BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE CORRECTED APPLICATION FILED BY AUGUSTIN PLAINS RANCH, LLC FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN IN THE STATE OF NEW MEXICO	Hearing No. 17-005 OSE File No. RG-89943 POD1 through POD 37

WATER RIGHTS DIVISION'S RESPONSE TO THE NMELC PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

The Water Rights Division ("WRD") hereby responds to *The Community Protestants' Motion for Summary Judgment*, ("NMELC MSJ"), filed by the New Mexico Environmental Law Center ("NMELC"). The WRD respectfully submits that the State Engineer may deny the NMELC MSJ for the following reasons:

1. The NMELC MSJ fails to meet the requirements of a motion for summary judgment pursuant to Rule 1-56 because it does not plainly state either the undisputed material facts or the law upon which it is entitled to judgment, as is required in a request for summary judgment.
2. To the extent that NMELC's purported facts are discernable within its arguments, WRD disputes many of them.

NMELC Protestants also argue that the Corrected Application is speculative. What might constitute a "speculative" application is not well-defined in New Mexico law, though the New Mexico courts have indicated generally that speculation in water is anathema to the New Mexico Code. Currently, there are no specific requirements in statute, rule, or case law to overcome many of the issues associated with speculation when determining whether or not an application is complete for filing. For example, our laws do not require that an applicant have a contract with

the end user, or that the end user be the applicant. But it would be proper for the State Engineer to address these issues at this point in the case as a third issue to resolve.

In an effort to assist the State Engineer at this juncture of the case, the WRD attempts to distill the 51 arguments put forth in the NMELC MSJ in order to respond. The WRD addresses the following arguments suggested –although not clearly stated – by NMELC's motion: (1) the application is not complete and therefore should not have been accepted by the WRD, nor advertised, (2) the application is identical in all material respects to the previously filed and ruled upon application and therefore must be denied as it is the same application, and (3) the application is speculative on its face which is contrary to the beneficial use and prior appropriation doctrines.

With regard to the first two of these arguments, the NMELC is wrong. The application is complete in accordance with current statutory and regulatory requirements. The application on its face is not identical to the previous application and cannot be summarily dismissed on the grounds of preclusion. The third argument regarding speculation is more problematic, especially in the light of a preliminary procedural question: does the issue of speculation in the application need to be addressed at this stage or can it be addressed later in the administrative hearing process? Although New Mexico law does not specify requirements concerning speculation in order for an application to be complete, an application must be deemed complete to be accepted for filing and publication. The WRD recommends that in applications such as this – where the application seeks to appropriate groundwater in a geographically distinct region and transport to another region of the state for municipal supply and other uses – the applicant should state whether 1) the applicant will be the party to place the water to beneficial use, or 2) the applicant has a specific plan to deliver a specific quantity of water to each identified entity that will place

the water to beneficial use, and 3) that the applicant can and will place the water to beneficial use.

I. The NMELC Protestants' memorandum in support of their motion fails to meet the requirements of New Mexico Rules Annotated, 1978, Rule 1-056(D)(2).

Under NMRA 1-056(D)(2), a memorandum in support of a motion for summary judgment must contain a numbered list "of all of the material facts as to which the moving party contends no genuine issue exists," as well as "a short concise statement of the reasons in support of the motion with a list of authorities relied upon." The NMELC Protestants' memorandum in support of their motion fails to identify any material undisputed facts, nor has it provided a list of legal authorities upon which they have relied.

The New Mexico Supreme Court dealt with a similar issue in *Richardson v. Glass*, 114 N.M. 119 (1992), in the context of a response to a motion for summary judgment. In *Richardson*, the court found that the plaintiff's memorandum in response to the defendant's motion for summary judgment did not "contain a concise statement of the material facts to which the party contends a genuine issue does exist," nor was each fact in dispute "numbered or referenced with particularity to the record." *Id.* at 121. Accordingly, the court found that the plaintiff had "failed in her burden to oppose the motion for summary judgment." *Id.* at 121-122. In the instant case, the roles are reversed, but the effect is the same. Thus, the absence of a recitation of the undisputed material facts in the NMELC MSJ is a basis of denial.

II. The NMELC Protestants make many factual assertions that the WRD disputes.

"Summary judgment is appropriate where there is no genuine issue of material fact", and the burden of establishing a prima facie case that there is no genuine issue of material fact is on the moving party. *Pollock v. State Highway and Transp. Dept.*, 127 N.M. 521, 523, 984, P.2d

768, 770 (Ct.App. 1999). The WRD cites the following as examples of facts put forth in the NMELC MSJ that are disputed:

1. The WRD disputes the NMELC Protestants' claim that the corrected application submitted by Augustin Plains Ranch, LLC ("APR") is "identical in all material respects" to APR's original application. (NMELC MSJ pp. 2, 26-31, 44.)
2. The WRD disputes the NMELC Protestants' claim that no purpose of use is identified in APR's corrected application. (NMELC MSJ pp. 1, 5-9, 16, 21, 33.)
3. The WRD disputes the NMELC Protestants' claim that no place of use is identified in APR's corrected application. (NMELC MSJ pp. 7, 8, 16, 28, 29.)
4. The WRD disputes the NMELC Protestants' claim that no point(s) of diversion is (are) identified in APR's corrected application. (NMELC MSJ pp. 9-10)
5. The WRD disputes the NMELC Protestants' claim that APR's corrected application is insufficient to evaluate for impairment, conservation, or public welfare. (NMELC MSJ pp. 2, 10-11, 15, 34)

The legal basis for the NMELC Protestants' motion for summary judgment appears to reflect a simple syllogism: APR's original application was dismissed as incomplete; APR's corrected application is "identical in all material respects" to APR's original application; thus, APR's corrected application should be dismissed as incomplete. The problem with this syllogism is that it is factually inaccurate. APR's corrected application is obviously, on its face, different from APR's original application. The following are a few examples of the greater specificity and the differences in the corrected application from the original application:

1. The original application was for eleven purposes of use, namely: domestic, livestock, irrigation, municipal, industrial, commercial, environmental, recreational, subdivision,

replacement, and augmentation. The corrected application recites only two purposes of use, namely: municipal and commercial water sales.

2. The original application gave a proposed place of use of, "within the exterior boundaries of Catron County, Socorro County, and Augustin Plains Ranch." The proposed place of use identified in the corrected application is much more specific. It includes the municipal water service areas of Magdalena, Socorro, Belen, Los Lunas, the Albuquerque Bernalillo County Water Utility Authority, and Rio Rancho; as well as commercial sales in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties within the Rio Grande Basin.
3. Where the original application was devoid of details, the corrected application includes detailed technical descriptions of how the water will be withdrawn at the points of diversion, conveyed to, and delivered at, the places of use. (Corrected App., Exhibits A, C, D, and G.)

In addition to these specific differences from the original application, the circumstances of the filing of the corrected application are important to understand. APR's original application was dismissed "without prejudice to filing of subsequent applications." (Order Denying Application, ¶ 25, March 30, 2012, Exhibit 1 to NMELC Protestants' Motion). The dismissal of APR's original application contemplated the filing of a corrected application as a separate matter to be evaluated on its own merits. The State Engineer reinforced this point in its Answer Brief to the Court of Appeals in APR's appeal of the District Court's affirming of the State Engineer's denial of APR's original application, pointing out that "APR could simply have submitted a new application to the State Engineer that comports with law." Exhibit 4 to NMELC MSJ. That the corrected application is a matter separate and distinct from the original application is evidenced

by the fact that APR's corrected application bears a different Docket Number than APR's original application.

Because APR's corrected application is materially different from APR's original application, the dismissal of the original application has no legal bearing on the State Engineer's disposition of the corrected application. Similarly, because APR's corrected application is materially different from its original application, the State Engineer is not required by *res judicata*, collateral estoppel, or the law of the case to dismiss the corrected application. The dismissal of APR's original application does not, as a matter of law, support the NMELC MSJ arguments that the corrected application is the same.

Finally, the NMELC MSJ fails to acknowledge the difference between a preliminary determination of the completeness of a permit application and a water right. (NMELC MSJ, pp. 18-24.) In their memorandum, the NMELC Protestants equate the WRD's determination that the corrected application is complete and comports with law with the idea that the State Engineer has approved the application. *Id.* The NMELC Protestants invoke the spectre of "the dog in the manger" and cite *Millheiser v. Long*, 10 N.M. 99 (1900) for the proposition that acknowledging the completeness of the application gives APR "de facto ownership" of the water sought. (NMELC MSJ, p. 21.) This is entirely inaccurate.

The State Engineer has not issued a permit to APR, and will only do so upon a determination that APR has made the showings necessary to obtain that permit. The protestants will have a full and fair opportunity to show that APR is not able to do so. This is the difference between the situation as it existed in 1900 when *Millheiser* was decided and today. In 1900 there was no New Mexico Water Code and thus no permit application process. Today, any application for a new appropriation of water must be approved by the State Engineer. If the State Engineer

determines that the applicant has not carried its burden to demonstrate that a permit should be granted, then the application must be denied. *Millheiser* is irrelevant. It represents a situation that was possible in 1900, but is not possible today. The NMELC Protestants' "dog in the manger" arguments are premature and do not support summary judgment. The real issue at this juncture is whether or not the corrected application is complete enough.

III. The Motion Could Be Denied on the Grounds Stated Above, but the WRD Includes the Following Discussion of Colorado's Anti-Speculation Doctrine for the State Engineer's Consideration

NMELC Protestants argue that the Corrected Application should be dismissed as speculative. NMELC MSJ, pp. 18-24. What might constitute a "speculative" application for water rights is not well-defined in New Mexico law, though the New Mexico courts have indicated generally that speculation in water offends the principle of beneficial use that is essential to the prior appropriation doctrine. *See Millheiser v. Long*, 1900-NMSC-012, 10 N.M. 99, 61 P. 111 (speculation and monopoly in water is contrary to the prior appropriation doctrine); N.M. Const. art. XVI, Sections 1-5 (adopting the prior appropriation doctrine in New Mexico).

Although the NMELC MSJ could be denied for the procedural grounds stated above, the State Engineer may choose to address the issue of speculation here. One approach to considering that issue is to look to the water law of Colorado, which is similar to New Mexico's in many respects. *Lindsey v. McClure*, 136 F.2d 65, 69 (10th Cir. 1943) ("Colorado and New Mexico have the same basic water law"); *See also Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981), *superseded by statute as recognized in Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 1135 (D.N.M. 2002) (construing New Mexico law, a federal court cites both New Mexico and Colorado law for the principle that speculation is contrary to the beneficial use requirement of the prior appropriation doctrine). Colorado has directly addressed the issue of speculation both judicially and legislatively, establishing what Colorado courts refer

to as its "anti-speculation doctrine." *E.g., Jaeger v. Colo. Ground Water Com.*, 746 P.2d 515 (Colo. 1987) (Colorado's "anti-speculation doctrine" has been incorporated into the statutes and applies to groundwater as well as surface water). Because the State Engineer may decide to address the issue of speculation at this point concerning whether or not the corrected application is complete, the WRD offers the following discussion of Colorado law with respect to its anti-speculation doctrine.

In *Colo. River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 594 P.2d 566, 568 (1979), the Colorado Supreme Court held that:

> Our Constitution guarantees a right to appropriate, not a right to speculate. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of *others* not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees [*the corresponding action in New Mexico would be to grant a permit*] grounded on no interest beyond a desire to obtain water for sale would—as a practical matter—discourage those who have need and use for the water from developing it.

The specific circumstances that gave rise to these statements of principle were that:

> Vidler has no firm contractual commitment from any municipality to use any of the water. Even the City of Golden has not committed itself beyond an option which it may choose not to exercise. The mere negotiations with other municipalities clearly do not rise to the level of definite commitment for use required to prove the intent here required.

Id. The Court further noted that:

> While Vidler's efforts possibly went beyond mere speculation, there was no sufficient evidence that it represented anyone committed to actual beneficial use of the water not intended for use on its own land. Indeed, there is not even evidence of firm sale arrangements. In essence, water rights are sought here on the assumption that growing population will produce a general need for more water in the future. But Vidler has no contract or agency relationship justifying its claim to represent those whose future needs are asserted.

Id. Under the *Vidler* case, it appears that an application is speculative unless the applicant itself actually intends to use the water or there is a "firm contractual commitment" from non-applicant municipalities expected to use the water.

The holding in the *Vidler* case has been incorporated into statute and extended in ways that have offered further perspective on what constitutes speculation. A recent Colorado District court decision in *Front Range Resources, LLC v. Colorado Groundwater Commission*, No. 15-CV-30493 (Adams County District Court) (May 26, 2016), p.9, noted that the *Vidler* Court's "essential holding has been codified," citing C.R.S. 37-92-103 (3) (a), which states:

> **(3)** (a) "Appropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by either of the following:
>
> > **(I)** The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation.
> >
> > **(II)** The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a specific quantity of water for specific beneficial uses.

This statutory language does not put the anti-speculation doctrine directly in terms of a firm contractual commitment from the ultimate beneficial users, as the *Vidler* case appeared to do. Rather, the statute requires a "legally vested interest or a reasonable expectation of procuring such an interest" in the lands or facilities of the ultimate beneficial users. Alternatively, the statute requires that the appropriator have a "specific plan and intent [to appropriate] a specific quantity of water for specific beneficial uses."

Another, more recent statutory provision extended Colorado's anti-speculation doctrine, adding what is often referred to as the "can and will" requirement. C.R.S. 37-92-305 (9) (b) provides guidance for state officials considering water rights applications:

> No claim for a conditional water right may be recognized or a decree therefor granted except to the extent that it is established that the waters can be and will be diverted, stored, or otherwise captured, possessed, and controlled and will be beneficially used and that the project can and will be completed with diligence and within a reasonable time.

In *Vermillion Ranch Ltd. P'ship v. Raftopoulos Bros.*, 2013 CO 41, 307 P.3d 1056, ¶45, 48, the Colorado Supreme Court observed of this provision:

> The General Assembly enacted the "can and will" statute "to reduce speculation associated with conditional decrees and to increase the certainty of the administration of water rights in Colorado." *FWS Land & Cattle Co. v. State Div. of Wildlife*, 795 P.2d 837, 840 (Colo. 1990). The statute goes beyond the anti-speculation doctrine of *Vidler*, 197 Colo. at 417, 594 P.2d at 568, by requiring an applicant seeking a conditional water right decree to demonstrate that the water "can and will" be beneficially used. *Bd. of Cnty. Comm'rs v. United States*, 891 P.2d at 961. Specifically, an applicant for conditional water rights must demonstrate a "substantial probability that within a reasonable time the facilities necessary to effect the appropriation can and will be completed with diligence.'" *ACJ P'ship*, 209 P.3d at 1083 (quoting *Bd. of Cnty. Comm'rs v. United States, 891 P.2d at 961)*.
>
> The key inquiry is whether "'evidence of factors supporting the substantial probability of future completion is sufficient to outweigh the presence of future contingencies.'" *ACJ P'ship*, 209 P.3d at 1085 (*quoting City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 45 (Colo. 1996)). Whether an applicant has met the "can and will" requirement presents a mixed question of fact and law. *See Buffalo Park Dev. Co.*, 195 P.3d at 683.

The *Vermillion* case applied both aspects of the Colorado anti-speculation doctrine—the "specific plan" test and the "can and will" test— in holding that the applicant in that case had not met the burden to show that the application was not speculative. There were no specific plans for wells, nor could the applicant state what quantity of water was needed.

Here, the corrected application was not filed by the eventual end user, nor does APR have any contractual relations with the end users. While the corrected application goes to great lengths to satisfy many of the questions that might arise from the "specific plan" test and the "can and will" test, the corrected application does not specify the amount of water that will be eventually used by the different users. This is especially troublesome when evaluating the reasonable future demand of the municipalities listed. NMSA 1978, Section 72-1-9 requires that the amount of water rights held by a municipality be limited to the amount of water needed by the municipality not to exceed forty-years. The corrected application does not specify how much water could be used by each individual municipality listed making it impossible to evaluate whether or not that quantity will be needed by the municipality during its planning period.

IV. Conclusion

On its face, APR's corrected application is complete based upon the current New Mexico statutes and rules. The NMELC Protestants have offered no sufficient legal basis for the granting of summary judgment. They have identified no undisputed facts (in contravention of the requirements of NMRA 1-056(D)(2)), and, in fact, there are a number of facts that the WRD disputes. However, the WRD welcomes any guidance from the State Engineer on how to evaluate whether or not an application such is this is complete for filing.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Motion for Summary Judgment was mailed to all parties this 30th day of October, 2017. A complete copy may be located on the Office of the State Engineer website, http://www.ose.state.nm.us/HU/AugustinPlains.php. The service list will be updated as necessary.

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