SEVENTH JUDICIAL DISTRICT COURT
STATE NEW MEXICO
COUNTY OF CATRON

AUGUSTIN PLAINS RANCH, LLC,

Appellant,

v.

JOHN D'ANTONIO, JR., P.E.,
New Mexico State Engineer

Appellee,

and

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS, et al.,

Appellees.

Dist. Court No. D-728-CV-2018-00026
The Honorable Roscoe A. Wood
District Court Judge

Appeal from Office of the State Engineer
Hearing No. 17-005

NEW MEXICO STATE ENGINEER'S CONSOLIDATED REPLY TO AUGUSTIN PLAINS RANCH, LLC'S CONSOLIDATED RESPONSE TO APPELLEES' MOTIONS FOR SUMMARY JUDGMENT AND COMMUNITY PROTESTANTS' RESPONSE TO THE STATE ENGINEER'S MOTION FOR SUMMARY JUDGMENT

Appellee, the New Mexico State Engineer ("State Engineer"), by and through undersigned counsel, submits this Consolidated Reply to Augustin Plains Ranch, LLC's ("APR") Consolidated Response to Appellees' Motions for Summary Judgment ("APR Consol. Resp. to Appellees MSJs") and Community Protestants' Response to the State Engineer's Motion for Summary Judgment ("CP Resp. to SE MSJ").

INTRODUCTION

On remand to this Court, there remain only two substantive issues to be determined: (1) whether APR's 2014 Application is administratively complete for filing pursuant to NMSA 1978,

§ 72-12-3(A); and (2) whether the 2014 Application is facially invalid because it is speculative. APR agrees with the State Engineer that the 2014 Application is complete under Section 72-12-3 (A)(1)-(6) but disagrees that the 2014 Application is speculative. (APR Consol. Resp. to Appellees MSJs, p. 2). In the Community Protestants' Response to the State Engineer's Motion for Summary Judgment ("CP Resp. to SE MSJ"), they disagree that the 2014 Application is complete, but agree with the State Engineer that the 2014 Application is speculative. (CP Resp. to SE MSJ p. 2). The State Engineer's analysis and application of New Mexico law, as informed by Colorado law, provides the Court with a straightforward pathway to conclude that the 2014 Application is speculative. By contrast, APR proposes an evaluation during an evidentiary hearing of its subjective intent to place water to beneficial use. (APR Consol. Resp. to Appellees MSJs, p. 13). APR's subjective intent is to sell the 54,000 acre-feet of water for use on a list of potential places, at unknown quantities, for different potential purposes of use. Therefore, APR's subjective intent test also necessitates a determination of the subjective intent of the end users of the water, because in this case it is those end users that will place the water to beneficial use, not APR itself. This is one reason why the State Engineer's evaluation considered whether there was evidence demonstrating that APR had secured an end user via a contract or some other assurance to determine if the 2014 Application is speculative. Further, APR's test is also impractical as it requires the State Engineer to wait and see if the applicant's subjective intent comes to fruition while an enormous quantity of water is tied up and unavailable for appropriation by other users.

There are no disputes of material fact that must be resolved for the Court to find the 2014 Application speculative, and this matter is ripe for summary judgment. The State Engineer requests that its Motion for Summary Judgment be granted on the grounds that the 2014 Application is complete to accept for filing but is still speculative on its face.

REPLY TO APR'S RESPONSE TO STATE ENGINEER'S STATEMENT OF UNDISPUTED MATERIAL FACTS

APR asserts that the State Engineer's UMF 1-4 are immaterial. (APR Consol. Resp. to Appellees MSJ, Appx. 4). However, these facts demonstrate that the 2014 Application is complete under NMSA 1978 Section 72-12-3 (A)(1)-(6). This is an issue on which APR and the State Engineer are aligned. These facts are relevant to the completeness of APR's 2014 Application and should not be disregarded by this Court.

APR's quarrel with the State Engineer's UMF 6-10 is not with their factual accuracy, but whether these facts demonstrate that the 2014 Application is speculative under APR's flawed articulation of applicable law.

APR disputes the State Engineer's UMF 11-12 indicating that one letter from the City of Rio Rancho and an unsupported affidavit constitute substantial evidence, which they do not. APR fails to provide a factual response to the facts detailed in UMF 11-12.

APR asserts that the State Engineer's UMF 13-14 are immaterial citing to arguments in response to arguments made by parties other than the State Engineer. (APR Consol. Resp. to Appellees MSJ, p. 14-17). Inclusion of these material facts supports the State Engineer's arguments in its Amended Memorandum in Support of its Motion for Summary Judgment ("SE Amended Memorandum") that the 2014 Application is speculative and should not be disregarded by this Court. (SE Amended Memorandum, pp. 9-11**)**.

The Community Protestants do not dispute the State Engineer's Undisputed Material facts.

Regarding APR's Additional Material Facts, the State Engineer specifically incorporates by reference its responses to APR's statement of undisputed material facts as set forth in the State

Engineer's Response to Applicant Augustin Plains Ranch, LLC's Second Motion for Summary Judgment and Memorandum in Support ("SE Resp. to APRs Second MSJ").

ARGUMENT

I. The 2014 Application is Complete for Filing under NMSA 1978, Section 72-12-3, but is Speculative on its Face.

In their Response to State Engineer's Motion for Summary Judgment, the Community Protestants argue that the 2014 Application is incomplete under NMSA 1978 Section 72-12-3 (A)(2) and (6) (1967). (CP Resp. to SE MSJ, p. 2**)**. The State Engineer addressed these arguments in its Amended Memorandum at pages 13-14, and in its Consolidated Response to Pittman Protestants' and Community Protestants' Motions for Summary Judgment ("SE Response to Protestants MSJ") at pages 4-12 and incorporates those discussions here by reference. The 2014 Application is complete as it contains all the essential requirements under the above statute and was therefore properly accepted for filing by the State Engineer.

Even though the 2014 Application is complete as an administrative matter, it is speculative on its face. The State Engineer's arguments on this point are set forth in the SE Amended Memorandum at pages 14-22, and the SE Resp. to APR Second MSJ at pages 6-8 and incorporates those arguments here by reference. The State Engineer explained the basis for finding the 2014 Application speculative by first explaining applicable law from New Mexico and helpful guidance from Colorado and incorporates those arguments here. (SE Amended Memorandum, pp. 14-22; SE Resp. to APR Second MSJ p. 3-8).

It is well established in New Mexico law since before statehood that the main objective of the prior appropriation doctrine is to prevent speculation. *Millheiser v. Long*, 1900-NMSC-012, ¶31, 10 NM 99. It is also a central principle that speculation is contrary to the doctrine of beneficial use under the New Mexico Constitution. N.M. Const. art XVI, § 3. Colorado water law is founded

on the same principles. *See State ex rel. Office of the State Engineer v. Lewis*, 2007-NMCA-008, ¶ 40. (SE Amended Memorandum, pp. 9-11, 15-19; SE Resp. to APR's Second MSJ, p. 3-5). These doctrines are not new principles. As explained in the State Engineer's prior briefing, the 2014 Application does not meet either the "specific plan" or the "can and will" tests articulated by Colorado. (SE Amended Memorandum, pp. 9-11 and 15-22; SE Resp. to APR's Second MSJ, pp. 4-6**)**. These tests are helpful to determine whether the sought-after water will actually be put to beneficial use. The purpose of these tests is to prevent violation of the beneficial use and prior appropriation doctrines, which are followed by courts in both New Mexico and Colorado. Therefore, the guidance provided by Colorado courts is helpful in determining whether an application is speculative. If an application is speculative, it would violate these doctrines in both states.

APR attempts to distinguish the guidance from Colorado, arguing that requiring evidence of a firm contractual commitment, a specific plan, or an agency relationship runs contrary to NM law as articulated in *Mathers v. Texaco*, 1966-NMSC-226, 77 N.M. 239. (APR Consol. Resp. to Appellees MSJs, p. 29). The State Engineer responded to many of these arguments in its Resp. to APR's Second MSJ at pages 6-8 and incorporates that response here. APR further relies on *Jicarilla Apache Tribe v. United States,* 657 F.2d 1126 (10th Cir. 1981), to suggest that there must be a trial in this case to determine whether the 2014 Application was speculative. (APR Consol. Resp. Appellees MSJ, p. 29). The fact-finding conducted by the court in *Jicarilla Apache Tribe* was for the purpose of determining whether a federal contract should be declared void. 657 F.2d at 1131. Specifically, the pertinent issue was whether the storage of project water constituted a beneficial use, which was a requirement for a valid federal contract. *Id.* at 1132. It is unclear from the opinion whether any dispositive motions were considered on this issue. Thus, *Jicarilla Apache*

Tribe does not dictate whether a trial court may determine facts during consideration of motions for summary judgment, nor does it dictate that further fact finding is necessary on the question of speculation in the instant case.

APR's suggestion that the State Engineer is limited by the statutory considerations under NMSA 1978, Section 72-12-3(E) when granting an application for a new appropriation, (APR Consol. Resp. to Appellees MSJs, p. 35-36), ignores the fact that Article XVI, Sections 2 and 3 of the New Mexico Constitution and case law interpreting the doctrines of prior appropriation and beneficial use also apply to applications for water use. While Section 72-12-3(E) allows an application to be denied if it is contrary to conservation of water or detrimental to the public welfare of the state, the State Engineer may also ***refuse to consider*** an application under NMSA 1978, Section 72-5-7 if approval would be contrary to conservation of water within the state or detrimental to the public welfare of the state. Even though the statute does not enumerate specific considerations for determining what is detrimental to the public welfare of the state, violation of the fundamental principles set forth in the NM Constitution would meet this criterion. As explained in the SE Response to APR's Second MSJ, the 2014 Application violates the doctrines of prior appropriation and beneficial use and is inconsistent with the NM Constitution, rendering it speculative on its face.

For the reasons articulated in the State Engineer's briefing in this matter, and because there are no disputed issues of material fact, the State Engineer's Motion should be granted.

II. APR's Construction of Relevant Standards of Law is Incorrect and Inconsistent with New Mexico Law.

APR's articulation of the relevant standards for determining whether an application is speculative places the most weight on the applicant's subjective intent to put water to beneficial use. (APR Consol. Resp. to Appellees MSJs, pp. 19-20). The State Engineer's articulation, by

contrast, places the most weight on whether there is evidence that the water sought to be appropriated will actually be put to beneficial use. APR begins with a constrained reading of a dictionary definition of speculation, then recites definitions from case law outside of New Mexico, and then relies upon *State ex. rel. Offc. Of the State Eng'r. v. Elephant Butte Irrigation District*, 2021-NMCA-066, 499 P.3d.690 (hereinafter "*Gray*"), to recommend a totality of the circumstances approach to determine intent. First, APR offers dictionary definitions to articulate a legal test based on common law. The dictionary definitions are not useful here because they describe situations tied to economic market fluctuations, which are not considered in deciding whether to grant a water use application. See, e.g. § 72-12-3. Next, regarding the out-of-state case law cited by APR, the State Engineer's prior briefing points out that these cases do not support the one-sided subjective intent test advanced by APR. (SE Resp. to APR's Second MSJ, p. 10-12**)**. Finally, the *Gray* case is focused on whether the water rights at issue had vested, and whether they were abandoned. The language APR quotes from that case relating to a bona fide intent to complete an appropriation within a reasonable time frame is addressed to the doctrine of relation back, which applies to determine the priority date of a water right. *Gray* has no applicability to the question of whether an application should be granted in the first place, which is the central inquiry here. The SE Response to APR's Second MSJ at pages 7-10 analyzes APR's arguments pertaining to the relevant standards for finding speculation, and that analysis is incorporated by reference here.

Even if APR's subjective intent were relevant, APR's reliance on information attached to the 2014 Application as evidence of its subjective intent is more demonstrative of an ability to deliver water rather than any intent to place the water to beneficial use. APR states that it is "ready, willing and able to undertake the pipeline project and put the applied-for water to beneficial use."

(APR Consol. Resp. to Appellees MSJs, p. 12). While APR has provided sufficient evidence regarding the first part of that statement, the second part is dependent not on APR's intent, but on that of theoretical end users that do not presently exist. APR's plan is to sell water for unknown users to place to beneficial use in unknown quantities at unknown locations. As discussed on pages 7-8 of the SE Resp. to APR's Second MSJ, APR's evidence of demand is lacking and/or unsupported. Further fact finding regarding whether APR possesses subjective intent to appropriate water will not aid this Court in deciding whether the 2014 Application is speculative. APR's persistent requests for such fact finding should be rejected as unnecessary.

Finally, regulatory safeguards to prevent "over appropriation" do not address the problem of speculation. (APR Consol. Resp. to Appellees MSJs, p. 31-32). The regulatory safeguards cited by APR (e.g., 19.26.2.13(B), (C); 19.27.1.20; 19.27.1.21; 19.27.1.38 NMAC) pertain to perfecting or vesting a water right. These regulations, which, for example, require users to prove beneficial use or obtain an extension of time in which to do so, apply ***after*** a permit has been granted based on sufficient evidence that the amount of water appropriated will be placed to an actual, specified beneficial use (i.e, where there is no speculation). These regulations do not adequately protect against the harms posed by speculative water rights applications. First, canceling a water use permit for failure to put water to beneficial use triggers an administrative review process, followed by judicial appeals, and there is no guarantee that the cancellation will be upheld. Second, the process of cancelling permits for failure to put the water to beneficial use can take many years. During that entire time, even if the permitted water right is never put to beneficial use, that water is unavailable for others to appropriate. If other users apply to appropriate water from the same basin, the State Engineer must analyze those applications to determine whether they may impair existing permits. *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 28, 141 N.M. 21, 150 P.3d

971. Even if a permit is unused, the State Engineer's analysis must assume that the permits are being fully exercised. *Id.* A large, but unused, permit could significantly skew the impairment analysis, suggesting impairment to existing water rights based on accelerated groundwater drawdown levels. This could easily lead to the denial of a new application that may have otherwise been granted. In effect, a speculative water rights permit corners available water and makes it much harder for others to appropriate that same water. The regulations allowing for unused permits to eventually be cancelled are inadequate to guard against this harm because of the long lag time between issuance of a permit and its eventual cancellation.

III. Summary Judgment Standards Are Satisfied

APR argues that there are substantial disputes of material fact. (APR Consol. Resp. to Appellees MSJs, p. 18**)**. However, this is only true if the Court adopts APR's approach to determining whether an application is speculative, i.e., there are material issues of disputed fact regarding APR's subjective intent to put water to beneficial use within a reasonable time. On the other hand, if the Court adopts an approach consistent with New Mexico law and utilizing guidance from Colorado cases, as proposed by the State Engineer, there are no disputes of material facts that the application is speculative. Contrary to APR's assertion, there is no admissible evidence to weigh. For instance, it is undisputed that APR has not identified end users willing to place 54,000 acre-feet of water to beneficial use. It is also undisputed that there is no information regarding how much water will be put to use in each of the counties identified in the 2014 Application, or the specific uses in those counties. The undisputed facts clearly demonstrate that the 2014 Application is speculative on its face and no further factual development is necessary.

CONCLUSION

The State Engineer respectfully requests the Court to grant the State Engineer's Motion for Summary Judgment because the 2014 Application is contrary to the doctrines of prior appropriation and beneficial use as set forth in the New Mexico Constitution and is therefore speculative under New Mexico law.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2023, I served a true and correct copy of the foregoing through Odyssey File and Serve.

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