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OFFICE OF THE STATE ENGINEER HEARINGS UNIT SANTA FE, NM

BEFORE THE NEW MEXICO STATE ENGINEER IN THE MATTER OF THE APPLICATION BY AUGUSTIN PLAINS RANCH, LLC FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN OF NEW MEXICO	))))))	Hearing No. 09-096 OSE File No. RG-89943

PROTESTANTS' REPLY TO RESPONSES FILED BY AUGUSTIN PLAINS RANCH, LLC's AND THE WATER RIGHTS DIVISION REGARDING PROTESTANTS' MOTION TO DISMISS APPLICATION

Protestants hereby reply to the *Responses* filed by Augustin Plains Ranch, LLC ("the Corporation") and by the Water Rights Division ("WRD").[1]

Neither the Corporation nor WRD provides any legitimate reason why the Corporation's application should not be dismissed entirely.

ARGUMENT

1. **No evidentiary hearing is required to determine that the Corporation's Application is speculative and must be dismissed.** The Corporation agrees that speculation in water is detrimental to public welfare but argues that the State Engineer cannot determine on the face of the application whether it is unlawfully speculative. *APR Response at 15-16.* To support this argument, the Corporation relies on the Colorado case of Colorado v. Southwestern Colorado Water Conservation District, 671 P.2d 1294 (Colo. 1983) and concludes that dismissal "at this stage … would be untimely." *APR Response at 16.* Because of critical differences between Colorado and New Mexico law, the Corporation is mistaken.

Under Colorado law, the intent of the appropriator, the priority date, and notice to third parties are all dependent upon a fact-intensive inquiry into whether and what "first step" an appropriator actually took "towards an appropriation." Vought v. Stucker Mesa Domestic

[1] The *Responses* of the Corporation and of WRD are herein referred to as the "*APR Response*" and "*WRD Response*," respectively.

Pipeline Co. (In re Vought), 76 P.3d 906, 911-912 (Colo. 2003). This "first step … is complete when overt acts coalesce to *openly demonstrate the applicant's intent to appropriate the water for a beneficial use*. Id. at 912 (emphasis added). Moreover:

> The overt act or acts must fulfill three functions: (1) manifest the necessary intent to appropriate water to beneficial use; (2) demonstrate the taking of a substantial step toward the application of water to beneficial use; and (3) constitute inquiry notice to interested persons of the nature and extent of the proposed demand upon the water supply.

Id. Only if the appropriator satisfies these requirements through physical acts does its priority relate back to the "first step," and then only if it also "diligently pursued [the appropriation] to completion."[2] Id. at 911-912.[3] Given this fact-intensive inquiry, it is unsurprising that motions to dismiss based solely on the contents of an application are inappropriate in Colorado.

But this is New Mexico. In New Mexico, the filing of an application substitutes entirely for the fact-driven "first step" inquiry. As the Corporation points out, *under New Mexico law*, the priority date of a water right, as well as the applicant's intentions and notice to third parties, are all based solely on the content and timing of the permit application. *APR Response at 8, 13, 28-30.* There is no "first step" inquiry. Thus, in stark contrast to Colorado, New Mexico necessarily relies solely on the application to manifest the applicant's specific intentions and provide notice to third of parties. As a result, and unlike Colorado, if the applicant fails to

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[2] However, regardless of the timing of the first step, "water rights adjudicated in a previous decree are [*always*] senior to water rights adjudicated in a subsequent decree on the same stream, regardless of their dates of appropriation." Shirola v. Turkey Canon Ranch Ltd. Liab. Co., 937 P.2d 739, 749 (Colo. 1997). Thus, in Colorado, no one but the would-be appropriator is harmed by long delays, because its relative priority will be the date that the decree is issued, which is equivalent to the date that the State Engineer issues a permit in New Mexico.

[3] Tying priority to this fact-intensive inquiry, rather than a filing date, virtually eliminates the incentive for applicants with no particular plan, such as the Corporation, to prematurely file applications for the sole purpose of securing an early priority date and preempting later appropriations.

adequately describe a specific desired water right, including the specific elements of that water right, then its application can and must be dismissed under New Mexico law. See, generally *Motion to Dismiss.* The Corporation's application falls into this category. It shows no specific intention to appropriate water for any particular purpose; it shows an intention to hoard and to monopolize a potentially vast water supply.[4] The Corporation's application thus fails to provide adequate notice and cannot substitute, as it must, for the crucial "first step" towards a legitimate appropriation. Accordingly, it must be dismissed.

2. The Corporation's Application should be dismissed because it fails "to state a claim upon which relief can be granted." The Corporation agrees that the standard under Rule 12(b)(6) NMRA is appropriate for determining whether its application should be dismissed. *APR Response at 6-7*; *Scheduling Order ¶¶ 4&5* (allowing for potential dismissal of application on *Motion*). Under this standard, the application should be dismissed because the State Engineer cannot lawfully grant the "relief" sought by the Corporation. Rule 12(b)(6) NMRA (allowing for dismissal of complaints for "failure to state a claim upon which relief can be granted"). Put in other words, the application should "be dismissed [because] it is clearly without any merit, and [its] want of merit ... consist[s] of an absence of law to support [it]." Saenz v. Morris, 106 N.M. 530, 531, 746 P.2d 159, 160 (Ct. App. 1987) (citing C & H Constr. & Paving, Inc. v. Foundation Reserve Ins. Co., 85 N.M. 374, 512 P.2d 947 (1973)). Based on the face of the application, and assuming the truth of its contents, the Corporation seeks a permit that gives it the option to use or sell water to undisclosed third parties for any purpose anywhere within seven New Mexico

[4] The Corporation incorrectly claims to have discovered a "new" supply of water, as if it were a hidden mineral deposit. *APR Response at 1, 3, 23.* In reality, the potential of the basin underlying the Plains of San Augustine has been known for decades.

counties—roughly a 12 million acre area.[5] As a matter of law, this "relief" cannot be granted. See generally *Motion to Dismiss*. The State Engineer can only issue permits that will authorize the establishment of particular water rights, which under New Mexico law are defined by specific elements, including beneficial use, amount of water, and place of use. The Corporation's application fails to identify these elements. Accordingly, as the WRD explains, "it would be extremely difficult to fully evaluate whether the proposed appropriation would impair existing rights, be contrary to the conservation of water or be detrimental to the public welfare of the state." *WRD Response at 5.* Moreover, the Corporation clearly seeks authorization to hoard water for speculation, which is contrary to law and detrimental to public welfare.[6]

3. Dismissal of the Corporation's Application will satisfy the requirement of a hearing "on the merits." The Corporation appears to believe that dismissal under Rule 12(b)(6) is inconsistent with a hearing "on the merits."[7] *APR Response at 14. 2, 14-17, 21, 23.* The Corporation is mistaken. Although Rule 12(b)(6) is specifically designed to avoid wasting time and money on pointless evidentiary hearings of legally meritless claims, dismissals under this Rule are nevertheless "on the merits." Federated Dep't Stores v. Moitie, 452 U.S. 394, 399 (1981) ("The dismissal for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) is a "judgment on the merits"); Lewis v. Smith, 361 Fed. Appx. 421, 423-424 (3d Cir. Pa. 2010 ("dismissal for failure to state a claim under Rule 12(b)(6) is a final judgment on the merits for res judicata purposes"). Thus, even though the State Engineer dismisses the application, he will

[5] The Corporation refers repeatedly to "the Project," *APR Response at 1-3, 5, 21, 23*, as if "the Project" were well-defined in its application. It is not. "The Project" is simply an attempt to stake a claim to a potentially vast water supply, as if it were a proprietary mineral deposit, for hoarding and potential future sales when the market is sufficiently profitable.

[6] WRD takes no position on this fundamental issue.

[7] WRD does not oppose dismissal on the basis of Rule 12(b)(6).

nonetheless have provided the Corporation a hearing "on the merits," as required on all protested applications. See Lion's Gate Water v. D'Antonio, 2009 NMSC 57, 147 N.M. 523, 226 P.3d 622 (affirming State Engineer's denial of an application on motion for summary judgment).

4. **The Corporation's application must be dismissed because it fails to comply with applicable statutes and regulations**. The Corporation devotes numerous pages to arguing that its application cannot be dismissed because it allegedly complies with all statutes and regulations and was accepted for filing by the Office of the State Engineer ("OSE").[8] *APR Response at 6, 8, 12, 13, 15-16, 18, 21, 25.* The Corporation is again mistaken. First, its argument is equivalent to arguing that a judge cannot dismiss a complaint after it has been accepted for filing by the court clerk. This notion conflicts with the Rules of Civil Procedure, which generally apply to State Engineer hearings, as well as with common sense. See, e.g., Rule 12(b) NMRA (allowing for dismissal of filed complaints based strictly on the pleadings); NMSA 1978, § 72-2-13 (incorporating Rules of Civil Procedure into State Engineer hearings); § 19.25.2.9 NMAC (same). Just as a judge can dismiss a properly filed but meritless complaint based solely on the face of the complaint, id., the State Engineer can similarly dismiss (i.e., deny) a properly filed but meritless application. In this case, for all the reasons set out in Petitioners' *Motion to Dismiss*, the Corporation's application is meritless and should be dismissed without further consideration.

[8] WRD appears to believe the Corporation need only comply with the "statutory requirements for filing of an application," *WRD Response at 3*, implying that compliance with OSE regulations is unimportant. Applicants must comply with both statutory and regulatory requirements. NMSA 1978, § 72-5-7; § 19.27.1.11 NMAC.

Second, and contrary to the Corporation's claim, its application violates several statutory and regulatory filing requirements:[9]

a. No statutory or regulatory provision allows permit applications to be "amended" or "modified," and the Corporation never refiled a "corrected" or new application.

The Corporation submitted its original application on October 12, 2007, *APR Response at 3*; then it purported to file a substantially "amended" application on May 5, 2008, *APR Response at 4*; then it purported to file a substantial "modification" to its amended application on June 26, 2008. *APR Response at 4*; *June 26, 2008, email from J. Wechsler to D. Anderson.* Because no statute or regulation authorizes an applicant to file "amended" or "modified" applications, each of the Corporations filings should have complied with the requirements applicable to original filings of new applications, with each subsequent filing resetting the priority date. § 19.27.1.9 NMAC ("The date of filing establishes the original priority date of any application"). Nowhere in its *Response*, however, does the Corporation claim to have refiled new applications on May 5, 2008, or on June 26, 2008. Instead, it claims to have filed only *one* application, which it thereafter substantially amended and modified, with a priority date allegedly relating back to the original filing date, October 12, 2007. *APR Response at 13.* This violates OSE's regulations, which apply equally to every applicant, including the Corporation.

OSE's regulations do allow for the refiling of "corrected" applications, with priority relating back to the original filing, but only in certain limited circumstances:

> Applications which are defective as to form or fail to comply with the rules and regulations shall be returned promptly to the applicant with a statement of the changes required. If the changes are made and the application refiled [triplicate] with the state engineer within thirty (30) days after the applicant has been notified of the changes required, the application shall be processed with a priority date the same as the original filing date. When a corrected application is filed after the

[9] WRD takes no position on these issues.

> time allowed, it shall be treated in all respects as an original application received on the date of its refiling.

§ 19.27.1.11 NMAC; *see also* NMSA 1978, § 72-5-3 (allowing retention of original priority if defective application corrected within sixty days). The Corporation admits that it failed to identify any particular lands to be irrigated within the proposed seven-county place of use until June 26, 2008, eight months after the original filing. *APR Response at 4*. The regulations required the Corporation to refile a corrected application within thirty days (in triplicate) in order to retain the priority of any valid original filing; *after* thirty days, the Corporation was required to file an entirely new application (in triplicate), which would have reset its priority to the date of the new filing. Id. Rather than comply with this regulation, as would be required of any other applicant, eight months after its original filing the Corporation merely sent an email to WRD that identified specific lands to be irrigated. Because of the importance of the application in providing notice and setting priority, the Corporation's blatant disregard of OSE regulations requires dismissal of this case.

b. The original application, the so-called "amended" application, and the so-called "modified" application all failed to identify a specific beneficial use, place of use, or amount of use. The Corporation admits that its application must identify "the beneficial use to which the water will be applied," "the place of use," and the "amount applied for." *APR Response at 7*. The Corporation violated these requirements. By specifying *every* possible beneficial use, the Corporation effectively identified no beneficial use. Similarly, by identifying a seven-county "place of use," the Corporation effectively forces the OSE, Protestants and others to guess where and how water might actually be used under the application. And finally, the amount of water requested by the Corporation is not based on, measured by, or limited to any particular beneficial use, as required by the New Mexico Constitution and numerous other

authorities. It is merely a very large arbitrary amount of water. This lack of specificity violates the intent of the applicable statutes and regulations, which is to provide accurate and specific information about proposed appropriations to the State Engineer, existing water rights owners, governmental entities, and the public. See, e.g., NMSA 1978, § 72-12-3.

The Corporation's application raises important policy considerations. If its vague "shotgun" approach were valid under New Mexico law, then the State Engineer's application process would become meaningless and no longer effectively substitute for the "first step" of an appropriation. All applicants would be on notice *not* to request anything too specific. Instead, they would be encouraged to apply for every possible beneficial use, to serve entire basins (or even the entire State of New Mexico), and to seek unrealistically large quantities of water unrelated to any beneficial use. If this were allowed, applicants could secure early priority dates and yet have no specific plan in mind. Or they could simply keep their plans secret and options open until the hearing, which past State Engineers have sometimes put off for more than a decade after an application was filed.[10] This unjust and absurd result could not have been intended by the Legislature. DeWitt v. Rent-A-Center, Inc., 2009 NMSC 32, 31, 146 N.M. 453, 212 P.3d 341 ("In effectuating the intent of the Legislature, we must avoid any interpretations that would lead to absurd or unreasonable results.") Accordingly, the Corporation's vague application must be denied.

c. The original application, the so-called "amended" application, and the so-called "modified" application request to appropriate water from 37 wells in violation of OSE regulations. OSE regulation is clear and unequivocal: The State Engineer will not approve any application for more than the "annual amount that can reasonably be expected to be produced

[10] However, acquiescence in such delay by the applicant may subject its application to dismissal for lack of diligence.

and applied to beneficial use from a single well constructed at the point, in the manner, and for the purpose set forth in the application." § 19.27.1.10 NMAC. WRD fails to mention this regulation in its *Response*. However, given the clear and unequivocal limitation it imposes, applicants desiring to drill multiple wells have traditionally submitted separate applications for each well, with each application specifying the beneficial use, place of use, and amount of water associated with each well. The Corporation's submission of a single application for 37 wells conflicts with this traditional procedure and violates OSE regulations, which again apply equally to all applicants.

d. The original application, the so-called "amended" application, and the so-called "modified" application were not submitted on forms prescribed by the OSE. The applicable statutes and regulations require all applicants, including the Corporation, to apply for permits on forms supplied by the State Engineer. NMSA 1978, § 72-12-3(A) (providing that applicants "shall apply to the state engineer in a form prescribed by him"); § 19.27.1.9 NMAC ("application to appropriate shall be filed in triplicate on forms provided by the state engineer"). Contrary to this requirement, the Corporation's original application and so-called "amended" and "modified" applications were not filed on forms provided by the State Engineer. They were instead submitted on forms that the Corporation made up to accommodate its desire to file a single application for 37 wells and to continuously change its application, without losing priority, through purported amendments and modifications.

The Corporation admits that "the relevant statutory provisions, as well as OSE regulations implementing those provisions," are pertinent to determining whether an application is "facially valid." *APR Response at 6.* The Corporation is not entitled to disregard these provisions. Moreover, Protestants are entitled to have OSE comply with its own regulations.

See United States v. Ramos, 623 F.3d 672, 683 (9th Cir. Cal. 2010) ("It is a well-known maxim that agencies must comply with their own regulations.") Thus, even putting aside the speculative nature of its application, the forgoing list of statutory and regulatory violations alone render the Corporation's application invalid and require dismissal of this case. The Corporation must comply with the applicable statutory and regulatory requirements just as any other water rights applicant must.

WRD is mistaken in arguing that the State Engineer has absolute discretion to determine whether an application complies with applicable statutes and regulations. *WRD Response at 5, 7.* New Mexico courts give no deference to an agency's construction of a statute, and will only defer to an agency's interpretation of a regulation if it is *ambiguous* and the agency's interpretation is reasonable. See, e.g., Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regulation Comm'n, 2010 NMSC 13, 50-51. Moreover, an agency's misapprehension of the law constitutes an abuse of discretion. See, e.g., New Energy Econ., Inc. v. Shoobridge, 2010 NMSC 49, 4. None of the constitutional, statutory or regulatory requirements cited by Protestants is ambiguous. Because the Corporation's application fails to comply with these requirements, it must be dismissed as a matter of law.

5. The Corporation's alleged "reliance" on OSE is irrelevant and unjustified. The Corporation argues at length that its invalid application resulted from "justified reliance" on WRD, which accepted the application and authorized publication of notice. *APR Response at 1, 2, 5, 8, 12-13, 19, 21, 29.* This argument has no merit.

First, the Corporation's "contention is in the nature of an estoppel, which does not apply to a sovereign state where public waters are involved." State ex rel. Reynolds v. Fanning, 68 N.M. 313, 317, 361 P.2d 721, 724 (1961); see also State ex rel. Erickson v. McLean, 62 N.M.

264, 274, 308 P.2d 983, 989 (1957) ("Public policy forbids the application of the doctrine of estoppel to a sovereign state where public waters are involved.") Second, even if estoppel could be asserted against the State Engineer given the requisite "justified reliance" and egregious circumstances,[11] the OSE's unilateral acceptance of the Corporation's invalid application does not in any way estop Protestants from pointing out the invalidity and insisting on dismissal. Even if WRD intentionally misled the Corporation, this could not prejudice the rights of Protestants.

And third, the Corporation has no case for estoppel.

> A party seeking to establish estoppel against the government must establish that (1) the government knew the facts; (2) the government intended its conduct to be acted upon or so acted that plaintiffs had the right to believe it was so intended; (3) plaintiffs must have been ignorant of the true facts; and (4) plaintiffs reasonably relied on the government's conduct to their injury.

Hanson v. Turney, 2004 NMCA 69, 19, 136 N.M. 1, 94 P.3d 1. The Corporation does not even attempt to prove the elements of estoppel; nor could it. Acceptance of an application by OSE *never* guarantees approval by the State Engineer. The State Engineer "may ... refuse to consider or approve *any* application ... if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state." NMSA 1978, § 72-5-7 (emphasis added). Furthermore, the "completeness and accuracy of the notice for publication is the responsibility *of the applicant*," and if "there are substantive errors in the published notice, it shall be re-advertised *at the expense of the applicant.* § 19.27.1.13 NMAC (emphasis added). Finally, the "issuance of a notice for publication does not in any way indicate favorable action on

[11] In State ex rel. Reynolds v. McLean, 76 N.M. 45, 48 (1966), the Supreme Court declined to "reach the question of whether or not the state can be estopped to assert its right in the administration of the public waters of the state," thereby suggesting estoppel may be possible. However, no known case has ever resulted in an estoppel against the State Engineer.

the application by the state engineer." 19.27.1.12 NMAC. These statutes and regulations completely undermine any claim of "justifiable reliance" by the Corporation; indeed, its lawyers had to know that the Corporation's application, seeking as it does to monopolize a potentially vast supply of water for no particular purpose, was novel (at best). In any event, the State Engineer is not estopped from dismissing the application on Protestants' *Motion*.

6. The published notice was inadequate and Protestants have standing to raise this issue on behalf of the public. The Corporation contends that its notice was adequate and that, even if it was not, Protestants received actual notice and thus lack standing to complain. *APR Response at 2, 11-12, 24-28.* The Corporation asserts the same invalid arguments that the New Mexico Environment Department ("NMED") asserted in Martinez v. Maggiore (In re Northeastern N.M. Reg'l Landfill), 2003 NMCA 43, 133 N.M. 472, 64 P.3d 499, and just like NMED in Martinez, the Corporation misunderstands the purpose of the statutory notice requirements. The primary purpose is not to give actual notice to "particular individuals," but to apprise *all* who might be affected by the application. Id. The group of potentially affected persons is not limited to water rights owners or permittees, but expressly includes everyone who may "be substantially and specifically affected by the granting of the application," including the State of New Mexico or any of its branches, agencies, departments, boards, instrumentalities or institutions, and all political subdivisions of the state and their agencies, instrumentalities and institutions."[12] NMSA 1978, § 72-12-3(D). For example, anyone potentially affected by the Corporation's recently revealed plan to construct a pipeline from its ranch in Catron County to

[12] Thus, WRD's suggestion that only "water rights holders are entitled to notice and an opportunity to be heard" (*WRD Response at 5*) is clearly incorrect.

the City of Santa Fe would have standing to file a protest,[13] yet the application and published notice failed to disclose the path or destination of the proposed pipeline.[14] Nor would anyone reading the notice be able to ascertain where or for what purpose water might be used, although he or she could glean that it might be used for any purpose anywhere within seven counties. This is equivalent to no notice at all.

The Corporation's claim that Protestants lack standing to complain about its failure to provide notice has no merit. First, if the Corporation were correct, then no one could ever question the published notice: OSE would be estopped from complaining, Protestants would lack standing, and those directly injured by improper notice would be absent from the hearing. This absurd result could not have been intended by the Legislature, because it would defeat the purpose of imposing statutory notice requirements.

Moreover, Protestants have standing to "vindicat[e] the general public's right to participate in the permitting process in addition to their own right to proper statutory notice." Martinez ¶ 18. Protestants have this standing because, first, each of them claims "an injury in fact," i.e., that the granting of the Corporation's application will impair their water rights and violate the other statutory criteria for issuance of a permit. Id. ¶ 19. Second, Protestants and

[13] The extent of the pipeline was first revealed by the Corporation's public relations person, who came out with a report dated March 2011. The report is available at **http://www.abqjournal.com/abqnews/john-fleck-nm-science-mainmenu-31/28600-updated-augustin-plains-white-paper.html**. The report also reveals the Corporation's intent to provide water throughout a vast trans-basin "service area," as if the Corporation were a regulated public water utility with customers located in a third of the state. The Corporation, of course, is *not* a public utility and has no "service area."

[14] Any such pipeline, however, would involve decades of negotiations with hundreds of property owners, including federal, state and tribal sovereigns. Each of these was entitled to proper notice of the intended right of way. The Corporation will also have to file multiple condemnation cases in order to force its way across the lands of recalcitrant landowners, all of whom were entitled to proper notice.

"absent opponents" of the Corporation's application "share an important interest in insuring that" the Corporation's application does "not adversely affect" their water rights or violate the other statutory criteria. Id. "Third, absent opponents of [the Corporation's] application have been hindered in participating in the permitting process by [the Corporation's] failure to publish notice as required by Subsection [72-12-3(D)]." Id. Therefore, pursuant to Martinez, Protestants have standing to vindicate the public's right to proper statutory notice.

7. The State Engineer cannot rewrite the Corporation's application. Both the Corporation and WRD argue that the State Engineer can disregard the Corporation's actual application and issue a permit strictly for irrigation of specified lands on the Corporation's ranch. *APR Response at 30-31*; *WRD Response at 4, 5, 7.* They argue that the "State Engineer is not bound by the amount requested in an application" and that the Corporation did eventually identify specific lands to be irrigated. Id. The Corporation and WRD are mistaken for the following reasons:

a. Although the State Engineer may grant a permit "for an amount less than that asked for in the application," § 1.27.1.10 NMAC, no regulation or statute grants him power to redesign the Corporation's proposed "project" or to award consolation prizes. The Corporation applied to appropriate 54,000 AFY from its ranch via 37 wells in order to provide water for any purpose anywhere within seven New Mexico counties, and the public notice of its application (albeit inadequate) was based entirely on this stated intention. If the Corporation desires to change its intention to one of only irrigating specific lands on its ranch, then this is an entirely different project which requires an entirely different application, priority date, and public notice in order to be consistent with law. Indeed, WRD admits that a notice which provides

"misleading information about the matter to be heard" would violate due process. *WRD Response at 6.*

b. The amount of water requested in the application (54,000 AFY), the number of wells (37), and the depth (3000 feet) and diameter (20 inches) of the wells obviously have no rational relationship to irrigating 4,440 acres of land. Taken at face value, this would require construction of a multi-million dollar well system in order to inundate the "irrigated" land with water over 12 feet deep per year.

c. Narrowing the Corporation's application to proposed irrigation of specific ranch land does not cure any of the statutory and regulatory filing violations identified above or in Protestants' *Motion to Dismiss.*

d. The Corporation will not be prejudiced if forced to refile a valid application to irrigate specifically identified lands. Such an application would request substantially less water, require far fewer wells, and draw far less opposition. Moreover, according to the Corporation, there is plenty of water left in the basin, so there is little risk that the available unappropriated water will run out before it can file a new application.

e. Protestants will be substantially prejudiced if the Corporation is allowed to play bait and switch with its application. Unless and until the Corporation discloses exactly how much water it intends to request for irrigation and the number, depth and location of proposed wells, Protestants cannot adequately analyze the "revised" project's impact or prepare for hearing. Moreover, taxpayers and the parties in this case should not be forced to bear the expense of conducting an evidentiary hearing, amounting to hundreds of thousands of dollars,

when the application is invalid on its face and fails to comply with law. It should have been rejected outright by WRD; at this stage, it should be summarily dismissed.[15]

CONCLUSION

The Corporation's application should be dismissed without further delay or waste of time and money. The application is vague and obviously speculative. Through this application the Corporation seeks to monopolize a potentially vast supply of public water to serve any potential need anywhere within all or part of seven New Mexico counties. Although New Mexico is obviously an arid state and subject to drought, water law demands specificity. No person has ever obtained a water right, whether in New Mexico or any other prior appropriation state, based on speculation about possible future demands somewhere within a vast area of the state. Even regulated public water utilities and municipalities are limited to defined service areas and populations, and even then they can only acquire water rights forty years in advance of projected demand. The Corporation is neither a public utility nor a municipality. It has no "service area." Accordingly, there is no way of determining how much water it may need to appropriate, or the timing of that need, because the Corporation would not be limited to serving any particular population or service area.[16] A permit such as that requested by the Corporation would thus bestow upon it a heretofore unknown special status, giving it the ability to sit atop and monopolize a potentially vast supply of water, unlimited by the "40-year statute" or the doctrine of beneficial use. The requirement of putting water to beneficial use within a reasonable time, moreover, would impose no real limit. After all, an epic private water project such as that

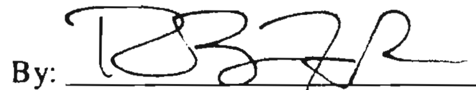
[15] WRD assumes that the Corporation will simply file a new application that complies with law. *WRD Response at 5.* Why WRD makes this assumption is unclear. Moreover, this has no bearing on whether the State Engineer should reject the current application, and WRD's acceptance of an invalid application should not be allowed to prejudice Protestants.

[16] Seven counties is not a meaningful limitation.

proposed by the Corporation, including a pipeline from Catron County to the City of Santa Fe, could reasonably require decades and cost many millions of dollars to complete. But this is not consistent with law. Under the law, the Corporation is not entitled to special treatment or special status. Its application must either comply fully with the law as it exists or be dismissed, just as any other application. Because its application does not comply with law, it must be dismissed

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER

By: 

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CERTIFICATE OF SERVICE: I certify that I served a copy of the foregoing paper on the parties entitled to service on the 13th day of May, 2011.

R. Bruce Frederick