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STEPHEN T. PACHECO
Angelica Gonzalez

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

WILDEARTH GUARDIANS,
Petitioner,

v. **Case No. D-101-CV-2016-00734**

TOM BLAINE, the New Mexico State
Engineer,
Respondent,

Hon. Francis J. Mathew
District Judge

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

STATE ENGINEER'S ANSWER TO ALTERNATIVE WRIT OF MANDAMUS

COMES NOW, Respondent New Mexico State Engineer ("State Engineer"), by and through his attorneys of record, and hereby files this Answer to the Alternative Writ of Mandamus issued by the Court on April 7, 2016 ("Writ").

I. ANSWER TO ALLEGATIONS IN THE WRIT

The Writ and the State Engineer's Answer shape the issues before this Court concerning Petitioner WildEarth Guardians' ("Petitioner") plea for mandamus. *State ex rel. State Highway Comm'n v. Quesenberry*, 1963-NMSC-113, ¶ 11, 72 N.M. 291 ("The issues in mandamus are created solely by and are limited to the allegations of the writ and the answer thereto."). In determining the legal sufficiency of the Writ, the Court should not consider the allegations of the Petition underlying the Writ. *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, ¶ 13, 124 N.M. 698. Accordingly, in responding to the Writ the State Engineer is required only to answer the Writ's two enumerated paragraphs. The State Engineer answers paragraphs 1 and 2 of the Writ as follows:

1. Paragraph 1 of the Writ requires a legal conclusion by the State Engineer and therefore no response is necessary. To the extent a response is required, the State Engineer lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 and therefore denies them.

2. Paragraph 2 of the Writ requires a legal conclusion by the State Engineer and therefore no response is necessary. To the extent a response is required, the State Engineer lacks knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 2 and therefore denies them.

II. AFFIRMATIVE DEFENSES

A. The District Court Lacks Jurisdiction to Issue the Writ

Petitioner's mandamus action against the State Engineer is an unavailing gambit to circumvent the State Engineer's statutorily-delegated exclusive jurisdiction over the matter referenced in paragraph 1 of the Writ. Petitioner is apparently aggrieved by the State Engineer's supposed failure to "either set a due date for demonstrating proof of beneficial use of water under Permit Nos. 0620 and 1690 or cancel the permits." Writ, ¶ 1. Rather than pursue the statutory remedy that is the exclusive avenue to this Court's jurisdiction, Petitioner seeks mandamus relief to compel action by the State Engineer. *Id.* Because this Court lacks jurisdiction, the Writ should be quashed.

NMSA 1978, Section 72-7-1 of the water code provides that any "party dissatisfied with any decision, act or *refusal to act* of the state engineer may appeal to the district court . . . ." (Emphasis added). Before such an appeal may be made to the district court, however, Section 72-2-16 requires that an administrative hearing be requested by the aggrieved party and that the hearing be held before the State Engineer:

> If, without holding a hearing, the state engineer enters a decision, *acts or refuses to act*, any person aggrieved by the decision, act or refusal to act, is entitled to a hearing. . . .*No appeal shall be taken to the district court until the state engineer has held a hearing and entered his decision in the hearing.*

§ 72-2-16 (emphasis added). In this case, no hearing has been held before the State Engineer regarding the relief requested in the Writ, nor has Petitioner requested a hearing. New Mexico law is clear. Jurisdiction over State Engineer administrative matters, including administration of the State Engineer permits identified in paragraph 1 of Writ, "does not lie in the courts until the statutorily required administrative procedures are fully complied with." *In re Angel Fire Corp.*, 1981-NMSC-095, ¶ 5, 96 N.M. 651; *accord El Dorado Utils., Inc. v. Galisteo Domestic Water Users Ass'n*, 1995-NMCA-059, ¶ 2, 120 N.M. 165.

The State Engineer's exclusive administrative jurisdiction over the issues raised in the Writ is confirmed by several cases wherein the New Mexico Supreme Court recognized the legislature's intent that, because of the scarcity and flowing nature of water, State Engineer administration of water must be exclusive and comprehensive. *See Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 24, 147 N.M. 523 (purpose of water code's grant of broad powers to the State Engineer "is to employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process"); *State ex rel. Reynolds v. Aamodt*, 1990-NMSC-099, ¶ 8, 111 N.M. 4 ("The legislature granted the State Engineer broad powers to implement and enforce the water laws administered by him."); *Headen v. D'Antonio*, 2011-NMCA-058, 149 N.M. 667 (affirming district court's dismissal of declaratory judgment action to establish validity of water right where plaintiff had failed to exhaust administrative remedies before the State Engineer on application to transfer the water right). *See also* §72–2–1 (providing that the State Engineer "has general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as

required"); § 72–2–8(H) (providing that "[a]ny regulation, code or order issued by the state engineer is presumed to be in proper implementation of the provisions of the water laws administered by him"); § 72–2–9 (providing that "[t]he state engineer shall have the supervision of the apportionment of water in this state"); § 72–5–1 (providing that the sole means for acquiring a water right is to "make an application to the state engineer for a permit to appropriate, in the form required by the rules and regulations established by him").

Lion's Gate is particularly germane to this case because it involved an improper effort to invoke a district court's original jurisdiction similar to Petitioner's attempted end-run around State Engineer hearing procedures in this case. The *Lion's Gate* court held that it would be a "usurpation of the State Engineer's authority and jurisdiction under the water code" if district courts were treated as courts of original jurisdiction for water administration matters. 2009-NMSC-057, ¶ 29. It would "create a short circuit in the administrative process, thereby frustrating the purpose of the water code and its broad grant of power to the State Engineer . . . ." *Id. Lion's Gate* thus makes clear that by mandate of the Legislature any matter that implicates the State Engineer's jurisdiction over the administration of water must first go before the State Engineer.

It follows that Petitioner's attempt to use the extraordinary remedy of a writ of mandamus to circumvent the State Engineer's administrative process is manifestly contrary to the legislative intent in the water code. *See Lion's Gate, supra.* As a matter of law, Petitioner's failure to request and pursue a hearing before the State Engineer divests this Court of jurisdiction over the matters addressed in the Writ. *See Derringer v. Turney*, 2001-NMCA-075, ¶ 5, 131 N.M. 40 (even where a water rights applicant waived a pre-decision hearing, the failure to hold a post-decision hearing under §72-2-16 precluded jurisdiction in the district court); *Headen*, 2011-

NMCA-58, 142 N.M. 786 (a party cannot seek to the exercise of original jurisdiction by the district court on water rights applications prior to following established State Engineer administrative procedures). The Writ must therefore be quashed.

B. The Writ is Insufficient as a Matter of Law and Fails to Meet The Requirements of the Mandamus Statute.

1. The Writ Contains No Factual Allegations, Contrary to NMSA 1978, Section 44-2-6, and Therefore Fails to State A Claim for Relief.

A mandamus proceeding "is technical in nature and closely regulated by statute." *Mimbres Valley Irrigation Co. v. Salopek*, 2006-NMCA-093, ¶ 10, 140 N.M. 168, (citing *In re Grand Jury Sandoval County*, 1988-NMCA-007, ¶ 10, 106 N.M. 764).[1] NMSA 1978, Section 44-2-6, sets out the mandatory contents of an alternative writ of mandamus and requires that the writ "state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it." In other words, "[t]he writ itself is required to set forth the full and complete allegations which entitle the petitioner to the writ." *Mimbres*, 2006-NMCA-093, ¶ 14; *see also* Charles T. Dumars & Michael B. Browde, *Mandamus In New Mexico*, 4 N.M. L. Rev. 155, 157 (1974). The Writ in this case manifestly fails to meet the most fundamental statutory requirement of Section 44-2-6, as it contains no factual statements whatsoever. Instead, the Writ consists primarily of two numbered sentences, containing two directives, including the command to perform an ill-defined action or show cause and the command to reimburse Petitioner's alleged costs.

The State Engineer is entitled to challenge the legal sufficiency of the Writ as he would a deficient complaint under Rule 1-012(B)(6) NMRA. *See Mora County Bd. of Educ. v. Valdez*,

[1]In *Mimbres*, the Court held that the respondent may waive statutory defects in the writ by answering the allegations of the petition as if they were set forth in the writ. 2006-NMCA-093, ¶ 15. In this Answer, the State Engineer addresses only the myriad of legal shortcomings of the Writ.

1956-NMSC-078, ¶ 11, 61 N.M. 361 (the rules for testing the sufficiency of a complaint in an ordinary civil action apply to a writ of mandamus). Applying this standard proves fatal to Petitioner's request for mandamus relief because the Court may consider the allegations in the Writ but cannot rely on the Petition to cure deficiencies of the Writ. *Brantley*, 1998-NMCA-023, ¶¶13, 20. As the Writ alleges *no* facts to show that Petitioner is entitled to the requested mandamus relief, it follows that the Writ fails to state a cognizable claim and should be quashed. *See id.*; § 44-2-6.

2. A Writ May Not Issue Where, As Here, There is a Plain, Speedy, and Adequate Remedy at Law Pursuant to NMSA 1978, Section 44-2-5.

"A writ of mandamus shall not issue in any case when there is a plain, speedy and adequate remedy at law." NMSA 1978, §44-2-5. The Writ fails to allege, much less show that Petitioners are without a plain, speedy and adequate remedy at law. On the contrary, as established above in Section II of the State Engineer's Answer, Petitioner has improperly sought mandamus from this Court for the very purpose of avoiding the mandatory administrative and statutory process available to Petitioner for addressing the purported act or failure to act by the State Engineer referenced in paragraph 1 of the Writ. Because Petitioner has refused to pursue the administrative remedy dictated by the water code, the Writ also contravenes the statutes and case law governing mandamus. *See* §44-2-5 ("A writ of mandamus shall not issue in any case when there is a plain, speedy and adequate remedy at law."); *State ex rel. Hyde Park Co. v. Planning Comm'n*, 1998-NMCA-146, ¶11, 125 N.M 832 ("mandamus is a drastic remedy and will issue only if no other remedy is available"); *Sanchez v. Bd. of Ed. of Town of Belen*, 1961-NMSC-081, ¶ 11, 68 N.M. 440 (failure to follow a statutory remedy negates a right to proceed by mandamus). Such authority further confirms Petitioner is not entitled to mandamus relief and

that this Court lacks jurisdiction to issue the Writ. The Writ thus fails to comply with Section 44-2-5 and should be quashed.

3. The Writ Should be Quashed Because it Fails to Allege Extraordinary Circumstances Warranting Mandamus.

"The writ of mandamus is an extraordinary remedy to be reserved for extraordinary circumstances." *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 94, 149 N.M. 330; *State ex rel. Coll v. Johnson*, 1999-NMSC-036, ¶12, 128 N.M. 154 (mandamus "is a drastic remedy to be invoked only in extraordinary circumstances")(citation and internal quotation marks omitted). A writ of mandamus "*may* be issued . . . to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station." *FastBucks of Roswell, N.M., LLC v. King*, 2013-NMCA-008, ¶ 7 (emphasis added) (citing *Territory ex rel. Gildersleeve v. Perea*, 1892-NMSC-018, ¶ 12, 6 N.M. 531 (overruled by statute on other grounds)). Even where sufficient grounds exist warranting mandamus, issuance of mandamus remains in the court's discretion in any given case. *FastBucks of Roswell, N.M., LLC*, 2013-NMCA-008, ¶ 7. Because, as explained above, the Writ contains no facts to show that Petitioner is entitled to the requested mandamus relief, the Writ necessarily fails to make the requisite showing of extraordinary or drastic circumstances warranting its issuance. *See Lyons*, 2011-NMSC-004, ¶ 94. The Writ should therefore be quashed.

4. Mandamus is not Available Pursuant to NMSA 1978, Section 44-2-4, Because the Actions Ordered by the Writ are Discretionary and Non-Ministerial.

A writ of mandamus will issue only to compel the performance of an act that is a duty of office. NMSA 1978, § 44–2–4. The duty to be compelled must be "ministerial" and "clear and indisputable." *Am. Fed'n of State, Cnty. & Mun. Emps. v. Martinez*, 2011-NMSC-018, ¶ 4, 150 N.M. 132; *New Energy Econ., Inc. v. Martinez*, 2011-NMSC-006, ¶ 10, 149 N.M. 207; *State ex*

rel. Perea v. Bd. of Comm'rs of De Baca County, 1919-NMSC-030, ¶ 6, 25 N.M. 338 ("A ministerial act is an act which an officer performs under a given state of facts, in a prescribed manner, in obedience to a mandate of legal authority, without regard to the exercise of his own judgment upon the propriety of the act being done."). A writ of mandamus is not available when a matter is entrusted to the discretion of a public officer. *Mimbres*, 2006-NMCA-93, ¶ 11. In other words, mandamus is proper only when an act is nondiscretionary. *State ex rel. King v. Lyons*, 2011-NMSC-004, ¶ 28, 149 N.M. 330 ("Mandamus cannot be used to compel an executive officer acting in his discretion."). Mandamus cannot be used to "control the judgment" of a public officer in matters committed to his discretion. *State ex. rel. Four Corners Exploration Co. v. Walker*, 1956-NMSC-10, ¶7, 60 N.M. 459.

The Writ in this case is improper under the standard established by Section 44-2-4 and applicable case law and should be quashed because Petitioner is trying to use this Court and the drastic remedy of mandamus to override the State Engineer's broad statutory authority under the water code. *See Lion's Gate*, 2009-NMSC-057, ¶¶ 23, 24, 29. This authority not only contemplates, but requires, his exercise of discretion in the administration of the permits issued by him, including the permits referenced in paragraph 1 of the Writ. It is a misuse of mandamus to apply it in the present instance, where the issue is not the State Engineer's performance of a ministerial duty of office in a prescribed manner without the exercise of judgment, but a matter concerning the State Engineer's interpretation and application of his own regulation, 19.26.2.13(C) NMAC, which, on its face, allows for the exercise of his discretion in the administration of permits issued by his office.

19.26.2.13(C) NMAC applies where a permittee is "unable to construct the necessary works or apply water to beneficial use within the time authorized" and outlines the procedure a

permittee may follow to request additional time to comply with any applicable requirement and the discretion of the State Engineer to grant or deny an extension of time. 19.26.2.13(C) NMAC. The rule sets out the discretionary standard that the State Engineer must apply in evaluating applications for extensions of time. *Id.* ("The state engineer may grant an extension of time upon a proper showing of due diligence or reasonable cause for delay, *or upon the state engineer finding that it is in the public interest to allow additional time.*") (Emphasis added). Thus the only legal citation in the entire Writ refutes the availability of mandamus against the State Engineer in this matter.

Petitioner's misreading of 19.26.2.13(C) NMAC extends to the alleged official act or refusal to act from which Petitioner seeks relief. The directive in the Writ wrongly implies that decisions by the State Engineer on any permit requiring filing of proof of beneficial use ("PBU") are limited to a binary choice. The Writ demands that the State Engineer "*either* set a due date for demonstrating proof of beneficial use" on the one hand, "*or* cancel the permits" on the other hand. Writ, ¶1 (emphasis added). As 19.26.2.13(C) NMAC makes clear, however, the State Engineer has a discretionary third option of granting extensions of time. *Id.*; *see also* NMSA 1978, § 72-5-14 ("The state engineer shall have the power to grant extensions of time in which to . . . apply water to beneficial use *and for such other reasonable purposes as may in his opinion appear*, under any water right application on file in his office, upon proper showing by the applicant of due diligence or reasonable cause for delay.") (emphasis added). Section 72-5-14 applies specifically to extensions of time in which to put surface water to beneficial use. However, our Supreme Court has held generally that it is within the State Engineer's discretion to accept extension requests at any time and that "the failure to file an application for extension

of time to place water to beneficial use prior to the expiration of the last extension *granted does not automatically terminate water permits*." *Aamodt*, 1990-NMSC-099, ¶ 11 (emphasis added).

The State Engineer's exercise of his informed judgment in the interpretation of his own regulations and statutes within his charge is entitled to deference from the courts. *Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033 (" . . . [w]hen an agency that is governed by a particular statute construes or applies that statute, the court will begin by according some deference to the agency's interpretation" and "will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function" (*citing Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579 (internal quotation marks and citation omitted)); *see also Raton v. Vermejo Conservancy Dist.*, 1984-NMSC-037, 101 N.M. 95 (State Engineer interpretation of NMSA 1978, §72-9-4 is persuasive to the court). Because the State Engineer may, in his discretion, act in a way other than commanded by the Writ, the commanded act is not ministerial and mandamus is improper. A writ of mandamus is not available when matters such as PBU conditions applicable to a particular State Engineer permit, or extensions of time to file a PBU under that permit, have been entrusted to the discretion of a public officer, the State Engineer. *See Mimbres*, 2006-NMCA-93, ¶ 11.

C. The Writ Violates the Constitutional Doctrine of Separation of Powers.

As a matter of administrative prioritization and resource allocation, the State Engineer may choose to grant retroactive approval for extensions of time to apply water to beneficial use rather than require prospective requests. This practice was specifically upheld by the New Mexico Supreme Court based upon the "broad powers to implement and enforce the water laws administered by [the State Engineer]" that have been delegated by the legislature under the water

code. *Aamodt*, 1990-NMSC-099, ¶¶ 8, 11. Decisions regarding whether and how to implement such a practice with respect to the State Engineer permits identified in the Writ are well within the State Engineer's discretion as the head of a state agency and his decision must be presumed to be correct. *See State v. Myers*, 1958-NMSC-059, ¶ 14, 64 N.M. 186 (in reviewing State Engineer's administrative action, the court will presume decisions of an administrative body are valid and reasonable); *Aamodt*, 1990-NMSC-09, ¶ 10 ("By our action today we continue a long tradition of upholding the State Engineer's authority to take reasonable and appropriate action to protect and administer the water laws of New Mexico.")

In asking the Court to override the State Engineer's statutorily delegated authority and discretion, the Writ unreasonably and impermissibly asks the Court to interfere with the State Engineer's ability to administer water in the State of New Mexico based upon the resources available. Such interference manifestly contravenes the legislative intent of the water code. *See Lion's Gate*, 2009-NMSC-057, ¶¶ 23, 24, 29 (describing attempts to transform district courts into general administrators of water rights as "absurd" and "unreasonable"); *Aamodt*, 1990-NMSC-099, ¶¶ 8, 11. Moreover, compelling the State Engineer through mandamus on the issues identified in the Writ would also violate the Separation of Powers doctrine established in the New Mexico Constitution. N.M. Const., art. III, Section 1; *see also, State ex rel. Smith v. Martinez*, 2011-NMSC-043, 150 N.M. 703 (Governor violated Separation of Powers doctrine in attempting to change resource allocations set by the legislature). The Court should not allow itself to be so interjected into administration over water matters in the State of New Mexico. Instead, the Court should permit the State Engineer to administer the waters of the State of New Mexico in accordance with his authority under the water code and duly adopted regulations without the kind of unjustified judicial interference sought by Petitioner in this case.

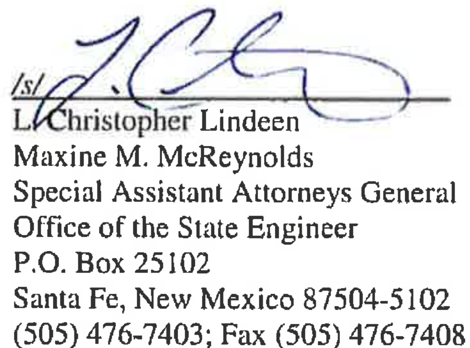
D. Petitioner is Not Entitled to an Award of Attorneys' Fees in a Mandamus Action.

The Writ commands the State Engineer to "[r]eimburse Petitioner for costs incurred in this action, including but not limited to attorneys' fees." Writ, ¶ 2. The directive to pay Petitioner's attorneys' fees is contrary to law. It is well established in New Mexico that attorneys' fees are not recoverable as costs or an element of damages unless specifically provided by statute or court rule. *State ex rel. Stanley v. Lujan*, 1939-NMSC-39. A mandamus action is no exception to this rule. *See, e.g., State ex rel. Roberson v. Bd. of Ed. of City of Santa Fe*, 1962-NMSC-064, ¶¶ 21-23, 70 N.M. 261 (denying request for attorneys' fees in mandamus proceeding and agreeing that "attorney fees are not taxed as costs or considered as an item of damages."). The Writ references no authority that would allow for an award of attorneys' fees in this case, and such relief should be denied.

III. PRAYER FOR RELIEF

For the foregoing reasons, Petitioner is not entitled to extraordinary mandamus relief. The State Engineer requests that the Court quash the Writ and grant to him such other relief as the Court deems just.

Respectfully submitted this May 9, 2016.



/s/ L. Christopher Lindeen
Maxine M. McReynolds
Special Assistant Attorneys General
Office of the State Engineer
P.O. Box 25102
Santa Fe, New Mexico 87504-5102
(505) 476-7403; Fax (505) 476-7408

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing ANSWER TO ALTERNATIVE WRIT OF MANDAMUS was served to all parties of record on this 9th day of May, 2016.

/s/

Samantha Ruscavage-Barz
WildEarth Guardians
516 Alto Street
Santa Fe, NM 87501
Counsel for Petitioner

Derrick Lente, Chairman
Adrian Oglesby, Vice-Chair
Mike Hamman, Chief Engineer/CEO
Middle Rio Grande Conservancy District
1931 Second Street, SW
Albuquerque, NM 87102
Real Party in Interest

Damon P. Martinez, United States Attorney
Manuel Lucero, Assistant U.S. Attorney
P.O. Box 607
Albuquerque, NM 87103
Attorneys for United States of America

John C. Cruden, Assistant Attorney General
James J. Dubois
United States Department of Justice
Environment & Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Attorneys for United States of America