STATE OF NEW MEXICO
CATRON COUNTY
SEVENTH JUDICIAL DISTRICT COURT

Augustin Plains Ranch, LLC,	)	
	)	
Applicant/Appellant,	)	
v.	)	No. D-728-CV-2012-08
	)	
Scott A. Verhines, P.E.,	)	Appeal from a decision
	)	of the New Mexico
New Mexico State Engineer/Appellee,	)	State Engineer in OSE Hearing No.
	)	09-096
and,	)	
	)	
Kokopelli Ranch *et al.*,	)	
	)	
Protestants/Appellees.	)	
_____	)	

MEMORANDUM IN SUPPORT OF PROTESTANTS' MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Nearly five years ago, October 2007, Augustin Plains Ranch ("APR") submitted an application to the Office of the New Mexico State Engineer ("OSE") for a permit to appropriate public water ("the Application" or "APR's Application"). Following public notice, hundreds protested the Application, leading to the administrative hearing below. Arguing that APR's Application was invalid on its face, Protestants filed dispositive motions asking the State Engineer to deny the Application outright and dismiss the hearing. After allowing extensive briefing and oral argument, an OSE hearing examiner recommended granting Protestants' motions and issued the attached "Order Denying Application." Exhibit A. The State Engineer thereafter adopted this Order, in full, resulting in the instant appeal. Id.

The only issue on appeal is whether, as a matter of law, APR's Application was invalid on its face and thus properly denied by the State Engineer. Pursuant to Rule 1-056 NMRA, this issue should be decided on summary judgment, as there is no genuine issue of material fact regarding APR's Application.

APR's Application sought to appropriate 54,000 acre-feet of public groundwater per year ("AFY") from the Rio Grande Underground Water Basin ("Rio Grande Basin"). Ignoring the one-application-per-well rule imposed by OSE's regulations, APR's Application proposed a "well field" consisting of thirty-seven (37) high-yield wells, each twenty-inches (20") in diameter, drilled to a depth of three thousand feet (3000'), and capable of producing two thousand gallons per minute (2000 gpm). APR proposed to construct the well field on its ranch in South-Central New Mexico, located on the Plains of San Augustin along State Highway 60, between Datil and Magdalena, New Mexico.

The State Engineer properly denied APR's Application for several reasons, but most importantly, because the Application omitted basic critical details required by law—how, when, where, and in what quantities APR intended to use water. Instead of disclosing these details, thus providing the requisite notice of its intent to appropriate water, APR's Application listed a number of possible appropriations. APR suggested that it would be possible, for example, to pipe the water approximately sixty (60) miles to the Rio Grande for a number of salutary purposes—to augment surface flows for compact compliance, to protect senior water rights, to irrigate farmer's fields, to protect the environment, or to promote recreation. On the other hand, APR also suggested that it might possibly use the water for its own, less altruistic purposes—to develop the commercial, real estate, and/or agricultural potential of its ranch. Or the water might be delivered to Socorro or to Magdalena or to another city, although no such city or any other

potential third-party user was a co-applicant. To accommodate all these possibilities, APR's Application necessarily designated the "place of use" as virtually anywhere within seven New Mexico counties, from Elephant Butte in the South to the City of Santa Fe in the North.

The law of prior appropriation, codified at all levels of New Mexico law, has always required would-be appropriators to make their intentions regarding the public's water clear and specific. By requesting to use 54,000 AFY for any purpose virtually anywhere in seven counties, APR's intentions were anything but clear and specific. Although the vagueness of its Application served the purpose of keeping APR's options as numerous as possible, it was also the Application's fatal flaw. The Application's lack of critical information precluded the State Engineer from evaluating, for example, whether APR's proposed appropriation would impair existing water rights or harm to public welfare, because he could not determine exactly which appropriation APR had in mind. Similarly, the vagueness of the Application made effective notice impossible to provide, again because APR's Application failed to manifest any particular intent to appropriate water. APR's only clear intention was to speculate in water and to keep all options open, which has long been forbidden under the law of prior appropriation.

As a result of the defects in APR's Application, the State Engineer could not even consider the Application without violating his statutory duties, denying due process of law, and contravening fundamental principles of prior appropriation. The dozens of parties represented by the New Mexico Environmental Law Center ("Protestants"), therefore, respectfully request this Court to enter summary judgment, upholding the State Engineer's denial of APR's Application and dismissing this appeal.

STANDARD OF REVIEW

APR timely appealed the State Engineer's Order Denying Application pursuant to Section 72-7-1, which provides that the "proceeding upon appeal shall be *de novo* as cases originally docketed in the district court." NMSA 1978, § 72-7-1(E) (1971); see also N.M. Const. Art. XVI, §5 (requiring de novo review "unless otherwise provided by law.") The scope of this review, however, "is limited to a *de novo* review of the issue before the State Engineer." Lion's Gate Water v. D'Antonio, 2009 NMSC 57, 2, 147 N.M. 523; Headen v. D'Antonio, 2011 NMCA 58, P7, 149 N.M. 667 (same). In the instant appeal, the sole issue decided by the State Engineer was that that APR's application was invalid on its face. Exhibit A. Accordingly, this is the only issue before this Court on appeal, and the Court can and should resolve this issue on summary judgment. There is no genuine issue of material fact, and, as a matter of law, APR's Application is invalid on its face. Protestants, therefore, are entitled to summary judgment upholding the State Engineer's Order Denying Application and dismissing APR's appeal.

STATEMENT OF MATERIAL FACTS

There is no genuine issue as to the following material facts:

1. On October 12, 2007, APR filed with the OSE the attached Application for Permit to Appropriate Underground Water ("Original Application"). Exhibit B. The Original designates the "elements" of the water right being applied for, as follows:

a. Source of Water and Amount Requested: APR requested a permit to appropriate 54,000 AFY, but this amount is not based on any particular beneficial use. Id. at 2.

b. Purpose of Use: APR did not commit to any particular purpose of use. Instead, the Application identified numerous *possible* beneficial uses. Thus, APR's Application checks off every category of beneficial use listed on OSE's standard application form—

domestic, livestock, irrigation, municipal, industrial, and commercial. Id. Where OSE's standard application form called for APR to identify its intended "specific use," APR referred the OSE to "Attachment B." Id. Attachment B lists several *possible* uses: "the water resources could be utilized to support municipalities in the region, including Datil, New Mexico, Magdelena [sic], New Mexico, and Socorro, New Mexico"; "for on site real estate development"; to support a "commercial agricultural" operation on the ranch; "to support the State of New Mexico as a whole"; "to augment [the State of New Mexico's] capacity to meet compact deliveries to the State of Texas on the Rio Grande at Elephant Butte"; or "to offset the effects of ground water pumping on the Rio Grande in lieu of retirement of agriculture." Id. at 8-9. APR does not specify whether these uses might occur in particular combinations or whether they are mutually exclusive.

c. Place of Use: Anywhere within Catron and Sierra Counties, New Mexico, including anywhere on APR's ranch in Catron County, which comprises all or part of 43 surveyed sections of land.[1] Id. at 10.

d. Location of Well: As provided on Attachment A to its Original Application, APR proposed to construct a well field consisting of 37 wells, 20 inches in diameter, each drilled to a depth of 2000 feet and capable of producing 2000 gallons per minute ("gpm"). Id. at 6-7.

2. On May 14, 2008, APR filed the attached "Amended" Application for Permit to Appropriate Underground Water ("Amended Application"). Exhibit C. Because OSE has no standard forms or regulations that would accommodate APR's purported amendment or allow for more than a single well per application, APR had to modify OSE's standard application form.

[1] A section of land is one square mile.

Cf. Exhibit B with Exhibit C. The Amended Application is basically the same as APR's Original Application, except as follows:

a. Purpose of Use: APR's Amended Application adds "environmental, recreational, subdivision and related, replacement and augmentation" as possible uses. Where the application called for APR to identify a "specific use," APR left the application blank. Exhibit C at 2.

b. Place of Use: APR referred OSE to "Attachment B" where it proposed to greatly expand its already expansive "place of use" to:

> Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.

Id. at 7.

c. Location of Well: APR's Amended Application proposed to deepen the 37 wells from a depth of 2000 feet to a depth of 3000 feet. Id. at 4.

3. On June 26, 2008, one of APR's attorneys sent an email to OSE staff, purporting to further "modify" APR's Amended Application ("Modified Application"). Exhibit D. This email provided:

> Please accept the following as a modification of the Augustin Plains Ranch, LLC Amended Application for Permit to Appropriate Underground Water, filed May 5, 2008. …
>
> [To] the extent that the applied-for water will be used for irrigation on Augustin Ranch, the irrigation will be limited to 120 acres within a 1,290 foot radius of each of the 37 well locations listed on Attachment A to the Amended Application. The total acreage to be irrigated on the Ranch will be 4440 acres.

Id. Prior to submitting this email, APR had not identified any particular lands to which irrigation water rights might become appurtenant.

4. Hundreds of protests were timely filed following public notice of APR's Applications. Exhibit E at 3.

5. On November 29, 2010, OSE Hearing Examiner Kovach entered a Scheduling Order in the administrative proceeding below. Id. This Scheduling Order provided in pertinent part:

> As a preliminary matter, Protestants raise what they characterize as substantial and fundamental issues relating to the facial validity of the application, specificity of the application, speculation and beneficial use of water.

Exhibit E ¶ 4 at 4. The Scheduling Order then set out a briefing schedule on the issue of whether APR's Application was facially invalid. Id.

6. On February 11, 2011, Protestants timely filed a Motion to Dismiss Application, and, on May 13, 2011, Protestants filed a related Reply Brief.[2] Several other parties below filed similar motions or notices of concurrence with Protestants' Motion. Exhibit A at 2.

7. On February 7, 2012, OSE Hearing Examiner Core[3] heard oral argument from the parties, including APR, the Protestants and the State Engineer on the issue of whether APR's Application was invalid on its face and should be dismissed. Exhibit A.

8. On March 30, 2012, State Engineer Scott A. Verhines, P.E., signed the Order Denying Application and dismissed the hearing below. Exhibit A. State Engineer Verhines denied APR's Application, as a matter of law, based solely on the information provided on the face of APR's Original, Amended, and Modified Applications (collectively referred to herein as "APR's Application"). Among other things, Mr. Verhines found:

> 17. An application is, by its nature, a request for final action.

[2] The Reply Brief is entitled Protestants Reply to Responses Filed by Augustin Plains Ranch, LLC, and the Water Rights Division Regarding Protestants' Motion to Dismiss Application.

[3] Mr. Kovach, the former hearing examiner, had retired.

18. It is reasonable to expect that, upon filing an application, the Applicant is ready, willing and able to proceed to put water to beneficial use.

19. The statements on the face of the subject Application make it reasonably doubtful that the Applicant is ready, willing and able to proceed to put water to beneficial use.

20. The face of the subject Application does not make it clear whether irrigation is contemplated only on any lands within the Ranch, or at some other, unnamed, locations.

21. Consideration of an application that lacks specificity of purpose of the use of water or specificity as to the actual end-user of the water would be contrary to sound public policy.

22. Consideration of an application to pump groundwater from a declared underground water basin which will then be released into a natural stream or watercourse without specific identification of delivery points and methods of accounting for that water would be contrary to sound public policy.

23. To consider or approve an Application that, on its face, is so vague and overbroad that the effects of granting it cannot be reasonably evaluated is contrary to sound public policy.

24. In keeping with NMSA section 72-5-7, Application RG-89943, filed with the State Engineer on October 12, 2007 and on May 5, 2008, should not be considered by the State Engineer.

Exhibit A at 3-4.

ARGUMENT

I. THE STATE ENGINEER HAD TO DENY APR'S APPLICATION, BECAUSE THE APPLICATION FAILED TO COMPLY WITH CONSTITUTIONAL, STATUTORY, AND REGULATORY REQUIREMENTS.

The prior appropriation doctrine, also known as the "Colorado doctrine," is built into New Mexico's Constitution:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right. N.M. Const. Art. XVI, § 2.

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water. N.M. Const. Art. XVI, § 3.

See also NMSA 1978, § 72-1-2 (1941) (codifying same basic principles of prior appropriation); NMSA 1978, § 72-12-2 (1931) (same). The statutory code governing appropriation of water in New Mexico "codifies the Colorado doctrine [and] prescribes the procedure for effecting appropriations through applications for permits made to and granted by the state engineer, and provides for the issuance by the state engineer, upon the completion of the physical works and the application of the water to beneficial use, of a license to appropriate water." Lindsey v. McClure, 136 F.2d 65 (10th Cir. N.M. 1943).

Prior appropriation and its core "principle of beneficial use is based on 'imperative necessity' … and aims fundamentally at definiteness and certainty." State ex rel. Martinez v. City of Las Vegas, 2004 NMSC 9, ¶ 34, 135 N.M. 375, 89 P.3d 47; Carangelo v. Albuquerque-Bernalillo County Water Util. Auth., 2012 N.M. App. LEXIS 21 *47 (Ct. App.) ("The principle of limiting the use of the public's waters to what constitutes beneficial use is intended to promote the economical use of water by requiring definiteness and certainty in appropriating a finite and limited resource.") Thus, at any given time, a water right is made "definite and certain" by its fixed "elements," including the "amount, purpose, … and place of use, and as to water used for irrigation," by the "specific tracts of land to which [the right] shall be appurtenant." NMSA 1978, § 72-4-19 (1953); see also NMAC § 19.26.2.7 (EE) (defining "water right" as the "legal right to appropriate water for a specific beneficial use" and identifying the typical "elements" of a water right).

A permit issued under the water code grants the State Engineer's authorization "to develop a water right" based on "a particular beneficial use … at a particular place of use …." NMAC § 19.26.2.7 (W); see also Hanson v. Turney, 2004 NMCA 69, ¶ 9, 136 N.M. 1, 94 P.3d 1

(holding that a permit issued by the State Engineer authorizes the permittee to appropriate water for a particular purpose at a particular place). Applications for permits are governed by Section 72-12-3 (2001), which requires applicants to disclose the specific elements of the water right that they seek to establish through beneficial use. Pursuant to this statute, APR's Application should have disclosed "the amount of water applied for," "the beneficial use to which the water will be applied," "the location of the proposed well," "the place of the use for which the water is desired," and "the description of the land to be irrigated and the name of the owner of the land." In addition, the amount of water requested in APR's Application should have been limited to "the annual amount … that can reasonably be … produced and applied to beneficial use from a single well …." NMAC § 19.27.1.10.

APR's Application violated prior appropriation's fundamental principles of "definiteness and certainty" as well as the specific statutory and regulatory requirements intended to carry out these principles. APR's Application is flawed, fundamentally, because the amount of water requested (54,000 AFY) is not based on, measured by, or limited to any particular beneficial use. It is simply a very large number. The constitutional, statutory and regulatory requirements codifying the prior appropriation doctrine required more of APR. They required it to disclose some specific intent to appropriate water in a particular amount, for a particular beneficial use, and at a particular place. Because APR's Application failed to disclose any such intention, the State Engineer had to deny the Application. See Carangelo at *12 (holding that statutory application requirements "limit OSE's power to act").

II. THE STATE ENGINEER HAD TO DENY APR'S APPLICATION, BECAUSE THE VAGUENESS OF THE APPLICATION PREVENTED THE STATE ENGINEER FROM PERFORMING MANDATORY STATUTORY DUTIES, VIOLATED PUBLIC NOTICE REQUIREMENTS, AND PRECLUDED PRIORITY FROM RELATING BACK TO THE DATE OF FILING.

In evaluating any application to appropriate water, the State Engineer has a mandatory statutory duty to determine whether the "proposed appropriation" would (1) "impair existing water rights from the source," (2) be "contrary to conservation of water within the state," or (3) be "detrimental to the public welfare of the state." NMSA 1978, § 72-12-3(E) (2001); Tri-State Generation & Transmission Ass'n v. D'Antonio, 2011 NMCA 15, P9, 149 N.M. 394 ("The State Engineer must further evaluate applications to ensure that the proposed use will not impair existing rights, is not contrary to conservation of water within the state, and is not detrimental t o the public welfare.") As part of this analysis, the State Engineer must determine whether the amount of water requested is reasonable, whether the proposed project is feasible, and whether the water requested can and will be applied to beneficial use within a reasonable time. See, e.g., Martinez ¶ 35 ("water users have a reasonable time after an initial appropriation to put water to beneficial use"); State ex rel. Erickson v. McLean, 62 N.M. 264, 270, 308 P.2d 983, 987 (1957) (holding that no one is "entitled to receive more water than is necessary for his actual use"); Young & Norton v. Hinderlider, 15 N.M. 666, 677, 110 P. 1045, 1050 (1910) (holding that it is "obviously for the public interest that investors should be protected against making worthless investments in New Mexico").

The State Engineer cannot perform these basic statutory duties unless, as a threshold matter, the application under consideration discloses exactly how, where, when, and how much water will be used. See Exhibit A ¶ 8. APR's Application lacks this basic information. For example, on its face, the Application failed to disclose whether all 54,000 AFY might be

exported from the basin, and thus fully consumed, or whether some might be used *in situ* and recharge the basin as "return flow." The State Engineer also could not determine how surface flows and existing surface water rights might be impaired, because the Application does not reveal where or even whether, for example, water might be discharged into the Rio Grande. Nor could the State Engineer evaluate the reasonableness of the amount requested or the feasibility of the proposed project, because APR's Application failed to propose any particular use of water or project. Accordingly, the State Engineer had to deny APR's Application, on its face, because its vagueness made any further evaluation impossible. Id.; Lion's Gate at ¶ 2 (State Engineer properly denied application based on threshold issue that eliminated need for further consideration); Headen, 2011 NMCA 58, P9 (same).

The vagueness APR's Application also made it impossible to comply with statutory notice requirements. NMSA 1978, § 72-12-3(D) (2001). In discussing these requirements in the context of an application to divert surface water, the Court of Appeals very recently held:

> [The statutory notice requirements] are part of a framework that requires an applicant to describe proposed actions in detail, including the source and proposed disposition of the water and the potential effects of the proposed actions on other water users. The essence of these statutes is to require the disclosure of sufficient information to provide notice to interested parties and to allow the determination of likely impairment of others' water rights by any contemplated changes. …

Carangelo *17. On its face, APR's Application failed to "describe the proposed actions in detail … [or] the "proposed disposition of the water." Accordingly, adequate public notice of APR's specific intention to appropriate water could not be provided, because APR had no specific intention. Because this lack of adequate notice violated the due process rights of water rights owners and others with standing to protest under Section 72-12-3(D), see Eldorado at Santa Fe, Inc. v. Cook, 113 N.M. 33, 36, 822 P.2d 672 (Ct. App.), cert. denied, 113 N.M. 1, 820 P.2d 435

(1991); Nesbit v. City of Albuquerque, 91 N.M. 455, 458, 575 P.2d 1340 (1977), the State Engineer had to dismiss APR's Application without further consideration.

Adequate notice is also essential to priority, which many regard as "the most important stick in the water rights bundle." Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1148 (Colo. 2001). Under the general law of prior appropriation, before imposition of our statutory permitting system, water rights were established simply by appropriating water through beneficial use. If the appropriation required time to perfect, the priority of the right would relate back to the "first step" taken by claimant to initiate the appropriation.[4] This "first step" could be "any substantial act necessary to, ***and giving notice of***, the building of the contemplated [diversion] system," but it had to be of "such character as to put a reasonable person on notice" of the elements of the new appropriation, including its purpose, point of diversion, and magnitude. Farmers Dev. Co. v. Rayado Land & Irrigation Co., 28 N.M. 357, 369 (1923) (emphasis added); see also, e.g., In re Water Rights of the City of Central v. City of Central, 125 P.3d 424, 443 (Colo. 2005) ("… the 'first step' to initiate an appropriation and to relate back a priority date consists 'of the concurrence of the intent to appropriate water for application to beneficial use with an overt manifestation of that intent through physical acts sufficient to constitute notice' to interested parties.")

New Mexico's statutory permitting system has now replaced the common law's "first step" doctrine, but the basic law regarding notice is the same. Now, instead of the common law "first step," the application manifests the claimant's intent to appropriate and priority relates back to the filing date. NMSA 1978, § 72-1-2 (1953). However, just as a vague "first step" could never provide adequate notice or support relation back under the common law, neither can

[4] Relation back assumes that the claimant diligently pursue his claim and applied water to beneficial use within a reasonable time.

a vague application under the water code. Cf. Carangelo, 2012 N.M. App. LEXIS 21 at *17. Therefore, the State Engineer had to dismiss APR's Application, because it failed to disclose any specific intent to appropriate and thus did not provide the requisite notice on which priority is based.

III. THE STATE ENGINEER HAD TO DISMISS APR'S APPLICATION, BECAUSE APR DID NOT SEEK TO APPLY WATER TO BENEFICIAL USE, BUT ONLY TO MONOPOLIZE A WATER SUPPLY FOR SPECULATIVE PURPOSES.

In Martinez, supra, the New Mexico Supreme Court struck down the Pueblo Rights Doctrine, which purportedly granted the Town of Las Vegas a perpetual, unlimited right to take as much water from the Gallinas River as it needed. The Court held that this claim could not prevail, because it was wholly at odds with the law of prior appropriation. In so holding, the Court decisively reversed Cartwright v. Public Serv. Co., 66 N.M. 64, 343 P.2d 654 (1959) and embraced Justice Federici's dissent in that case. Martinez ¶ 38 ("We therefore agree with the dissent in Cartwright that the ever-expanding quality of the pueblo water right 'is as antithetical to the doctrine of prior appropriation as day is to night.'") In his dissent, Justice Federici explained:

> The reasons that the doctrine of prior appropriation was adopted in all of the western states except California were twofold. First, to utilize scarce water, ***and second to prohibit the monopoly inherent in the riparian doctrine***.

Cartwright at 107, 343 P.2d at 684 (J. Federici, dissenting, emphasis added). Justice Federici continued:

> It was pointed out in Albuquerque Land & Irrigation Company v. Gutierrez, 10 N.M. 177, 61 P. 357 [that] there is no such thing as private ownership in [public water]. The appropriator acquires only the right to take … a given quantity of water for a specified purpose, Snow v. Abalos, 18 N.M. 681, 140 P. 1044[.] Many times this Court has held that the priority of right is based upon the intent to take a specified amount of water for a specified purpose and he can only acquire a perfected right to so much water as he applied to beneficial use. See, also, Harkey v. Smith, 1926, 31 N.M. 521, 531, 247 P. 550, 553, where this Court stated: ***"no***

> ***'dog in the manger' policy can be allowed in this state***, unless these waters can be and are beneficially used by plaintiffs, the defendants or others may use the same."

Id. at 109-110, 343 P.2d at 684 (J. Federici, dissenting) (emphasis added).

Under the law of prior appropriation, APR cannot use a vague and indefinite Application to play "dog in the manger"[5] with respect to a potentially enormous supply of water; nor can the State Engineer lawfully allow anyone to monopolize a water supply for speculative purposes. Id.; see also Turley v. Furman, 16 N.M. 253, 266, 114 P. 278, 283 (1911) (condemning "the Turley irrigation project" because it "will be both waterless and valueless, a purely speculative proposition, obnoxious to irrigation laws"); Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 121 (1912) (holding that the right to use water under the prior appropriation doctrine "must be exercised … so [as not] to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual"); cf. Young & Norton v. Hinderlider, 15 N.M. 666, 677,110 P. 1045, 1050 (N.M. 1910) ("It is … obviously for the public interest that investors should be protected against making worthless investments [in proposed irrigation projects] in New Mexico, and especially that they should not be led to make them through [the Territorial Engineer's] official approval of unsound enterprises"); David B. Schorr, Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights, 32 Ecology L.Q. 3, *32 (historical analysis showing that prior appropriation "aimed at preventing 'monopoly' control of water").

The anti-speculation/anti-monopoly aspects of prior appropriation were embraced and explained by the New Mexico Supreme Court over one hundred years ago in Millheiser v. Long, 10 N.M. 99, 117, 61 P. 111 (1900). In Millheiser, defendants Long and Truxton "took

[5] Refers to a person who prevents others from enjoying something of which he has no need.

possession of a large ditch" that was capable of diverting the entire surface flow of the Rio Hondo. Millheiser at 116, 61 P. at 117. Their aim was to gain control over an entire water supply, not for their own use, but in hopes of selling water to third parties. Id. They argued that their intent and ability to divert "all the water" were in themselves sufficient under the law to create a right to own "all the water." The Court disagreed:

> Under [Long and Truxton's] construction of the law, the first person who diverts the water from the stream, [would] have a monopoly of all the water of any stream, by simply making this ditch large enough to conduct it from the usual channel. There need be but one appropriation, and all other settlers upon such stream must pay tribute to the person making the first diversion. This is not the law governing water rights in this Territory where the waters of natural streams are declared to be free to those who apply them to a beneficial use, until all are thus appropriated. Mr. McKinney in his work on irrigation has this to say on this subject:
>
> 'Under the later decisions relative to the capacity of the ditch being the limit of the extent of the appropriator's rights in and to the waters of a stream, it is held to be against the general policy of the entire modern system of the doctrine of appropriation that the greatest good shall accrue to the greatest number. For if this was the law upon the subject a person might lay claim to the water of whole rivers for the ostensible purpose of irrigating immense tracts of land, which with the utmost diligence would take years to accomplish; and although others might intervene and attempt to appropriate the water of a stream, they could only lay claim to it for a temporary period of time, and until the works of the first appropriator were eventually completed, and they would then be deprived of their appropriation.'

Millheiser at 116-117, 61 P. at 117. The Court adopted Mr. McKinney's analysis and denied Long and Truxton's attempt to gain control over an entire water supply. The Court further explained that, had it not done so:

> [The] way for speculation and monopoly [would] be opened and the main object of [prior appropriation] defeated.

Id. at 117, 61 P. at 117. The intent manifested by APR's Application is no different than that of Long and Truxton's over one hundred years ago—to gain dominion over an entire water supply to speculate in future water sales. Millheiser thus required the State Engineer to deny APR's

Application. Id.; see also Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P.2d 566 (1979) (holding that the law of prior appropriation "guarantees a right to appropriate, not a right to speculate"); City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 67 (Colo. S.Ct. 1996) ("Although Vidler has most often been cited as defining the anti-speculation doctrine, we did not articulate a new legal requirement in that case, but rather merely applied longstanding principles of Colorado law"); Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1134 (10th Cir. 1981) (applying Vidler to hold that "Albuquerque … cannot take the water now with a mere hope of possible sales in the future").

CONCLUSION

The State Engineer had to deny APR's Application. As a threshold matter, the Application failed to comply with basic constitutional, statutory and regulatory requirements. APR failed to provide critical details in its Application, which are required of all applicants in order to manifest a specific intent to appropriate water. This failing prevented the State Engineer from evaluating the Application and made effective notice of the Application impossible to provide. Accordingly, the State Engineer could not even consider APR's Application without violating mandatory statutory provisions regarding the appropriation of water. Moreover, the clear speculative intent manifested in APR's Application is against public policy and violates fundamental principles of the prior appropriation doctrine.

WHEREFORE, Protestants respectfully request this Court to grant summary judgment upholding the State Engineer's Order Denying Application and dismissing this appeal.

Respectfully submitted:

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CERTIFICATE OF SERVICE: I certify that I served a copy of the foregoing paper on the parties' attorneys identified below on the 26th day of July, 2012.

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R. Bruce Frederick