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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 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

REPORT AND RECOMMENDATION GRANTING MOTIONS FOR SUMMARY JUDGMENT

This matter came before Uday V. Joshi, the State Engineer's Hearing Examiner following a Hearing held in Reserve, New Mexico on December 13, 2017, on two Motions for Summary Judgment filed in the above-captioned matter: (1) Motion for Summary Judgment and Memorandum in Support filed on September 26, 2017 (MSJ1) by Community Protestants; and (2) Motion for Summary Judgment and Memorandum in Support filed on October 16, 2017 (MSJ2) by Catron County Board of County Commissioners (Catron County).

At the hearing held on December 13, 2017, the Hearing Examiner heard argument from the following:

Movants: Douglas J. Miekeljohn, Esq., presented argument on behalf of Community Protestants in support of MSJ1. Pete V. Domenici Jr. Esq., (also in support of MSJ1) presented argument on behalf of Catron County in support of MSJ2.

Joinders in support of MSJ1: 1) Peter White, Esq., presented argument in support of Cuchillo Valley Community Ditch Protestants' Joinder to MSJ1; 2) Samantha Ruscavage-Barz, Esq., presented a brief argument in support of Wild Earth Guardians' Joinder to MSJ1; 3) Jessica Aberly, Esq., presented argument in support of Pueblos' (San Felipe, Santa Ana, Sandia, and Isleta) Joinder to MSJ1; 4) Tessa Davidson, Esq., presented oral argument in support of Hands' Joinder to MSJ1; 5) Jane Marx, Esq., argued in support of Navajo Nation's Joinder to MSJ1; and 6) Pete Domenici, Esq., presented argument in support of Catron County Board of County Commissioners' Joinder to MSJ1.

The following Parties appeared telephonically in support of MSJ1:[1] Simeon Herskovitz, Esq., presented a brief argument on behalf of San Augustin Water Coalition's Joinder to MSJ1;

[1] The Notice of Oral Argument issued on November 16, 2017 identified Reserve, New Mexico for the location of the December 13, 2017 Hearing. On December 9, 2017, the above-mentioned Joinders filed a Motion to Appear

Olivia Mitchell, Esq., represented New Mexico Farm and Livestock Bureau in support of its Joinder to MSJ1; Jonathan Roehl, Esq., represented Pecos Valley Artesian Conservancy District in support of its Joinder to MSJ1; and Jeffrey H. Albright, Esq., represented Kokopelli Ranch, LLC.

The following Parties appeared in support of MSJ2: Tessa Davidson, Esq., presented argument on Hands' Joinder to MSJ2;

Respondents: 1) Jeffrey J. Wechsler, Esq., and John B. Draper representing Applicant Augustin Plains Ranch, LLC. (APR), presented argument and their Response to MSJ1 and MSJ2; 2) L. Christopher Lindeen, Esq., representing the Water Rights Division (WRD), presented argument and its Response to MSJ1 and MSJ2.

Hearing/Oral Argument:

The Hearing Examiner permitted only the Movants and Respondents to provide Oral Argument in support of their respective positions. In brief, the arguments presented in support of MSJ1 and MSJ2 asserted the following: 1) the Corrected Application is incomplete; 2) the Corrected Application is no different than the previously dismissed application and should be denied on the principles of *res judicata*; 3) the Corrected Application is facially invalid and it does not provide a sufficient degree of specificity in order for it to be analyzed; 4) the Corrected Application is speculative and, therefore, contrary to sound public policy and is detrimental to the public welfare of the state.

BACKGROUND

Applicant Augustin Plains Ranch, LLC., (APR) filed its Corrected Application on July 14, 2014, and subsequently on December 23, 2014, and on April 28, 2016, amended or revised its Corrected Application No. RG-89943 with the State Engineer for Permit to Appropriate Groundwater in the Rio Grande Underground Water Basin of the State of New Mexico.

This Corrected Application follows APR's previous Application that the State Engineer denied on March 30, 2012 (SE Denial). The District Court affirmed the denial on January 3, 2013 (Reynolds Order). The Reynolds Order followed the District Court's Memorandum Decision on Motion for Summary Judgment dated November 14, 2012 (Reynolds

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Telephonically. As a result, the parties were provided a teleconference number to participate. The Hearing Examiner, however, given the situation, requested and all parties provided, an acknowledgment that appearing telephonically may compromise the clarity of the digital recording and any arguments made telephonically may not be audible and / or clear and that they would waive any resulting prejudice.

Memorandum). APR filed this Corrected Application to address the deficiencies and issues identified in the SE Denial and the Reynolds Memorandum. Having fully considered the matter and being fully briefed in the premises, the Hearing Examiner finds the following:

1) Beneficial Use is the basis, the measure and limit of a water right. NM Const. Art XVI, §3.

2) The jurisdiction of the State Engineer is invoked pursuant to Articles 2, 5 and 12 of Chapter 72 NMSA 1978.

3) The State Engineer has jurisdiction of the parties and the subject matter.

4) NMSA 1978, Section 72-12-7 (C) states, "[i]f objections or protests have been filed within the time prescribed in the notice or if the state engineer is of the opinion that the permit should not be issued, the state engineer may deny the application or, before he acts on the application, may order that a hearing be held."

5) On December 13, 2017, the State Engineer's Hearing Examiner conducted a hearing on MSJ1 and MSJ2.

DISMISSAL ON SUMMARY JUDGMENT CONFORMS WITH CHAPTER 72 AND 19.25.2 NMAC

6) APR asserts that the State Engineer is required to hold an evidentiary hearing pursuant to NMSA 1978, Sections 72-2-16 and 72-2-17.

7) As has been the practice of the State Engineer's Hearing Unit since its inception, dispositive motions such as Motions to Dismiss and Motions for Summary Judgment are consistently scheduled for hearing and decided in order to expedite the proceedings, determine whether genuine issues of material fact exist and whether an evidentiary hearing pursuant to NMSA 1978, Section 72-2-17 is required.

8) Briefing and oral argument in a hearing before the State Engineer's hearing examiner, following the filing of a Motion for Summary Judgment, provides litigants a full and fair opportunity to be heard on all issues raised in such a motion.

9) Action on a motion for summary judgment may result in the dismissal or denial of an application or protest, but only after all parties have been offered a full and fair opportunity for briefing and to present oral argument at a hearing.

10) The granting of a Motion for Summary Judgment and denial or dismissal of an application, after briefing and oral argument in a hearing before the State Engineer's hearing

examiner, satisfies the requirement of a hearing held before the State Engineer before an appeal may be taken to the district court under NMSA 1978, Section 72-2-16. The Court's decision in *Derringer v. Turney*, 2001-NMCA-075, is not to the contrary. In *Derringer* the Court held that the State Engineer was required to provide a requested post-decision hearing after granting a motion for summary judgment where the aggrieved party did not receive a hearing prior to the granting of the motion. Here, in contrast, the parties both in favor of the motion for summary judgment and those opposed participated in the hearing before the State Engineer's Hearing Examiner on December 13, 2017.

11) APR argues that the State Engineer must consider the full merits of its Corrected Application in an evidentiary hearing, including questions on the availability of water for appropriation and the potential impacts on other water rights. APR's argument is a misreading of NMSA 1978, Sections 72-2-16 and 72-2-17. APR's reading, if given credence, would compromise and unduly limit proceedings before the State Engineer, which are intended to follow the New Mexico Rules of Civil Procedure as far as possible, and to be judicially efficient. It would require an evidentiary hearing on technical issues of hydrology and other matters in cases when, as a matter of law and on undisputed material facts, an application should be denied or dismissed.

12) In this case, the Respondent does not present any genuine issues of disputed material fact and, therefore, the State Engineer may determine, as a matter of law, whether the movants are entitled to an order that dismisses or denies the application. This is in full compliance with the applicable Hearing Unit Rules and Regulations. *See* 19.25.2 NMAC; *See also* 19.25.2.6 NMAC ("The objective of this rule is to establish procedures that govern hearings before the state engineer and the hearings unit and to ensure the expeditious and orderly handling of all administrative and enforcement matters consistent with the requirements of due process.")

UNDISPUTED MATERIAL FACTS

13) APR filed its Corrected Application on July 14, 2014, December 23, 2014, and April 28, 2016.

14) The Corrected Application is for the appropriation of 54,000 acre-feet per annum of groundwater from 37 wells in the Rio Grande Underground Water Basin.

15) The Corrected Application identified the location of the 37 wells intended for the diversion of 54,000 afa.

16) The Corrected Application identified the purpose of use as municipal purposes and commercial sales.

17) The Corrected Application identified the place of use as "parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties."

18) APR requested to have the Corrected Application heard in two stages.

19) Stage 1 would "consist of an evaluation of the hydrological issues ... including the amount of water available for appropriation without impairing other water rights...."

20) Stage 2 would "consist of the finalization of the individual purposes of use, places of use, and amounts for each use...with additional detail regarding the types and places of use for the water...."

21) The Corrected Application, as filed, did not describe in detail the purposes, places of use or amounts of use of any individual users.

22) APR generally identified seven counties in which it proposed that water would be put to beneficial use but did not identify a specific county in which a contractual agreement had been reached for APR to serve as a water provider.

23) APR did not provide any detail on the delivery and use of water by any specific municipalities, or identify any existing contractual agreement for the delivery of water to any municipality or other commercial user.

THE WRD PROPERLY FOUND THE CORRECTED APPLICATION TO BE FACIALLY VALID AND COMPLETE

24) Movants assert that the Corrected Application is incomplete and that consideration of the Corrected Application is barred under the principles of *res judicata.*

25) NMSA 1978, Section 72-12-3 (A) requires that an applicant designate: 1) the underground water basin from which the water is to be appropriated; 2) the beneficial use to which the water will be applied; 3) the location of the proposed wells; 4) the owner of the lands on which the wells are to be situated; 5) the amount of water; 6) the place of use for which the water is desired; and 7) if the use is for irrigation, the description of the land to be irrigated and the name of the owner of the land.

26) The WRD applies the rules and regulations and statutes that govern applications filed with the Office of the State Engineer to determine whether an application is complete.

27) Here, the WRD deemed the Corrected Application complete because all

information required by NMSA 1978, §72-12-3 had been provided on the application form.

28) The Corrected Application is facially valid in that it meets the minimum requirements of the statute. *See* NMSA 1978, §72-12-3.

29) The WRD correctly determined that the Corrected Application is administratively complete for purposes of its acceptance for filing and public notice.

30) The determination by the WRD that an application is administratively complete does not include a determination of whether an application is speculative.

31) The WRD did not make a determination of whether the Corrected Application was speculative.

32) The Corrected Application is sufficiently different from the previous iteration so as not to be barred under the principle of *res judicata.*

33) Only the State Engineer may determine whether an application as filed is in conformance with New Mexico law.

THE NEW MEXICO CONSTITUTION, THE WATER CODE, AND THE LAW OF PRIOR APPROPRIATION AND BENEFICIAL USE GOVERN APPLICATIONS FOR PERMIT

34) "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.

35) "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

36) "All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use." NMSA 1978, § 72-1-1.

37) "The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use." NMSA 1978, § 72-12-1.

38) Water rights in New Mexico are developed under the doctrine of prior appropriation. *Millheiser v. Long,* 1900-NMSC-012, ¶*3; Albuquerque Land & Irrig'n Co. v.*

Gutierrez, 1900-NMSC-017, ¶ 32; *Snow v. Abalos*, 1914-NMSC-022, ¶9.

39) Prior to the enactment of the New Mexico water code in 1907, the New Mexico Supreme Court declared speculation and monopoly to be contrary to the law of prior appropriation. *Millheiser v. Long*, 1900-NMSC-012, ¶¶31-32.

40) The 1907 water code did not supplant the common law of prior appropriation, but rather was merely declaratory of the law as it had already been established in New Mexico by judicial decisions. *Hagerman Irrig'n Co. v. McMurry*, 1911-NMSC-021, ¶4; *see also Yeo v. Tweedy*, 1929-NMSC-033, ¶8.

41) Provisions of both the New Mexico Constitution and the New Mexico water code reflect and incorporate basic principles of the law of prior appropriation.

42) The right of the public to appropriate the public waters of the State of New Mexico for beneficial use and priority of appropriation are key pillars of prior appropriation law in New Mexico.

43) In addition to New Mexico reported decisions, it is beneficial to look to Colorado case law, another western state whose administration of water rights is governed under the prior appropriation doctrine. *See, e.g., Albuquerque Land & Irrigation Co.*, 1900-NMSC-017, ¶ 31; *State ex rel. Reynolds v. South Springs Co.*, 1968-NMSC-023, ¶ 19-22; *State ex rel. Office of the State Engineer v. Lewis*, 2007-NMCA-008, ¶ 40

44) The evolution of Colorado's water doctrine concerning speculation may serve as guide for New Mexico to continue its development of the same. *See, e.g., Denver v. Northern Colorado Water Dist.*, 130 Colo. 375, 408, 276 P.2d 992, 1009 (1954); *Colorado River Water Conservation District v. Vidler Tunnel Water Co.*, 197 Colo. 413, 594 P. 2d 566, 568 (1979); *Vermillion Ranch Ltd., Partnership v. Raftopoulos Brothers*, 2013 Colo. 41, 34, 307 P.3d 1056, 1064 (2013)

45) The Colorado Courts and legislature have long wrestled with the challenge of how to evaluate the possible speculative nature of water rights applications, and have developed, based on principles of the prior appropriation doctrine, standards or elements to guide that evaluation under what is known as the 'anti-speculation doctrine'. *See* Aaron Pettis, *Conditional Water Rights and the Problem of Speculation*, 18 U. Denv. Water L. Rev. 312 (2015); *Vidler*, 594 P.2d 566; C.R.S. §§ 37-92-103(3)(a), 37-92-305(9)(b); *Vermillion*, 307 P.3d 1056; *Front Range Resources, LLC v. Colo. Groundwater Comm'n No.* 15-CV-30493 (Adams County

District Court) (May 26, 2016).

46) Colorado Law provides several standards or factors for the evaluation of whether a water right application is speculative, including the specific plan test and the can and will test. See C.R.S. §§ 37-92-103(3)(a), 37-92-305(9)(b). These standards can serve as guides for the evaluation of whether an Application for a new appropriation in New Mexico is speculative.

GRANTING THIS APPLICATION WILL DEPRIVE THE PUBLIC OF ITS RIGHT TO APPROPRIATE WATER FOR BENEFICIAL USE

47) It is the long-standing policy of the State Engineer to encourage the beneficial use of water while protecting existing water rights.

48) The New Mexico Constitution and the New Mexico water code recognize the law of prior appropriation and the principle that the waters of the State of New Mexico belong to the public and are available for appropriation for beneficial use.

49) Granting the Corrected Application would allow APR to tie up, or otherwise make unavailable for appropriation by the public, 54,000 acre-feet of water without any proposed or intended application of water to beneficial use by the applicant itself. This would deprive the public of the opportunity under the law of prior appropriation and our water code and Constitution to appropriate that water for beneficial use.

50) In the Corrected Application, APR proposes a two-stage administrative hearing process for the State Engineer to consider the Corrected Application.

51) Upon completion of the proposed first stage, intended to allow APR to determine the amount of water available, APR proposes that "[t]he individual detailed purposes and amounts of use will be finalized in Stage 2 of the application process, in conjunction with the amended and additional information to be included in the Amended Application.".

52) APR further proposes that "places of use will be finalized in Stage 2 of the Application process, in conjunction with the amended and additional information to be included in the Amended Application."

53) Administrative proceedings before the State Engineer are neither the time nor the place for Applicants to develop their intentions. Those intentions should be well-developed based on reasonable projections of future demand and clearly and specifically articulated in the application.

54) In one of the first cases to articulate what later came to be codified as the specific

plan test, the Colorado Supreme Court stated: "[o]ur constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would as a practical matter discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains." *Vidler*, 594 P.2d 566, 568.

55) There are numerous parallels between NMSA 1978, Section 72-1-9 and the "specific plan" test in Colorado.

56) In New Mexico, "[m]unicipalities, counties, state universities and public utilities supplying water to municipalities or counties shall be allowed a water use planning period not to exceed forty years." NMSA 1978, Section 72-1-9.

57) APR is not one of the 72-1-9 entities listed above, does not have a vested interest in the lands or facilities proposed to be served by the requested appropriation, nor does it have an agency relationship with any of the entities listed in Section 72-1-9.

58) Similar to NMSA 1978, Section 72-1-9, the Colorado water code distinguishes public and private enterprises in its definition of "appropriation" and requirements with respect to each:

> "Appropriation" means the application of a specified portion of the waters of the state to a beneficial use pursuant to the procedures prescribed by law; but no appropriation of water, either absolute or conditional, shall be held to occur when the proposed appropriation is based upon the speculative sale or transfer of the appropriative rights to persons not parties to the proposed appropriation, as evidenced by either of the following:
>
> (I) The purported appropriator of record does not have either a legally vested interest or a reasonable expectation of procuring such interest in the lands or facilities to be served by such appropriation, *unless such appropriator is a governmental agency or an agent in fact for the persons proposed to be benefited by such appropriation*
>
> (II) The purported appropriator of record does not have a specific plan and intent to divert, store, or otherwise capture, possess, and control a

specific quantity of water for specific beneficial uses."

C.R.S. 37-92-103(3)(a) (emphasis added).

59) Both New Mexico Law and Colorado Law, NMSA 1978, Section 72-1-9 and C.R.S. 37-92-103(3)(a)(II), respectively, require public entities to show that the proposed appropriation is consistent with its reasonably anticipated water requirements.

60) "Requiring adjusted, realistic estimates of future need in subsequent diligence proceedings is consistent with the purpose underlying both the anti-speculation doctrine and diligence requirement, i.e., preserving unappropriated water for future users having legitimate, documented needs." *Pagosa Area Water and Sanitation Dist v. Trout Unlimited*, 170 P.3d 307, 316 (2007).

61) That mandate in Colorado is implemented through the "specific plan" test. Pettis, *supra,* at 329.

62) The "specific plan" test creates a standard by which a public appropriator may be granted a conditional right to appropriate water if certain conditions are met.

63) The Court in *Vidler* held that an application for a conditional appropriation could be deemed to be speculative and conjectural when it is based on a hypothetical sale or transfer of water rights for a yet-to-be identified entity.

64) Conditional appropriations[2] in Colorado intended to serve municipal needs require a specific plan, and a showing "that the contracted-for amount is necessary for the entity's reasonably anticipated needs, based on substantiated projections of population growth." *Upper Yampa Water Conservancy Dist.*, 249. P.3d at 800.

65) More specifically, after codification of the anti-speculation principle articulated in *Vidler (C.R.S.* § 37-92-103(3)(a)), in order to defeat a claim of speculation, the applicant must put forth a specific plan to divert and control a specific quantity of water for specific beneficial uses, and demonstrate the non-speculative need for the amount of water claimed. *Vermillion*

[2] Under Colorado law, a conditional water right is defined as "a right to perfect a water right with a certain priority date upon the completion with reasonable diligence of the appropriation upon which such water right is to be based." C.R.S. § 37-92-103(6). "To establish a conditional water right, an applicant must show in general that a 'first step' toward the appropriation of a certain amount of water has been taken, that the applicant's intent to appropriate is not based upon the speculative sale or transfer of the appropriative rights, and that there is a substantial probability that the applicant can and will complete the appropriation with diligence." *City of Thornton v. Bijou Irrigation Company*, 926 P.2d 1, 31 (1996). The adjudication of a conditional water right in Colorado is roughly analogous to the approval by the State Engineer of an application for a permit to appropriate water for beneficial use under New Mexico law.

Ranch, 307 P. 3d 1056, ¶¶ 34, 35 *(quoting Upper Yampa Water Conservancy Dist.*, 249. P.3d at 800).

66) The Corrected Application expresses APR's intent to provide water for municipal purposes to the following municipalities and entities: Magdalena, Socorro, Belen, Los Lunas, Albuquerque Bernalillo County Water Utility Authority, and Rio Rancho, but it does not demonstrate the existence of a contractual agreement for the purchase or delivery of water with any of these municipalities or entities.

67) Attachment 2 Exhibit E to the Corrected Application suggests that the City of Rio Rancho may be interested in discussing water purchase in the event that APR is successful in its application.

68) The attachment evinces, at best, the City of Rio Rancho's possible future use of the applied-for water rights. These circumstances are comparable to those considered by the Colorado Supreme Court in *Vidler* ("Vidler has no firm contractual commitment from any municipality to use any of the water. Even the City of Golden has not committed itself beyond an option which it may choose not to exercise. The mere negotiations with other municipalities clearly do not rise to the level of definite commitment for use required to prove the intent here required.").

69) APR is not an entity covered under NMSA 1978, Section 72-1-9 and, therefore, does not benefit from a 40-year planning horizon to hold water unused for future growth and demand.

70) At the hearing held on December 13, 2017, APR averred that it is not required under New Mexico Law to have any contractual agreements in place for the purchase or delivery of water. This is a fundamental misapprehension of New Mexico law with respect to the evaluation of an application for a permit for a new appropriation of water, and raises the question of speculation.

71) APR does not identify how the 54,000 afa that it seeks to appropriate would be allocated to each of the municipalities identified in its application.

72) APR has shown neither: (1) a contractual agreement or an agency relationship with the municipalities identified in the Corrected Application, nor (2) a specific plan for the purchase and delivery of a specific amount of water for specific beneficial uses to meet the reasonably anticipated needs of those municipalities.

73) An application for a new appropriation of water of this size and nature for municipal purposes should, with specificity, identify for each municipality: reasonable, substantiated projections of future demand, and the respective quantities, purposes and places of use for each identified user.

74) Similar to the diligence required to put water to beneficial use to establish a water right under New Mexico law (*see* NMSA 1978, Sections 72-5-8, 72-5-14), the Colorado legislature has codified a diligence requirement for an approval of an application for a conditional water right in C.R.S. §37-92-305(9)(b).

75) Both New Mexico and Colorado require that a water right be perfected with diligence and within a reasonable time.

76) In *Vermillion*, the Court stated, that "an applicant bears the burden to demonstrate that: 1) it has taken a 'first step,' which includes an intent to appropriate the water and an overt act manifesting such intent; 2) its intent is not based on a speculative sale or transfer of the water to be appropriated; and 3) there is a substantial probability that the applicant "can and will" complete the appropriation with diligence and within a reasonable time." 307 P.2d 1056, ¶44.

77) APR has invested significant time and resources into the conceptual development of a project and pipeline for the delivery of water for municipal and commercial purposes, but that must be considered in light of the need to demonstrate a specific plan, the probability of implementation, the requirement that water be applied to a beneficial use within a reasonable time, and the reasonably anticipated needs of any municipal entities involved.

78) All APR has established is that it wants to appropriate and convey water to uncommitted municipalities or entities in unknown quantities.

79) Here, there is a striking absence of information, namely agreements with specific end-users for specific quantities and purposes that APR could rely upon to defeat a claim of speculation and show a substantial probability that it will complete the proposed appropriation with diligence by placing water to beneficial use within a reasonable period of time.

80) Approval of the Corrected Application would "encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains." *Vidler,* 594 P.2d 566, 568

81) Approval of the Corrected Application would be contrary to long established principles of the law of prior appropriation embodied in our Constitution and water code.

82) In the absence of a specific plan to appropriate a specific quantity of water for specific identified beneficial uses, there is no showing of a non-speculative need, which is a requirement for the issuance of a permit under which a water right may be developed.

Therefore, the Hearing Examiner recommends that MSJ1 and MSJ2 be granted. All of the findings of fact and conclusions of law set out above collectively support the conclusion that APR's Corrected Application is speculative and should be denied. Hearing No. 17-005 should be dismissed and the Corrected Application (OSE File No. RG-89943 POD 1 through POD 37) should be denied as a matter of law.

DONE this 31st day of July, 2018.

Uday V. Joshi
Hearing Unit, Managing Attorney
Hearing Examiner

I ACCEPT AND ADOPT THE REPORT AND RECOMMENDATION OF THE HEARING EXAMINER THIS 31st DAY OF JULY, 2018.

Tom Blaine, P.E.
NEW MEXICO STATE ENGINEER

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

CERTIFICATE OF SERVICE

I certify that a copy of the ***Report and Recommendation Granting Motions for Summary Judgment*** (Order) filed August 1, 2018, was served via certified mail/return receipt requested, on the 2nd day of August, 2018 to the parties listed below.

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Hearing Unit Administrator

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