

IN THE MATTER OF THE APPLICATION)	
BY THE VILLAGE OF RUIDOSO FOR)	Hearing No. 08-039
PERMIT TO TEMPORARILY CHANGE)	
THE LOCATION OF WELL AND PLACE)	
AND/OR PURPOSE OF USE OF THE)	OSE File No. H-685
GROUNDWATER WITHIN THE HONDO)	into H-2049 et al. (T)
BASIN IN THE STATE OF NEW MEXICO)	
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MOTION FOR PARTIAL SUMMARY JUDGMENT

Protestant Rio Bonito Preserve respectfully requests the Hearing Examiner to grant partial summary judgment on an issue of law that will limit the maximum amount of water that the Village of Capitan (“Capitan”) can transfer to the Village of Ruidoso (“Ruidoso”) under the current application. Pursuant to well established law, only perfected water rights are transferable¹ under the applicable statutes. Therefore, the maximum amount of water that Capitan can transfer to Ruidoso is that amount of water, if any, that Capitan has lawfully pumped from the move-from wells and applied to beneficial use, thereby perfecting a water right at the move-from location. Although substantial evidence in the record demonstrates that Capitan has not applied nearly as much water to beneficial use as it now seeks to transfer to Ruidoso, this assertion may be disputed by the Applicants. The instant Motion, however, does not depend on the resolution of this or any other disputed fact. Therefore, Rio Bonito Reserve is entitled to partial summary judgment on the issue as a matter of law. Furthermore, it is important that the Hearing Examiner render a pretrial judgment on this issue as soon as possible, because it may substantially reduce the amount of water that Capitan can transfer to Ruidoso and thus possibly influence the parties’ analysis of impairment.

¹ In this context, “transferable” means the ability to change the point of diversion and place of use, whether temporarily or permanently.

Argument

The basis, measure and the limit of the right to use water in New Mexico is defined solely by the physical application of water to beneficial use. N.M. Const. art. XVI, § 3. See also, e.g., Hanson v. Turney, 2004 NMCA 69, 10, 94 P.3d 1, 3-4 (Ct. App. 2004) (“For more than a century, our law has been that a water right is perfected by the application of the water to beneficial use.”) Accordingly, a permit to appropriate water issued by the State Engineer does not create a water right, but only an “inchoate” right to apply water to beneficial use (at a specific place and for a specific purpose) within a reasonable time and thus establish a water right. Hanson at ¶ 9, 94 P.3d at 3 (“A water permit is an inchoate right, and is the necessary first step in obtaining a water right”) (internal quotation marks omitted).

The statutes that allow an appropriator to change the elements of his water right apply only to perfected “water rights,” not to inchoate permit rights. In Hanson, the Court established this fundamental principle of New Mexico water in the opening paragraph of its opinion:

NMSA 1978, § 72-12-7(A) (1985) allows the owner of a “water right” to change the use of the water. Plaintiff Mabel Hanson had two permits to appropriate water but never put the water to beneficial use. When she filed applications to change the use from irrigation to subdivision use, the State Engineer denied her requests, reasoning that her failure to put the water to beneficial use meant that there was no “water right” to be changed. Plaintiff [Hanson] argues that a permit to appropriate water constitutes a “water right” that can be changed even if there has been no beneficial use. We agree with the State Engineer, and affirm [the State Engineer’s decision not to allow a change in the purpose of use].

Id. at ¶ 1, 94 P.3d at 2. See also NMSA 1978, § 72-6-3(A)(2003) (“An owner may lease to any person all or any part of the water use due him under his *water right*”); NMSA 72-

12-7(A) (1985) (emphasis added) (“The owner of a *water right* may change the location of his well or change the use of the water”) (emphasis added).

As a matter of law, therefore, Capitan can transfer to the Village of Ruidoso (“Ruidoso”) only that amount of water (if any) that Capitan has lawfully applied to beneficial use at the move-from location and thereby established a perfected, transferable water right at that location.² Although it may be subject to some dispute, substantial evidence in the record indicates that the most Capitan has ever pumped³ under State Engineer File No. H-685 et al. is 228.00 acre-feet per year, far less than the amount (338.88 acre feet) sought to be transferred under the current application. (Protestant Rio Hondo Land & Cattle Company, Exhibit 1, Table 3 (Summary of Village of Capitan Diversions and Permits)). Therefore, although the instant Motion is one of pure law and does not require the Hearing Examiner to resolve this or any other disputed issue of fact, an early resolution of this legal issue is important, because it may affect the parties’ assessment of impairment.

² A separate issue, which Rio Bonito Preserve reserves the right to raise, is whether the purported transfer of 838.88 acre-feet to Capitan from the Eagle Creek Inter-Community Water Supply Association, in or around 1999, qualified as a lawful transfer of a vested water right or an invalid attempt to transfer an inchoate permit right or whether the transfer otherwise violated established principles of water law. Specifically, there is reason to dispute the Applicants’ assertion that the Eagle Creek water rights under License 0173 & 783 authorized a diversion of 1,677.76 acre-feet per annum at the time the rights were divided between Ruidoso and Capitan. Compare Engineering Report Concerning State Engineer Application No. H-685 into H-2049 et al. (T), Appendix 2, page 1 (stating that the total “water rights” divided between Capitan and Ruidoso was 1,677.76 acre-feet) with Rio Hondo Land & Cattle Company Exhibit 6 (October 5, 1981 OSE Memorandum—stating that “the actual amount of water applied to beneficial use . . . should only be 803.55 acre-feet per annum, based on mean annual flow in Eagle Creek) and also Rio Hondo Land & Cattle Company Exhibit 1, Table 2 (indicating that the maximum diversion under License 0173 & 783 was only 1026.03 acre-feet).

³ The maximum “pumped amount” may not necessarily correspond to the maximum application of water to beneficial use.

The granting of partial summary judgment on this point of law, however, will of course not end the inquiry. For example, in addition to deciding whether the transfer (of whatever amount) will impair existing water rights, be detrimental to public welfare or contrary to the conservation of water, Rio Bonito Preserve will also request the Hearing Examiner to determine whether the proposed transfer constitutes an abuse of NMSA 1978, 72-1-9(2006), which allows municipalities and certain other named entities to acquire water rights forty years in advance of their actual need to use the water. Cf. Tercero v. Roman Catholic Diocese, 2002 NMSC 18, 7, 48 P.3d 50, 55 (2002) (statutes “in derogation of the common law ... must be strictly construed”). If the State Engineer grants the instant application, the scope of Capitan’s water use will no longer be measured or limited by the growth rate of Capitan’s population and its need for water, but by the combined growth rates and needs of two populations—the population of Capitan and that of Ruidoso. Moreover, allowing Ruidoso to use Capitan’s water rights, without also requiring Capitan to curtail its own use of water by the same amount, will substantially increase both the timing and the magnitude of impairment because of the overlapping effects of Capitan and Ruidoso’s dual use of the same permit rights. (See Rio Bonito Preserve’s Motion for Clarification.) Although these issues are not raised by the current motion, Rio Bonito Preserve expressly reserves the right to raise them in this proceeding and in any appeal.

WHEREFORE, Rio Bonito Preserve respectfully requests the Hearing Examiner to render partial summary judgment to the effect that, as a matter of law: (1) only water rights perfected at the move-from location are transferable under the applicable statutes; and (2) the maximum amount of water that Capitan can transfer to Ruidoso is that

amount (if any) that Capitan has lawfully pumped from the move-from wells and applied to beneficial use, thereby establishing a perfected water right at the move-from location.

Respectfully submitted,

New Mexico Environmental Law Center

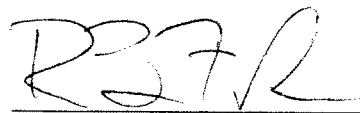
By 

Bruce Frederick
Jon Block
Eric Jantz
Doug Meiklejohn
1405 Luisa Street, Suite 5
Santa Fe, New Mexico 87505
Tel: (505) 989-9022, ext. 26
Fax: (505) 989-3769
bfrederick@nmelc.org

Certificate of Service

I, Bruce Frederick, certify that on the 14th day of May, 2009, I caused a copy of the foregoing document to be mailed by first class mail to the following persons:

Daniel Rubin Office of the State Engineer P.O. Box 25102 Santa Fe, New Mexico 87504-5102	Alvin F. Jones A. J. Olsen Hennighausen & Olsen P.O. Box 1415 Roswell, New Mexico 88202-1415
Kelly Mack Cassels Sanders, Bruin Coll & Worley, PA P.O. Box 550 Roswell, New Mexico 88202-0550	Holly Meyer Gregory C. Mehojah U.S. Dept. of Interior Office of the Solicitor 505 Marquette Ave., Suite 1800 Albuquerque, New Mexico 87102



Bruce Frederick

