BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE CORRECTED APPLICATION FILED BY AUGUSTIN PLAINS RANCH, LLC., FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN IN THE STATE OF NEW MEXICO	**Hearing No. 17-005** **OSE File No. RG-89943 POD 1 through POD 37**

APPLICANT'S REPLY TO WATER RIGHTS DIVISION'S RESPONSE TO THE NMELC PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

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Augustin Plains Ranch, LLC ("Augustin") hereby replies to the Water Rights Division's ("WRD") Response to the NMELC Protestants' Motion for Summary Judgment ("WRD Response").

INTRODUCTION

Augustin agrees with WRD on many subjects, but writes to provide its position on new and important issues raised in the WRD Response.

WRD recognizes that the 2014 Application "is complete in accordance with current statutory and regulatory requirements," WRD Response at 2, and acknowledges that the ELC Protestants "have offered no sufficient legal basis for the granting of summary judgment," *id.* at 11. Augustin agrees, and the ELC Protestants' Motion must be denied for those reasons alone.

Notwithstanding this outcome, however, Augustin recognizes the value of WRD's request for guidance on the anti-speculation doctrine. WRD seeks guidance on two issues (1) should the State Engineer adopt an anti-speculation standard, and (2) if adopted, when should an anti-speculation standard be applied. As discussed in Section III, if the State Engineer is inclined to adopt an anti-speculation standard, that standard should be flexible and should strike a balance between the concerns of applicants and protestants. In addition, if the State Engineer is inclined to adopt a new standard, that standard can only be applied at the conclusion of the evidentiary hearing.

DISCUSSION

I. THE WRD IDENTIFIES PROBLEMS WITH THE ELC PROTESTANTS' MOTION THAT NECESSITATE DENIAL OF THE MOTION

Augustin concurs with much of the analysis of the WRD. For example, the WRD is correct that the 2014 Application "is materially different from [Augustin's] original application." WRD Response at 4. Thus, the 2014 Application "is not identical to the previous application and cannot

be summarily dismissed on the grounds of preclusion." *Id.* Augustin also concurs with WRD that there is a "difference between a preliminary determination of the completeness of a permit application and a water right." *Id.* at 6. As WRD describes, the 2014 Application "is complete in accordance with current statutory and regulatory requirements." WRD Response at 2. As previously explained, this fact alone necessitates denial of the Motion. Augustin Response to ELC Protestants at 13-28.

WRD goes on to identify two reasons that the ELC Protestants' "could" be denied. *Id.* at 7. One of the reasons that the WRD identifies for potentially denying the ELC Protestants' Motion is a dispute over the material facts. The WRD identifies numerous disputes over the material facts, WRD Response at 3-7, but incorrectly characterizes these disputes as a reason that the ELC Protestants' Motion "*may*" be denied, suggesting an element of discretion, *id.* at 1. In fact, no such discretion exists. Rather,

> [s]ummary judgment is appropriate where there is no evidence raising a reasonable doubt that a genuine issue of material fact exists. On the other hand, ***where any genuine controversy as to any material fact exists, a motion for summary judgment should be denied and the factual issues should proceed to trial.*** To that end, a summary judgment motion is not an opportunity to resolve factual issues, but should be employed to determine whether a factual dispute exists.

Beggs v. City of Portales, 2009-NMSC-023, ¶ 10, 146 N.M. 372 (emphasis added). *See also Summers v. American Reliable Ins. Co.*, 1973-NMSC-060, ¶ 10, 85 N.M. 224 ("Resolution of disputed questions of material fact is improper in summary judgment proceedings, whether by findings of fact or otherwise."); *Thompson v. Fahey*, 1980-NMSC-013, ¶ 6, 94 N.M. 35 ("Summary judgment is a drastic remedy to be used with caution. So long as one issue of material fact exists it may not be properly granted.") (internal citations omitted); *Ceboletta Land Grant, ex rel Bd. Of Trustees of Cobelleta Land Grant v. Romero*, 1982-NMSC-043, ¶ 3, 98 N.M. 1, 644 P.2d 515 ("The sole purpose of a summary judgment proceeding is to determine whether a genuine

issue of material fact exists, it is not to be used to decide an issue of fact.") (internal citations omitted); *Peoples State Bank v. Ohio Cas. Ins. Co.*, 1981-NMSC-106, ¶ 7, 96 N.M. 751, 635 P.2d 306 ("Summary judgment is an extreme remedy which should yield to a trial on the merits if, after resolving all reasonable doubts in favor of the opponent of the motion, the evidence adduced at the hearing establishes the existence of a genuine issue as to any material fact."); *Watson v. Tom Growney Equipment, Inc.*, 1986-NMSC-046, ¶ 20, 104 N.M. 371, 721 P.2d 1302 (same).

Likewise, WRD argues that the ELC Protestants' Motion "fails to meet the requirements of New Mexico Rules Annotated, 1978, Rule 1-056(D)(2)," but terms that failure "a basis of denial," WRD Response at 3, and submits that the State Engineer "may [still] choose to address the issue of speculation." Contrary to the WRD's implication, however, compliance with the rules is not voluntary. Failure "to meet the requirements" of the rules, necessitates denial of the ELC Protestants' Motion. *See* 19.25.2.16(A) NMAC (New Mexico Rules of Civil Procedure are generally applicable).

In sum, the WRD is correct that the ELC Protestants "have offered no sufficient basis for the granting of summary judgment." WRD Response at 11. Because there is a dispute over the material facts, *id.* at 3-7, and because the ELC Protestants' Motion "fails to meet the requirements of the New Mexico Rules Annotated," *id.* at 3, the Hearing Examiner need proceed no further – the motion *is required* to be denied so that the disputes can be resolved based on the evidence at hearing.

II. IF THE HEARING EXAMINER ADOPTS A STANDARD, THAT STANDARD SHOULD APPLY ONLY AT THE CONCLUSION OF THE EVIDENTIARY HEARING

The WRD poses the question of whether "the issue of speculation in the application need[s] to be addressed at this stage or can it be addressed later in the administrative hearing process?,"

WRD Response at 2, but offers no resolution. The answer is, if the Hearing Examiner adopts a standard, that standard can apply only at the conclusion of the evidentiary hearing for five related reasons.

First, as discussed in Augustin's Response to the ELC Protestants' Motion, Section 72-12-3 specifies the information that must be included in an application to appropriate groundwater, and the 2014 Application includes all of this information (and more). Augustin Response to ELC Protestants at 13-28. The WRD questions whether additional information should be included as part of evaluating whether an application is complete, but in interpreting Section 72-12-3, the Hearing Examiner is not free to read into the statute "language which is not there, particularly if it makes sense as written." *New Mexico Indus. Energy Consumers v. PRC*, 2007-NMSC-053, ¶ 33, 142 N.M. 533 (internal quotation omitted); *see also State v. Maestas*, 2007-NMSC-001, ¶ 15, 140 N.M. 836 (court "may only add words to a statute where it is necessary to make the statute conform to the legislature's clear intent, or to prevent the statute from being absurd"). If the Legislature had intended to require additional information as part of an application, it would have included it in the statute. *Cf. Morningstar Water Users Ass'n v. New Mexico Public Utility Com'n*, 1995-NMSC-062, ¶ 38, 120 N.M. 579 (Legislature intended to limit the definition of "public utility" to an enumerated list of specific types of utilities). In *Mathers v. Texaco, Inc.*, 1966-NMSC-226, 77 N.M. 239, the New Mexico Supreme Court rejected a similar claim that an application was required to contain more information than was identified in Section 72-12-3. The Court noted that the application contained all of the information identified by the statute, and had been submitted on "forms furnished and prescribed by the State Engineer." *Id.* at ¶ 25. It held that "clearly these statutes do not require forms different from those submitted." *Id.* at ¶ 30. That same reasoning applies to the 2014 Application.

Second, the WRD confirms that the 2014 Application "is complete in accordance with current statutory and regulatory requirements." WRD Response at 2; *see also id.* ("New Mexico law does not specify requirements concerning speculation in order for an application to be complete"). It nevertheless suggests that the Hearing Examiner adopt three new criteria for "applications such as this" – criteria that are not required by the statute or the current regulations. *Id.*; *see generally,* 19.27.1 NMAC. By advocating for the adoption of three new criteria, the WRD is effectively advocating for adoption of a new rule to be applied "where the application seeks to appropriate groundwater in a geographically distinct region and transport it to another region of the state." *Id.* But this proceeding is an adjudicatory permit proceeding, which, unlike a rulemaking, is *not* designed to "create[] generally applied standards" such as the three new criteria offered by WRD. *Earthworks' Oil & Gas Accountability Project v. New Mexico Oil Conservation Com'n*, 2016-NMCA-055, ¶ 5, 374 P.3d 710; *see also Rauscher, Pierce, Refsnes v. Taxation and Revenue Dep't*, 2002-NMSC-013, ¶ 42, 132 N.M. 226 (explaining that rulemaking, not adjudications, "affects the rights of broad classes of unspecified individuals"). "It is clear" that the State Engineer "may not promulgate a rule during an adjudicatory process and then retroactively apply the rules to a party whose rights are being adjudicated." *Matter of Rates and Charges of U.S. West Communication, Inc.*, 1993-NMSC-074, ¶ 15, 116 N.M. 548; *accord Hobbs Gas Co. v. New Mexico Public Service Commission*, 1993-NMSC-032, ¶ 7, 115 N.M. 678 ("regulatory treatment which radically departs from past practice without proper notice will not be sustained" (internal quotation omitted)). It necessarily follows that the State Engineer cannot adopt three new criteria to apply retrospectively to the determination that the 2014 Application is complete.[1]

[1] An illustration that the WRD is putting forward a new standard to be added to Section 72-12-3 can be seen by comparing the Order denying the 2007 Application with the WRD's Response. In the Order Denying Application,

Third, as explained in Augustin's briefing before the Court of Appeals, *see* Augustin Response at Exhibits B and E, Augustin's Response to the ELC Protestants Motion, *id.* at 25-28, and Augustin's Response to the Catron County Motion, *see* pgs. 2-7, once an application has been accepted for filing and publication, the State Engineer "must consider the full merits of an application" in an evidentiary hearing. *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 31, 147 N.M. 523; *see also D'Antonio v. Garcia*, 2008-NMCA-139, ¶ 9, 145 N.M. 95 ("the right to a hearing granted by Section 72-2-16 is a procedural right that is intended to ensure that the state engineer affords an appropriate degree of process to the parties before a final decision is entered"); *Derringer v. Turney*, 2001-NMCA-075, ¶ 15, 131 N.M. 40 (rejecting the argument that the hearing requirement "can be satisfied solely by the written pleadings of the parties" and oral argument on a motion); 19.27.1.15 NMAC ("In the event an application is protested, hearings shall be conducted").

Fourth, evaluation of the new criteria proposed by the WRD is a fact-specific inquiry that cannot be decided at this stage. *See, e.g., Application for Water Rights*, 307 P.3d 1056, 1064 (Colo. 2013) ("Whether an applicant has met the legal standards for a conditional appropriation presents mixed questions of law and fact"); *City of Thornton v. Bijou Irr. Co.*, 926 P.2d 1, 32 (Colo. 1996) (resolution of conditional appropriation "must be made by the court through the application of a legal standard to the particular facts of the case"). This is true because, as recognized by WRD, there are numerous disputes over the material facts. Thus, in *Colorado v. Southwestern Colo. Water Conservation Dist.*, 671 P.2d 1294, 1321 (Colo. 1987) (en banc), the Colorado Supreme

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the State Engineer reasoned that an application must contain "sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights." ELC Protestants' Motion at Exhibit 1, ¶ 8. In comparison, the WRD views the 2014 Application as sufficient "to evaluate for impairment, conservation, or public welfare." WRD Response at 4 (denying the ELC Protestants' claim to the contrary). Thus, the 2014 Application satisfies the standard identified by the State Engineer as part of his evaluation of the 2007 Application. The State Engineer is not free to move the goal post by adopting yet another new standard as part of this proceeding.

Court found that dismissal of an application without an evidentiary hearing "based on general information" on the face of the applications was improper because it penalized the applicants "for following statutory application procedures."

Fifth, it is bad policy to reject applications without affording the applicants an opportunity to present their case. *See, e.g., Charter Bank v. Francoeur*, 2012-NMCA-078, ¶ 11, 287 P.3d 333 (recognizing policy that "causes should be tried upon the merits"). The State Engineer should consider applications on their merits, particularly for potentially meaningful projects such as the one being proposed by the 2014 Application. As discussed in Augustin's Response to the ELC Protestants, *see* pgs. 50-52, consideration of the 2014 Application on the merits is in the public interest.

In short, if the State Engineer adopts new criteria to evaluate the anti-speculation doctrine, that criteria can only be applied at the conclusion of the evidentiary hearing.

III. ADDITIONAL CONSIDERATIONS IF THE HEARING EXAMINER IS INCLINED TO ADOPT A NEW STANDARD

A. If the Hearing Examiner Adopts a New Standard, the Standard Should Strike a Balance Between the Concerns of the Applicant and the Protestants

The WRD suggests that "the State Engineer may choose to address the issue of speculation" as part of the ELC Protestants' Motion. WRD Response at 7. In case the State Engineer is so inclined, the WRD offers a possible standard for evaluating the issue of speculation in complex water applications. *Id.* at 9-10. If the State Engineer elects to articulate a standard as part of addressing the ELC Protestants motion, however, he should articulate a standard that appropriately balances the concerns over speculation with the need for expanding water supplies in New Mexico and the realities of developing complex water projects.

In attempting to address the ELC Protestants' concerns, it is necessary to understand what is meant by "speculation." The WRD is correct that "[w]hat might constitute a 'speculative' application for water rights is not well-defined in New Mexico law." *Id.* It is therefore useful to start with principles that *are* established in New Mexico water law. First, it has long been recognized that sale is a valid beneficial use. *See, e.g.,* Augustin Response to ELC Protestants at Exhibit N (letter from WRD advising Augustin to include sale as a beneficial use); *Trujillo v. CS Cattle Co.*, 1990-NMSC-037, 109 N.M. 705; *Albuquerque Land & Irrigation Co. v. Gutierrez*, 1900-NMSC-017, 10 N.M. 177; S.C. Weil, Water Rights in the Western States, 2d ed., § 120, p. 198 ("Mining and power are useful purposes for which appropriation may be made. Sale or public supply likewise.") (internal citations omitted). Second, contrary to the position of the Protestants, it is not necessary for an application to identify the specific end-users of water. *See, e.g., Mathers*, 1966-NMSC-226, ¶ 30 ("Certainly there is nothing in our law which requires that an application to appropriate public waters for a beneficial use must be made by or in the names of all persons who may ultimately use or be benefitted by such use."). Third, the law allows appropriations to be made for the future use of another person or entity. *See, e.g., Gutierrez*, 1990-NMSC-017, ¶ 65 ("the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use *to be made* through some other person, and upon lands and possession other than those of the appropriator" (emphasis added)); *Scherck v. Nichols*, 95 P.2d 74, 78 (Wyo. 1939) (cited favorably by the New Mexico Supreme Court in *Mathers*, 1966-NMSC-226 at ¶ 30) (an applicant "may initiate an appropriation for the future use of another"). These principles govern the ELC Protestants' Motion, and provide guide posts for what is considered "speculative" in New Mexico. Notwithstanding the Protestants' claims, the 2014 Application does not violate the anti-speculation doctrine in any of these respects.

Other prior appropriation states also provide useful guidance on the definition of prohibited water speculation. For example, in Montana, "[t]he policy of the law is to prevent a person from acquiring exclusive control of a stream, or any part thereof, not for present and actual beneficial use, but for mere future speculative profit or advantage, without regard to existing or contemplated beneficial uses." *Toohey v. Campbell*, 60 P. 396, 397 (Mont. 1900). To the same effect, Utah courts have explained that an applicant "may not file his application, construct his works, and then hold the water and wait for something to happen. He cannot withhold the water from the proposed beneficial use." *Sowards v. Meagher*, 108 P. 1112, 1117 (Utah 1910). Indeed, it was to prevent just that type of water hoarding that the Colorado Legislature adopted the "can and will" statute that the WRD discusses in its Response: "the purpose of the ['can and will'] statute was to prevent speculation by denying recognition of claims for conditional water rights that have no substantial probability of maturing into completed appropriations." *Matter of Board of County Com'rs of County of Arapahoe*, 891 P.2d 952, 960 & n. 8 (Colo. 1995); *see also Municipal Subdistrict, Northern Colorado Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 709 (Colo. 1999) ("The anti-speculation doctrine initially was intended to prohibit the entry of conditional decrees when the holder had *nothing more* than an intent to sell the right *at an unknown time in the future*." (emphasis added")); *Dallas Creek Water Co. v. Huey*, 933 P.2d 27, 35 (Colo. 1997) (the purpose of the "can and will" statute is to subject conditional rights "to continued scrutiny to prevent the hoarding of priorities to the detriment of those seeking to apply the state's water beneficially"). Put simply, the anti-speculation doctrine raised by the Protestants applies only when use of the water is a "mere afterthought," *Baily v. Tintinger*, 122 P. 575, 583 (Mont. 1912), and an applicant's sole purpose is to "hold the water and wait for something to happen," *Sowards*, 108 P. at 1117; *see also Scherck v. Nihols*, 95 P.2d 74, 78 (Wyo. 1939) (distinguishing bona fide intent to appropriate

with "mere speculation or monopoly"). Thus, by claiming that Augustin is attempting to improperly speculate, hoard water, or "play 'dog in the manger,'" ELC Protestants' Motion at 20, the Protestants are claiming that Augustin does not intend to take any steps to put the water to beneficial use. *See OXY USA, Inc.*, 990 P.2d at 709.

If the Hearing Examiner develops a standard, it must address this concern over speculation, while also meeting the needs and concerns of applicants. *See, e.g., Lion's Gate Water*, 2009-NMSC-057, ¶ 24 (one of the purposes of the statutory administrative process is "to protect the rights and interests of water rights applicants"). As Augustin explained in its Response to ELC Protestants, a bedrock purpose of water administration in New Mexico is the maximization of water for beneficial use. *See* Augustin Response to ELC Protestants at 34-36; N.M. Const. art. XVI, § 2 (water is "subject to appropriation for beneficial use"). This is so because "[the] entire state has only enough water to supply its most urgent needs." *Kaiser Steel Corp. v. W.S. Ranch Co.*, 1970-NMSC-043, ¶ 15, 81 N.M. 414 ("utilization [of water] for maximum benefits is a requirement second to none, not only for progress, but for survival"). Any standard adopted by the Hearing Examiner, must consequently (1) "balance[] the preservation of water for actual use with the need for development in the arid west," *Curry v. Pandora County Canal & Reservoir Co.*, 370 P.3d 440, 462 (Mont. 2016), (2) "encourage the pursuit of projects designed to place waters of the state to beneficial uses," *Dallas Creek Water Co.*, 933 P.2d at 35, (3) accommodate the reality that developing contemporary water projects "is ofttimes a long drawn out enterprise," *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, ¶ 22, 68 N.M. 467, and (4) recognize that "[i]nvested capital and improvements [must be] protected," *Yeo v. Tweedy*, 1929-NMSC-033, ¶ 20, 34 N.M. 611. *See also OXY USA, Inc.*, 990 P.2d at 708 ("A conditional water right encourages development of water resources by allowing the applicant to complete financing, engineering, and

construction with the certainty that if its development succeeds, it will be able to obtain an absolute water right." (internal quotation omitted)); *Scherck*, 95 P.2d at 78 ("the owner of land, or one in possession thereof, may not have the capital with which to construct the irrigation works, and that others who are willing and able to do so should not be prevented from doing so in order to put the waters of the state to a beneficial use").

Moreover, as discussed above, the anti-speculation doctrine is designed to prevent hoarding of water "by denying recognition of claims for conditional water rights that have no substantial probability of maturing into completed appropriations." *Matter of Board of County Comm'rs of County of Arapahoe*, 891 P.2d at 960. The corollary to this principle is that if there is a "substantial probability" that the project will "mature into [a] completed appropriation," then it is not speculative and should be allowed to proceed. Therefore, as discussed in the next section, and recognized by WRD, the focus of this hearing should be on whether the evidence establishes that Augustin is able to diligently proceed toward completing its project.

B. If the Hearing Examiner Adopts a New Standard, the Standard Should Be Flexible, and Focus on the Intent of the Appropriator as Demonstrated Through Its Actions

If the Hearing Examiner is inclined to provide additional guidance through the adoption of a standard, the WRD suggests that "[o]ne approach . . . is to look to the water law in Colorado." WRD Response at 7. But the Hearing Examiner should avoid the wholesale adoption of Colorado law due to the differences in water administration. In Colorado, a system of water courts have exclusive jurisdiction over "water matters." Colo. Rev. Stat. §§ 37-92-201, -203. Anyone seeking a water right, approval of a change of a water right, approval for an augmentation plan, or finding of reasonable diligence, must file an application with the water court in the district where the water right is located. *Id.* at § 37-92-302(1)(a). This creates a rigid and decentralized system controlled

by a number of judges spread throughout the state. In contrast, New Mexico has a single centralized State Engineer with jurisdiction over all water applications. As a result, the State Engineer has the ability to carefully evaluate water applications in the context of water administration and policy throughout the state, and has the ability to tailor appropriate conditions of approval. It is in the best interests of the State Engineer to adopt a flexible standard that gives him the ability to address applications based on the facts of each case. In addition, many of the elements of the Colorado test are statutory, and may not have applicability in New Mexico. *See* WRD Response at 9-10. At a minimum, if the Hearing Examiner is inclined to adopt a standard that includes concepts annunciated in Colorado, he should specify that the New Mexico State Engineer is not incorporating all principles of Colorado water law.

In its discussion of Colorado law, the WRD suggests that the Colorado model for conditional water rights provides helpful guidance for considering contemporary water projects. Although New Mexico does not possess a conditional water right statute, the concepts are not foreign to the State. New Mexico case law has long recognized the right to gradually develop a water right without using all of it immediately, thereby allowing rights to be appropriated for a contemplated use. *See, e.g.*, *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 35, 135 N.M. 375 ("If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated."); *Snow v. Abalos*, 1914-NMSC-022, ¶ 12, 18 N.M. 681 ("The intention to apply to beneficial use, the diversion works, and the actual diversion of the water necessarily all precede the application of the water to the use intended, but it is the application of the water, or the intent to apply, followed with due diligence toward application and ultimate application, which gives to the appropriator the continued and continuous right to take the water. All the steps precedent to actual application are but preliminary to the

same, and designed to consummate the actual application."); Augustin Response to ELC Protestants at 28-30 (describing the relation back doctrine); *see also Lockwood Area Yellowstone County Water and Sewer Dist.*, 2015 WL 5478235 at * 4 (Mont. Water Ct. 2015). Thus, as explained in Augustin's Response to the ELC Protestants, *see* pgs. 28-30, "establishing a water right is a process that takes a period of time," *Hanson v. Turney*, 2004-NMCA-069, ¶ 8, 136 N.M. 1, and so long as an applicant has acted with reasonable diligence, the priority date will "relate back" to the initiation of the right by the filing of the application. It is for that reason that State Engineer permits typically contain a provision requiring that proof of beneficial use be filed within a specified amount of time. In short, Augustin agrees with the WRD that the conditional water rights doctrine provides a useful analogy.

As WRD recognizes, in Colorado, a conditional water right is granted upon a showing of an intent to appropriate water and a showing that the project can and will be completed within a reasonable time. WRD Response at 9-10; *see In re Vought*, 76 P.3d 906, 912 (Colo. 2003) ("To decree a conditional water right, the water court must find and conclude that the applicant completed the first step for an appropriation and that the applicant can and will complete the appropriation diligently and within a reasonable time."). Augustin concurs with WRD that an applicant need not produce a contractual commitment to show the requisite non-speculative intent, so long as it has a "specific plan" to appropriate water. WRD Response at1-2 ("our laws do not require that an applicant have a contract with the end user, or that the end user be the applicant"), 9 (citing C.R.S. § 37-92-103(3)(a)). Moreover, as discussed above, a speculative intent is an intent to hoard priorities without taking steps to place that water to beneficial use; to the extent an applicant takes tangible steps to put water to beneficial use, the appropriation is not speculative. Because of the overlap in the considerations, the Colorado courts have recognized that "the [non-

speculative intent] and the 'can and will' requirements are closely related. A conditional decree applicant cannot reasonably prove that its project can and will be completed with diligence and within a reasonable time if it lacks the requisite non-speculative intent." *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307, 316 (Colo. 2007) (citing *City of Black Hawk v. City of Central*, 97 P.3d 951, 956-57 (Colo. 2004)). Thus, assessment of both elements suggested by WRD involves consideration of the same diligence factors.

In New Mexico, as in other prior appropriation states, the critical element in determining whether an appropriation is valid is whether the applicant has a "bona fide intent" to put water to beneficial use. *Gutierrez*, 1900-NMSC-017, ¶ 65; *see also Snow*, 1914-NMSC-022, ¶ 12 ("it is the application of the water, or the intent to apply, followed by due diligence toward application, and ultimate application, which gives to the appropriator the continued and continuous right to take the water."). It follows that any standard should emphasize "the question of the [applicant's] intent, and thereby separate *bona fide intent* from *mere future speculation*." *Curry v. Pondera Cty. Canal & Reservoir Co.*, 370 P.3d 440, 463 (Mont. 2016) (emphasis in original) (internal quotation omitted).

Distilling the WRD's discussion, and modifying it slightly to make it more appropriate for New Mexico, produces the following standard[2]:

> To overcome a claim of hoarding or speculation, at the evidentiary hearing, the applicant must demonstrate by a preponderance of the evidence:
>
> (1) A bona fide intent to act with reasonable diligence to put the water to beneficial use;[3] and

[2] To be clear, Augustin believes that the 2014 Application can be fully evaluated with the existing standard of impairment, public welfare, and conservation, and it is not advocating for the adoption of a new standard. If the State Engineer is inclined to adopt a new standard, however, it should be a flexible standard such as the one articulated by Augustin.

[3] This standard combines the first step test, which was not discussed by WRD, and the non-speculative intent element, into a single inquiry regarding the intent of the applicant. *See, e.g., In re Vought*, 76 P.3d at 912-14. This approach is most consistent with New Mexico law.

(2) A reasonable probability that the facilities necessary to effect the appropriation can and will be completed with diligence.

See, e.g., Lockwood Area Yellowstone County Water and Sewer Dist., 2015 WL 5478235 (Mont. Water Court 2015) ("The right to appropriate a water right for future use depended on the appropriator's bona fide intent at the time of the appropriation and the diligence shown in eventually applying water to use.").

Proof of these elements will include "current information and necessarily imperfect predictions of future events and conditions." *Matter of Bd. of Cty. Comm'rs of Cty. of Arapahoe*, 891 P.2d at 961. Both elements are evaluated through a balancing test that examines numerous non-dispositive factors including, but not limited to, the specific plan to appropriate water for beneficial use, the demand for the water (including the status and nature of contracts or other agreements for the water and whether the applicant has a reasonable expectation of procuring an agreement for the water), expenditures made to develop the appropriation, the technical and economic feasibility of the project, the applicant's present right and prospective ability to access the property, the status of requisite permit applications and other required governmental approvals, the ongoing conduct of engineering and environmental studies, and the design and construction of facilities. *Application for Water Rights*, 307 P.3d at 1067; *Dallas Creek Water Co.*, 933 P.2d at 36-37.

"The key inquiry is whether 'evidence of factors supporting the substantial probability of future completion is sufficient to outweigh the presence of future contingencies.'" *Application for Water Rights*, 307 P.3d at 1067 (quoting *ACJ P'ship*, 209 P.3d at 1085); *see also City of Thornton v. Bijou Irr. Co.* 926 P.2d 1, 45 (Colo. 1996).

As discussed below, Augustin satisfies this standard.

C. The Augustin Application Would Satisfy the Standard Identified by WRD

As discussed in Sections I and II, it would be inappropriate to apply a newly minted anti-speculation standard to the 2014 Application at this stage of the proceeding. Even if that standard were applied, however, the 2014 Application satisfies the standard identified by WRD.

WRD recognizes that the 2014 Application "goes to great lengths to satisfy" the "'specific plan' test and the 'can and will' test." WRD Response at 11. Indeed, as discussed in Augustin's Response to the ELC Protestants, *see* pgs. 16-17, the 2014 Application is 162 pages long, and includes an overview of the project, a description of the work undertaken thus far, a description of

the distribution system and methods of delivery, a description of the demand and uses of the water, a description of the delivery points, letters indicating financial feasibility, a detailed routing analysis describing the pipeline route, a mile-by-mile map showing the pipeline route and place of use, letters of interest from municipal users, sample agreements, and a detailed conceptual engineering design. At a minimum, this substantial evidence shows "a specific plan and intent to appropriate a specific quantity of water for specific beneficial uses."[4] WRD Response at 9. In fact, the uncontroverted evidence indicates that "Augustin intends to put the full amount of applied-for water to beneficial use within a reasonable amount of time." Augustin Response to ELC Protestants at Exhibit O at Attachment 2, pg. 3.

The evidence attached to the 2014 Application also shows "a substantial probability that within a reasonable time the facilities necessary to effect the appropriation can and will be completed with diligence." WRD Response at 10 (quoting *Application for Water Rights*, 307 P.3d at 1066-67). For example, in *Municipal Subdistrict, Northern Colorado Water Conservancy District v. Chevron Shale Oil Co.*, 986 P.2d 918 (Colo. 1999) the Colorado Supreme Court upheld the water court's finding that Chevron demonstrated reasonable diligence because the record showed that the company invested resources in planning, evaluation, and design of the project. *See id.* at 921-23. That same analysis applies here, where the record shows that Augustin, like the permittee in *Chevron*, has "invested resources" in "planning for a diversion facility, . . . planning for pipeline facilities, preparing environmental baseline studies, preparing a detailed master planning document . . . , and participating in miscellaneous activities related to the conditional water rights such as litigation, research projects, and studies." *Id.* at 921.

[4]The evidence also shows a dispute over the material facts, which requires that the ELC Protestants' Motion be denied.

In its discussion, the WRD also briefly indicates, without citation, that "the corrected application does not specify the amount of water that will be eventually used by the different users." WRD Response at 11. While technically correct, neither New Mexico nor Colorado law requires such a showing as part of an application. Most importantly, as discussed in Augustin's Response to ELC Protestants, *see* pgs. 17-20, the New Mexico Supreme Court has rejected the argument that an application must "specify the amount of water that will be . . . used by different users." *Mathers*, 1966-NMSC-226, ¶¶ 24-30 ("Certainly there is nothing in our law which requires that an application to appropriate public waters for a beneficial use must be made by or in the names of all persons who may ultimately use or be benefitted by such use."); *Guitierrez*, 1900-NMSC-017, ¶ 65 ("the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made through some other person, and upon lands and possession other than those of the appropriator"). Nor does Section 72-12-3 require this information. Similarly, the Colorado Supreme Court has explained that while "intent must be relatively specific regarding the amount of water to be appropriated, its place of diversion, and its type of beneficial use," for the purposes of a conditional water right, "the applicant need not know the exact amount of water or point of diversion at the time" the application is filed. *In re Vought*, 76 P.3d at 912; *see also City of Thorton v. Bijou Irr. Co.*, 926 P.2d 1, 34 (Colo. 1996) (identifying the notice required as "more than mere notice of an unrefined intent to appropriate, but something less than a detailed summary of exact diversion specifications").

In sum, the undisputed material facts do not support the ELC Protestants' contention that Augustin intends to hoard water and "withhold the water from the proposed beneficial use." *Sowards*, 108 P. at 1117. Rather, the extensive material included with the 2014 Application shows Augustin's intention to take tangible steps to put water to beneficial use. It is clear that the

"evidence of factors supporting the substantial probability of future completion is sufficient to outweigh the presence of future contingencies.'" *Application for Water Rights*, 307 P.3d at 1067. At the very least, the evidence establishes a dispute over the material facts. Consequently, WRD is correct that the 2014 Application satisfies the specific plan and can and will tests, and the ELC Protestants' Motion must be denied.

D. Information on the Amount of Water Needed in the Municipalities Is Readily Available

Next, WRD expresses concern that the 2014 Application "does not specify how much water could be used by each individual municipality." WRD Response at 11. As discussed above, this information is not required to be part of an application.[5] Nor is the WRD correct that this intentional exclusion "mak[es] it impossible to evaluate whether or not that quantity will be needed by the municipality during its planning period." *Id.* Instead, the information is readily available from the 40-Year Plans on file with the State Engineer, and could be presented as part of this hearing process.

Furthermore, to the extent that the WRD raises this issue out of concern that there may be insufficient demand for the applied-for water, it is instructive to look to the Middle Rio Grande Regional Water Plan, which was created under the direction of the Interstate Stream Commission. Figure 7-1 of the Middle Rio Grande Regional Water Plan 2017 shows the supply and demand for the Middle Rio Grande:

[5] If the Hearing Examiner were to find that this information *is* required, a proposition that Augustin disputes, the correct remedy is not to deny the 2014 Application as suggested by the ELC Protestants. Rather, the State Engineer would be required to notify Augustin of the required changes, and give Augustin 30 days to refile the application. § 72-12-3(C).

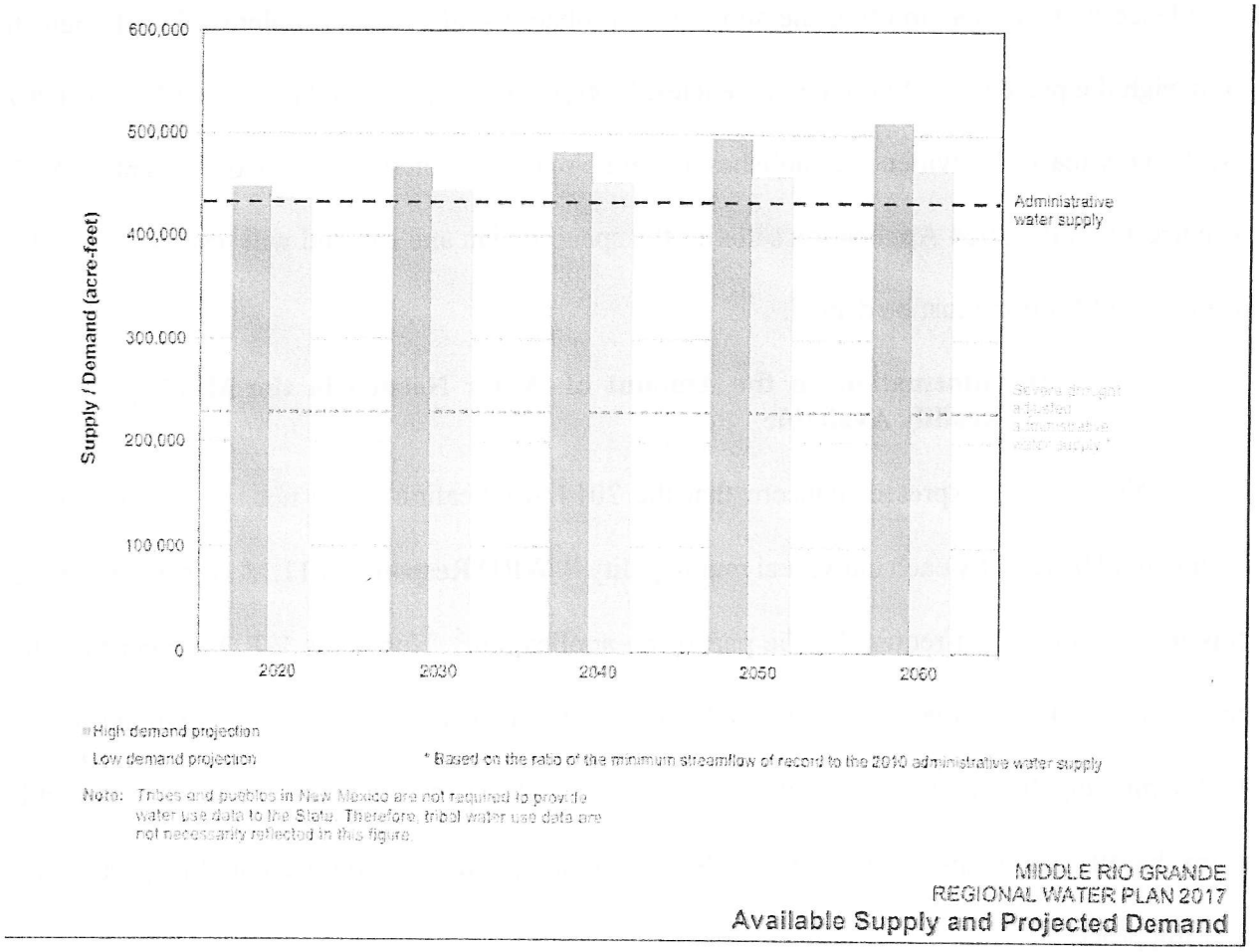


Figure downloaded from:

http://www.ose.state.nm.us/Planning/RWP/documents/Reg12_MiddleRioGrandeRegionalWaterPlan2017_Reducedsize.pdf. As can be seen from Figure 7-1, there is a significant demand for water in the Middle Rio Grande. According to the Water Plan:

> Even without the projected growth in demand, major supply shortages are indicated in drought years. Because of its reliance on surface water, the region has a very high degree of vulnerability to drought, and ***the estimated annual shortage in drought years is expected to range from 207,357 to 282,108 acre-feet.***

Id. (emphasis added). This estimated annual shortage does not include water use from Tribes and Pueblos, which could be significant, further underscoring the need for the Augustin project.

IV. THE HEARING EXAMINER HAS TOOLS AVAILABLE TO APPROPRIATELY ADDRESS THE CONCERNS RAISED BY THE PROTESTANTS

Augustin maintains that the issues presented by the 2014 Application can be fully and fairly evaluated through the normal hearing process. If the Hearing Examiner believes it is necessary, however, there are procedural tools available to appropriately address the concerns expressed by the Protestants.

A. The Two-Stage Process Requested by Augustin Would Address the Concerns of the Protestants

As discussed in Augustin's Response to Catron County, identifying exactly how much water would be allocated to each of the municipalities, as WRD suggests, is partly a theoretical exercise until Augustin knows how much water is available for appropriation. Augustin Response to Catron County at 11. Bifurcating the hearing as requested by Augustin would address this issue by focusing on the hydrologic issues in the first stage so that Augustin can provide additional information for consideration of the Hearing Examiner and parties in the second stage.[6] In this way, the two-stage proposal offers a compromise that would allow the Hearing Examiner to manage the hearing to balance the concerns of the Applicant, Protestants, and WRD, while allowing for an efficient and organized evaluation of the issues. *Id.* at 7-12.

B. Protestants' Concerns Could Be Addressed by Conditions of Approval

Alternatively, or in connection with the two-stage process, the Protestants' concerns could be addressed by appropriate conditions of approval. Augustin concurs with the WRD that there is a meaningful difference between the cases and principles relied upon by the Protestants in that

[6] It matters not that some of the Protestants "will not stipulate to a two-stage process," Protestants Hands' Reply to Applicant's Response to Catron County's Motion for Summary Judgement at 1 (filed Nov. 21, 2017), since the Hearing Examiner has inherent authority to "take all measures necessary or proper for the efficient and orderly conduct of the hearing." § 72-2-12.

those cases were decided at a time that "there was no New Mexico Water code and thus no permit application process." WRD Response at 6. One consequence of that difference, is that the State Engineer is now in a position to impose appropriate conditions on the permit to address the Protestants' concerns, including conditions that ensure diligent completion of the project and timely application of the water to beneficial use. *See, e.g. Yellow Jacket Water Conservancy Dist. v. Livingston*, 318 P.3d 454, 457 (Colo. 2013) (explaining that conditional water rights address the anti-speculation doctrine by requiring a permittee to "demonstrate [every 6 years] that it is diligently working toward completing the conditionally decreed appropriation"); *Scherck*, 95 P.2d at 78-79 (reasoning that hoarding or speculation of water rights "would . . . hardly [seem] possible under the extensively regulative laws of this state, if the State Engineer and the Board of Control do their duty, and we presume that they do").

For example, the primary concern expressed by the Protestants is that Augustin will sit on its water right without putting it to beneficial use, thereby playing "dog in the manger." However, as previously discussed, setting a deadline for the permittee to put water to beneficial use has become standard practice. A similar condition in Augustin's permit, or a condition that parallels the 'can and will' doctrine and requires Augustin to periodically report on its progress, would address the Protestants' concern by ensuring that Augustin does not "hold the water and wait for something to happen." *Sowards*, 108 P. at 1117.

V. DENYING THE AUGUSTIN APPLICATION AT THIS STAGE WOULD HAVE A CHIILLING EFFECT ON INVESTMENT IN WATER PROJECTS IN NEW MEXICO

Finally, Augustin is prepared to invest hundreds of millions of dollars in the State of New Mexico to bring water to the economic heart of the State. But that will not happen if the State Engineer denies the 2014 Application at this stage of the proceeding. In light of the extensive

litigation that occurred from 2007 to 2014, Augustin was justified in believing that it had reached a significant milestone when the State Engineer accepted its 2014 Application and determined that the Application "conform[ed] to the requirements of the statutes and rules and regulations." 19.27.1.11 NMAC. It would be enormously discouraging and inefficient if the State Engineer granted either of the motions to dismiss, sending the proceeding back to an appellate posture, even after all of the time and resources that Augustin has invested in addressing the concerns of the State Engineer and district court. At that point Augustin would have to seriously reevaluate whether to proceed in New Mexico, or to invest its resources elsewhere.

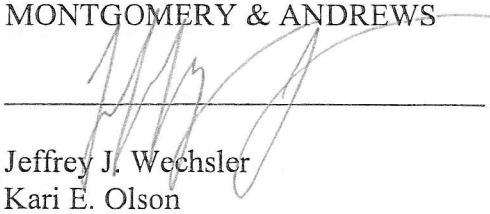
More alarming to the State, this proceeding is being carefully watched by other interested parties and organizations with the wherewithal to invest in needed water development in New Mexico. Denying the 2014 Application at this stage, without even affording Augustin a fair opportunity to present its evidence at a hearing, would send a clear message to other potential investors that New Mexico is not interested in large-scale water projects, interbasin transfers, or private sector investment. In short, denying the Augustin application at this stage would have a chilling effect on investment in water projects in New Mexico.

CONCLUSION

Because the 2014 Application "is complete in accordance with current statutory and regulatory requirements," WRD Response at 2, the law requires that the ELC Protestants' Motion be denied. Notwithstanding this outcome, however, Augustin is open to the suggestion of the WRD that the Hearing Examiner provide guidance on the standard that must be met at the conclusion of the evidentiary hearing.

Respectfully submitted,

MONTGOMERY & ANDREWS



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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2017, a copy of the foregoing was sent via U.S. Mail to all Parties Entitled to Notice as located on the Office of the State Engineer's website, http://www.ose.state.nm.us/HU/AugustinPlains.php, revised 10/20/17.

I further certify that on November 28, 2017, a copy of the foregoing was sent via electronic mail to the following parties:

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