

Other description relating point of diversion to common landmarks, streets, or other: The wells will be located on Augustin Plains Ranch, north and south of U.S. Highway 60, East of Datil, New Mexico. Please see Exhibit 3 to the Attachment for a map illustrating the locations of the wells.

Note: The following information is for wells only. If more than one (1) well needs to be described, provide attachment.

Approximate depth of well (feet): 2000

Outside diameter of well casing (inches): 20

Driller Name: Licensed New Mexico Drilling Contractor

Driller License Number: N/A

FOR OSE INTERNAL USE

Application for Permit, Form wr-05

|              |             |
|--------------|-------------|
| File Number: | Trn Number: |
|--------------|-------------|

**5. PLACE(S) OF USE**  
List each individually

(not applicable \_\_\_)

a. \_\_\_\_\_ Acres of Irrigated Land Described as Follows (if applicable):

| <b>b. Legally Described By:</b><br>___ Public Land Survey System (PLSS)<br>___ Hydrographic Survey Report or Map<br>___ Irrigation or Conservation District Map<br>___ Subdivision | <b>c.</b><br>PLSS<br>Section<br><u>and/or</u><br>Map No.<br><u>and/or</u><br>Lot No. | <b>d.</b><br>PLSS<br>Township<br><u>and/or</u><br>Tract No. (Please list each<br>tract individually)<br><u>and/or</u><br>Block No. | <b>e.</b><br>PLSS Range | <b>f.</b><br>Acres |
|--|--|--|-------------------------|--------------------|
| PLSS Quarters or Halves,<br><u>and/or</u><br>Name of Hydrographic Survey or District,<br><u>and/or</u><br>Name and County of Subdivision   |  |  |                         |                    |
| Please see Attachment  |  |  |                         |                    |
|  |  |  |                         |                    |
|  |  |  |                         |                    |
|  |  |  |                         |                    |
|  |  |  |                         |                    |
|  |  |  |                         |                    |
|  |  |  |                         |                    |
|  |  |  |                         |                    |
|  |  |  |                         |                    |

**g. Other description relating place of use to common landmarks, streets, or other:** The water will be put to use by municipal, industrial and other users along the pipeline route shown on Exhibit 4 to the Attachment. Please see the Attachment for additional details.

**h. Place of use is on land owned by (required):** Please see Attachment

**i. Are there other sources of water for these lands?** No\_\_ Yes\_\_ describe by OSE file number Please see Attachment

Note: If on Federal or State Land, please provide copy of lease.

**6. ADDITIONAL STATEMENTS OR EXPLANATIONS**

This Application is being filed in to obtain a permit to appropriate 54,000 acre-feet per year from 37 wells. The water will be transported by pipeline from the points of diversion to various users along the pipeline route shown on Exhibit 4 to the Attachment. Applicant intends to construct enhanced recharge facilities which will collect runoff that would otherwise evaporate in the Plains of Augustin. This water will augment the groundwater in the aquifer and offset the amount that is pumped from Applicant's wells. Applicant requests for these enhanced recharge projects in an amount to be determined at the hearing. As part of this Application, Applicant Augustin Plains

FOR OSE INTERNAL USE

Application for Permit, Form wr-05

|                    |                   |
|--------------------|-------------------|
| File Number: _____ | Trn Number: _____ |
|--------------------|-------------------|



ACKNOWLEDGEMENT

I, Rich Radice  
Print Name(s)

Affirm that the foregoing statements are true to the best of (my, our) knowledge and belief.

[Handwritten Signature]  
Applicant Signature

\_\_\_\_\_  
Applicant Signature

President  
Augustin Plains Ranch, LLC

ACTION OF THE STATE ENGINEER

This application is:

approved  partially approved  denied

provided it is not exercised to the detriment of any others having existing rights, and is not contrary to the conservation of water in New Mexico nor detrimental to the public welfare and further subject to the attached conditions of approval.

Witness my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, for the State Engineer,

\_\_\_\_\_, State Engineer

By: \_\_\_\_\_  
Signature

\_\_\_\_\_  
Print

Title: \_\_\_\_\_  
Print

FOR OSE INTERNAL USE

Application for Permit, Form wr-05

|              |             |
|--------------|-------------|
| File Number: | Trn Number: |
|--------------|-------------|

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## ATTACHMENT 2

### TO AUGUSTIN PLAINS RANCH LLC APPLICATION FOR PERMIT TO APPROPRIATE GROUNDWATER

#### I. OVERVIEW OF THE PROJECT

Augustin Plains Ranch LLC (“APR” or “Applicant”) is a New Mexico company which owns a ranch located in the San Augustin Plains near Datil, NM (“Ranch”). The overall purpose of this Application is to obtain approvals from the State Engineer for a permit to appropriate 54,000 acre-feet per year (AFY) from 37 wells to be drilled on the Ranch. Applicant proposes to convey the water through a pipeline from the Ranch near Datil in Catron County to the Albuquerque metropolitan area. The water will be used for municipal, industrial, commercial, instream, offset of surface water depletions, replacement, and other uses at locations along the length of the pipeline. The project will provide a new water resource in the State’s most populated area, supplying economic and environmental benefits to the population. In addition, Applicant intends to construct enhanced water recharge facilities which will collect runoff that would otherwise evaporate in the Plains of Augustin. This water will augment the groundwater in the aquifer and partially offset the effects of pumping from Applicant’s wells. Applicant requests credit for the enhanced recharge facilities in an amount to be determined at the hearing.

A description of the project is contained in Exhibit A to this Attachment (“Project Description”).

Applicant has already invested over \$3 million in the development of the project. Activities have included investment and investigation in the following areas:

#### Hydrologic:

- Acquired land necessary for the project layout
- Drilled two test wells to a maximum depth of 1,500 ft and conducted pump tests in each well
- Tested water quality from two test wells
- Drilled one borehole to a depth of 3,000 ft
- Contracted with nationally recognized hydrologists who conducted an initial analysis of the aquifer and developed a preliminary groundwater model

#### Engineering:

- Contracted with nationally recognized engineering firms as well as a pipe manufacturer to develop and evaluate the project’s preliminary engineering and cost estimates
- Contracted with a nationally recognized environmental firm to evaluate the project’s impacts and benefits, identify permitting requirements, and propose an optimal routing for the pipeline



Stakeholder Involvement:

- Held discussions with all major water users in the Middle Rio Grande
- Identified end-users of project water
- Public presentations on the project, including town hall meetings designed to inform local residents of the project's objectives and preliminary design, to the New Mexico Association of Counties, the Interstate Stream Commission, the New Mexico Legislature Water and Natural Resources Committee, the Association of Commerce and Industry, and other stakeholders

Financial:

- Contracted with senior economic and financial analysts with knowledge of the Middle Rio Grande water resources and infrastructure finance requirements to evaluate the project's economic and financial feasibility and develop a financial model
- Worked with several infrastructure investors, including publicly traded investment banks and private equity, to assess the financial model and evaluate the project's feasibility

Applicant recognizes that additional investigation and analysis is necessary, which Applicant is ready, willing and able to undertake as part of the hearing. In addition, Applicant is in position to obtain all financing necessary to put the water to beneficial use within a reasonable time. For example, Exhibit B presents a letter from current investors attesting to their willingness to support the financing of the project through all phases of development, a letter from a leading investment bank attesting to the bankability of the project, and a certificate attesting to the inclusion of the project in the list of the 100 top global infrastructure projects at the 6<sup>th</sup> Annual Global Infrastructure Leadership Forum.

**II. PROPOSED HEARING PROCEDURE**

Pursuant to the statutory and regulatory authority of the State Engineer, and consistent with prior practice, the Applicant requests a two-stage process for consideration of this Application by the State Engineer.

Stage 1:

The first stage ("Stage 1") consists of an evaluation of the hydrological issues related to the Application, including the amount of water available for appropriation without impairing other water rights, and the amount of enhanced recharge. It would include advertisement of the Application and the opportunity for protests. The hearing during Stage 1 will allow for the presentation of exhibits and expert testimony on the hydrologic issues. Conservation of water and public welfare will also be addressed in Stage 1 to the extent they relate to the hydrologic issues. Stage 1 would result in an initial order on the hydrologic issues.

Stage 2:

Once the order on the hydrologic issues is entered, Applicant requests that it be given up to twelve (12) months to adjust and finalize the individual purposes of use, places of use and amounts for each use. Stage 2 would begin when Applicant submits an Amended Application with additional detail regarding the types and places of use for the water based on the order on the hydrologic issues. The information contained in the Amended Application will be included in a second advertisement to the public and a second opportunity to protest. Stage 2 consists of consideration of whether the detailed purposes and places of use can be approved without impairment of other rights, detriment to the public welfare, or being contrary to conservation of water within the State.

Applicant intends to put the full amount of applied-for water to beneficial use within a reasonable amount of time pursuant to the prior appropriation doctrine and applicable statutes and regulations. Bifurcating the hearing on the Application into two stages will allow the State Engineer to make a determination on hydrologic issues, and enable Applicant to use the initial order to finalize plans for the ultimate disposition of the water. The revised information on the places of and purposes of use will be included in the Amended Application and will be re-advertised to ensure that all interested parties in both the move-from and move-to locations have a full opportunity to evaluate the Application and participate if they choose. Applicant recognizes that it will not be entitled to apply water to beneficial use until the successful conclusion of both Stage 1 and Stage 2, and final action on this Application is not requested from the State Engineer until the conclusion of Stage 2.

### **III. ADDITIONAL INFORMATION FOR SECTIONS OF THE APPLICATION**

#### **2. Purpose of Use and Amount of Water**

The purposes of use of the Application are municipal, industrial, commercial, offset, replacement, and sale. The individual detailed purposes and amounts of use will be finalized in Stage 2 of the application process, in conjunction with the amended and additional information to be included in the Amended Application. Amounts pumped and the amounts recharged will be metered and reported in a manner acceptable to the State Engineer.

#### **3. County Where Water Right Will Be Used**

The counties in which the applied for water will be used are Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe. Extant statutes define each of the seven counties, with a description of each county by legal subdivision. *See* NMSA 1978, §§ 4-1-1 to -2 & Compiler's notes (Bernalillo County), § 4-23-1 (Sandoval County), § 4-26-1 (Santa Fe County), § 4-2-1 (Catron County), § 4-27-1 (Sierra County), § 4-28-1 (Socorro County), § 4-32-1 (Valencia County). The place of use of the water within those counties is limited to those portions of those counties that are situated within the geographic boundaries of the Rio Grande Basin. *See* 19.27.49 NMAC.

#### **4. Points of Diversion ("PODs")**

The groundwater points of diversion are 37 wells located on Augustin Plains Ranch, as more particularly shown on Exhibit C to this Attachment.

5. Places of Use

The water will be provided to municipal, industrial, commercial and other users who will connect to the pipeline and use water along the route presented in Exhibit D. Exhibit E contains a letter of support from one such municipal entity. The preliminary engineering of the pipeline is discussed in the Project Description. The places of use will be finalized in Stage 2 of the application process, in conjunction with the amended and additional information to be included in the Amended Application. The terms of delivery and use of the water for the end-users will be provided as part of Stage 2. Water will be accounted for in a manner acceptable to the State Engineer.

**LIST OF EXHIBITS**

Exhibit A: Project Description

Exhibit B: Investors Letters

Exhibit C: POD Map

Exhibit D: Routing Analysis

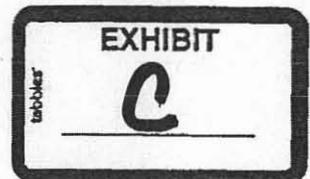
Exhibit E: Rio Rancho Letters

**BEFORE THE NEW MEXICO STATE ENGINEER**

|  |   |                                    |
|--|---|------------------------------------|
| <b>IN THE MATTER OF THE APPLICATIONS BY</b>  | ) | <b>Hearing No. 09-086, 09-087,</b> |
| <b>BERRENDO, LLC, ET. AL., FOR PERMIT TO</b> | ) | <b>09-088, 09-089 and 09-090</b>   |
| <b>CHANGE PLACE AND PURPOSE OF USE OF</b>    | ) |                                    |
| <b>GROUNDWATER IN THE FORT SUMNER</b>        | ) | <b>CONSOLIDATED</b>                |
| <b>UNDERGROUND WATER BASIN IN THE</b>        | ) |                                    |
| <b>STATE OF NEW MEXICO</b>                   | ) |                                    |

**ORDER DENYING APPLICATIONS**

This matter came on before Andrew B. Core, the State Engineer's designated Hearing Examiner, at a hearing held on December 1, 2010, in the State Capital Building in Santa Fe, New Mexico to consider a Motion to Dismiss Applications or In the Alternative Motion for Republication (Motion to Dismiss), filed by Protestant Pecos Valley Artesian Conservancy District (PVACD) on September 13, 2010. The parties appeared as follows: John B. Draper, Esq., and Jeffrey J. Wechsler, Esq., represented Applicants Berrendo LLC, VP Bar, Sunnyside Dairy, LLC, Peters Properties, LLC, Fallon Living Trust and Finney Farms, Inc.; Jennifer M. Anderson, Esq., represented Protestant Village of Fort Sumner; Steven Hernandez, Esq., represented Protestant Carlsbad Irrigation District; Seth Fullerton, Esq., represented Protestant Last Chance Water Co.; A. J. Olsen, Esq., represented Protestant PVACD; Alvin F. Jones, Esq., represented Protestants Berrendo Cooperative Water Users Assn., NM Farm & Livestock Bureau, Roswell Chamber of Commerce, Roswell-Chavez County Economic Development Corp., Town of Hagerman, and Town of Dexter; Albert L. Pitts, Esq., represented Protestants City of Roswell, City of Artesia, Eddy County Board of County Commissioners and County of Chaves; Amy Atchley, legal assistant, appeared for the NM Commissioner of Public Lands; Keitha Leonard, Esq., represented Protestant NM Interstate Stream Commission; Protestant Representative Dennis Kintigh appeared *pro se* on his own behalf; Joshua Mann, Esq., and Christopher B. Rich, Esq., represented Protestant U.S. Department of Interior, Bureau of Reclamation; and Chris Lindeen, Esq., represented the Water Rights Division of the Office of the State Engineer.



During the period from September 27, 2010 to November 24, 2010, several parties to the captioned matter each filed motions which incorporated and adopted the PVACD Motion to Dismiss (Berrendo Cooperative Water Users Assn, NM Farm & Livestock Bureau, Roswell Chamber of Commerce, Roswell-Chavez County Economic Development Corp., Town of Dexter, Town of Hagerman, City of Roswell, City of Artesia, Eddy County Board of County Commissioners and County of Chaves); one party filed a Motion to Request Hearing Examiner to Order Applicants to Amend Applications (Village of Fort Sumner); the Applicants filed an Opposition to the PVACD Motion to Dismiss; the Applicants filed an Opposition to Additional Motions to Dismiss Applications or In the Alternative Motion for Republication and to Set Order Designating Hearing Location Aside; the Applicants filed a Response in Opposition to Village of Fort Sumner's Motion to Request Hearing Examiner to Order Applicants to Amend Applications; the Water Rights Division (WRD) of the Office of the State Engineer (OSE) filed a response to the PVACD Motion to Dismiss; the WRD filed a response to the Village of Fort Sumner's Motion to Request Hearing Examiner to Order Applicants to Amend Applications; a group of parties filed a response to the Applicants Opposition to Additional Motions to Dismiss Applications or In the Alternative Motion for Republication and to Set Order Designating Hearing Location Aside (City of Roswell, City of Artesia, Eddy County Board of County Commissioners and County of Chaves); and the Village of Fort Sumner filed a reply to WRD's response to the Village of Fort Sumner's Motion to Request Hearing Examiner to Order Applicants to Amend Applications. Having examined all of the pleadings and considering the arguments presented at hearing, the Hearing Examiner finds the following and recommends to the State Engineer the following Order denying the subject Applications.

1. The PVACD Motion to Dismiss and the subsequent motions which incorporated and adopted the PVACD Motion to Dismiss are, in effect, identical.
2. The relief sought by the Village of Fort Sumner's Motion to Request Hearing Examiner to Order Applicants to Amend Applications is essentially of the same nature as the alternative portion of the PVACD Motion to Dismiss and the subsequent motions which incorporated and adopted the PVACD Motion to Dismiss.

3. A separate hearing for each of the motions noted in findings 1 and 2 is unwarranted.
4. NMSA section 72-12-7A states (in relevant part): "The **owner of a water right** may change the location of his well or change the use of water, but only upon application to the state engineer and upon showing that the change will not impair existing rights and will not be contrary to the conservation of water within the state and will not be detrimental to the public welfare of the state." (emphasis added)
5. NMSA section 72-12-7C states (in relevant part): "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...."
6. The face of the subject Applications states that: "Berrendo LLC has an **option** to purchase the subject water right(s) from the co-applicant(s)." (emphasis added)
7. The face of the subject Applications states (in relevant part): "**Some or all of the water** transported by pipeline into the Rio Grande Basin **may** be applied to first beneficial use through the City of Santa Fe Water System. **Whether and on what terms** the water will be delivered to the City of Santa Fe Water System are under discussion with the City." (emphasis added)
8. The face of the subject Applications states (in relevant part): "Water delivered to the Rio Grande Basin will be delivered to the City of Rio Rancho...for use and reuse to extinction, **as well as to other users and other uses to be specified before final action is requested** on the application." (emphasis added)
9. An application is, by its nature, a request for final action.
10. It is reasonable to expect that, upon filing an application, the Applicant(s) are ready, willing and able to proceed to put water to beneficial use.
11. The statements on the face of the subject Applications indicate that the Co-Applicants are not ready, willing and able to proceed to put water to beneficial use.
12. The face of the subject Applications does not make it clear whether irrigation is contemplated on any lands within the described move-to locations, or only at the

move-from locations.

13. The face of the subject Applications requests almost all possible uses of water at the suggested move-to locations but does not identify a purpose of use at any one move-to location with sufficient specificity to allow for reasonable evaluation of whether the proposed transfer 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.
14. Consideration of an application that lacks specificity of purpose of the use of water or specificity as to the actual end-user of the water would be contrary to sound public policy.
15. Consideration of an application wherein no Co-Applicant is an owner of move-to lands; or has contractual permission from any move-to landowners; or is an entity with governing control or authority that would enable them to put water to beneficial use within the move-to area, would be contrary to sound public policy.
16. The face of the subject Applications suggests that: "Unconsumed return outflow from first uses and **some first-use water** will be delivered to the Rio Grande at a point to be specified." (emphasis added)
17. Consideration of an application to pump groundwater from one declared underground water basin which will then be released into a natural stream or watercourse within the boundaries of another declared underground water basin without specific identification of delivery points and methods of accounting for that water would be contrary to sound public policy.
18. To consider or approve applications that, on their face, are so vague and overbroad that the effects of granting them cannot be reasonably evaluated is contrary to sound public policy.
19. Applications FS-1, FS-2 & FS-2-X, FS-3-A, FS-3 et al, FS-21-1C, FS-21 & FS-22 Comb-A, FS-23-1, FS-23-2, and FS-1200 & FS-1200-S; FS-72, FS-73, FS-74, FS-75, and FS-79; FS-154, FS-154-S, FS-155, FS-156, FS-157, FS-158, FS-160, FS-161, and FS-162; FS-159, FS-163, FS-181, and FS-258; and FS-193 and FS-196, all filed with the State Engineer on February 23, 2009, should be denied without prejudice to filing of subsequent applications.

**ORDER**

Applications FS-1, FS-2 & FS-2-X, FS-3-A, FS-3 et al, FS-21-1C, FS-21 & FS-22 Comb-A, FS-23-1, FS-23-2, and FS-1200 & FS-1200-S; FS-72, FS-73, FS-74, FS-75, and FS-79; FS-154, FS-154-S, FS-155, FS-156, FS-157, FS-158, FS-160, FS-161, and FS-162; FS-159, FS-163, FS-181, and FS-258; and FS-193 and FS-196, all filed with the State Engineer on February 23, 2009, are denied and Hearing No. 09-086, 09-087, 09-088, 09-089 and 09-090 Consolidated is dismissed.

*Andrew B. Core*

Andrew B. Core  
Hearing Examiner

**I ACCEPT AND ADOPT THE ORDER OF THE HEARING EXAMINER,**

**THIS 8<sup>th</sup> DAY OF February, 2011**

*John R. D'Antonio, Jr.*  
JOHN R. D'ANTONIO, JR., P.E.  
NEW MEXICO STATE ENGINEER

