BEFORE THE NEW MEXICO STATE ENGINEER	)	
IN THE MATTER OF THE APPLICATION BY	)	Hearing No. 09-096
AUGUSTIN PLAINS RANCH, LLC FOR	)	
PERMIT TO APPROPRIATE GROUNDWATER	)	OSE File No. RG-89943
IN THE RIO GRANDE UNDERGROUND	)	
WATER BASIN OF NEW MEXICO	)	

RESPONSE IN OPPOSITION TO AUGUSTIN PLAINS RANCH, INC.'S MOTION FOR STAY

The Protestants named below ("Protestants") oppose the attempt by Augustin Plains Ranch, Inc. ("the Corporation") to halt this proceeding pending a district court ruling in the so-called "Berrendo case," which the Corporation characterizes as "an unrelated proceeding." *Motion for Stay at 2 ¶ 2.* As the Corporation admits, "there are significant factual differences between [its] applications [sic][1] and" the Berrendo case, *id. at 3 ¶ 9*, which involves a different applicant, a different application, and different protestants. Given the admitted differences between Berrendo and the instant case, the Corporation's *Motion* has no basis. The Berrendo case, moreover, will likely require years to resolve and the instant case has already consumed three years of Protestants' time. Further delay will unduly prejudice the hundreds of Protestants who paid the mandatory hearing fee and have invested substantial time and money organizing the community and preparing for this case, which they believe threatens their way of life. They are entitled to a timely determination of whether the Corporation has the right to monopolize a regional water supply. For these reasons, and as set out in detail below, the Hearing Examiner should deny the Corporation's *Motion for Stay.*

[1]Although the Corporation seeks multiple points of diversion, i.e., thirty-seven wells, it filed only one application in violation of State Engineer regulations.

Argument

1. As authority for its *Motion*, the Corporation cites several cases in which courts have stayed judicial proceedings pursuant to the courts' undisputed "inherent powers." *Motion to Stay ¶¶ 10 & 12.* However, unlike courts:

> Administrative bodies are the creatures of statutes. As such they have no common law or inherent powers and can act only as to those matters which are within the scope of the authority delegated to them.

Public Serv. Co. v. New Mexico Envtl. Improvement Bd., 89 N.M. 223, 226, 549 P.2d 638, 641 (Ct. App. 1976). Although the regulations of the State Engineer expressly allow for a temporary continuance of scheduled hearing dates, NMAC §§ 19.25.2.25 &19.25.4.20, no statute or regulation contemplates a stay of proceedings, much less an indefinite stay pending the outcome of an "unrelated proceeding." Neither of the statutes cited by the Corporation, NMSA 1978, §§ 72-2-12 & 72-2-17, allows for—or even mentions—the possibility of a "stay" or any other device of indefinite delay. On the contrary, the clear intent of both statutes is to promote the "efficient and orderly conduct" of formal hearings. NMSA 1978, § 72-2-12; see also NMSA 1978, § 72-2-17(B) (allowing for efficient formal hearings). Thus, although the Hearing Examiner may grant continuances of scheduled hearing dates for good cause, no authority authorizes either the Examiner or the State Engineer to stay proceedings indefinitely pending the outcome of an "unrelated proceeding."

2. However, even if such authority existed, the Hearing Examiner should deny the Corporation's *Motion* because it has no merit. The Corporation admits that Berrendo is "an unrelated proceeding" and "that there are significant factual differences between" Berrendo and the instant proceeding. *Motion to Stay at 2 ¶ 2, 3 ¶ 9.* Indeed, the Corporation *never* identifies a specific issue in the instant case—whether factual or legal—that will be resolved or even

clarified by a decision in Berrendo.[2] Nor can it. Just as the issue of "impairment depends upon the facts of each case," Roswell v. Reynolds, 86 N.M. 249, 253, 522 P.2d 796, 800 (1974), the issue of whether the Corporation's application is unduly vague, speculative or otherwise invalid under the law depends entirely on the unique facts of *this* case. It has to. Similarly, Berrendo will be decided entirely on its facts, which the Corporation admits are *significantly different* than the facts in the instant case. Most obviously, the instant case presents an application for a totally *new* appropriation, whereas Berrendo involves the *transfer* of existing water rights that were presumably vested through application of water to beneficial use. Accordingly, waiting for a decision in Berrendo will not help resolve any issue in this "unrelated proceeding," nor will it promote efficiency or conserve resources.

3. The Corporation fails to cite even one case in which an administrative agency stayed its proceedings pending the resolution of another case, much less an unrelated case. The cases cited by the Corporation all concern the stay of judicial proceedings. *Motion to Stay at 4-5 ¶ 12.* In every one of them there was a specifically identified common issue of law, typically involving statutory construction, which was pending before an appellate court capable of publishing its decisions and establishing binding precedent. Thus, the New Mexico Supreme Court stayed its own proceedings in Sonic Indus. v. State, 2006 NMSC 38 "pending a ruling in Kmart Corp. v. Taxation & Revenue Dep't, 2006 NMSC 6, 139 N.M. 172, 139 N.M. 172, 131 P.3d 22, which also raised the issue of the [Department of Taxation and Revenue's] authority to impose [gross receipt tax] on the licensing of intangible property subsequent to the 1991 amendments." Id. ¶6. In Rivera-Platte v. First Colony Life Ins. Co., 2007 NMCA 158, the district court stayed its proceedings "pending [the New Mexico Supreme Court's] decision in

[2] The Corporation appears to put some stock in the fact that both Berrendo and the instant case involve pipeline schemes. *Motion to Dismiss ¶¶ 1 & 2.* However, the Corporation's desire to pipe water to distant locals has no legal relevance to Protestants' *Motion to Dismiss.*

Azar v. Prudential Insurance Co. of America, 2003 NMCA 62, 133 N.M. 669, 68 P.3d 909, an interlocutory appeal expected to control a threshold inquiry into the primary jurisdiction of the Insurance Division of the New Mexico Public Regulation Commission." Id. ¶ 3. Unlike these cases, the Corporation points to no specific "threshold inquiry" in this case that will be resolved by Berrendo.[3] Indeed, the issues in Tenth Judicial District are not yet defined, and its final decision will not establish precedent or otherwise bind the Corporation or Protestants; and the State Engineer would likely appeal any adverse decision to the Court of Appeals.

4. The non-New Mexico cases cited by the Corporation, *Motion to Stay at 4-5 ¶ 12*, also do not support its *Motion*. Every one of these cases involved a stay of proceedings in one case pending resolution of a specifically identified and highly technical common issue in another by a court capable of establishing binding precedent. Unionbancal Corp. v. United States, 93 Fed. Cl. 166, 168 (Fed. Cl. 2010) (other case involved common issue of "whether the lease-leaseback transactions (LILO) possess economic substance"); Sandisk Corp. v. Phison Elecs. Corp., 538 F. Supp. 2d 1060, 1063 (W.D. Wis. 2008) (other case involved substantially same parties and the same highly technical patent issues); An Giang Agric. & Food Imp. Exp. Co. v. United States, 28 C.I.T. 1671, 1677 (Ct. Int'l Trade 2004) (other case would decide whether the Department of "Commerce in fact has the statutory authority to deviate from its standard practice in NME cases, by valuing intermediate inputs that were self-produced by the foreign producer" and "that decision will have 'critical precedential value' in this proceeding"). As mentioned above, the Corporation has not identified any specific legal issue in the instant case that will be resolved by a decision in Berrendo, nor is there any assurance that Berrendo will be resolved within a reasonable time. Cf. Unionbancal at 167 (Court granted stay pending resolution of a

[3] Moreover, as it turned out, the Azar case did not even resolve the threshold inquiry. First Colony ¶ 3.

common issue by the Federal Circuit, but noted that "[s]tatistics from the Federal Circuit's website show that the median time from docketing to disposition, on the merits, is approximately ten months.")

5. The cases cited by the Corporation were based on Justice Cardozo's landmark opinion in Landis v. North American Co., 299 U.S. 248 (1936), which established the following standard for staying proceedings in courts of law:

> [The movant] for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else.

Id. at 255. The burden is especially high where the movant seeks to stay proceedings in one case pending the outcome of another:

> Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both.

Id. The hundreds of Protestants in this case should not be compelled to "stand aside" while the attorneys of a single party, the Corporation,[4] attempt to prejudice the Protestants' rights in an "unrelated proceeding" in which neither the Corporation nor the Protestants are involved.

6. Protestants will be extremely prejudiced if this proceeding is stayed. This proceeding has already dragged on for three years. Now the Corporation proposes an indefinite stay pending resolution of Berrendo by a remote district court in a case involving a different applicant, a different application, different protestants, and—as the Corporation points out—many other "significant factual differences." *Motion to Stay at 3 ¶ 9.* The case pending in the Tenth Judicial District, moreover, is "de novo as [in] cases originally docketed in the district court," N.M. Const. Art. XVI § 5, which brings into play all of the provisions for discovery,

[4] Montgomery and Andrews represents the applicant in both cases.

motion practice, and numerous opportunities for delay. Furthermore, the District Court's decision in the Berrendo case will likely be appealed to the Court of Appeals and then further appealed to the Supreme Court. Any of these courts, moreover, may remand the case back to a lower tribunal for further proceedings giving rise to more appeals. Thus, Berrendo may and likely will require many years to finally resolve.

7. Years of delay will severely prejudice Protestants. Unlike the Corporation, most of the Protestants are human beings with naturally limited life spans. Many of them are individuals in their seventies and eighties, and, put bluntly, they cannot afford to wait while the Corporation's counsel litigates Berrendo, "an unrelated proceeding" in which Protestants are not involved. Protestants paid the mandatory hearing fee in *this* proceeding. They have held numerous community meetings and obtained an expert witness. They are prepared to move forward and are entitled to a timely resolution of *this* proceeding. Further delay will prejudice them, disrupt their momentum, and potentially deny many their "day in court."

8. Protestants will also be prejudiced by the uncertainty created by the application, which seeks to appropriate all of the remaining unappropriated water (if any) in the basin. As long as this uncertainty persists, already depressed property values will suffer and any local development that depends on establishment of new water rights will be discouraged.

9. Given the likelihood of prejudice to Protestants, the Corporation must demonstrate a "clear case of hardship" if it is compelled to go forward and defend the application *that it filed*. Landis at 255 (requiring movant "for a stay must make out a clear case of hardship ... if there is even a fair possibility that the stay ... will work damage to someone else"). The Corporation has not and cannot demonstrate any such hardship. The Corporation is not a party to Berrendo and it is not being forced to defend two or more cases in multiple forums, which was

the common theme in Landis and other cases in which one court stayed its proceedings pending the outcome of another case. Protestants' *Motion to Dismiss* raises purely legal issues, which will be fully briefed and decided by the State Engineer within weeks. Indeed, the Corporation has no objection to briefing the pending *Motions*. *Motion to Stay at 6.* Any party aggrieved by State Engineer's decision regarding these *Motions* can appeal to the appropriate district court, with the right of further appeal to the Court of Appeals—just as in Berrendo.

10. The Corporation's worries about "unwieldy" scenarios if this case is allowed to move forward are overstated and unjustified. *Motion to Stay ¶ 14.* As already mentioned, this case is factually distinct from Berrendo. However, to the extent that two factually distinct applications raise common legal issues, which is common in the narrow confines of water law, the legal research and argument done in one can readily be adopted to the facts of the other. Moreover, if the State Engineer timely grants the pending *Motions to Dismiss* in this case and successive appeals are thereafter filed, both Berrendo and the instant case will likely be pending in the Court of Appeals at the same time. If there really are common issues between the two cases, they can be consolidated and decided by the Court of Appeals—a Court empowered to publish its decisions and establish precedent that will be binding on all.

Conclusion

The Corporation represented at the scheduling conference in Socorro that it was not ready to move forward, and accordingly, it proposed an extended hearing scheduling that would consume several more years. The Hearing Examiner rejected the Corporation's request for delay. Protestants respectfully request the Hearing Examiner to again deny the Corporation's attempt to delay these proceedings. Its *Motion for Stay* is meritless. Protestants will be severely prejudiced if this case is further delayed, and, as required under Landis, the Corporation failed to

demonstrate any "clear case of hardship" if it is compelled to go forward with the application that it filed. Accordingly, the *Motion for Stay* should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE: I certify that I served a copy of the foregoing paper on the parties entitled to service on the 29th day of April, 2011.

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R. Bruce Frederick