FILED
7th JUDICIAL DISTRICT COURT
Catron County
12/14/2023 12:43 PM
RACHEL GONZALES
CLERK OF THE COURT
Rachel Gonzales

STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

AUGUSTIN PLAINS RANCH, LLC,

Applicant/Appellant,

v.

D-728-CV-2018-00026
Judge Roscoe A. Wood

MIKE HAMMAN, P.E.,

New Mexico State Engineer/Appellee,

and

Appeal from a decision of the
New Mexico State Engineer
in OSE Hearing #17-005

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.,*

Protestants/Appellees.

THE CAROL PITTMAN PROTESTANTS' REPLY TO THE AUGUSTIN PLAINS RANCH'S RESPONSE TO THE PITTMAN PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

Introduction

The members[1] of the Carol Pittman Protestants Group ("the Pittman Protestants"), hereby reply to the Augustin Plains Ranch's ("APR's") Consolidated Response to Appellees' Motions for Summary Judgment (APR's Response). Because the Pittman Protestants' Motion for Summary Judgment ("Pittman

[1] Carol Pittman, Patti Bearpaw, Lisa Burroughs-Betras, the Center for Biological Diversity, Beverley and Bryan Dees, Paul Geasland, Michael Hasson, Don and Cheryl Hastings, Patricia Henry, Ian and Margreet Jenness, Victoria Linehan, Mary Ray, Elaine Smith, and Peggy Thompson.

Protestants' Summary Judgment Motion") is one of the Motions to which APR's Response is directed, this Reply is directed to the assertions in APR's Response that pertain to the Pittman Protestants' Summary Judgment Motion.

There are four principal reasons why APR's Response is unpersuasive. The first is that the Response misconstrues and fails to respond to Pittman Protestants' argument that is based on the two stage procedure proposed by the Application filed by APR in 2014 and amended in 2016 ("the Current APR Application").

The second reason is that APR's Response relies inappropriately on the Supreme Court's ruling in *Mathers v. Texaco*, 1966-NMSC-226, 77 N.M. 239.

The third reason is that the Current APR Application and the supporting materials cited by APR demonstrate that the Application is speculative.

The fourth reason is that – contrary to the assertions in APR's Response – the Current APR Application fails to provide adequate notice to members of the public and parties that may protest that Application.

Argument

I. APR's Response misconstrues and fails to respond to the Pittman Protestants' argument addressing APR's proposed two stage procedure.

APR's Response purports to address the arguments made by protestants[2]

[2] Although APR's Response purports to address Catron County Board of County Commissioners' arguments (APR's Response page 14), the Pittman Protestants also made arguments based on APR's proposed two stage procedure.

by alleging that "bifurcating the hearing would have provided an efficient and fair process …." (APR's Response page 15) and that "whether or not the State Engineer bifurcates its consideration of the issues raised in the [Current APR] Application is legally irrelevant" to this matter. (APR's Response, page 17) Those allegations misconstrue the Pittman Protestants' arguments based on the proposed two stage procedure and fail to respond to those arguments.

Contrary to the assertions in APR's Response (APR's Response pages 14-17), the Pittman Protestants did not argue that having a two stage procedure for consideration of the Current APR Application would be unfair or inefficient. Rather, the Pittman Protestants made two points in their Summary Judgment Motion and in their Response in Opposition to the Augustin Plains Ranch's Second Motion for Summary Judgment ("the Pittman Protestants' Response") based on the Current APR Application's proposed two stage procedure. The first point was that the two stage procedure demonstrated that the beneficial use or uses to which the water at issue would be put had not been determined, and the second point was that the two stage procedure demonstrated that the place or places where that use or those uses would occur also had not been determined.

A. APR's proposed two stage procedure shows that neither the use of the water at issue nor the place where that use would occur has been determined.

As the Pittman Protestants have pointed out, the Current APR Application's

two stage procedure acknowledges that the Current APR Application does not specify the beneficial use or uses to which the water at issue would be put or the place or places were that use or those uses would occur. (Pittman Protestants' Summary Judgment Motion, pages 26-28 and Pittman Protestants' Response, pages 24-25) On the contrary, the Current APR Application indicates that the first stage of the hearing procedure consists of an evaluation of the hydrologic issues posed by the Application, including how much ground water can be appropriated without impairing other water rights and the effect of "enhanced recharge." (Current APR Application, Attachment 2, page 2 **[R 00016]**)

According to the Current APR Application, after an order is entered on these hydrologic issues, APR will request that it be given up to a year in which to "adjust and finalize the individual purposes of use, places of use, and amounts for each use" (Current APR Application, Attachment 2, page 3 **[R 00017]**), and that the second stage of the hearing would begin when APR "submits an Amended Application with additional detail regarding the types and places of use for the water." (Current APR Application, Attachment 2, page 3 **[R 00017]**)

In addition, the Current APR Application proposes that Stage 2 of its two stage procedure would consist of determining whether "the detailed purposes and places of use can be approved without impairment of other rights, detriment to the public welfare, or being contrary to conservation of water within the State." (*Id.*)

The Current APR Application indicates as well that the "individual detailed purposes and amounts of use will be finalized in Stage 2 of the application process." (Current APR Application, Attachment 2, page 3, Section III.2a **[R 00017]**)

Thus, these proposals in the Current APR Application indicate that the beneficial use or beneficial uses for the ground water APR seeks to appropriate have not yet been determined as is required by Section 72-12-3.A(2) NMSA 1978. These proposals also confirm that the specific place or places for the beneficial use or beneficial uses of the ground water APR seeks to appropriate have not been determined, as is required by Section 72-12-3.A(6) NMSA 1978.

B. APR' Response fails to address this argument by the Pittman Protestants.

APR's Response never addresses this argument by the Pittman Protestants. Instead, APR's Response focuses solely (and incorrectly) on an argument that APR attributes to the Catron County Board of County Commissioners ("Catron County"). APR's Response alleges that Catron County has objected to any bifurcation of this proceeding. APR also alleges that bifurcation of the issues in this matter is "legally irrelevant" to determining whether the Current APR Application was complete. (APR's Response, pages 14-17)

In fact, however, Catron County made an argument similar to the argument

presented by the Pittman Protestants.[3] Both argued that the proposed two stage procedure confirms that the Current APR Application fails to specify the beneficial use or uses for the water APR proposes to appropriate and fails to specify the location or locations where that use or those uses would occur. (Catron County Motion and Memorandum for Summary Judgment, pages 27-30; Pittman Protestants' Summary Judgment Motion, pages 26-28) That is the critical point about the Current APR Application's proposed two stage procedure; it makes clear that the beneficial use or uses for the water at issue have not been determined, and that the place or places where that use or those uses would occur also have not been determined.

Thus the two stage procedure proposed in the Current APR Application demonstrates that the Application does not provide the information that is required by §72-12-3.A(2) NMSA 1978 and §72-12-3.A(6) NMSA 1978 for an application to appropriate ground water. For that reason, this Court should deny APR's appeal from the State Engineer's denial of the Current APR Application.

II. APR's position is not supported by the Supreme Court's ruling in *Mathers v. Texaco.*

Like APR's Second Motion for Summary Judgment, APR's Response relies inappropriately on the Supreme Court's decision in *Mathers v. Texaco*, 1966-

[3] The Pittman Protestants do not presume to speak for Catron County, but on this point the Pittman Protestants and Catron County presented similar arguments.

NMSC-226, 77 N.M. 239 (APR's Second Motion for Summary Judgment, pages 11-12; APR's Response, pages 6-7, 29-30) That reliance is inappropriate because the facts in *Mathers v. Texaco* are very different from the facts in this matter.

Here, the Current APR Application lists many different purposes for which the water APR seeks to appropriate could be used. The Application states that the water could be used for unspecified municipal and other uses: unspecified commercial water sales. Current APR Application, page 3, ¶2 **[R 00002]**. The Application also indicates that the water could be used for unspecified municipal, industrial and other uses (Current APR Application, page 3, ¶5.g **[R 00004]**) or for unspecified municipal purposes within the authorized service areas of Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo County Water Utility Authority, or Rio Rancho.[4] (Current APR Application Attachment 2, page 4, ¶5.A)

In addition, the Current APR Application states that the water to be appropriated also could be used for unspecified municipal purposes and commercial sales along the length of APR's proposed pipeline. (Current APR

[4] As noted on page 4 of the Pittman Protestants' Response, two of these entities – Magdalena and Socorro – protested the Current APR Application, and the Chair of a third – the Albuquerque/Bernalillo County Water Utility Authority – has stated that the Authority will not purchase the right to use water appropriated from the San Agustin Basin by APR. The statement by the Chair of the Albuquerque/ Bernalillo County Water Utility Authority to which APR has objected is part of the Record in this matter and has been referred to earlier in these proceedings without objection from APR.

Application, Attachment 2, page 1, Section I **[R 00015]**) The Application indicates as well that the water could be used for bulk sales to be put to unspecified uses by municipal and investor-owned utilities, commercial enterprises, and state and federal government agencies. (Current APR Application, Attachment 2, Page 5, Section III, ¶6.B **[R 00019]**)

Moreover, the Current APR Application indicates an extremely open-ended list of places where the water APR seeks to appropriate would be used. According to the Application, the water could be used for unspecified municipal purposes and unspecified commercial sales at unnamed locations along the 140 mile length of APR's proposed pipeline. Current APR Application, Attachment 2, page 1, Section I **[R 00015]**. The Application also indicates that the water could be used within the service areas of Magdalena, Socorro, Belen, Los Lunas, the Albuquerque/Bernalillo County Water Utility Authority, or Rio Rancho. Finally, the Application states that the water could be used at undisclosed locations in seven New Mexico counties (Current APR Application, page 2, ¶3 **[R 00003]**), which include a total of about 12 million acres of land.

None of these descriptions of possible uses of the water at issue or the places where those uses would occur is at all definite; each of them is only possible use or uses for that water at possible places. In *Mathers v. Texaco*, on the other hand, the proposed use of water to be appropriated was quite definite. Texaco sought to

appropriate 350 acre feet of water per year for the purpose of flooding 1,360 acres of oil-bearing formation in a producing oil field. 1966-NMSC-2262, ¶1, 77 N.M. 241-242. The use of the water for this purpose, which had been approved by the State Oil Conservation Commission, was estimated to recover approximately one million barrels of oil. *Id.* Unlike the Current APR Application, Texaco was very clear about the purpose for which it sought to appropriate the water at issue and the results that its use of the water would produce. Moreover, Texaco was also very clear about the place where the water it sought to appropriate would be used. The water would be used on 1,360 specific acres in a producing oil field. *Id.*

The decision in *Mathers v. Texaco* is not relevant to this matter. Moreover, the issue that was raised in *Mathers v. Texaco* as to the sufficiency of Texaco's application to appropriate water was very different from the issue before this Court. Here, the issues are the failure of APR to include in the Current APR Application specific information about the purpose and place of use of the water to be appropriated and whether the Application is speculative. In *Mathers v. Texaco*, the issues were whether Texaco's application was required to be made in the name of any person or in the names of all persons who would benefit from use of the water (1966-NMSC-2262, ¶¶24-27, 77 N.M. 247-249) and whether the proposed appropriation of water would impair the rights of the holders of other water rights (*see* 1966-NMSC-2262, ¶¶4-23, 77 N.M. 242-246).

For these reasons, there is no merit to the allegation in APR's Response that an issue here is whether the State Engineer's Decision was inconsistent with the ruling in *Mathers v. Texaco*.

III. The Current APR Application is speculative.

A. The Current APR Application provides only possible beneficial uses for the water at issue and possible locations for those uses.

The contrast between the facts in *Mathers v. Texaco* and the facts in this matter demonstrates that the Current APR Application is speculative. In *Mathers v. Texaco,* Texaco sought to appropriate a specified amount of water – 350 acre feet per year for a specific purpose – flooding 1,360 specific acres of oil-bearing formation – at a specific place – in a producing oil field. 1966-NMSC-2262, ¶1, 77 N.M. 241-242. The purpose of using the water at issue for this purpose – which had been approved by the State Oil Conservation Commission – was projected to recover about one million barrels of oil. *Id.*

The Current APR Application provides nothing comparable to this level of detail about the use or uses to which APR would put the water to be appropriated or where that use or those uses would occur. As the Pittman Protestants pointed out at pages 7-8 above, the Current APR Application only provides a list of possible beneficial use or beneficial uses for the water that APR proposes to appropriate and a list of possible places where that beneficial use or those beneficial uses could occur. There is nothing in the Current APR Application that

specifies either the beneficial use or uses to which the water at issue would be put or the specific location or locations where that use or those uses would occur.

Thus the Current APR Application keeps open a wide range of possibilities for APR's possible use of the water that APR seeks to appropriate. The Application provides neither a specific beneficial use or uses for the water at issue nor a specific place or places where that use or those uses would occur. The Current APR Application therefore proposes to appropriate the water at issue in order to be able to sell the right to use it for possible uses at possible places. As the Supreme Court has ruled, that is speculation. *See Millheiser v. Long*, 1900-NMSC-012, ¶¶30-31, 10 N.M. 116-117.

B. Michael Jichlinski's affidavit confirms that the Current APR Application is based on speculation.

Michael Jichlinski's affidavit,[5] on which APR relies for its assertion that the Current APR Application is not speculative (pages 22-23 of APR's Response), in fact demonstrates the opposite. Mr. Jichlinski's allegations demonstrate only that APR has developed conjectures or inferences without proof or evidence that purport to show that APR has "end-users" (Mr. Jichlinski's term) for the water at issue. Those conjectures or inferences constitute speculation because they are not supported by facts or other evidence.

[5] Mr. Jichlinski's affidavit was Exhibit 1 to APR's Response in Opposition to Catron County's Motion for Summary Judgment filed on May 8, 2019.

First, Mr. Jichlinski's conclusions are based alleged communications with "potential end users" of the water at issue, but none of those "end-users" is even alleged to have made a commitment to purchase the right to use the water that APR proposes to appropriate. Mr. Jichlinski begins paragraph 28 of his affidavit by stating that:

> [b]ased on *discussions with potential end-users,* as well as research, evaluation, and publically [*sic*] available information, [APR] has performed an updated analysis of where the water will be put to beneficial use.

Jichlinski affidavit, ¶28, emphasis added.

Mr. Jichlinski then asserts on the basis of this information and his analysis that specific amounts of the water at issue could be used in particular places. Similarly, later in that paragraph, Mr. Jichlinski asserts that:

> [t]he nature of the agreements that [APR] anticipates and *has discussed with end-users* are illustrated in Exhibit F to Attachment 2 to [the Current APR] Application.

Id., emphasis added.

In addition, he then states that "*end-users have indicated a preference* to wait until [APR] obtains a permit before finalizing any agreement" and that "there is strong interest in the [APR] project *among end-users.*" *Id.*, emphasis added.

Thus the most that can be said is that some potential "end-users" of the water at issue have expressed a "strong interest in the [APR] project." None of the potential "end-users" of the water at issue has made any commitment to purchase

the right to use that water. Similarly, none of the potential "end-users" of the water has made any commitment to use the water at a specific location.

C. The Rio Rancho City Manager's letter to Mr. Jichlinski does not indicate a commitment to purchase the right to use APR water.

Finally, the letter to Mr. Jichlinski from Keith Riesberg, the City Manager for the City of Rio Rancho, also does not demonstrate a specific use at a particular place for the water that APR proposes to appropriate. First, it indicates only that:

> [i]f [APR] is successful in its application, *we [Rio Rancho] are interested in discussing with [APR] moving water into Rio Rancho's water utility system* to serve Rio Rancho's municipal, industrial and commercial uses.

Riesberg letter to Jichlinski ¶2, emphasis added.

Thus Rio Rancho's only expressed interest is in "*discussing moving water into Rio Rancho's water system*" if the Current APR Application is granted. That does not constitute a commitment to put the water that APR proposes to appropriate to one or more beneficial uses or to put that water to one or more beneficial uses at a specific place or places.

Second, Rio Rancho's need – as expressed in Mr. Riesberg's letter – is for "several thousand acre feet of water" (*Id.*, ¶1) – not the 54,000 acre feet of water that APR proposes to appropriate each year. Thus the letter to Mr. Jichlinski from Mr. Riesberg does not express a specific need at a specific place for the 54,000 acre feet of water that APR proposes to appropriate each year.

D. The Current APR Application and its supporting materials indicate that the Application is speculative.

Mr. Jichlinski's affidavit and Mr. Riesberg's letter indicate that none of the potential "end-users" of the water APR proposes to appropriate from the San Agustin Basin has made a commitment to purchase the right to use that water. Moreover, as explained at pages 7-8 above, the Current APR Application provides neither a specific beneficial use or uses for that water nor a specific location or locations where the water would be used.

Thus the Current APR Application's proposed appropriation of that water is based on APR's speculation that APR will be able to sell the right to use that water to one or more "end-users". Because the Current APR Application is speculative, this Court should deny APR's appeal from the State Engineer's ruling dismissing the Current APR Application.

IV. The Current APR Application fails to provide adequate notice to possible protestants.

APR's Response alleges unpersuasively that the Current APR Application was complete because it provided all of the information required for an application to appropriate ground water. (APR's Response, pages 4-7) APR's allegation is inaccurate for two reasons. First, APR's Response relies on the Supreme Court's ruling in *Mathers v. Texaco*, 1966-NMSC-226, 77 N.M. 239, but for the reasons outlined above, that ruling is not relevant to this matter. Second, APR's allegation

that the Current APR Application provides all of the information required to give adequate notice to members of the public is incorrect.

The statute governing applications to appropriate ground water makes clear that the Current APR Application does not provide all of the information required to give notice to members of the public who wish to protest that Application. APR cites *Carangelo v. Albuquerque/Bernalillo County Water Utility Authority*, 2014-NMCA-032, 320 P.2d 492 for the proposition that an application to appropriate surface water need only provide notice adequate to allow interested parties to determine whether the proposed appropriation would cause impairment of other water rights. (APR's Response, page 6) Although that is the only issue that was addressed by the Court of Appeals at that point in the *Carangelo* case (2014-NMCA-032, ¶20), the statute governing applications to appropriate ground water and protests of those applications provides that impairment is not the only possible basis for protests of applications to appropriate ground water.

Section 72-12-3 NMSA 1978 governs applications to appropriate ground water and provides for protests to those applications. As the Pittman Protestants have pointed out (Pittman Protestants Summary Judgment Motion, pages 21-22) section 72-12-3.A NMSA 1978 provides that an application to appropriate ground water must designate both "the beneficial use to which the water will be applied" and "the place of the use for which the water is desired." Sections 72-12-3.A(2)

NMSA 1978 and 72-12-3.A(6) NMSA 1978. A similar level of specificity is required for protests of a proposed appropriation. Section 72-12-3.D NMSA 1978 provides in part that:

> Any person, firm or corporation or other entity objecting that the ranting of the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state and showing that the objector will be *substantially and specifically* affected by the granting of the application shall have standing to file objections or protests ….

NMSA 1978 §72-12-3.D, emphasis added.

As this Court pointed out in its 2012 Memorandum, requiring specificity by objectors but not by applicants would be absurd:

> It would be anomalous for an applicant to be allowed to give general statements of intent to appropriate water for beneficial use yet require specificity for objectors. That over 900 protests were filed in this case demonstrates the absurdity of this result, if Applicant's [APR's] interpretation of the statute were allowed to stand.

2012 District Court Memorandum, pages 18-19 **[R 01393-01394]** (emphasis in original).

This Court's analysis is particularly applicable to protests of proposed appropriations that are based not only on assertions of impairment but also on assertions that the proposed appropriation would be contrary to conservation of water in the state or assertions that the proposed appropriation would be contrary to the public welfare of the state.

An individual or entity protesting the Current APR Application could present arguments addressing conservation of water and the public welfare based on the effects of APR's proposed withdrawal of water from the San Agustin Basin, but such an individual or entity would almost certainly not be able to present those arguments based on the alleged use and asserted place of use of that water. There is simply not enough information in the Current APR Application to provide a basis for an argument that the use of the water – for municipal and industrial purposes, commercial sales, or uses by federal and state utilities and agencies – would be contrary to conservation of water or contrary to the public welfare. Similarly, the Current APR Application's descriptions of the place where the water at issue would be used – in parts of seven counties (that include approximately 12 million acres), in six municipal service areas, and at undisclosed locations along the 140 mile pipeline – would make it difficult if not impossible for a protestant to argue that the proposed appropriation would be contrary to conservation of water or contrary to the public welfare.

Thus there is no merit to APR's assertion that the Current APR Application provides adequate notice to potential protesters.

Conclusion

APR's Response is unpersuasive because:

- It misconstrues and fails to respond to the Pittman Protestants' argument

based on the Current APR Application's proposed two stage procedure;

- It relies inappropriately on the Supreme Court's ruling in *Mathers v. Texaco;*
- The Current APR Application and the supporting documents provided by APR demonstrate that the Application is speculative; and
- The Current APR Application fails to give adequate notice to members of the public and potential protestants.

For these reasons and the other reasons outlined in the Pittman Protestants' Summary Judgment Motion and their Response to APR's Summary Judgment Motion, this Court should deny APR's appeal from the State Engineer's order dismissing the Current APR Application.

Dated: December 14, 2023.

MEIKLEJOHN LAW FIRM LLC

/s/Douglas Meiklejohn
Douglas Meiklejohn
1304 Escalante Street
Santa Fe, NM 87505
Telephone: (505) 699-7262
Electronic mail: meiklethepickle@gmail.com

Attorney for the members of the Pittman Protestants Group

Certificate of Service

I certify that this Reply was served on counsel of record in this matter through the Odyssey electronic filing system on December 14, 2023.

/s/Douglas Meiklejohn
Douglas Meiklejohn