STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

AUGUSTIN PLAINS RANCH, LLC,
Applicant/Appellant,
v.

TOM BLAINE, P.E. ,
New Mexico State Engineer/Appellee,
and

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS, *et al.,*
Protestants/Appellees.

D-728-CV-2018-00026
Judge Roscoe Woods

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

COMMUNITY PROTESTANTS' REPLY TO AUGUSTIN PLAINS RANCH, LLC'S CONSOLIDATED RESPONSE TO APPELLEES' MOTIONS FOR SUMMARY JUDGMENT

Joan and Don Brooks, James Coleman, Randy Cox, Mike and Ann Danielson, John and Eileen Dodds, Gila Conservation Coalition, Upper Gila Watershed Alliance, Homestead Landowners Association, Rick and Patricia Lindsay, Owen Lorentzen, Maureen M. MacArt, Ray Pittman, Patricia and John H. Preston, Christopher Sansom, Kathy and Ray Sansom, and Roger Thompson, (collectively, "Community Protestants"), through counsel, the New Mexico Environmental Law Center (Maslyn Locke, Ann McCartney and Mara Yarbrough), submit this Reply to Applicant-Appellant Augustin Plains Ranch, LLC's Consolidated Response to Appellees' Motions for Summary Judgment ("Response"). The Court should disregard the allegations presented by Applicant Augustin Plains Ranch, LLC's ("APR") and grant Community Protestants' Motion for Summary Judgment ("Motion") because APR has failed to demonstrate that a genuine issue of material fact exists for trial and has not shown that Community Protestants are not entitled to judgment as a matter of law.

I. Introduction

In APR's most recent attempt to assert it is entitled to an evidentiary hearing on its flawed 2014 Application, APR asks the Court to simply believe it does not intend to hoard the water it seeks.

Moreover, APR asks the Court to require the State Engineer to move forward in accepting an insufficient application that fails to show APR's bona fide intent to appropriate the sought-after water and to apply it to some beneficial use or purpose. In asserting Community Protestants are not entitled to summary judgment, APR fails to point to any genuine issue of material fact and fails to successfully demonstrate Community Protestants are not entitled to judgment as a matter of law. For the reasons set forth below, Community Protestants urge the Court to reject APR's arguments and respectfully request the Court grant summary judgment in favor of Community Protestants and dismiss APR's appeal.

II. Argument

A. APR's Response is a thinly veiled attempt to ask again for an evidentiary hearing, contrary to the Court of Appeal's ruling that APR has received the only hearing to which it is statutorily entitled, and should be rejected by this Court.

Community Protestants urge the Court to see APR's Response for what it is: continued obstinacy and an unwillingness to accept the New Mexico Court of Appeals' holding in *Augustin Plains Ranch v. D'Antonio* that "[APR] was not entitled to an evidentiary hearing" to present additional evidence in support of its 2014 Application and that "based on [the Court's] review of applicable statutes, regulations and case law … [APR] received a hearing sufficient to satisfy statutory requirements and resolve the issues raised by the motions for summary judgment." 2023-NMCA-001, ¶¶ 8-22, cert. denied (S-1-SC-39556, October 28, 2022). Not only does APR blatantly disregard the Court of Appeals' decision, APR also obstinately defies the Seventh Judicial District's directive that the scope of motions for summary judgment on remand is limited to only two issues, (1) whether the application is complete on its face, and (2) whether the 2014 Application is speculative. Notably, this scope excludes the issue of whether APR is entitled to an evidentiary hearing. [04-17-23 Hrg. 10:19:03-10:22:15 AM] Rather than adhering to the "familiar rule of law that all matters determined by a former decision of a case become the law of the case and are binding upon the courts and litigants," *see First Nat'l Bank v. Cavin*,

1923-NMSC-016, ¶ 3, 28 N.M. 468 (opting in a second appeal to adhere to the lower Court's opinion rather than further consider the case), APR refuses to take no for an answer. Instead, APR attempts to persuade this Court to ignore the Court of Appeals and to consider its request for an evidentiary hearing on issues APR had ample opportunity to address at hearing before the State Engineer. Response at 29-30. In asserting it is entitled to an evidentiary hearing, APR claims questions of reasonableness and feasibility of its proposed water grab cannot be resolved at the summary judgment stage, *see, e.g.*, Response at 12-13, 23, – ignoring the fact that any applicant must demonstrate, with specificity, their bona fide intent to put the water to beneficial use at the time the State Engineer reviews an application. *See Millheiser v. Long*, 1900-NMSC-012, ¶¶ 8-9, 10 N.M. 99 (emphasis added).

Ironically, APR relies on *Jicarilla Apache Tribe v. United States* to support its claim that it is entitled to additional fact-finding on its 2014 Application and an evidentiary hearing. In so doing it ignores that the Tenth Circuit in *Jicarilla* found the exact types of actions APR proposes to take in its 2014 Application to be speculative. In *Jicarilla*, the Tenth Circuit held, "a mere hope of possible sales in the future, most of which sales are yet to materialize," is insufficient to demonstrate beneficial use. 657 F.2d 1126, at 1135 (10th Cir. 1981). APR's statement that the Tenth Circuit "made several factual findings" in *Jicarilla*, Response at 29, does not support APR's request for an additional hearing. APR was afforded a full opportunity to flesh out its 2014 Application at the hearing on summary judgment motions before the State Engineer in 2017. The Court of Appeals found "[APR] received a hearing sufficient to satisfy statutory requirements and resolve the issues raised by the motions for summary judgment," *Augustin Plains Ranch*, 2023-NMCA-001, ¶ 22. Furthermore, the purpose of summary judgment "'is to hasten the administration of justice and to expedite litigation by avoiding needless trials . . . ,'" *Martinez v. Metzgar*, 1981-NMSC-126, ¶ 5, 97 N.M. 173, (citing *Agnew v. Libby*, 53 N.M. 56, 58) Therefore, consistent with the purpose of summary judgment and the Tenth Circuit's conclusions in

Jicarilla – that hopes of future sales with no such sales having yet materialized does not constitute beneficial use, *see id.*, 1134-1135 – an additional hearing on the Application is needless. APR's request for an additional evidentiary hearing should be denied. *See Martinez v. Metzgar*, 1981-NMSC-126, ¶ 5.

Second, Community Protestants urge this Court to reject APR's argument for additional fact-finding at an evidentiary hearing before the State Engineer, as APR has failed to demonstrate that, in adhering to the law of the case, that would be an erroneous or unjust result. *See Reese v. State*, 1987-NMSC-110, ¶ 5, 106 N.M. 505 ("The doctrine [of the law of the case] should not be utilized to accomplish an obvious injustice, or applied where the former appellate decision was clearly, palpably, or manifestly erroneous or unjust."). Although the New Mexico Supreme Court in *Reese* went on to note that "appellate courts . . . may exercise a certain degree of discretion in applying [the law of the case]" and declined to apply it in favor of applying the "law of the land," *Id*., Community Protestants urge this Court to apply the law of the case and adhere to the Court of Appeals holding that APR is not entitled to an evidentiary hearing because the Court of Appeals holding was <u>not</u> erroneous or unjust. APR has failed to show that this Court's adherence to the law of the case – as determined by the Court of Appeals in *Augustin Plains Ranch* – would result in an injustice. *See, generally,* 2023-NMCA-001.

Finally, this Court should deny APR's request for an additional evidentiary hearing because "[t]he law of the case, whether right or wrong, is controlling on the second appeal." *Royal Int'l Optical Co., d/b/a v. Tex. State Optical Co.***,** 1978-NMCA-094, ¶ 46, 92 N.M. 237. *See also Varney v. Taylor*, 1968-NMSC-189, ¶ 5, 79 N.M. 652; *see also Badilla v. Wal-Mart Stores East, Inc.*, 2017-NMCA-021, ¶ 5. This appeal <u>is APR's second appeal</u> of its 2014 Application. *See Augustin Plains Ranch*, 2023-NMCA-001, ¶¶ 4-6 (recounting the procedural history of this case). As such, Community Protestants urge this Court to follow the law of the case as established by the Court of Appeals' holding in *Augustin Plains Ranch* that APR is not entitled to an evidentiary hearing.

B. APR has failed to demonstrate that a genuine issue of material fact for trial exists and has failed to show that Community Protestants are not entitled to judgment as a matter of law.

In a summary judgment proceeding, the movant must show that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. Rule 1-056(C) NMRA. When the movant has met this burden, the burden shifts to the non-movant, here, APR, to show a genuine issue of material fact for trial exists and the movant, Community Protestants, is not entitled to judgment as a matter of law. *Buke, LLC v. Cross Country Auto Sales, LLC*, 2014-NMCA-078, ¶ 21. Furthermore, summary judgment is appropriate "[w]here reasonable minds will not differ as to an issue of material fact." *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 7, 148 N.M. 713, (citing *Montgomery v. Lomos Altos, Inc*., 2007-NMSC-002, ¶ 16, 141 N.M. 21) (internal citations omitted)). APR has failed to allege material facts proving its 2014 Application should not have been denied. APR also has failed to allege material facts proving its 2014 Application is not speculative, and has failed to demonstrate Community Protestants are not entitled to summary judgment as a matter of law. As such, Community Protestants urge the Court to reject APR's arguments, grant summary judgment in favor of Community Protestants, and dismiss APR's appeal.

1. APR has failed to demonstrate its 2014 Application is complete such that the State Engineer was correct in accepting the 2014 Application for consideration.

In asserting the State Engineer did not err in accepting APR's 2014 Application for consideration, APR ignores the contents of the 2014 Application, relying instead on a newly alleged "long standing practice," whereby the State Engineer supposedly allows whole counties and municipalities as places of use in an application. Response at 13, 15. This "practice," notably, is raised in the APR Response for the very first time in the long history of this case. However, APR fails to point to any facts, either in the record or through additional sworn statements, to support the "practice" and

instead repeat that because it checked every box on the OSE-provided application form, its 2014 Application is complete and the State Engineer's consideration of the 2014 Application was not an error. Response at 6. In making this claim, APR misconstrues relevant New Mexico law and asks this Court to blindly accept its listing of seven counties and six municipalities – none of which have indicated any commitment to use the sought-after water for any purpose – as a sufficient indication of the place of use for the enormous quantity of water APR seeks to appropriate. Response at 9-10. For the reasons further explained below, Community Protestants urge the Court to reject APR's arguments, to grant summary judgment in favor of Community Protestants, and to dismiss APR's appeal because the State Engineer's decision to accept the 2014 Application for consideration was plainly erroneous.

a) APR's 2014 Application is nearly identical to APR's 2007 Application, which the State Engineer denied because it was speculative.

APR asserts its 2014 Application "provides significantly more information than the statutory and regulatory minimum," Response at 3; however, merely referencing the number of the pages in the 2014 Application, *see* Response at 6, 11, 21, along with the checking of boxes on the OSE's standard application form, does not necessitate approval or demonstrate statutory adequacy for completeness. First, APR provides little additional specific information about the places of use in its 2014 Application when compared to its 2007 Application.

Instead of explaining how the State Engineer's acceptance of the 2014 Application for evaluation was correct, despite the fact the 2014 Application and APR's denied 2007 Application are nearly identical, APR merely re-asserts that its 2014 Application satisfied all requirements for consideration. Response at 3, 7. However, a comparison of the language of APR's 2007 Application to the language of its 2014 Application, clearly demonstrates the State Engineer's error in considering APR's 2014 Application.

In October 2007, APR filed its first application with the OSE to appropriate 54,000 acre-feet per year of underground water from the Rio Grande Underground Water Basin ("2007 Application"). **[AR 1632]**. This 2007 Application was ultimately denied by the State Engineer at a hearing on motions for summary judgment because APR had failed to adequately specify the beneficial use(s) for the water to be appropriated or the place(s) where the beneficial use or uses would occur. **[AR 1367-71]**. For example, when listing APR's proposed places and purposes of use, the 2007 Application reads, "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." **[AR 1368-69]**. The 2014 Application similarly reads, "Parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties." **[AR 4]**. Relatedly, again when describing the places and purposes of use, the 2007 Application states, "The proposed place of use is within the exterior boundaries of Catron County, Socorro County and Augustin Plains Ranch," **[AR 1641]**, while the 2014 Application states, "The counties in which the applied for water will be used are Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe." **[AR 17]**. Finally, in its 2007 Application, APR states, "Preliminary studies indicate the water resources could be utilized to support municipalities in the region, including Datil, New Mexico, Magdalena, New Mexico, and Socorro, New Mexico." **[AR 1369, 1640]**. Similarly, in its 2014 Application, APR asserts that it intends to provide water "for municipal purposes in one or more of the following municipalities:

> … [w]ithin the service area of the Village of Magdalena municipal water system … [w]ithin the corporate limits of the City of Socorro … [w]ithin the service area of the City of Belen municipal water system in Valencia County . . . Village of Los Lunas municipal water system service area . . . [s]ervice area of the Albuquerque Bernalillo County Water Utility Authority municipal water system . . . Rio Rancho . . . Town of Alameda Grant West of the Rio Grande and surrounding areas in Sandoval County. . .
> **[AR 18]**.

Ultimately, while APR may have used more words in the 2014 Application to describe its intended uses for the sought-after water and may have listed more counties and cities that may use the applied-for water, there is still no basis for its assertion that the 2014 Application is more specific than the 2007 Application and that the State Engineer was correct in accepting it for consideration. APR has asked this Court to accept a meritless argument without the force of fact or law behind it, and its argument should be rejected.

b) The State Engineer erred in accepting APR's 2014 Application for consideration because the 2014 Application does not include enough information to provide protestants adequate notice of APR's project.

Community Protestants agree with APR that an application to appropriate groundwater must include enough information to allow for a protestant to meet his or her burden under NMSA 1978, § 72-12-3(E) Response at 5-6; *see also Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth.*, 2014-NMCA-032, ¶ 20. APR's assertion that listing an entire county (along with including a map of the boundaries of the Rio Grande Basin touching each county) is sufficient to allow a protestant to identify a purported place of use, Response at 9-10, App. 2 at 2 – along with APR's unverifiable assertion that such lack of information in applications has been commonly accepted as sufficient by the OSE, Response at 34 (claiming that "[t]he State Engineer routinely approves permits with place of use descriptions that are far broader than the Augustin Application") – should be staunchly rejected. Not only does APR fail to point to any evidence in the record indicating its assertions are true, APR's arguments are not grounded in law and should be rejected by this Court because APR has not shown that Community Protestants are not entitled to judgment as a matter of law on the issue of whether the State Engineer erred in accepting APR's 2014 Application for consideration; nor has APR demonstrated that a genuine issue of material fact exists.

First, a nonsensical result would follow if the Court were to accept APR's argument that listing an entire county or municipality, along with including a map of the boundaries of the Rio Grande Basin touching each of the six counties and seven municipalities proposed as places of use, is sufficient to provide notice to a potential protestant. APR's argument that simply listing a county or counties is sufficient notice belies the reasoning behind the statutory requirement for an applicant to clearly identify the place of use of sought-after water, which is to give sufficient information to the OSE to evaluate the application and to give needed details to potential protestants who must prove how they will be specifically impacted by any approved application under NMSA 1978, Sec. 72-12-3(D)(2001). 2012 District Court Memorandum, pages 18-19 **[AR 1393-1394]**. *See also Mathers v. Texaco,* 1966-NMSC-226, ¶ 25-27, 77 N.M. 239. The places of use in the 2014 Application, however, are primarily unknown, such that neither the OSE, nor Community Protestants, can meaningfully assess the impacts of the proposed water transfer.[1]

In addition, if one were to accept APR's reasoning that the statutory requirements of NMSA 1978, § 72-12-3 are primarily to provide notice, and merely listing counties and municipalities that may or may not use the applied-for water achieves that effect, any potential protestant would be expected to formulate a protest on an application without knowing where the place of use will be for the water in the absence of more meaningful and specific information upon which a protestant could base a protest. An application providing such scant, unspecific information cannot possibly allow for any protestant to reasonably evaluate whether the proposed appropriation would impair her existing rights, further explained below. *Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth.,* 2014-NMCA-032, ¶ 20.

[1] APR is neither a municipality nor a county asking to move the water, such that its claim that merely providing a list of counties and municipalities as places of use may be appropriate. *See* State Engineer's Amend. Memorandum in Support of Motion for Summary Judgment at 4 ("The Applicant is a Limited Liability Corporation and not a municipality.") citing **[AR 2]**.

Moreover, as this Court pointed out in its 2013 Memorandum Decision on Motion for Summary Judgment (granting summary judgment in favor of Community Protestants), requiring protestants to object to an application with specificity, while allowing applicants to describe an application in vague, non-specific terms, would be absurd **[AR 1393-1394]**. Despite this Court's finding, APR asserts that, by providing a map of the boundaries of the Rio Grande Basin along with the names of the seven counties, it has provided sufficient notice to protestants to formulate an objection to the 2014 Application with specificity. Response at 10. All APR's 2014 Application provides is a vague list of possible places and purposes of use covering a 25,000 square-mile area[2] that a protestant must object to without knowing which user will use how much water – or if any user at all will use any water. In no way does this constitute sufficient notice of whether, or how, any protestant's rights might be affected by the proposed application. APR points to no genuine issue of material fact demonstrating a need for trial on this issue, instead simply asserting this Court should take APR's word for it when it comes to the completeness of its 2014 Application, and, as such, its argument should be rejected.

c) APR has failed to demonstrate the State Engineer's decision to accept the 2014 Application for consideration is not plainly erroneous.

When an agency decision is plainly erroneous or inconsistent with the language of its statutes and regulations, the Court is not required to accept the agency's decision. *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1997-NMCA-046, ¶ 7, 123 N.M. 394; *see also Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm*., 1995-NMSC-062, ¶ 11, 120 N.M. 579 (a court has the authority to reverse the decision of the agency when the agency action represents an abuse of the agency's discretion resulting from plain error). NMSA 1978, Sec. 72-12-3(A) requires that all applications accepted by the State Engineer be accompanied, in relevant part, by a designation of beneficial use and the place of use for the applied-for water. *Id.* §§ 72-12-3(A)(2), (A)(6). Furthermore, any application accepted by the

[2] See New Mexico Counties, accessible at nmcounties.org (last viewed on Nov. 22, 2023).

State Engineer must show the ability of the applicant to carry the construction of the project to completion. NMSA 1978, § 72-5-3. This requirement that any application accepted for consideration by the State Engineer must designate a beneficial use of the applied-for water is further reflected in and explained by the State Engineer's implementing regulations, which require an application that is defective as to form or fails to comply with the rules and regulations be returned to the applicant promptly with a statement of the changes required. *See, e.g.*, 19.27.1.11 NMAC.[3] Importantly, the State Engineer's implementing regulations further require that an application include specific information regarding the applicant's proposed beneficial use, as the application must reflect the "annual amount that can reasonably be expected to be produced and applied to beneficial use from a single well constructed at the point, in the manner, and for the purpose set forth in the application." 19.27.1.10 NMAC.

The requirement that an application contain specific information regarding the place and purpose of use is further reflected in *Mathers v. Texaco*, in which the New Mexico Supreme Court found in favor of an applicant in part because the applicant had "expressly specified the particular use for which the water is to be appropriated and the precise lands to which the same is to be applied to accomplish the purpose of such use." 1966-NMSC-226, ¶ 27. In contrast to the applicant in *Mathers*, APR has failed to specify "the precise lands to which" it will apply the sought-after water for a "particular use." *Id*. Instead of addressing its failure to meet the specificity requirements found in these statutes and identified by the Court in *Mathers*,[4] APR deliberately misconstrues the State Engineer's required analysis of purported beneficial uses as listed in the 2014 Application by couching it as an

[3] APR seemingly knows this, as it specifically asks, in its request for a bifurcated hearing process, for the opportunity to revise its 2014 Application in order to further demonstrate compliance with the State Engineer's requirements. **[AR 16-17]**.

[4] Contradictorily, APR relies on select portions of *Mathers* at 25 while ignoring these relevant others. Response at 4, 6. APR neatly cites *Mathers* on use of the OSE form being sufficient but casually ignores the language in *Mathers* requiring an applicant to be specific about "particular use" and "precise lands". *Mathers* at 27.

inappropriate "graft[ing] of additional requirements onto the . . . statutory requirements. . ." for an application. Response at 5.

Rather than meet the requirement that an application must identify, with specificity, the place of use for the applied-for water, APR instead lists seven counties, two of which filed protests to the 2014 Application,[5] and six municipalities, two of which also filed protests to the 2014 Application,[6] that have not committed to using the applied-for water. In addition to providing this vague list of counties and municipalities at which the sought-after water may be used, APR fails to identify with any level of specificity the amount of water any county or municipality may use. In *Mathers,* the court emphasized that the applicant had indicated the "particular" use and the "precise" location where the appropriated water would be put to use. *Id*.

APR also fails to demonstrate the feasibility of its proposed project in its 2014 Application, as it relies only and almost exclusively on two nearly-identical, non-committal letters from one of the six municipalities it claims will use the sought-after water to demonstrate what APR generously claims is "interest" in the project, Response at 8. Finally, and perhaps most revealing, APR acknowledges in its 2014 Application that the project is nothing more than a "conceptual design." **[AR 19]**. None of this general information meets the statutory requirements for a complete application. In an attempt to address the issues in its 2014 Application regarding specificity, feasibility, and its failure to identify committed end-users for the water, APR relies exclusively on the assertions of Mr. Michel Jichlinski, its infrastructure development professional –who fantastically and erroneously claims that the lack of interest in APR's project is merely due to the fact that "the end-users are sophisticated entities that

[5] Notably, two of these counties, Catron County and Socorro County, filed protests against APR's 2014 Application. *See, e.g.*, Catron County Board of County Commissioners Motion for Summary Judgment and Memorandum in Support, **[AR 1494]**; *see also* **[AR 523-524].**

[6] Two of the municipalities listed in APR's 2014 Application, the City of Socorro and the Village of Magdalena, also filed protests against the Application. *See* **[AR 227-229, 1286]**.

carefully evaluate options and potential risks … [and t]he end-users have therefore indicated a preference to wait until Augustin obtains a permit before finalizing any agreement" – to demonstrate feasibility and ability to complete the project. *See* Appellant Augustin Plains Ranch, LLC's Response in Opposition to Catron County Board of County Commissioners' Motion for Summary Judgment, Ex. 1, "Jichlinski Second Affidavit" p. 9 (May 8, 2019).

However, APR fails to demonstrate with evidence in the record that the listed counties and municipalities will even entertain an agreement with APR, nor does it explain how, after all the many years of outreach APR purports to have conducted along the proposed pipeline route, the only letters of interest, both from the city of Rio Rancho, can possibly rise to the "strong interest in the project," Response at 22, that APR claims exists.

Instead of meeting its statutory obligations, APR's 2014 Application flaunts its own unknowns. This is demonstrated most strongly by APR's request for a bifurcated hearing process and for the eventual filing of yet another amended application once APR has actually identified with specificity the places, purposes and feasibility of its project. *See, e.g.*, **[AR 18]** ("The places of use will be finalized in Stage 2 of the application process, in conjunction with the amended and additional information to be included in the Amended Application"); *see also* **[AR 17]** ("The individual detailed purposes and amounts of use will be finalized in Stage 2 of the application process, in conjunction with the amended and additional information to be included in the Amended Application."). Rather than address this blatant showing of speculation, APR now disingenuously claims its request for a bifurcated process is irrelevant to the issue of speculation, brazenly asserting its proposed two-stage hearing process was merely a suggestion to aid all parties, when the real purpose of APR's request is clear: APR does not have the requisite information it was required to include in its 2014 Application. Response at 17. As such, its 2014 Application should have been rejected by the State Engineer.

Ultimately, APR points to no evidence suggesting a genuine issue of fact for trial exists, nor does it show Community Protestants are not entitled to judgment as a matter of law on the issue of whether the State Engineer erred in accepting its 2014 Application for consideration. Because the State Engineer erred in accepting for consideration APR's 2014 Application, Community Protestants urge the Court to reject APR's arguments and dismiss its appeal.

2. APR has failed to show its 2014 Application is not speculative and that the State Engineer did not err in denying it.

Should the Court determine the State Engineer did not err in accepting APR's 2014 Application for consideration, Community Protestants urge the Court to see through APR's incessant, misguided attempts to obtain a permit from the OSE to hoard the groundwater of the Rio Grande Basin. When an agency that is governed by a particular statute – such as the OSE, which is vested with the duty of "the general supervision of waters of state and of the measurement, appropriation, distribution thereof and such other duties as required" pursuant to NMSA 1978, § 72-2-1 – construes or applies that statute, the Court may defer to the agency's interpretation of its own function. *Morningstar Water Users Ass'n*, 1995-NMSC-062, ¶ 11. While "not bound by the agency's interpretation, the appellate court will … confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Elephant Butte Irrigation Dist. v. N.M. Water Control Comm'n*, 2022-NMCA-045, ¶ 9 (citing Morningstar Water Users Ass'n, 1995-NMSC-062, ¶ 11; *see also*, *Augustin Plains Ranch*, LLC, 2023-NMCA-001, ¶ 31. Thus, because any order issued by the State Engineer may be presumed to be in proper implementation of the provisions of the water laws administered by him, if the Court determines that the 2014 Application was complete for consideration by the OSE, Community Protestants urge this Court to grant summary judgment in favor of Community Protestants and dismiss APR's appeal, because, as the State Engineer determined, APR's 2014 Application is speculative.

Instead of identifying any issue of material fact in the record to prove APR's 2014 Application is not speculative, or asserting any meritorious argument Community Protestants are not entitled to judgment as a matter of law, APR ignores relevant evidence in the record and asks the Court to simply take its word that it does not intend to hoard water. As support, APR relies again exclusively on the Jichlinski affidavits,[7] in which Jichlinski states, "APR has no intention of 'hoarding' water for some indeterminate time" and "that the financial models that underlie APR's business plan do not anticipate hoarding as a financial strategy." Response at 23. These assertions do not address whether APR has shown a bona fide intent to put the applied-for water to beneficial use and certainly do not rise to the level of proving that APR's 2014 Application is not speculative as found by the State Engineer.

Discussed in greater detail below, waters of declared underground basins are subject to appropriation for beneficial use in accordance with applicable law. *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 1967-NMSC-089, ¶ 26, 78 N.M. 41. To be deemed beneficial, however, the proposed use of any to-be-appropriated water cannot be speculative in nature. *See Millheiser*, 1900-NMSC-012, ¶ 9 ("an appropriation of waters cannot be constructive, but must be actual."). For APR to overcome a suspicion of speculation, APR needed to have demonstrated "...the bona fide intent to appropriate the waters, and apply the same to some beneficial use or purpose … and … the actual application of all the water appropriated and so diverted to some beneficial use or purpose … must be

[7] APR calls into question the affidavits relied upon by the State Engineer as providing extrinsic evidence (of the lack of demand for water and thus the lack of feasibility for APR's proposed project), as evidence not appropriate for consideration at the summary judgment stage, Response at 24. Simultaneously, APR asks the Court to rely on APR's own extrinsic evidence provided at the summary judgment stage. In contrast to Rule 1-056(E), the rules governing appeals of State Engineer decisions do not contemplate additional evidence provided via affidavits. *See* NMSA 1978, § 72-7-1(E) (allowing that "[e]vidence taken in a hearing before the state engineer may be considered as original evidence subject to legal objection, the same as if the evidence was originally offered in the district court" but is silent on whether evidence submitted by affidavits is admissible). As the current proceeding originated in APR's appeal of a State Engineer decision, § 72-7-1(E) is controlling. The Court should disregard any evidence APR has proffered through affidavits.

actually applied within a reasonable time." *Id*. Since APR neither demonstrated its 2014 Application is not speculative nor pointed to any evidence in the record suggesting a genuine issue of material fact, Community Protestants urge the Court to disregard APR's arguments, grant summary judgment in favor of Community Protestants, and dismiss APR's appeal.

a) APR has not demonstrated the bona fide intent to put the sought-after water to beneficial use.

A party seeking to appropriate water must demonstrate "the bona fide intent to appropriate the waters, and apply the same to some beneficial use or purpose" to overcome a finding of speculation. *Id*. Thus, under *Millheiser*, APR must point to evidence in the record of its bona fide intent to apply the water it seeks to beneficial use in order to show Community Protestants are not entitled to judgment as a matter of law, or in order to show a genuine issue of material fact for trial exists. APR has done neither.

Instead, in arguing Community Protestants are not entitled to summary judgment on the speculativeness of its 2014 Application, APR once again focuses on the resources it has spent on planning the project and asks the Court to find that to be a sufficient showing of intent. Response at 21-22. In doing so, APR relies entirely on the fact it *applied* to appropriate water with the State Engineer to support its claim of bona fide intent to put the water to beneficial use, conflating its intent to apply for a permit to appropriate water (shown through its never-ending filing of speculative applications) with a demonstration of intent to actually put the applied-for water to a beneficial use. Response at 9. APR further claims Community Protestants, the Pittman Protestants and the State Engineer, should rely on evidence beyond the 2014 Application, and the record of the earlier 2007 proceeding, to assess APR's showing of intent. Response at 8 and 16.

In making this claim, APR seems to forget that the parties are engaging in motions practice on issues equipped for summary judgment and that any party's reliance on extrinsic evidence is not

appropriate.[8] Furthermore, because this matter is an appeal from a decision of the State Engineer, it allows only for the Court's de novo review on issues previously considered by the State Engineer. *Lion's Gate Water v. D'Antonio,* 2009-NMSC-057, ¶ 30, 147 N.M. 523. Thus, any reliance on extrinsic evidence by any party is inappropriate at this time.[9] Ultimately, APR has asked this Court to find that, because APR *says* it does not intend to speculate in the market for water, then its plan is not speculative. Because APR's argument is unsupported by either facts or law, Community Protestants urge this Court to reject APR's assertions and dismiss APR's appeal, and instead grant summary judgment in favor of Community Protestants.

b) APR has not demonstrated that it will put the sought-after water to beneficial use.

While municipal and commercial uses may be accepted by the State Engineer as beneficial uses in some instances, APR has not met its burden of demonstrating a bona fide intent to put the water it seeks to a beneficial use. Because APR's 2014 Application is incomplete, merely listing six municipalities and seven counties that may or may not use the water as proposed places of use, Community Protestants have no way of knowing whether any of the water APR seeks will be used by any entity, let alone whether such use will be beneficial.

Instead, APR engages in a lengthy discussion arguing against a claim Community Protestants did not make about water sales as a potential beneficial use. This is an attempt both to distract the Court and to convince the Court that, because a water sale has been previously been determined by the State

[8] Again, APR questions other parties' reliance on extrinsic evidence, Response at 24, while APR relies on extrinsic evidence. *See, e.g.*, Response at 8-9, 16-17, 21-24; fn. 7, *supra*.

[9] Community Protestants agree with APR that an argument regarding APR's failure to demonstrate bona fide intent to put the applied-for water to beneficial use at the summary judgment stage requires the 2014 Application be complete with certain details. *See* Response at 23. Without those details, however, the State Engineer's later determination APR had failed to demonstrate a bona fide intent to put the water to beneficial use was legal, necessary, and proper.

Engineer to be a beneficial use, the OSE erred in denying APR's 2014 Application. Contrary to APR's assertions, however, Community Protestants assert that appropriation for sale to unidentified, non-committal end users with no plan or showing of intent to use the water is speculative. *See Jicarilla*, at 1135 (hope for possible sales, mostly unmaterialized, is insufficient to demonstrate beneficial use). APR's 2014 Application provides nothing other than a theoretical, "conceptual," **[AR 134-162]**, plan and, as such, APR has not demonstrated that its 2014 Application is not speculative.

Moreover, APR ignores and misconstrues the clear language of the OSE's Order Denying its 2014 Application, asserting instead the OSE is improperly requiring APR to obtain contractual agreements with end users in order to satisfy the legal requirement of bona fide intent without pointing to anything in support of its argument. Response at 5, 30-31. APR continues to assert the State Engineer erred in denying APR's 2014 Application based on what APR perceives to be a requirement imposed by the OSE - requiring APR to produce a contract with an end-user to defeat at a finding of speculation. Response at 31. The State Engineer, however, did not include such a requirement in his Order. Rather, the State Engineer, in finding that APR's 2014 Application lacks the requisite specificity and intent to put the applied-for water to beneficial use, simply provides examples APR could have pointed to, if any existed, to demonstrate such specificity and beneficial use. The State Engineer suggested, but did not require, evidence such as "a contract with an end user or a specific plan for the purchase and delivery of a specific amount of water for specific beneficial uses to meet the reasonably anticipated needs" of the possible end users. Order at 11 **[AR 2515]**. Instead of pointing to any facts in the record showing a specific plan for beneficial use, APR ignores this relevant language in an attempt to create a legal issue where none exists. APR's argument should be unconditionally rejected.

APR also continues to conflate the State Engineer's reliance on Colorado Law as persuasive authority with an inappropriate "addition" of new application requirements, alleging the OSE has

engaged in improper adjudicatory rulemaking. Response at 25. In addition to hypocritically berating the State Engineer for looking to the law of other states for guidance while doing the same to support its own arguments, *see* Response at 29-30, APR ignores the fact the State Engineer – in looking to the state of Colorado, which has similar water rights principles – merely relied on the laws of Colorado to provide examples of what may be considered appropriate evidence of bona fide intent when applying the applicable laws of the state of New Mexico. Order at 6-13 **[AR 2510-2517]**.

APR's argument that it provided a sufficient demonstration of a bona fide intent to put the sought-after water to beneficial use is meritless and misguided and should be rejected by this Court.

c) APR has failed to demonstrate its ability to put the applied-for water to beneficial use within a reasonable time.

Finally, APR fails to point to any law or evidence in the record to dispute the fact it cannot demonstrate – and *has not demonstrated* – an ability to put applied-for water to a beneficial use within a reasonable time. *See Office of the State Eng'r v. Gray*, 2021-NMCA-066, ¶¶ 46, 47; *see also Millheiser*, 1900-NMSC-012, ¶ 9. Instead, APR states it intends to put the water to beneficial use in a reasonable time because not doing so would lead to the forfeiture of its water rights – asking the Court to accept this faulty reasoning and to assume, because of forfeiture law, it will put the water to beneficial use. Response at 33. A claim that APR would not be so careless as to lose its right to the water does not demonstrate APR will put the water to beneficial use in a reasonable time. In asserting this absurdity, APR ignores not only its own request for a bifurcated hearing process, which would inevitably delay putting the water to beneficial use, but also all the evidence in the record suggesting APR cannot, in fact, put the applied-for water to beneficial use in a reasonable time. APR has no pending sales or commitments from end-users and intends to wait for a second stage process with the State Engineer to determine the place, potential beneficial use and amount of water to be delivered. These facts define speculation.

Blank “sample agreements" and letters from “investors attesting to their willingness to support the financing of the project” only suggest APR can and will continue to invest in an infeasible project, not that water will be put to beneficial use within a reasonable time. Response at 21-23. Because APR has failed to point to any evidence in the record proving that a genuine dispute of material fact exists, or that Community Protestants are not entitled to judgment as a matter of law on the speculativeness of APR’s 2014 Application, Community Protestants respectfully request this Court disregard the allegations in APR’s Response and grant summary judgment in favor of Community Protestants.

III. Conclusion

Community Protestants assert summary judgment should be granted in their favor as no genuine issue of material fact exists and they are entitled to judgment as a matter of law, since APR’s 2014 Application is incomplete and the State Engineer should not have accepted the 2014 Application for consideration. Should the Court determine the State Engineer did not err in accepting APR’s 2014 Application as complete, Community Protestants assert summary judgment should be granted in their favor because APR’s 2014 Application is speculative, and the State Engineer correctly denied it. APR has pointed to no evidence in the record indicating that a genuine issue of material fact exists in regard to either issue asserted by Community Protestants and has failed to demonstrate that Community Protestants are not entitled to judgment as a matter of law but, instead, has simply asked this Court to take its word that it does not intend to speculate or hoard the underground water of the Rio Grande Basin. Because APR has failed to show Community Protestants’ Motion for Summary Judgment should not be granted, Community Protestants respectfully request this Court grant their Motion for Summary Judgment and dismiss APR’s appeal.

Respectfully submitted,

NEW MEXICO ENVIRONMENTAL LAW CENTER

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/s/ Ann McCartney

Ann T. McCartney
Maslyn K. Locke
Mara C. Yarbrough
P.O. Box 12931
Albuquerque, NM 87195
Tel.: (505) 989-9022
Fax.: (505) 629-4769
mlocke@nmelc.org
mara.yarbrough@nmelc.org
amccartney@nmelc.org

Attorneys for the Community Protestants

CERTIFICATE OF SERVICE

I certify that on December 15, 2023, a copy of the foregoing Reply was e-served on the following counsel of record, emailed to the *pro se* protestants with email addresses, and mailed to the *pro se* protestants with mailing addresses.

Jeffrey J. Wechsler
Kari E. Olson
Kaleb W. Brooks
Montgomery & Andrews, P.A.

325 Paseo de Peralta
Santa Fe, NM 87501
(505) 982-3873
jwechsler@montand.com
kolson@montand.com
kwbrooks@mondand.com

Office of the State Engineer
A. Nathaniel Chakeres
Simi Jain
Owen Kellum
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-3824
nathaniel.chakeres@ose.nm.gov
sjainlaw@outlook.com
owen.kellum@ose.nm.gov

John Draper
Draper & Draper
325 Paseo de Peralta
Santa Fe, NM 87501
john.draper@draperllc.com

L. Christopher Lindeen
P.O. Box 2508
Santa Fe, NM 876504
(505) 930-0665
lclindeen@gmail.com

Lorraine Hollingsworth
Pete Domenici
Domenici Law Firm, P.C.
320 Gold Avenue SW, Suite 1000
Albuquerque, NM 87102-3228
(505) 883-6250
lhollingsworth@domenicilaw.com
pdomenici@domenicilaw.com

Tessa T. Davidson
Tea B. Davidson
Davidson Law Firm, LLC
P. O. Box 2240
Corrales, NM 87048
(505) 792-3636
ttd@tessadavidson.com
tea@tessadavidson.com

Samantha Ruscavage-Barz
WildEarth Guardians
301 N. Guadalupe St., Suite 201
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org

A.J. Olsen
Robert J. McCrea
Hennighausen, Olsen & McCrea LLP
P O Box 1415
Roswell, NM 88202-1415
ajolsen@h2olawyers.com

bmccrea@h2olawyers.com
Coppler Law Firm, P.C.
John L. Appel
Frank R. Coppler
645 Don Gaspar
Santa Fe, NM 87505
(505) 988-5656
Fax: (505) 988-5704
jappel@coppler.com
fcoppler@coppler.com

MacArthur Stant II
Navajo Nation Department of Justice
Water Rights Unit
P.O. Box 2010
Window Rock, Navajo Nation, AZ 86515
(928) 871-6938
mcstant@nndoj.org

Adren Robert Nance
Nance Pato & Strout LLC
P. O. Box 772
Socorro, NM 87801
adren@npslawfirm.com
(575) 838-0911 ext. 801

Joshua Mann
Pueblo of Isleta
3012 Don Quixote Dr. NW
Albuquerque, NM 87104
(505) 999-8788
josh@mannwaterlaw.com

Steffani A. Cochran
General Counsel
Pueblo of Sandia
481 Sandia Loop
Bernalillo, NM 87004
(505) 771-7981
scochran@sandiapueblo.nsn.us

Veronique Richardson
Barnhouse Keegan Solimon & West LLP
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123
vrichardson@indiancountrylaw.com

Simeon Herskovits
Iris Thornton
Advocates for Community and Environment
P.O. Box 1075
El Prado, N.M. 87529-1075
(575) 758-7202
simeon@communityandenvironment.net
iris@communityandenvironment.net

Meiklejohn Law Firm, LLC
Douglas Meiklejohn
1304 Escalante Street
Santa Fe, NM 87505
(505) 699-7262
meiklethepickle@gmail.com

PRO SE PROTESTANTS/APPELLEES SERVED BY EMAIL:

Ann Boulden, PO Box 528, Datil, NM 87821, gmaboulden@gmail.com
Jack W Bruton and Bruton Ranch LLC, PO Box 321, Magdalena, NM 87825,
Brett.bruton@yahoo.com, bonniebruton@yahoo.com
Randy Coil, Coil Family Partnership, PO Box 44, Monticello NM 87939, lazylt@gmail.com
Thomas A. Cook, PO Box 531, Datil NM 87821, tomcook@gilanet.com
Tom Csurilla, PO Box 366, Quemado, NM 87829, tomc-totwl@gilanet.com
Louise and Leonard Donahe, 2614 Navajo Road, Las Cruces NM 88007, donahe@comcast.net
Patricia Eberhardt, 302 Gene Ave., Albuquerque NM, 87107, peberhardt436@gmail.com
Gary and Carol Hegg, PO Box 646, Pie Town, NM 87827
Garyhegg@gmail.com, carolhegg@hotmail.com
Marie Lee, PO Box 100, Datil, NM 87821, mleeactionrealty@gmail.com
Robert Mackenzie, 5 Mackenzie Drive, Datil, NM 87821, suzanwm@gmail.com
Michael Mideke, PO Box 1115, Magdalena, NM 87825, mideke@gilanet.com
Wanda Parker, 103 E 10th Street, Shamrock, TX 79079, Wanda.parker@gmail.com
Stephanie Randolph, PO Box 225, Datil, NM 87821, Stephanie.c.randolph@gmail.com
Janice Simmons, 4452 Paseo Del Sol, Santa Fe ,NM 87507, jtsimmons26@gmail.com
Wildwood Highlands Landowners Assoc., PO Box 646, Datil, NM 87821
sanders@thiefmtn.com
Donald and Margaret Wiltshire, PO Box 41, Magdalena, NM 87825, mtn_don@yahoo.com

PRO SE PROTESTANTS/APPELLEES SERVED BY USPS FIRST CLASS MAIL:

Abbe Springs Homeowners Assoc., 1380 Rio Rancho Blvd. #280, Rio Rancho, NM 87124
Gladys and Manuel Baca, 8305 Bataan Memorial West, Las Cruces, NM 88012
Robert and Mona Bassett, PO Box 127, Datil NM 87821
Thomas Betras Jr., 20 Arcola Dr., Ashtabula, OH 44004
Michael D. Codini Jr., 120 Spring Rd. NE, Rio Rancho, NM 87124
Joshua Cravens, PO Box 41, Monticello, NM 87939
Tom Csurilla, PO Box 815, Pie Town, NM 87827
Roger & Dolores Jeanne Daigger, 14090 FM 2920, Ste. G, #525, Tomball, TX 77377
Roy Farr, PO Box 1000, Datil, NM 87821
Sandy How and Eric Hoffstetter, 1820 S. Heritage Street, Mesa AZ 85210
Jeff McGuire, 9 Antigua Road, Santa Fe, NM 87508
Walter and Diane Olmstead, PO Box 163, Datil, NM 87821
Patricia and Leo Padgett, PO Box 183, Datil ,NM 87821
Daniel Rael, 1315 Old Mescalero Rd., Tularosa, NM 88352

The following Protestants/Appellees have no known email address or mail forwarding address and, to the knowledge of all counsel, have not been involved in the proceeding since the initial appeal to the Seventh Judicial District:

David and Terri Brown, Charles and Lucy Cloyes, Janet Coleman, Nancy Crowley, Catherine Hill, Amos Lafon and Cleda Lenhardt, Michael Robert Loya, Sonia Macdonald, Douglas Marable, Thea Marshall, Sam and Kristin McCain, Kenneth Mroczek, Janice Pryzbyl, Peter John and Regina Naumnik, Robert and Veronika Nelson, Dennis A. and Gertrude O'Toole, Karl and Max Padget, Kenneth Rowe, John and Betty Schaefer, Susan Schuhardt, Bill and Anne Schwebke, Ned R. Smith Jr., Jim Sonnenberg, Anne Sullivan, Gloria Weinrich, James Wetzig, Evelyn Carlisle Yates

/s/ Ann McCartney