STATE OF NEW MEXICO
CATRON COUNTY
SEVENTH JUDICIAL DISTRICT

Augustin Plains Ranch, LLC

Applicant/Appellant,

v. **Dist. Ct. No. D-728-CV-2018-00026**

Tom Blaine, P.E.,

New Mexico State Engineer/Appellee,

and

Catron County Board of County Commissioners, *et al.*,

Protestants/Appellees.

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS' REPLY TO APPLICANT-APPELLANT AUGUSTIN PLAINS RANCH, LLC'S CONSOLIDATED RESPONSE TO APPELLEE'S MOTIONS FOR SUMMARY JUDGMENT

COMES NOW the Catron County Board of County Commissioners (the Board), by and through undersigned counsel of record, and submits its Reply to Applicant-Appellant Augustin Plains Ranch, LLC's Consolidated Response to Appellee's Motions for Summary Judgment (APR Response).

The majority of arguments made by Augustin Plains Ranch (APR) in its Response to the Motions for Summary Judgment have already been addressed by the State Engineer, the Board, the Pittman Protestants, and the Community Protestants in their responses to APR's Second Motion for Summary Judgment. *See* State Engineer's Response to Applicant Augustin Plains Ranch, LLC's Second Motion for Summary Judgment and Memorandum in Support (SE Response), filed September 22, 2023; Catron County Board of County Commissioners'

Response to Applicant Augustin Plains Ranch, LLC's Second Motion for Summary Judgment and Memorandum in Support (Board Response), filed September 7, 2023; The Carol Pittman Protestants' Response in Opposition to Augustin Plains Ranch's Second Motion for Summary Judgment (Pittman Protestants' Response), filed September 21, 2023; and Community Protestant's Response in Opposition to Applicant Augustin Plains Ranch, LLC's Second Motion for Summary Judgment (Community Protestants' Response), filed September 22, 2023. In order to avoid redundancy and unnecessary repetition, the Board will not restate its previous arguments but incorporates its Response to APR's Second Motion for Summary Judgment herein and provides the following additional reply.

I. THE BOARD DID NOT ASSERT THAT THE APPLICATION IS NOT ADMINISTATIVELY COMPLETE

In Section I of its Response, APR addresses arguments made by "Protestants" that the Application fails to include information necessary for a groundwater application to be deemed administratively complete. The Board did not challenge the administrative completeness of the Application and does not dispute that "[t]he State Engineer's acceptance of Augustin's Application as administratively complete was appropriate." (APR Response at 3). The basis for Board's summary judgment motion is that the application is speculative as a matter of law, not that the application did not contain the information required for administrative acceptance and public notice. Throughout Section I, APR confuses the Board's argument regarding speculation and the lack of evidence demonstrating that it is not speculative with arguments going to administrative completeness. (APR Response at 5, 8, 14). The Board's arguments regarding the lack of information regarding actual users, place of use, and quantity of use go to the question of speculation, not administrative completeness. The arguments made by APR in Section I are not applicable to Board's Motion for Summary Judgment.

II. APR HAS NOT PROVEN THAT, AS A MATTER OF LAW, THE APPLICATION IS NOT SPECULATIVE

> "Speculators are water rights owners who do not beneficially use the water rights and provide merely expressions of desire or hope to use the water rights at an undefined point where it is financially profitable."

Carlsbad Irrigation District, et al. v. John D'Antonio, New Mexico State Engineer, et al., _____NMCA-_____, Oct. 18, 2023, A-1-CA-39378 and A-1-CA-40372, ¶46.

Western water law, including in New Mexico, grants "a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit." (AR 2512-2513 at ¶54 (quoting *Colorado River Water Conservation District v. Vidler tunnel Water Co.,* 594 P.2d 566, 568 (Colo. 1979)). The extensive briefing in this matter demonstrates that APR meets the definition of speculator provided by the Court of Appeals in its October 18, 2023 decision.

It is undisputed that APR itself does not intend to put the water that it seeks to appropriate to beneficial use. Nor has APR identified any actual end users who will put the water to beneficial use in a specific amount at a specific place in a reasonable amount of time. Instead, APR has provided plans for a pipeline and "expressions of desire or hope" that, once it obtains the water rights, it will be able to find end users to put the water to beneficial use. Based on the record before the Court, APR has not identified a present intent to appropriate water but is merely setting forth an intent to divert the water through a pipeline in the hopes that it will find users at some point in the future. APR's proposal is based on its speculation that it will be able to sell or lease large amounts of water to its future, unidentified customers. APR's actual intent is to set itself up as the middleman that controls a huge amount of groundwater located in Catron County. Under this scenario, it will be APR, instead of the State Engineer, that decides, through its marketing, selling, and leasing of the groundwater, who gets the water, how much water they will get and where the water will be put to beneficial use. This outcome is contrary to the

doctrines of prior appropriation and State ownership of the waters of New Mexico. (*See* AR 2512-2517 at ¶¶47-82).

The Board does not argue that the sales or leasing of water is not a beneficial use or that such proposed uses are always speculative. What the Board does argue is that, based on the record before the Court, APR's Application is speculative because the only thing that it concretely proposes to do is drill 37 wells on its property and build a pipeline to deliver the 54,000 acre feet of water to be pumped from those wells to third parties. In other words, APR has put forth a specific plan for the diversion works, which, under well-established New Mexico law, does not constitute beneficial use. *State ex rel. Martinez v. McDermett,* 1995-NMCA-060, ¶12, 120 N.M. 327. The speculative nature of the Application arises from the failure to provide specific information about the actual use of the water by any third parties.

APR does not dispute that it has not provided information about the specific use of the water at specific locations by specific third parties. In fact, APR admits that it does not know who will use the water or how much will be put to beneficial use. On page 16 of its Response, in addressing the proposed two-stage hearing process, APR states:

> Augustin originally contemplated the two-stage hearing process to address Protestant's concerns. During the hearing on the 2007 Application, the Protestants raised the same desire to know how much water would be allocated to each of the proposed uses and places of use. But, as Augustin explained, that is partly a theoretical exercise until Augustin knows how much water is available for appropriation. This is true because Augustin will adjust its plan based on the permitted amount of water. For example, if Augustin is granted a permit for 30,000 acre-feet instead of 54,000 it has requested, it will have to modify the places of use for both municipal uses and commercial uses….Once Augustin knows the amount of water available without causing impairment, it will adjust its plan and provide the information that Catron County is requesting. (Emphasis added).

APR's plan, as it has been all along, is to obtain a substantial water right that it does not intend to put to beneficial use and that is unconnected to a specific beneficial use or place of use, and then

market the water to prospective end users for its own financial benefit. The State Engineer correctly found that "[a]ll APR has established is that it wants to appropriate and convey water to uncommitted municipalities and entities in unknown quantities." (AR 2516 at ¶78). The State Engineer found that "there is a striking lack of information, namely agreements with specific end-users for specific quantities and purposes that APR could rely upon to defeat a claim of speculation and show a substantial probability that it will complete the proposed appropriation with diligence by placing water to beneficial use in a reasonable period of time." (*Id.* at ¶79). The record still lacks this vital information.

Instead of identifying a specific amount of water needed by a specific user for a specific purpose, APR wants to obtain the water rights and then find the uses, locations, and amounts. APR has not identified any other permit applications that have been granted based on a similar proposal. As the State Engineer stated, "[a]dministrative proceedings before the State Engineer are neither the time nor the place for Applicants to develop their intentions. Those intentions should be well-developed based on reasonable projections of future demand and clearly and specifically articulated in the application." (AR at 2512 at ¶53).

Without some type of commitment from potential end users and specific information about their demand for and use of the water, all APR has are "expressions of desire or hope to use the water rights at an undefined point where it is financially profitable." *Carlsbad Irrigation District, et al. v. John D'Antonio, New Mexico State Engineer, et al.*, _____NMCA-_____, A-1-CA-39378 and A-1-CA-40372, ¶46. The only thing APR has proposed is an elaborate plan to build a pipeline in the hopes that it will be able to find users for 54,000 acre-feet of groundwater per year. There is simply no evidence in the record that APR will be able to sell or lease any quantity of water to third parties, let alone the enormous amount it is requesting.

APR argues that, as long as it has the subjective intent to put the water to beneficial use, the Application is not speculative. As stated by the State Engineer, APR "advances the position that the subjective intent of an applicant to place water to beneficial use satisfies the anti-speculation doctrine in New Mexico, despite the absence of concrete, specific plans on the part of end users to do so." (SE Response at 1). Rather than reiterate the legal and factual arguments already made in response to APR's contention regarding its subjective intent, the Board refers the Court to pages 8 to 13 of the State Engineer's Response to APR's Motion for Summary Judgment.

APR's response includes a summary of the actions it has taken to develop its project. (APR Response at 21-22). Although APR investors and experts may firmly believe that the project is "technically and financially feasible" and that "the water can be put to beneficial use," the fact remains that not one of the public entities identified as potential end users has indicated any interest whatsoever in buying or leasing water from APR. Nor has APR identified a single commercial user interested in buying or leasing water from APR. Ultimately, it is the end users, not APR, that will put the water to a specific beneficial use in a specific amount in a specific location. Without commitments of some type from its proposed customers, there is simply no evidence that the water APR seeks to appropriate will be put to beneficial use in a reasonable time.

APR argues, once again, that it is not required to identify specific end users or to have end users join its application. (Response at 28; 33-35). The Parties have fully addressed this argument in the responses to APR's Second Motion for Summary Judgment and the Board hereby incorporates the following as though set forth herein: State Engineer's Response at 6-8;

Board's Response at 5-13; The Carol Pittman Protestants' Response at 4-7, 12-18; Community Protestant's Response at 21-27.

APR argues that summary judgment is inappropriate because there are substantial disputes of material fact that preclude judgment as a matter of law with respect to speculation. (APR Response at 18). Pursuant to Rule 1-056 NMRA, summary judgment may be granted as a matter of law "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Board has already addressed this contention in its Response to APR's Second Motion for Summary Judgment, which the Board incorporates as though set forth herein. (Board Response at 13-14). As previously stated, APR has submitted its factual and legal arguments as to its intent to complete the project and has responded to the various summary judgment motions regarding the issue of speculation. APR has not identified any additional evidence or testimony that it would submit at an evidentiary hearing. The Court has all of the information, factual and legal, to determine if the Application is speculative as a matter of law. Summary judgment is therefore appropriate in this matter.

In the final analysis, APR's argument comes down to "we have the subjective intent to build a pipeline so that we can sell or lease water to currently unidentified third parties that might, at some point in the future, put the water to beneficial use somewhere in the seven counties identified in the Application" and therefore the Application is not speculative. The Application and the Jichlinski affidavit may show an intent to build a pipeline and an intent to sell or lease appropriated water to third parties so that those third parties can put the water to beneficial use. However, as has been stated repeatedly by the State Engineer and the Parties

opposing the Application, what is missing is specific information about who will actually use the water, how much water will be used, and where and when it will be used. It is the failure to take the next step of identifying the who, how much, where and when of the beneficial use that makes the Application speculative. As the State Engineer stated "APR may demonstrate that it intends to build a pipeline in a specific location to deliver 54, 000 acre-feet of water to named end-users; however, simply hoping that these end users are ready, willing and able to use that water sounds more like a pipe dream." (SE Response at 2).

Given the facts of this case and the applicable law, if APR's Application is not speculative, it is hard to imagine what would constitute a speculative application. "Approval of the Application would 'encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains.' *Vidler*, 594 P.2d 566, 568." (AR 2516, ¶80).

The State Engineer correctly found that APR's Application is speculative because it does not contain "a specific plan to appropriate a specific quantity of water for specific identified beneficial uses" and "there is no showing of a non-speculative need." (Administrative Record (AR) at 2516-2517). The State Engineer correctly concluded that approval of the Application "would be contrary to long established principles of the law of prior appropriation embodied in our Constitution and water code." (*Id.*). APR has not demonstrated, either factually or legally, that the State Engineer erred in denying the Application and the Board respectfully requests that the Court confirm the State Engineer's denial.

Respectfully submitted,

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I hereby certify that a true and correct copy of the foregoing was served on all counsel of record via the Court's electronic filing system on the 14th day of December, 2023.

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