STATE OF NEW MEXICO
COUNTY OF CATRON
SEVENTH JUDICIAL DISTRICT COURT

AUGUSTIN PLAINS RANCH, LLC,

Applicant/Appellant,

v.

JOHN D'ANTONIO, JR., P.E.,

New Mexico State Engineer/Appellee,

and

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

Protestants/Appellees.

D-728-2018-00026
Honorable Roscoe A. Woods

Appeal from final decision of
New Mexico State Engineer
OSE Hearing Unit No. 17-005

HELEN HAND & THE HAND TRUST'S REPLY TO AUGUSTIN PLAINS RANCH'S CONSOLIDATED RESPONSE TO APPELLEES' MOTIONS FOR SUMMARY JUDGMENT ON THE ISSUE OF SPECULATION

Comes now Helen Hand, individually, and as Trustee for the Helen and John Hand Revocable Trust ("Hand"), by and through their counsel the Davidson Law Firm, LLC (Tessa Davidson and Téa Davidson), and pursuant to Rule 1-056 NMRA, files this Reply to Augustin Plains Ranch's ("Augustin") Consolidated Response to Appellees' Motions for Summary Judgment ("Response") on the limited issue of speculation.

INTRODUCTION

Hand owns and operates a cattle ranch located directly adjacent to the proposed well field described in Augustin's application to the State Engineer for permit to appropriate 54,000 acre feet of groundwater ("Application"). Hand protested the Application claiming, among other things, that the proposals in it are "contrary to the public welfare of the State because they are speculative and

constitute an unsustainable use of the same resources upon which the Hands rely to satisfy their water rights." [AR 00332][1] Hand joined in the motions to dismiss the Application in the administrative proceedings held before the Office of the New Mexico State Engineer and has participated in all appeals resulting from the State Engineer's dismissal of the Application.

Here, for the purpose of efficiency, Hand joined four (4) other parties' motions for summary judgment ("Motions") requesting the Court to confirm the New Mexico State Engineer's dismissal of Augustin's application on the grounds that the Application is speculative.[2] *See* Hands' Joinder in the NM State Engineer's and Appellees' Motions for Summary Judgment on the Issue of Speculation (July 17, 2023) ("Joinder"). Hand's Joinder expressly reserved the right to file a reply to Augustin's response to the Motions, which Hand does now.

ARGUMENT

Augustin has the burden of proving its Application satisfies legal requirements. *See In re City of Roswell* 1974-NMSC-044, 86 N.M. 249. It requests the right to pump 54,000 acre feet of groundwater but admits it has no plans to use that water itself. And despite having almost 10 years since the Application was filed to produce a bona fide end-user of the water, it fails to do so. It makes no effort to show that any purported "others" have the will, financial ability, or viable plan to use the water it seeks to appropriate. As shown by the Movants, these are the type of facts that New Mexico courts have found appropriate for the State Engineer to consider when determining whether an application is speculative and not in the public's interest.[3] *See, e.g., Young v.*

[1] As used herein, "AR" refers to the bates-stamped administrative record of the State Engineer's Hearings Unit filed with the Court at the first stage of appeal in this matter.

[2] *See* Application in the State Hearing Hearings Unit's Administrative Record ("AR") [0000 – 1] and State Engineer's Decision [AR 02505-02516].

[3] As discussed in the State Engineer's Memorandum in Support of Motion for Summary Judgment filed July 14, 2023, for more than a century New Mexico law has been clear that speculation in the appropriation of water is

Hinderlider, 1910-NMSC-061, ¶ 24 (granting approval to an unsound water-use enterprise is contrary to the public's interest).

A water rights owner who does not beneficially use water but merely expresses a "desire or hope" that it will be used at an undefined point of time when it is financially profitable is a "speculator." *State of New Mexico ex. rel. v. Intrepid Potash, etc. al.* No. A-1-CA-40372 (October 18, 2023)(consolidated w/A-1-CA-39378), at WL 6969728, ¶ 46 (*citing South Springs Co.*, 1969-NMSC-023, ¶ 21). Whether an applicant seeks a new appropriation of water solely for speculative purposes is a threshold legal issue that the State Engineer can decide on a motion for summary judgment after affording the applicant an opportunity to show material facts in dispute and a hearing pursuant to statute. *See Augustin Plains Ranch, LLC v. D'Antonio, 2023-NMCA-001,* ¶¶ 8 - 22 (confirming a full evidentiary hearing is not required for State Engineer to dismiss deficient application in response to motions for summary judgment).

In Response to the Motions filed here, Augustin fails to show that the State Engineer misapplied the fundamental and constitutional requirements of New Mexico's prior appropriation doctrine to the undisputed facts. The legal bases upon which the State Engineer relied to find the Application speculative were not novel. It has long been established that would-be appropriators cannot seek to indefinitely tie up the public's water for mere speculative purposes in violation of New Mexico's prior appropriation doctrine.

Further, Augustin continues to fail to offer admissible evidence to show that the 54,000

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contrary to the principles of prior appropriation. See *Millheiser v. Long*, 1900-NMSC-012; *State ex rel. Erickson v. McLean*, 1957-NMSC-012; N.M. Const. art. XVI, §§ 2 and 3; NMSA 1978, §72-5-28 (2002); *Hagerman Irrigation Co. v. McMurry*, 1911-NMSC-021, ¶ 4, 16 N.M, 172; and *State ex rel. Office of the State Eng'r v. Elephant Butte Irrigation Dist.*, 2012-NMCA-090.

acre feet of groundwater it seeks to appropriate can or will be put to use by others.[4] Thus, the Court's *de novo* review of the merits of the State Engineer's decision under NMSA 1978 § 72-7-1(E) is straight forward. Augustin admits that it does not intend to use 54,000 acre feet of groundwater it seeks to appropriate, and it fails to provide admissible evidence to make a threshold showing that anyone else does, or even wants to. Having failed to show any disputed material facts necessary to resolve at an evidentiary hearing, this Court should enter summary judgment that the Application is speculative in violation of New Mexico's prior appropriation doctrine. *See* Rule 1-056 (E) (summary judgment may be entered against a non-moving party who fails to respond with admissible evidence showing a material fact in dispute requiring resolution at trial). The Motions should be granted.

I. AUGUSTIN HAS FAILED TO SHOW THE STATE ENGINEER'S SUMMARY DISMISSAL OF THE APPLICATION EXCEEDED HIS AUTHORITY OR WAS CONTRARY TO NEW MEXICO LAW

A. The State Engineer has authority to summarily dismiss an application that is contrary to New Mexico's prior appropriation doctrine.

Augustin argues that in finding the Application impermissibly "speculative" as a matter of New Mexico law, the State Engineer established "additional" requirements for applications to appropriate groundwater than those listed by the legislature in NMSA 1978 § 72-12-3. Response at 5. It suggests that the State Engineer can only "construe, interpret, or apply a specific provision of the Water Code." *Id.* at 36. While Augustin correctly describes the Office of the State Engineer as a creature of New Mexico's legislature, it dismisses the broad statutory authority granted to the

[4] In its Response (at 2), Augustin incorporated by reference its statement of undisputed material facts contained in its Second Motion for Summary Judgment and Memorandum in Support (July 14, 2023). However, the only sworn testimony offered in support those facts is in the form of two affidavits by Michel Jichlinski, the project manager for Augustin. Mr. Jichlinski is not competent to attest as to an end-users' intent to use water.

State Engineer to generally supervise and administer the public's water in accordance with law. *See, e.g.,* NMSA 1978 § 72-2-1 (1953) (granting the State Engineer "general supervision of waters of the state and of the measurement, appropriation, distribution thereof"). The groundwater code contains no language preventing the State Engineer from denying requests in an application that do not conform with the entire body of New Mexico water law. In fact, our courts have a "long tradition of upholding the State Engineer's authority to take reasonable and appropriate action *to protect* and administer *the water laws of New Mexico*." *State ex rel. Reynolds v. Aamodt,* 1990-NMSC-099, ¶ 10, 111 N.M 4 (emphasis added). Accordingly, the State Engineer does not establish "new" requirements when he determines that an application, while complete as to form pursuant to § 72-12-3, is nonetheless, as a matter of undisputed fact, speculative and contrary to New Mexico's prior appropriation doctrine.

B. The State Engineer appropriately applied New Mexico's established anti-speculation standard to evaluate the Application.

Augustin admits that New Mexico has an anti-speculation doctrine, Response at 19, but argues that the State Engineer cannot determine an application is speculative because there is no specific test for doing so. It attempts to define "speculation" utilizing dictionary definitions (at 19-20), but the New Mexico Court of Appeals has recently defined a "speculator" as a "water rights owner[] who do[es] not beneficially use the water rights and provide[s] 'merely expressions of desire or hope' to use the water rights at an undefined point when it is financially profitable." *See Intrepid Potash*, WL 6969728, ¶ 46. As the *Intrepid* court acknowledges, it has long been known that an appropriator must show more than a "hope or desire" to use the public's water to establish a right to use it under New Mexico's prior appropriation doctrine. *See South Springs*, 1969- NMSC -023, ¶ 21; and *Jicarilla Apache Tribe v. United States*, 657 F. 2d 1126, 1135 (10th

Cir. 1981) (beneficial use requires more than speculation under New Mexico's prior appropriation doctrine).

Thus, the State Engineer was not required to wait for the courts to derive a specific anti-speculation test before he had authority to find the Application speculative. Rather, he appropriately reviewed the Application under the two most fundamental requirements of New Mexico's prior appropriation doctrine: 1) water in New Mexico belongs to the public, and 2) beneficial use is the basis, measure, and limit of the right to use water. *See* N.M. Const. art. XVI, §§ 2, 3. Because all water in the state belongs to the public, one is incapable of owning the water itself. *See Tri-State Generation & Transmission Ass'n v. D'Antonio,* 2012-NMSC-039, ¶ 41 (water belongs to the State as trustee for the people and while the State can authorize its use, and the use be acquired, "there is no ownership in the corpus of the water") (citations omitted). The right to use the State's water is merely usufructuary and it is subject to the condition that water be put to beneficial use. *Walker v. United States,* 2007-NMSC-038 ¶ 27, 142 N.M. 45. Rights to use water "must be exercised or lost; one cannot sit on water rights to the exclusion of any other claimant without putting them to beneficial use." *Id.* ¶ 22.

Further, because New Mexico "has only enough water to supply its most urgent needs," the requirement of beneficial use encourages the "maximum utilization" of scarce water resources. *Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, ¶ 11, 81 N.M. 414. Thus, as the state supreme court reaffirmed in 2004,

> [t]he principle of beneficial use is based on "imperative necessity," *Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 181, 113 P. 823,825 (1911), and "aims fundamentally at definiteness and certainty." *Crider*, 78 N.M. at 315, 431 P.2d at 48.

State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, ¶ 34, 135 N.M. 375. An appropriator acquires the right to take and use a "*given quantity* of water" for a "*specific* purpose of use," which

promotes the goals of definiteness and certainty. *See Snow v. Abalos*, 1914-NMSC-022, ¶ 11, 18 N.M. 681 (emphasis added). He must necessarily have a "suitable ditch, or other device" to take the water and must have "suitable appliances for conducting the water to the place of use, otherwise he would not be able to use the same." *Id*. And, finally, the intended appropriation of water must be accomplished within a "reasonable time." *Id.* ¶ 10. *See also State ex rel. State Engineer v. Crider,* 1967-NMSC-133, 78 N.M. 312. An open-ended timeline to put water to beneficial use "is as antithetical to the doctrine of prior appropriation as day is to night." *New Mexico. State ex. rel Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 38, 135 N.M. 375 (citing dissenting opinion in *Cartwright v. Public Service Co. of N.M.,* 1958-NMSC-134, ¶ 143, 66 N.M. 64) In short, legitimate appropriators have always been required to show they have the need for a *particular* use of a *given quantity* of water and a means by which it can be used within a *reasonable time*. *See Snow*, 1914-NMSC-022.

As the *Intrepid* court just recognized, speculators do not have an imperative need to use water themselves but seek to acquire the right to use water with the hope that they can sell water in the future while locking up the resource from other intervening uses in the meantime. *See also* Sandra Zellmer, *Collaboration and the Colorado River: The Anti-Speculation Doctrine and its Implications for Collaborative Water Management*, 8 Nev. L.J. 994, 1004-06 (Spring 2008). As shown by the Movants, New Mexico has refused to allow proposed appropriators to stake a claim to water for speculative purposes by a mere "diversion" of water since 1900. *See Millheiser v. Long*, 1900-NMSC-012. Nonetheless, Augustin tries, but fails, to distinguish the cases upon which Movants rely to argue that it is not a speculator.

First, Augustin mischaracterizes the significance of *Millheiser* as simply a "priority dispute." Response at 27. The controversy in *Millheiser* involved a dispute between claimants of

water from two ditches off the Hondo River. 1900-NMSC-012. The first ditch was constructed by the Long group in 1884 and the second ditch was constructed by the Millheiser group in 1888. The earlier ditch had the capacity to divert the entire flow of the river. The Long group claimed they intended to use water to irrigate 3,000 acres of land, but evidence at trial indicated they irrigated only 200 acres. From 1889 to 1893 they entered into agreements with other parties to sell water to irrigate up to an additional 1,710 acres. The other ditch, constructed in 1888, was located down river and water from it had been used to irrigate about 340 acres. The Long group claimed a superior right to sell water because they diverted all the water from the river into their ditch. The court found that although they built the ditch to change the channel of the stream, all the water in the stream did not belong to them by "diversion" alone:

> Under such a construction of the law, the first person who diverts the water from the stream may have a monopoly of all the water of any stream system by simply making this ditch large enough to conduct it from the usual channel. There need not be but one appropriation, and all other settlers upon such stream must pay tribute to the person making the first diversion. This is not the law governing water rights in this territory, where the waters are declared to be free and those who apply them to a beneficial use, until all are thus appropriated.

Id. at ¶ 30.

Notably, the Long group diverted the entire flow of the river prior to needing a permit from the State Engineer to divert and use surface water. Thus, the significance of the court's refusal of a continued right to divert the entire flow of a river solely for sale to others was that it was necessary to defeat "speculation and monopoly," the "main object" of New Mexico's prior appropriation doctrine. *Id*. ¶ 31. Here, Augustin is asking for a permit from the State Engineer to do exactly what the Long group attempted to do, without a permit, but failed.

Here, like the Long group, Augustin desires to appropriate 54,000 acre feet, or whatever lesser amount that will not result in impairment others. Response at 16-17. Augustin anticipates

that others may be impaired by the enormous amount of water the Application requests. Thus, it is essentially seeking a permit to appropriate *all* of the groundwater it can possibly pump from the system and then sell it to others – just like the Long group's ditch that could take all the water from the river to be sold to others. Unlike the Long group, however, Augustin cannot move forward to appropriate water without a permit. Granting Augustin a permit to do what it seeks equates to the State Engineer authorizing Augustin to monopolize all of the unappropriated groundwater in the basin in the absence of evidence that anyone actually intends to use (or buy) the water.

Augustin also fails to distinguish the facts here from those in *Young & Norton v. Hinderlider*, 1910-NMSC-061, ¶¶ 25-29. There the court was tasked with construing the statutory authority of the Territorial Engineer under Laws 1907, c. 49, § 28 to reject an application for a new appropriation of water "if, in his opinion, the approval thereof would be contrary to the public interest." *Id.* ¶ 22. The matter involved two applications filed by two proposed appropriators to use water from the La Plata River. Hinderlider's application requested a permit to appropriate water sufficient to irrigate 14,000 acres of land, while Young and his partner sought a permit to irrigate 5,000 acres. Hinderlider filed his application first, but the Territorial Engineer rejected it and approved the Young application because Hinderlider's project would be more expensive and would require irrigators to pay more to use water. He also found the Young project was more feasibly suited to the available water supply.

On appeal the court determined that the prior appropriation doctrine did not prevent the Territorial Engineer from preferring a later application if an earlier application was found to be contrary to the "public interest" criteria in the statute, which included protecting the public against fraudulent or excessively expensive irrigation projects. Because the statute provided how one could acquire the use of "public waters," the court found it was "designed to secure the greatest

possible benefit from them for the public." *Id*. ¶ 23. The fact that the application filed by Young and his partner "was *not* asked for *speculative* purposes, but with the intent of irrigating and developing the lands now settled," compared to Hinderlider who was not a state resident but an investor, could be relevant in determining whether Hinderlider's irrigation project was sound. *Id.* ¶ 4 (emphasis added). The court explained:

> It is, for instance, obviously for the public interest that investors should be protected against making worthless investments in New Mexico, and especially that they should not be led to make them through official approval of unsound enterprises. If there is available unappropriated water of the La Plata river for only 5,000 or 6,000 acres of land, it would be contrary to the public interest that a project for irrigating 14,000 acres with that water should receive an official approval which would, perhaps, enable the promoters of it to market their scheme, to sell stock reasonably sure to become worthless, and land which could not be irrigated, at the price of irrigated land. Such a proceeding would in the end result only in warning capital away from the territory. The failure of any irrigation project carries with it not only disastrous consequences to its owners and to the farmers who are depending on it, but besides tends to destroy faith in irrigation enterprises generally.

Id. ¶ 24. Thus, whether Hinderlider's proposed water project was actually feasible, or just a marketing "scheme," was a relevant inquiry for the Territorial Engineer to make in his consideration of public interest. Finding insufficient evidence of these matters in the record, the court remanded the case back to the district court to make the necessary factual determinations. *Id*. ¶ 32.[5]

Augustin cannot deny that the "public interest" in New Mexico has required the rejection of efforts to monopolize the public water supply and unsound marketing "schemes" for over a

[5] The section of New Mexico's Water Code at issue in *Young* is now found at NMSA § 72-5-7 which amended the public interest criteria in 1985 to further empower the State Engineer to reject an application for a new appropriation if he finds "approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state." This new language affirmed the legislature's original grant of authority to the State Engineer to ensure that only those who have specific intent to use water for feasible purposes be permitted to make new appropriations of the state's water. *See, e.g, City of El Paso by & through Pub. Serv. Bd. v. Reynolds*, 597 F. Supp. 694, 699 (D.N.M. 1984) ("the State Engineer and state courts may consider the conservation and public welfare criteria equivalent to the 'public interest' standard in § 72–5–7 and construe them accordingly.")

century. And, like the Long group in *Millheiser* and Mr. Hinderlider in *Young*, Augustin is undeniably seeking to promote and sell the State's water to unknown users. Its plan to have the State Engineer bifurcate the hearing to first determine how much water was available for appropriation before providing the details of its proposed end-users fails to demonstrate a non-speculative intent to use the amount of water it seeks to appropriate. The simple fact that Augustin cannot support its requests in the Application with any evidence of real customers with actual demands for water and estimated timelines for using it led to the State Engineer's logical conclusion that Augustin could not show that its proposed appropriation was an "imperative necessity." *See Hagerman*, 1911-NMSC-021, ¶ 6. Augustin's plan is simply a marketing scheme to sell water to unknown users and the State Engineer properly rejected it as such. *See Young*, 1910-NMSC-061. Augustin fails to provide this Court any reason to not do the same.

II. AUGUSTIN CONTINUES TO FAIL TO PROVIDE ADMISSIBLE EVIDENCE REQUIRED TO SHOW MATERIAL FACTS IN DISPUTE UNDER RULE 1-056(E)

As the Applicant for a permit to appropriate groundwater, Augustin has the burden of showing actual intent to use water – not simply a desire to divert it for eventual use by unknown others. It has long been established that no "dog in the manger" policy is allowed in New Mexico. *Harkey v. Smith,* 1926-NMSC-011, ¶20, 31 N.M. 521. "[I]t is quite as necessary to make use of the water as it is to divert it." *Id.* at ¶7. In response to the several motions for summary judgment filed in the administrative process and with this Court, Augustin has had ample opportunity to provide admissible evidence under Rule 1-056(E) to show that others have the need, intent and ability to use the water it seeks to appropriate. Yet, it has never done so.

For example, after receiving protests to the Application, the State Engineer's Hearing Examiner entered a Scheduling Order that proposed a schedule for the proceedings and a date for

the final evidentiary hearing. [AR 01274] He provided all parties an opportunity to object to the proposed schedule, but none did. The Scheduling Order provided deadlines to conduct discovery, designate witnesses, exchange expert reports, and file motions. It also explicitly provided that "Rule 1-006 and Rule 1-007.1 A through E [NMRA] shall apply with respect to the filing of, and responding to, motions." [AR 01280] Rule 1-007.1(C) NMRA specifically addresses motions filed for summary judgment and requires they comply with Rule 1-056. Rule 1-056 (E) requires "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be *admissible in evidence*, and shall show affirmatively that the affiant *is competent to testify* to the matters stated therein" (emphasis added). If the adverse party does not provide admissible evidence of "specific facts showing that there is a genuine issue for trial," the court shall enter summary judgment against it. *Id.*

Soon after the Scheduling Order was entered, two motions seeking summary judgment were filed. [AR 01493, 01302] They argued the requests in the Application were legally deficient or impermissible as a matter of law, including New Mexico's anti-speculation doctrine. Augustin did not seek additional time to conduct discovery of material facts in dispute necessary to respond to the motions. Instead, its responses to the motions simply relied upon the facial requests in the Application. [AR 00081] Simply put, Augustin did almost nothing to show material facts in dispute. To survive summary judgment, Augustin was required to provide admissible evidence sufficient to establish a necessary element to acquire a water right – *i.e.,* intent to actually use water. Because it failed to do so, the State Engineer appropriately entered summary judgment against it. [AR 02505] (the Application was summarily dismissed because it was impermissibly vague and failed to show a non-speculative need for water)

Likewise, on appeal from the State Engineer's decision this Court adopted a schedule that allowed all parties the opportunity for discovery prior to hearing motions for summary judgment [RP 2810, 2813][6] and subsequently amended the schedule to provide even more time for parties to file their responses to the motions. [RP 3168] Even though it was provided the opportunity, Augustin did not serve discovery requests on any party or serve subpoenas on any purported end-user of water. In its responses in opposition to motions for summary judgment, Augustin provided only one affidavit by its project manager that described the process by which the Application was completed and explained the information contained in it. [RP 3596] Notably, Augustin failed to provide any admissible evidence or sworn testimony by a non-interested person—such as a municipal or commercial end user—to support that there is an actual need for the water it proposes to appropriate and an actual intent to use it.

Again, here, Augustin relies on the same affiant and same attestations to show Augustin's desire to appropriate water and to sell it, someday, to someone. Augustin offers no sworn testimony or statement by any other person or entity competent to testify as to an objective, actual intent to use any of the 54,000 acre feet of water Augustin seeks to appropriate. Surely, if anyone actually intended to do so, Augustin could have found at least one affiant to attest to it. The purported letter of interest from Rio Rancho (attached as Exhibit E to the Application) is not only insufficient to show an intent to use water, it is inadmissible hearsay in violation of the requirements of Rule 1-056(E). Augustin has also failed to provide the Court with any sworn declarations by experts who could opine that the proposals contained in the Application and its Exhibits are financially and technically feasible.

[6] Citations to "RP" refers to documents in the Record Proper submitted to the Court of Appeals.

The processes employed by the State Engineer's hearing examiner and this Court have provided Augustin ample opportunities to show, with *admissible* evidence, that others have the need and intent use the water it seeks to appropriate, and that the water can and will be put to beneficial use. Having failed to provide evidence of a disputed material fact necessary to be resolved at an evidentiary hearing, this Court should grant the Motions and enter summary judgment against Augustin.

CONCLUSION

Augustin fails to show any material fact is in dispute on the issue of speculation. Hand respectfully requests the Court grant the Motions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of December 2023, the foregoing was electronically filed and served on all counsel of record through the Odyssey File & Serve System.

/S/ Tessa T. Davidson
Tessa T. Davidson