

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,

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

and

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

Protestants/Appellees.

**THE CAROL PITTMAN PROTESTANTS' REPLY TO THE
STATE ENGINEER'S RESPONSE TO THE
CAROL PITTMAN PROTESTANTS' MOTION FOR SUMMARY
JUDGMENT**

Introduction

The members¹ of the Carol Pittman Protestants Group (“the Pittman Protestants”), hereby reply to the New Mexico State Engineer’s (“the State

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.

Engineer's") response to the Pittman Protestants' Motion for Summary Judgment ("the State Engineer's Response").

As is indicated at pages 1-2 of the State Engineer's Response, the State Engineer agrees with the Pittman Protestants' argument that the Application filed by the Augustin Plains Ranch ("APR") in 2014 and amended in 2016 ("the Current APR Application") is speculative and should be denied on that ground. The Pittman Protestants' Reply therefore does not address that issue.

However, the State Engineer's Response also asserts unpersuasively that the Pittman Protestants' argument that the Current APR Application was not complete and should have been denied on that basis was misplaced.² (State Engineer's Response ages 4-6) More specifically, the State Engineer asserted that the Pittman Protestants should not have relied on this Court's 2012 ruling that the Original APR Application was incomplete. *Id.* The State Engineer's Response implied that the Pittman Protestants relied on this Court's 2012 ruling without taking into account the differences between the Original APR Application and the Current APR Application. As is explained below, the State Engineer's allegations are not

² The State Engineer's Response alleges that the Pittman Protestants argued that the Current APR Application should not have been accepted for filing. (State Engineer's Response, page 4) In fact, however, the Pittman Protestants never argued that the Current APR Application should not have been accepted for filing; rather, they argued that it should have been denied because it lacked required information. (Pittman Protestants' Summary Judgment Motion, pages 20-31)

credible because the Pittman Protestants did not rely solely on this Court's 2012 ruling but instead relied on the principles established by New Mexico case and statutory law that were the basis for this Court's 2012 ruling and the failures of the Current APR Application to comply with those principles. These principles and the Current APR Application's failures to follow them are explained below.

Argument

I. The Pittman Protestants relied on New Mexico water law for their position that the Current APR Application is not complete.

A. The Pittman Protestants cited the New Mexico Constitution as interpreted by the Courts for the argument that water can only be appropriated for beneficial use.

The Pittman Protestants pointed out at page 20 of their Summary Judgment Motion that the New Mexico Constitution provides that beneficial use is the basis, the measure, and the limit of the right to use water. New Mexico Constitution, Article XVI, §3; NMSA 1978, §72-1-2 (1941). The Pittman Protestants also explained in their Summary Judgment Motion that New Mexico Courts have required that applications to appropriate water must specify the use or uses to which the water will be put and the place or places where that use or those uses will occur. (Pittman Protestants' Summary Judgment Motion, pages 20-21, citing *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, 135 N.M. 375 and *Carangelo c. Albuquerque-Bernalillo County Water Utility Authority*, 2014-NMCA-032, 320 P.3d 492)

In addition, the Pittman Protestants pointed out that the Current APR Application seeks to monopolize an entire water supply just as the defendants in *Millheiser v. Long*, 1900-NMSC-012, 10 N.M. 99 proposed to do, and that the Supreme Court rejected the efforts of the defendants in that case based on the principle of beneficial use. (Pittman Protestants' Summary Judgment Motion, pages 30-31; 1900-NMSC-012, ¶30, 10 N.M. at 116-117)

Finally, the Pittman Protestants explained that this Court recognized these principles in its 2012 ruling addressing the Original APR Application. (Pittman Protestants' Summary Judgment Motion, page 21)

B. The Pittman Protestants relied on New Mexico statutes' requirement that applications to appropriate ground water provide specific information.

The Pittman Protestants also cited the New Mexico Groundwater Code's provisions mandating that applications to appropriate ground water include specific information about the beneficial use to which the water to be appropriated will be put and the place or places where that beneficial use will occur. (Pittman Protestants' Summary Judgment Motion, pages 21-22, citing §§ 72-12-3.A(2) and 72-12-3.A(6) NMSA 1978)

II. The Pittman Protestants explained that the Current APR Application does not specify either the beneficial use for the water APR seeks to appropriate or the place where that water would be used.

In addition to establishing that New Mexico law requires that applications to

appropriate ground water must provide specific information about both the beneficial use for the water to be appropriated and the place where that use will occur, the Pittman Protestants explained that the Current APR Application does not provide either of those items of information.

A. The Pittman Protestants explained that the Current APR Application does not indicate the specific beneficial use or uses to which the water at issue would be put.

The Pittman Protestants pointed out that the Current APR Application lists various possible uses for the water at issue: municipal and other use: commercial water sales; municipal, industrial and other users; municipal purposes within six authorized service areas; municipal purposes and commercial sales for uses at locations along the length of the 140 mile proposed pipeline; and bulk sales to be put to use by municipal and investor-owned utilities, commercial enterprises, and state and federal government agencies. (Pittman Protestants Summary Judgment Motion, pages 23-24, citing various provisions in the Current APR Application)

The State Engineer's Response addressed only two of these proposed uses – municipal and commercial uses – asserting incorrectly that those were the only uses listed in the Current APR Application. (State Engineer's Response, pages 5-6) The State Engineer's Response said nothing about APR's proposed use of the water at issue for industrial uses, bulk sales, investor-owned utilities, or use by

state and federal government agencies.³

Moreover, the State Engineer's assertion that municipal uses can cover all uses in a municipal system (State Engineer Response pages 5-6) does nothing to address proposed use of the water at places along the 140 mile long pipeline that APR proposes to build where there are no municipalities. That assertion also ignores the point that two of the municipalities named in the Current APR Application – Magdalena and Socorro – protested the Current APR Application, and the Chair of a third – the Albuquerque/Bernalillo County Water Utility Authority – has said that the Authority will not purchase the right to use water appropriated by APR from the San Agustin Basin. (Pittman Protestants' Summary Judgment Motion, pages 14-17; page 14, note 6)

Thus, contrary to the State Engineer's assertions, the Pittman Protestants relied on the demonstrated failure of the Current APR Application to indicate the specific beneficial uses to which the water at issue would be put.

B. The Pittman Protestants explained that the Current APR Application does not state the specific place or places where the water at issue would be used.

Also contrary to the State Engineer's assertion that the Pittman Protestants

³ There is nothing in the Current APR Application to indicate the use or uses to which these government agencies would put the water that APR proposes to appropriate from the San Agustin Basin or the specific place or places where that use or those uses would occur.

relied solely on this Court's ruling addressing the Original APR Application, the Pittman Protestants relied on the failure of the Current APR Application to designate the specific place or places where the water at issue would be used. The Pittman Protestants pointed out that the Current APR Application indicates only that the water to be appropriated would be used in parts of seven New Mexico counties (Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe), within six authorized municipal service areas (Magdalena, Socorro, Belen, Los Lunas, Albuquerque/Bernalillo County Water Utility Authority, and Rio Rancho), and at undisclosed locations along the 140 mile proposed pipeline. (Pittman Protestants' Summary Judgment Motion, pages 23-24, citing various provisions in the Current APR Application)

Thus the Pittman Protestants relied on the failure of the Current APR Application to designate the specific place or places where the water to be appropriated would be used.

III. The Pittman Protestants based their argument on the Current APR Application's proposal for a two stage process.

The Pittman Protestants also relied on the Current APR Application's proposed two stage process for consideration of the Application. That two stage process indicates clearly that neither the use or uses for the water at issue nor the place or places where that use or those uses would occur has been determined.

As the Pittman Protestants pointed out in their Summary Judgment Motion, the Current APR Application states that the first stage of the proceeding 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”. (Pittman Summary Judgment Motion, page 26, citing the Current APR Application) As the Pittman Protestants also noted, the Current APR Application also states that once an order has been 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” 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.” (Pittman Protestants’ Summary Judgment Motion, pages 26-27)

The Pittman Protestants pointed out as well that the Current APR Application proposes that the second stage of its two stage process 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 also states that the “individual detailed purposes and amounts of use will be finalized in Stage 2 of the application process.” (Pittman Protestants’ Summary Judgment Motion, page 27, citing the Current APR Application)

On the basis of these provisions in the Current APR Application, the Pittman Protestants argued that neither the use or uses to which the water at issue would be put nor the place or places where that use or those uses would occur has been determined. The Pittman Protestants relied on this point as well for their argument that the Current APR Application did not provide the information that is required for an application to appropriate ground water.

IV. The Pittman Protestants relied on precedents set by the State Engineer.

Finally, to rebut APR's assertion that the State Engineer adopted new standards when he denied the Current APR Application (APR's Second Motion for Summary Judgment, pages 10-19), the Pittman Protestants explained in their Response to APR's Second Summary Judgment Motion (filed on September 21, 2023) ("Pittman Protestants' Response to APR's Summary Judgment Motion") that the State Engineer's ruling denying the Current APR Application was consistent with State Engineer rulings in the earlier cases involving the applications filed by Berrendo, LLC and Robert Crenshaw, and in the earlier matter involving the Original APR Application.

Specifically, the Pittman Protestants pointed out that in the case involving the applications filed by Berrendo, LLC, the State Engineer required specificity as to both the beneficial use or uses of the water to be appropriated and the place or places where that use or those uses would occur. (Pittman Protestants' Response

to APR's Summary Judgment Motion, pages 15-16) Similarly, in the matter involving the application filed by Robert Crenshaw, the State Engineer ruled that the application's description that the water to be appropriated would be used either inside or outside the Tularosa Basin did not constitute an adequate description of the place where the water to be appropriated would be used. (Pittman Protestants' Response to APR's Summary Judgment Motion, pages 16-17) Finally, in the matter involving the Original APR Application, the State Engineer determined that the description in the application that included "almost all possible uses of water" at any areas:

within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin" was not adequate to allow for "a reasonable evaluation of whether the proposed appropriation would impair existing rights or would not be contrary to the conservation of water within the state or would not be detrimental to the public welfare.

(Pittman Protestants' Response to APR's Summary Judgment Motion, page 17)

Thus the Pittman Protestants also relied on previous decisions made by the State Engineer.

Conclusion

The State Engineer's assertion that the Pittman Protestants relied solely on this Court's ruling addressing the Original APR Application is unpersuasive. In addition, for the reasons outlined above and in the Pittman Protestants' Summary

Judgment Motion, this Court should accept the Pittman Protestants' argument that the Current APR Application was incomplete and should have been denied on that basis.

Dated: December 14, 2023.

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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