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

WILDEARTH GUARDIANS,
Petitioner,
v.
TOM BLAINE, the New Mexico State Engineer,
Respondent,

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

Hon. Francis J. Mathew
District Judge

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

STATE ENGINEER'S RESPONSE TO THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT'S MOTION TO INTERVENE AND BRIEF IN SUPPORT OF MOTION

COMES NOW, Respondent New Mexico State Engineer ("State Engineer"), by and through his attorneys of record, and hereby files this Response to the Middle Rio Grande Conservancy District's Motion to Intervene and Brief In Support of Motion ("Motion"). The State Engineer does not oppose the relief requested in the Motion on the basis of permissive intervention, in that the Middle Rio Grande Conservancy District ("MRGCD" or "District") asserts defenses that raise questions of law in common with defenses asserted by the State Engineer. The State Engineer also does not oppose MRGCD's ability to intervene as of right, but only because the State Engineer has jurisdiction over the administration of the subject permits. In fact, the only way that MRGCD would a have sufficient interest that as a practical matter might be impaired by this mandamus action such that intervention as of right would be warranted is if the State Engineer has jurisdiction over the permits. The State Engineer objects to, and does not concur in, MRGCD's jurisdictional arguments, as discussed in Section II.C.

I. INTRODUCTION

Although MRGCD has a long history of submitting to the regulatory authority of the State Engineer, in recent years MRGCD and other statutory conservancy and irrigation districts have taken the position that they are above State Engineer authority and that they have "unquestioned power." *See* Motion, p. 7. MRGCD even describes the permits identified in the Alternative Writ of Mandamus issued by the Court on April 7, 2016 ("Writ") as "MRGCD's Permits," *id.*; Writ, ¶ 1, when in fact they are permits issued by the State Engineer. The State Engineer has exclusive authority over his permits and for the administration of the waters of the State of New Mexico. This authority is confirmed by several cases wherein the New Mexico Supreme Court has 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, ¶¶ 23, 24, 29, 147 N.M. 523 (purpose of water code's grant of broad powers to the State Engineer is to employ his "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"); and § 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").

The question presented by this proceeding is therefore not whether the Court can "purport to delegate" to the State Engineer authority to administer his permits, Motion, p. 7, but whether Petitioner can unreasonably interfere with the State Engineer's exclusive administrative jurisdiction over the issues raised in the Writ. State Engineer's Answer to Alternative Writ of Mandamus ("Answer"), p. 3-5, 8-10, and 10-11. The question germane to this Motion is whether MRGCD raises sufficient common issues of law to allow intervention as of right or whether MRGCD meets the standards for permissive intervention. Because the State Engineer has jurisdiction over the permits described in the Writ—and *only* because the State Engineer has jurisdiction—MRGCD has a cognizable interest in this action sufficient to warrant intervention as of right. But, MRGCD also raises sufficient common questions of law to warrant permissive intervention, which would allow MRGCD to participate in this proceeding without requiring a determination of the questions of State Engineer jurisdiction and authority raised by the Motion.

Therefore, the State Engineer requests that the Court grant the Motion on the basis of Rule 1-024(B) NMRA and allow MRGCD to permissively intervene.

II. ARGUMENT

A. MRGCD May Intervene Under Rule 1-024(B) Because MRGCD's Defenses Involve Common Questions of Law.

In general, permissive intervention is allowed where a would-be intervenor has claims or defenses that share a common question of law or fact with the main action. Rule 1-024 (allowing permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common."); *see also Am. Ass'n of People With Disabilities v. Herrera*,

257 F.R.D. 236, 259 (D.N.M. 2008) (applying Fed.R.Civ.P. 24(b)(1)(B), which is substantively the same as Rule 1-024(B) NMRA). Once the threshold requirement of a common question is met, the decision to allow or deny permissive intervention lies within the discretion of the district court. *Id.* A district court is vested with broad discretion in deciding whether an applicant for permissive intervention has presented sufficient evidence to establish that it should be permitted to intervene. *See Chino Mines Co. v. Del Curto*, 1992-NMCA-108, ¶ 17, 114 N.M. 521; *O'Hare v. Valley Utilities, Inc.*, 1976-NMSC-004, ¶ 16, 89 N.M. 105 (overruled on other grounds) (citing *Apodaca v. Town of Tome Land Grant*, 1974-NMSC-026, 86 N.M. 132); *and see Romero v. Bd. of County Commissioners for the County of Curry*, 313 F.R.D. 133, 142 (D.N.M. 2016) (citing 6 James W. Moore, Moore's Federal Practice § 24.10[1], 24–63 (3d ed.2012) (citation omitted) ("The district court possesses broad discretion in determining whether to grant permissive intervention and will rarely be reversed on appeal.")). "To permissively intervene, *a party need not have a direct personal or pecuniary interest* in the subject of the litigation." *San Juan County, Utah v. United States*, 503 F.3d 1163, 1207 (10th Cir.2007) (en banc) (quoting *Herrera*, 257 F.R.D. at 248) (emphasis added); *see also Stark-Romero v. Nat'l R.R. Passenger Co.*, 763 F. Supp. 2d 1231, 1238 (D.N.M. 2011) (applying and analyzing New Mexico law on intervention and noting that Rule 1-024(B) "permits intervention even when the intervening party cannot demonstrate an interest relating to the property or transaction which is the subject of the ongoing case.").

Here, MRGCD shares a common defense with the State Engineer in that both MRGCD and the State Engineer agree that the Writ's command to "either set a due date for demonstrating proof of beneficial use ["PBU"] of water under Permit Nos. 0620 and 1690 or cancel the permits," Writ, ¶ 1, is legally improper. *Compare* Answer, pp. 2-5 (the Court lacks jurisdiction

to issue the Writ) and pp. 7-10 (interpreting the meaning and effect of regulatory and statutory authorities) *with* Motion, p. 3 (acknowledging that whether the State Engineer has a duty to require MRGCD to file a PBU is a common question) and p. 12 (acknowledging that MRGCD will seek the Court to interpret the "meaning and effect of the State Engineer's statutory and regulatory authorities"). Although the State Engineer's and MRGCD's arguments regarding 19.26.2.13(C) NMAC and NMSA 1978, Section 72-5-14 may diverge, both the State Engineer and MRGCD raise common issue of law in that they both request the Court to construe and apply these authorities. *Id.* Furthermore, intervention would not cause undue delay such that the rights of Petitioners, if any, are prejudiced. Therefore, the Court should grant the Motion because MRGCD has satisfied Rule 1-024(B).

B. If MRGCD May Intervene Under Rule 1-024(A)(2) NMRA, it is Because the State Engineer has Jurisdiction over the Subject Permits.

NMSA 1978, Sections 44-2-1 to 44-2-14 ("Mandamus Statute"), provides no statutory right of intervention for a real party interest[1] in a mandamus proceeding. A mandamus proceeding is an "action," however, and Rule 1-024(A)(2) provides for intervention as of right when an applicant claims an interest in an action. In order to qualify for intervention as of right, MRGCD must demonstrate that "(1) it 'claims an interest relating to the property or transaction which is the subject of the action,' (2) it 'is so situated that the disposition of the action may as a practical matter impair or impede [its] ability to protect that interest,' and (3) its interest is not adequately represented by the existing parties to the litigation." *Nellis v. Mid-Century Ins. Co.*, 2007-NMCA-090, ¶ 8, 142 N.M. 115 (quoting Rule 1–024(A)(2)). Although intervention under

[1] The State Engineer assumes for the purposes of the Motion that MRGCD is a "real party in interest," but reserves the right to contest that either MRGCD or the United States qualifies as a real party in interest. The State Engineer notes specifically that *Redevelopment Agency v. Comm'n on State Mandates*, 43 Cal.App.4th 1188, 1196-97 (1996), cited by MRGCD at Motion p. 2, is a discussion of a California administrative mandamus action.

Rule 1-024(A)(2) also rests in the discretion of the Court, trial courts should be more circumspect in their exercise of discretion when intervention is of right rather than permissive. *See Murken v. Solv-Ex Corp.*, 2005-NMCA-137, ¶ 12, 138 N.M. 653 ("The Intervenors correctly assert that the district court 'should be more circumspect in [its] exercise of discretion when the intervention is of right rather than permissive.'") (quoting *Apodaca*, 1974-NMSC-026).

As to the first element of the Rule 1-024(A)(2) standard, even though New Mexico has not adopted an expansive view of intervention, should Petitioner prevail and the Court issue a peremptory writ of mandamus, having to either submit a proof of beneficial use or have permits cancelled likely constitutes "an interest that will be automatically harmed" sufficient to warrant intervention. *See Nellis*, 2007-NMCA-090, ¶ 9. MRGCD claims an interest related to the property which is the subject of the action.[2] There is, however, a factual issue as to MRGCD's ownership of the rights covered by the permits addressed in the Writ.[3] Writ, ¶ 1. Therefore, it may be that MRGCD's interest in the action are not sufficiently direct. *See New Mexico Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 17, 126 N.M. 788 (requiring the claimed interest be "significant, *direct rather than contingent*, and *based on a right belonging to the proposed intervenor* rather than [to] an existing party to the suit.") (internal quotation omitted, emphasis added). If MRGCD is not the owner of the water rights in the subject permits, and instead the water rights are owned by the United States, then the mere fact that MRGCD may be

[2] The State Engineer recognizes that the United States, also named a real party of interest in the Writ, may also have an interest in this matter, at least to the extent that MRGCD has such an interest.

[3] *See Grande Rio Grande Silvery Minnow (Hybognathus amarus) v. Bureau of Reclamation*, 599 F.3d 1165, 1168 (10th Cir. 2010) (holding that MRGCD is barred from challenging the United States' title to the property permitted by the State Engineer as identified in the Writ); *see also Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1128-44 (10th Cir. 2010) (vacating *Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 991 (D.N.M. 2002).

impacted by a permit requirement imposed under the permits is perhaps too tenuous to recognize intervention as of right in this matter.

Regarding the second element of the Rule 1-024(A)(2) standard, the *only* way that MRGCD could have an interest that could be harmed by this proceeding sufficient to warrant intervention is if, in fact, the State Engineer has authority to administer his permits such that the State Engineer could require submission of a PBU or cancel the permits identified in the Writ. Otherwise, if MRGCD is not subject to State Engineer jurisdiction and peremptory writ issues, and the State Engineer then takes one of the two commanded actions, the District would simply challenge the authority of the State Engineer to act on the permits at that time. In other words, the second prong of the Rule 1-024(A)(2) test for intervention is satisfied only if the State Engineer has authority such that *as a practical matter* MRGCD would have to submit to State Engineer authority if this Court issues a peremptory writ. Rule 1-024(A)(2); *Nellis*, 2007-NMCA-090, ¶ 8.

MRGCD argues that collateral estoppel arising from this action may be sufficient to justify the second element of the Rule 1-024(A)(2) standard. Motion, p. 9 (arguing practical impairment based on *res judiciata* or *stare decisis*). In support, MRGCD cites *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of Interior ("Spotted Owl")*, 100 F.3d 837, 844 (10th Cir. 1996), but that case is inapposite. Motion, p. 9. In *Spotted Owl*, the denial of would-be intervenor's application in a suit concerning federal protection for the Mexican Spotted Owl, if the challengers to federal protections were successful, would have foreclosed the interested intervenor from filing a later application for protection, because the issues of the first application for protection would have been adjudicated and binding as to any subsequent application. *Spotted Owl*, 100 F.3d 837, 844. Unlike the applicant in *Spotted Owl*, here MRGCD

does not face the same issues of *res judicata* or *stare decisis*, because jurisdiction may be raised at any point. *Deutsche Bank Nat. Trust Co. v. Johnston*, 2016-NMSC-013, ¶ 34 (citing *Chavez v. Cty. of Valencia*, 1974–NMSC–035, ¶ 15, 86 N.M. 205).

As the State Engineer has already pointed out, the issue presented by the Writ is limited to State Engineer authority and discretion. Section I, *supra*. The primary impact of the Writ is a determination by this Court that the State Engineer must generally interpret and apply 19.26.2.13(C) NMAC and Section 72-5-14 in a specific way. Although the command of the Writ references two permits, such a ruling has implications far beyond the permits identified in the Writ and would impact nearly every other permit holder in the State of New Mexico in light of how the State Engineer has long administered these provisions. Assuming MRGCD is the owner of the subject permits, while the Writ specifically references permits MRGCD claims an interest in, MRGCD is not uniquely impacted by the effect of the Writ. In fact, if MRGCD's jurisdictional argument was valid, which it is not, a peremptory writ in this matter has no practical effect on MRGCD, as jurisdiction is an issue that may be raised at any time. *Johnston*, 2016-NMSC-013, ¶ 34. Therefore, MRGCD's claim as to satisfying the second element of the Rule 1-024(A)(2) again is only valid if, in fact, the State Engineer has authority to administer his permits.

Finally, the third prong of the Rule 1-024(A)(2) may be satisfied. Should the Court find persuasive any one of the State Engineer's arguments and quash the Writ, as a result MRGCD's interests will have be adequately represented in this mandamus action and the Motion will be rendered moot. *See, generally*, Answer. In the event that the Court continues this mandamus action, MRGCD has novel defenses that the State Engineer opposes and therefore, as this Response demonstrates, the State Engineer would decline to assert. *See* Section II.C.

C. MRGCD's Jurisdictional Arguments are in Error.

The District raises several specious arguments designed to shield MRGCD from State Engineer authority. By not opposing the relief requested in the Motion, the State Engineer does not concede or accept the MRGCD's jurisdictional arguments his concerning administration of the permits identified in the Writ including, but not limited to, procedures regarding proof of beneficial use. MRGCD at various points also states that it is the holder of "substantial water rights," *see, e.g.* Motion, p. 6, or "thousands of acres of water rights," Motion, p. 12, based upon the permits. But the nature and extent of *any* water rights vested under the permits is a matter determined pursuant to State Engineer administrative procedures, including proof of beneficial use procedures and cancellation of permits. *Lion's Gate*, 2009-NMSC-057, ¶¶ 23, 24, 29; *Aamodt*, 1990-NMSC-099, ¶ 11; Answer, pp. 7-10. Section 72-5-14 and 19.26.2.13(C) NMAC contain no exceptions for statutory conservancy or irrigation districts, and such districts must comply with these provisions to the same degree as any other permittee.

MRGCD's arguments that it and the Conservancy Court have exclusive subject matter jurisdiction over any proceeding involving surface water rights within the District, and that the Conservancy Court must approve any change that would affect the District's Plan of Operation, in no way conflict with State Engineer authority to administer permits. *See* Motion, p. 7 (arguing that Sections 73-14-47(D)-(E) of the Conservancy Act "vests the authority to determine the extent of its water rights with the MRGCD Board of Directors, as approved by the Conservancy Court."). While *within* the District boundaries MRGCD may, with some limitations, distribute its water as it sees fit, the District as an entity remains subject to the provisions of the water code and State Engineer authority to administer permits. The fact that the State Engineer issued the subject permits in the first instance is evidence of the fact that MRGCD has long been subject to State Engineer jurisdiction. Similarly, no portion of NMSA 1978, Sections 73-14-49 to -51

stands for the principle that the State Engineer does not have jurisdiction to administer water permits that may impact MRGCD. Again, MRGCD has authority to make determinations about the distribution of water *within* its boundaries, but the subject permits have terms and conditions and the State Engineer has the authority to enforce his permit conditions.

The District also raises additional novel arguments regarding its purported ability "to effectuate their own beneficial uses of water and their own determinations of district water rights," Motion, p. 11, and to establish its own "beneficial use through the Conservancy Court in Albuquerque, and not through the State Engineer," Motion, p. 12. These arguments go to the heart of New Mexico water law and the State Engineer's ability to determine what is beneficial use and use of water. While the State Engineer acknowledges that MRGCD is a political subdivision allocating water within its district, the State Engineer rejects MRGCD's conclusions of law.

While the Writ goes too far in one direction, stating that the State Engineer must administer water in a certain way, MRGCD goes too far in the other direction with its Motion, stating that the State Engineer cannot possibly administer water in a certain way. *Compare* Writ and Motion. The reality of the State Engineer's authority and discretion lies in between the two polarized positions. *See*, *generally*, Answer. The State Engineer hereby objects, preserves, and does not waive, his right to address further any and all of MRGCD's jurisdiction arguments should they become at-issue in this proceeding.

III. CONCLUSION

For the foregoing reasons, the State Engineer submits that the Court should grant MRGCD's Motion and permit MRGCD to intervene permissively in this matter pursuant to Rule 1-024(B).

Respectfully submitted this May 24, 2016.

/s/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and complete copy of the foregoing STATE ENGINEER'S RESPONSE TO THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT'S MOTION TO INTERVENE AND BRIEF IN SUPPORT OF MOTION was served to all parties of record on this 24th day of May, 2016.

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