STATE OF NEW MEXICO
COUNTY OF SANTA FE
FIRST JUDICIAL DISTRICT COURT

WILDEARTH GUARDIANS,
***Petitioner*,**

v.

Case No. D-101-CV-2016-00734
Honorable Francis J. Mathew

TOM BLAINE, in his capacity as New Mexico State Engineer**,**
***Respondent*,**

and

MIDDLE RIO GRANDE CONSERVANCY DISTRICT,
U.S. BUREAU OF RECLAMATION,
***Real Parties in Interest*.**

PETITIONER'S RESPONSE TO MIDDLE RIO GRANDE CONSERVANCY DISTRICT'S MOTION TO INTERVENE

The Middle Rio Grande Conservancy District ("MRGCD") has moved to intervene in this matter on the side of the Respondent State Engineer. MRGCD Motion to Intervene (May 6, 2016) (hereafter, "Motion"). Petitioner WildEarth Guardians ("Guardians") does not oppose MRGCD's intervention in this action under the permissive intervention standard in Rule 1-024(B) NMRA. MRGCD has not, however, met all of Rule 1-024(A)'s requirements for intervention of right. Although MRGCD has demonstrated "an interest relating to the property or transaction which is the subject of the action" because it carries out water

operations under Permit Nos. 0620 and 1690 and that cancelation of the permits may impair its interest, it has not shown that the State Engineer will not adequately represent its interests.[1] Rule 1-024(A). In its arguments that it meets all of the factors for intervention of right, MRGCD mischaracterizes the nature of and basis for this lawsuit, introduces extraneous issues not implicated by this lawsuit, and overstates the effect that granting the Writ will have on the District. The flawed premises underlying MRGCD's arguments render these arguments insufficient for making the necessary showings required by Rule 1-024(A).

I. MRGCD's Interests in This Litigation.

Guardians does not dispute MRGCD's assertion that it has an interest in this matter because it "maintains its water operations under the subject permits." Motion at 5-6. For that reason, Guardians named MRGCD as a real party in interest in its Petition for Writ of Mandamus. This interest is consistent with the language of Rule 1-024(A) recognizing "an interest relating to the property or transaction which is the subject of the action" as sufficient for the "interest" prong of intervention. However, MRGCD asserts two additional interests that it seeks to protect that are not at issue in this litigation: (1) "the usurpation of jurisdiction of elected officials," and (2) the ability to work collaboratively with the State Engineer on water use quantification. Motion at 6, 8. MRGCD's arguments about

[1] Guardians does not dispute the timeliness of MRGCD's Motion to Intervene.

the relevancy of these interests and how they will be affected if the Court grants the requested relief only distract from the narrow issue in this case, *i.e.*, the State Engineer's failure to perform a nondiscretionary duty to either set a date certain for demonstration of proof of beneficial use or cancel Permit Nos. 0620 and 1690.

First, MRGCD argues that because the New Mexico Conservancy Act, NMSA § 73-14-1 *et seq*., vests it "with the absolute discretion to allocate water among all of its users," granting the Writ would "delegate to the State Engineer authorities over the MRGCD's permits" thereby usurping the MRGCD's "water storage and diversion functions." Motion at 6-7. This argument shows a blatant misunderstanding of both the basis for the Writ Petition and the nature of the requested relief. Granting the relief requested in the Writ would not require the State Engineer to make any changes in water allocation under the subject permits. To comply with the Writ (and the law), the State Engineer would take one of two actions for water permits issued pursuant to state law: (1) set a deadline for demonstrating proof of beneficial use of water, or (2) cancel the subject permits for failure to show proof of beneficial use. Nor would these mandatory duties of the *State Engineer* require *MRGCD* to change how it allocates water among its users. The allocation of water under the subject permits is simply not at issue in this litigation and comprises no part of the requested relief.

Moreover, because allocation of water under the subject permits is not implicated in the requested relief, granting this relief would not delegate authority to the State Engineer to determine how water is allocated under the subject permits, as MRGCD erroneously asserts. Thus, there would be no usurpation of MRGCD's roles and responsibilities related to water allocation under the Conservancy Statute. By law, the State Engineer has the authority to issue permits and licenses for putting water to beneficial use. NMSA 1978 §§ 72-2-9, 72-5-6, 72-5-13. A "permit" authorizes diversion of water from a specific diversion point for a particular beneficial use at a particular location, but "does not constitute a water right." § 19.26.2.7(W) NMAC. Any permit issued by the State Engineer must include "the time within which water shall be applied to beneficial use." NMSA 1978 § 72-5-6. The State Engineer's statutory duty to require proof of beneficial use by a date certain in no way conflicts with or intrudes on MRGCD's authority to allocate water use under a valid permit. Thus, there is no threat to MRGCD's jurisdiction over water allocation decisions under a valid permit that would provide an independent basis for intervention of right.

Second, MRGCD makes the conclusory argument that the outcome of this case would prevent collaboration between the State Engineer and the District relating to "quantities and the places of use of water in the Middle Rio Grande." Motion at 8. MRGCD provides no explanation of how requiring the State Engineer

to set a date certain for demonstrating proof of beneficial use of water, which he is already required to do under state law, "would deny the discretion of the State Engineer" to work with the District to quantify the amount of water being put to beneficial use under the subject permits. In fact, the opposite is true, as demonstrated by the correspondence between the State Engineer and MRGCD in 1997 when the State Engineer set a deadline for demonstrating proof of beneficial use and then proceeded to work with MRGCD on the process for making this demonstration. *See* Exhibit 11 of Amended Petition. Issuing the Writ would in no way preclude collaboration between the State Engineer and MRGCD, and would indeed encourage such collaboration. Issuance of the Writ poses no threat to the ability of these parties to work together to develop a process for demonstrating proof of beneficial use.

II. MRGCD's Interests in Self-Governance are not at Issue and will not be Impaired by Issuance of the Writ.

As a permit holder, MRGCD's interest in the permits at issue in this action may be impaired if the State Engineer ultimately decides to cancel the permits rather than set a date certain for proof of beneficial use. MRGCD's ability to carry out its duties under the Conservancy Act, however, will not be impaired by this action thus impairment of this purported "interest" does not provide an independent ground for intervention of right.

MRGCD builds on its erroneous argument that its authority to allocate water under the Conservancy Act is somehow at issue in this case by incorrectly asserting that issuance of the writ will "preclude" MRGCD board members from carrying out their duties. Motion at 8. However, MRGCD does not explain how a Writ requiring the State Engineer to set a date certain for proof of beneficial use under the subject permits—a duty he is already required to do under state law—will preclude the District's board members from performing their duties under the Conservancy Act. Nor does MRGCD explain which of the Board's duties are allegedly impaired by issuance of the Writ. Instead, MRGCD raises the issue of impairment to its self-governance seemingly to gain an "opportunity to interpose its own jurisdictional authorities and interests as against the State Engineer." Motion at 9. This argument appears to be an attempt by MRGCD to usurp this case to raise extraneous issues that have no bearing on the Court's decision as to whether the State Engineer has failed to perform a ministerial duty. To meet this prong of the intervention standard under Rule 1-024(A), the interest potentially impaired must "relat[e] to the property or transaction which is the subject of the action," and MRGCD's stated interest in the unimpeded performance of its duties under the Conservancy Act does not comport with the requirements of the Rule.

III. MRGCD Has Not Met Its Burden of Showing Inadequate Representation Simply Because the State Engineer is a Government Entity.

The District has not satisfied the "inadequate representation" prong of the test for intervention as of right because it has not shown the State Engineer will fail to adequately represent the District's interests. Where a governmental entity is named as a party to an action and the interest that the applicant for intervention seeks to protect is represented by the governmental entity, a presumption of adequate representation exists.[2] *See Chino Mines Co. v. Del Cuerto*, 1992-NMCA-108, ¶¶ 11-12, 842 P.2d 738, 741. To overcome this presumption, the applicant for intervention must make a "concrete showing" that representation is inadequate because of collusion, adversity of interest between the representative and the applicant, or failure of the representative to perform a duty. *Id*. MRGCD has not demonstrated that any of these factors are present here; thus, the Court may presume that the State Engineer adequately represents MRGCD's interests in this action.

[2] The Tenth Circuit takes the opposite position with respect to intervening on the side of the government. In cases where the United States was a defendant, the Tenth Circuit held that "the government's representation of the public interest generally cannot be assumed to be identical to the individual . . . interest of a particular member of the public merely because both entities occupy the same posture in the litigation." *Utah Ass'n of Counties*, 255 F.3d 1246, 1255-56 (10th Cir. 2001).

Even if the Court considers the Tenth Circuit's position on adequate representation, MRGCD still bears the burden, albeit a "minimal" one, of demonstrating that its interest as a permit holder are not adequately represented by the State Engineer. *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior,* 100 F.3d 837, 844-45 (10th Cir.1996). Although the Tenth Circuit often holds that the government's protection of both public and private interests creates a conflict sufficient to show inadequate representation of an intervenor, the Tenth Circuit has also held that "[t]his precedent does not apply, however, when interests are aligned. We have stated the general presumption that 'representation is *adequate* when the objective of the applicant for intervention is identical to that of one of the parties.'" *San Juan County, Utah v. U.S.,* 503 F.3d 1163, 1204 (10th Cir. 2007) (emphasis in original) (quoting *City of Stilwell, Okl v. Ozarks Rural Elec. Co-op. Corp.,* 79 F.3d 1038, 1042 (10th Cir. 1996). An intervenor-applicant must also give specific reasons why an existing party's representation is not adequate. *Kiamichi R.R. Co. v. Nat'l Mediation Bd.*, 986 F.2d 1341, 1345 (10th Cir. 1993).

The Tenth Circuit presumes representation to be adequate when "the objective of the applicant for intervention is identical to that of one of the parties." *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dep't of Interior*, 100 F.3d 837, 845 (10th Cir. 1996) (internal quotation omitted). Here,

MRGCD shares the same objective as the State Engineer in this case: to quash the writ. Motion at 11 (admitting that "the State Engineer will undoubtedly align with the MRGCD in its general litigation objective to quash the issued Writ."); *see generally* State Engineer's Answer (filed May 9, 2016). Yet MRGCD argues that the State Engineer's representation may be inadequate because even if the State Engineer and the District are aligned in terms of the litigation objective, the State Engineer will not "advocate from the position of the thousands of water users" under the subject permits. Motion at 11. However, the Tenth Circuit has recognized that, even when ultimate *motivations* differ, as long as the litigation *objectives* are the same, the representation is adequate. *See City of Stilwell*, 79 F.3d at 1042. Here, MRGCD and the State Engineer are aligned in their objective to quash the Writ, therefore the State Engineer adequately represents MRGCD in this proceeding.

CONCLUSION

Permissive intervention under the Rule 1-024(B) is appropriate here. MRGCD has not met all of the factors for intervention of right, and in arguing these factors has either misrepresented the nature and effect of this action or attempted to introduce extraneous issues that have no bearing on this action and serve only as red herrings. Because the Writ is against the State Engineer and requires him to perform duties he is already required to take under state law, and

has failed to perform, issuance of the Writ will not impair MRGCD's duties under the Conservancy Act pertaining to water allocation. Furthermore, because MRGCD and the State Engineer share the same objective here—quashing the Writ and allowing the unlawful status quo to continue indefinitely—the State Engineer adequately represents the District in this matter.

Respectfully submitted on this 23rd day of May 2016.

/s/ Samantha Ruscavage-Barz
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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2016, I electronically filed the foregoing Response through the court's File and Serve system and elected that it be served on all parties registered for eservice, including the following:

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I further certify that on May 23, 2016, I served a copy of the foregoing Motion on the following by first class mail

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