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.

Irma E. Corral, Law Clerk
Hearing Unit Administrator

WATER RIGHTS DIVISION
Office of the State Engineer
Administrative Litigation Unit
c/o Maureen C. Dolan, Esq.
c/o Felicity Strachan, Esq.
c/o Christopher Lindeen
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-3824
Maureen.dolan@state.nm.us
Felicity.Strachan@state.nm.us
Christopher.lindeen@state.nm.us
Co-counsel for Water Rights Division

ABRAMOWITZ FRANKS & OLSEN
c/o Martha C. Franks, Esq.
P.O. Box 1983
Fort Collins, CO 80522-1983
(505) 247-9011
Marthacfranks@earthlink.net
Co-Counsel for Water Rights Division

APPLICANT
MONTGOMERY & ANDREWS, P.A.
c/o Jeffrey J. Wechsler, Esq.
325 Paso de Peralta
Santa Fe, NM 87501
505-982-3873
jwechsler@montand.com
Co-counsel for Applicant Augustin Plains Ranch, LLC

DRAPER & DRAPER LLC
c/o John Draper, Esq.
325 Paso de Peralta
Santa Fe, NM 87501
505-570-4590
John.draper@draperllc.com
Co-counsel for Applicant Augustin Plains Ranch, LLC

PROTESTANTS

NANCE PATO & STOUT, LLC
c/o Adren Robert Nance, Esq.
P.O. Box 507
Reserve, NM 87820
Attorney for Catron County Board of County Commissioners (co-counsel with Domenici Law Firm) & Socorro County Commission
575-838-0911
adren@npslawfirm.com

DOMENICI LAW FIRM, P.C.
c/o Pete Domenici, Esq.
c/o Lorraine Hollingsworth, Esq.
320 Gold Ave., S.W., #1000
Albuquerque, NM 87102-3228
505-883-6250
pdomenici@domenicilaw.com;
lhollingsworth@domenicilaw.com
Attorneys for: Monticello Properties, LLC; Double Springs Ranch, LLC; Gila Mountain Ranches, LLC; John Hubert Richardson Rev. Trust; Richardson Family Farms, LLC; Co-counsel with Adren R. Nance, Esq. for Catron County Board of Commissioners

LEWIS ROCA ROTHGERBER CHRISTIE LLP
c/o Jeffrey Albright, Esq.
201 Third Street, N.W., Suite 1950
Albuquerque, NM 87102
(505) 764-5435
JAlbright@lrrc.com
Attorney for Kokopelli Ranch, LLC

COPPLER LAW FIRM, P.C.
c/o John L. Appel, Esq.
645 Don Gaspar
Santa Fe, NM 87505-5656
505-988-5656
jappel@coppler.com
Attorney for City of Truth or Consequences

DAVIDSON LAW FIRM, LLC
c/o Tessa T. Davidson, Esq.
P.O. Box 2240
Corrales, NM 87048-2240
505-792-3636
ttd@tessadavidson.com
Attorney for John & Helen A. Hand and The Hand Living Trust

Peter Thomas White, Esq.
125 E. Palace Ave., #50
Santa Fe, NM 87501-2367
505-984-2690
Pwhite9098@aol.com
Attorney for Cuchillo Valley Community Ditch Association; Salomon Tafoya

STEIN & BROCKMANN P.A.
c/o James C. Brockmann, Esq.
P.O. Box 2067
Santa Fe, NM 87504-2067
505-983-3880
jcbrockmann@newmexicowaterlaw.com
Attorney for Last Chance Water Company

WAYNE G. CHEW P.C.
c/o Wayne G. Chew, Esq.
20 First Plaza Ctr. NW, Suite 517
Albuquerque, NM 87102
wgchew@wgchewlaw.com
505-842-6363
Attorney for Apache Ranch- Kenneth R. Brumit

HENNIGHAUSEN & OLSEN, L.L.P.
c/o Alvin F. Jones, Esq.
c/o Olivia R. Mitchell, Esq.
P.O. Box 1415
Roswell, NM 88202-1415
575-624-2463
ajones@h2olawyers.com;
omitchell@h2olawyers.com
Co-counsel for New Mexico Farm & Livestock Bureau and Catron County Farm & Livestock Bureau

HENNIGHAUSEN & OLSEN, L.L.P.
c/o A.J. Olsen, Esq.
c/o Jonathan E. Roehlk, Esq.
P.O. Box 1415
Roswell, NM 88202-1415
575-624-2463
ajolsen@h2olawyers.com;
jroehlk@h2olawyers.com
Co-counsel for Pecos Valley Artesian Conservancy District

Lisa Henne, Esq.
New Mexico State Land Office
P.O. Box 1148
Santa Fe, NM 87504-1148
(505) 827-5702
lhenne@slo.state.nm.us
Attorney for State of New Mexico Commissioner of Public Lands

Jane Marx, Esq.
2825 Candelaria Road NW
Albuquerque, New Mexico 87107
(505) 344-1176 (office)
(505) 453-5071 (cell)
janemarx@earthlink.net
Attorney for Pueblo of Zuni and Pueblo of San Felipe

ABERLY LAW FIRM
c/o Jessica R. Aberly, Esq.
2222 Uptown Loop, N.E., #3209
Albuquerque, NM 87110
(505) 977-2273
aberlylaw@swcp.com
Attorney for Pueblo of Sandia

University of New Mexico
c/o P.J. Hart, Office of University Counsel
1 University of New Mexico
MSC 05 3440
Albuquerque, NM 87131-0001
505-277-5035
PAHart@salud.unm.edu
Attorney for University of New Mexico

JOHNSON BARNHOUSE & KEEGAN, LLP
c/o Veronique Richardson, Esq.
c/o Karl E. Johnson, Esq.
7424 4th St., N.W.
Los Ranchos de Albuquerque, NM 87107-6628
505-842-6123
vrichardson@indiancountrylaw.com;
kjohnson@indiancountrylaw.com
Attorneys for Pueblo of Santa Ana

NAVAJO NATION DEPARTMENT OF JUSTICE
c/o M. Kathryn Hoover, Esq.
c/o Lisa Yellow Eagle, Esq.
Water Rights Unit
P.O. Drawer 2010
Window Rock, AZ 86515
928-871-7510
Email: khoover@nndoj.org;
Lyelloweagle@nndoj.org
Co-Counsel for Navajo Nation

Samantha M. Ruscavage-Barz, Esq.
516 Alto Street
Santa Fe, NM 87501
(505) 401-4180
sruscavagebarz@wildearthguardians.org
Attorney for Wildearth Guardians

ADVOCATES FOR COMMUNITY & ENVIRONMENT
c/o Simeon Herskovits, Esq.
c/o Iris Thornton, Esq.
P.O. Box 1075
El Prado, New Mexico 87529
(575) 758-7202
simeon@communityandenvironment.net

Christopher D. Shaw, Esq.
New Mexico Interstate Stream Commission
5550 San Antonio Drive, NE
Albuquerque, NM 87109-4127
505-383-4054
Email: chris.shaw@state.nm.us
Attorney for New Mexico Interstate Stream Commission

Co-Counsel for San Augustin Water Coalition (SAWC)
SONOSKY, CHAMBERS, MIELKE & BROWNELL, LLP
c/o David Mielke, Esq.
500 Marquette Avenue NW, Suite 660
Albuquerque, New Mexico 87102
(505) 247-0147
Dmielke@abqsonosky.com;
Sjones@abqsonosky.com
Attorney for Pueblo of Isleta

NEW MEXICO ENVIRONMENTAL LAW CENTER
c/o Douglas Meiklejohn, Esq.
c/o Jaimie Park, Esq.
c/o Jon Block, Esq.
c/o Eric Jantz, Esq.
1405 Luisa Street. Ste. 5
Santa Fe. NM 87505
(505) 989-9022
dmeiklejohn@nmelc.org
jpark@nmelc.org
Co-counsel for NMELC GROUP:
Manuel and Gladys Baca; Robert and Mona Bassett; Patti BearPaw; Sue Berry-Fox; (Babe) Ann Boulden; Donald and Joan Brooks; David and Terri Brown; Jack Bruton and Bruton Ranch, LLC; Lisa Burroughs and Thomas Betras, Jr.; Charles and Lucy Cloyes; Michael D. Codini, Jr.; Randy Coil; James and Janet Coleman; Thomas A. Cook; Wildwood Highlands Landowners Association; Randy Cox; Nancy Crowley; Tom Csurilla; Elk Ridge Pass Development Company, LLC; Top of the World Land Company, LLC; Roger and Dolores Daigger; Michael and Ann Danielson; Bryan and Beverly Dees; John and Eileen Dodds; Louise and Leonard Donahe; Patricia Eberhardt; Roy Farr; Paul and Rose Geasland; Gila Conservation Coalition Center for Biological Diversity and Gila Watershed Alliance; Mary Rakestraw Greiert; Michael Hasson; Don and Cheryl Hastings; Gary and Carol Hegg; Patricia Henry; Catherine Hill; Eric Hofstetter; Sandy How; M. Ian and Margaret Jenness; Amos Lafon; Marie Lee; Cleda Lenhardt; Rick and Patricia Lindsey; Victoria Linehan; Owen Lorentzen; Mike Loya; Sonia MacDonald; Robert and Susan MacKenzie; Douglas Marable; Thea Marshall; Sam and Kristin McCain; Jeff McGuire; Michael Mideke; Kenneth Mroczek and Janice Przylbyl Mroczek; Peter Naumnik; John Naumnik; Regina Naumnik; Robert Nelson; Veronika Nelson; Walter and Diane Olmstead; Dennis and Gertrude O'Toole; Karl Padgett, Max Padget & Leo Padgett; Barney and Patricia Padgett; Wanda Parker; Ray and Carol Pittman; John Preston and Patricia Murray Preston; Daniel Rael; Stephanie Randolph; Mary C. Ray; Kenneth Rowe; Kevin and Priscilla Ryan; Ray and Kathy Sansom; Christopher Scott Sansom; John and Betty Schaefer; Susan Schuhardt; Ann and Bill Schwebke; Janice Simmons; Jim Sonnenberg; Margaret and Roger Thompson; Gloria Weinrich; James Wetzig and Maureen M. MacArt; Donald and Margaret Wiltshire and Wildwood Landowners Association; Joseph and Janet Siomiak; Homestead Landowners' Association, Kristin Ekvall; Bette Dugie; Abbe Springs Homeowners Association; and Anne Sullivan.

Victor Anspach
HC 61, Box 15
Datil, NM 87821

Andres Aragon
HC62, Box 625-7
Datil, NM 87821

Frank Baker
P.O. Box 156
Datil, NM 87821-0156

Mary Annette Boulden
P.O. Box 528
Datil, NM 87821

Theresa J. Bottomly
P.O. Box 1773
Socorro, NM 7801

Allen Bassler, M.D.
Wanda Bassler
P.O. Box 497
Datil, NM 87821

Clark & Midge Bishop
20 Falcon Crest, HC 61 Box 3917
Datil, NM 87821

Dorothy Brook
P.O. Box 1925
Socorro, NM 87801

Baxter B. Brown & Sherry L. Fletcher
602 N. Broadway
T or C, NM 87901

Jack Brunacini and
Janice Brunacini
P.O. Box 225
Magdalena, NM 87825

James Cherry
805 Kelly Road
Magdalena, NM 97925

Dean Crane
P.O. Box 83
Magdalena, NM 87825

Barbara Daitch, CPA
P.O. Box 31
Datil, NM 87821

Sandra Coker
Carol Coker
P.O. Box 2
Datil, NM 87821-0002

David and Martha Dalbey
HC 61, Box 1526
Datil, NM 87821

Lloyd Daniels
15829 West 933 Road
Park Hill, OK 74451

Hara Davis
P.O. Box 433
Cliff, NM 88028

Thomas Dolan
P.O. Box 653
Pie Town, NM 87827

Monte Edwards
P.O. Box 301
Datil, NM 87821

Elena Farr
P.O. Box 1000
Datil, NM 87821

Henry Edwards
P.O. Box 1000
Datil, NM 87821

Karen Farr
P.O. Box 1000
Datil, NM 87821

Sam Farr
P.O. Box 1000
Datil, NM 87821

Farr Cattle Co.
Roy T. Farr, President
Dana Farr-EdwardsP.O. Box 1000
Datil, NM 87821

Freddy and Yvonne Ferguson
P.O. Box 767
Datil, NM 87821

Connie Gibson
P.O. Box 83
Magdalena, NM 87825

Lucy Fowles
P.O. Box 124
Datil, NM 87821

Nelson Garber
P.O. Box 774
Datil, NM 87821

O.R. and Sharon Gigante
15 Turquoise Trail
Datil, NM 87821

Suzanne Garrigues
506 Greenwood Road
Baltimore, MD 21204

Mary Horn
4905 Haines Ave. N.E.
Albuquerque, NM 87110

Fancher Gotesky
P.O. Box 616
Magdalena, NM 87825

Randall Greenwood
P.O. Box 26
Aragon, NM 87820

Raymond and Linda Gray
HC 61, Box 1515
Datil, NM 87821

Amber Guin
Bertie Guin
P.O. Box 417
Magdalena, NM 87825-0417

James Hall
P.O. Box 800
Magdalena, NM 87825

James M. Hall, M.D. and
Linn Kennedy Hall
P.O. Box 740
Datil, NM 87821

Dennis Inman
P.O. Box 148
Quemado, NM 87829

John Hanrahan and
Ruth Hanrahan
P.O. Box 730
Pie Town, NM 87827

John Hand
P.O. Box 159
Datil, NM 87821

Fred Hunger and
Leslie Hunger
HC 61, Box 1528
Datil, NM 87821

Dallas Hurt
P.O. Box 143
Fairacres, NM 88033

Gary L. McKennon
11112 Huerfano, N.E.
Albuquerque, NM 87123

Lynn Daniel Montgomery
240 Camino De Las Huertas
Placitas, NM 87043

Linda Major
P.O. Box 206
Magdalena, NM 87825

Randell & Mary Lynn Major
P.O. Box 244
Magdalena, NM 87825

Major Ranch Realty
Randell Major
P.O. Box 244
Magdalena, NM 87825

Karl and Ann Kohler
P.O. Box 1034
Magdalena, NM 87825

Montosa Ranch
Dale Armstrong
P.O. Box 326
Magdalena, NM 87825

Nick and Laurene Morales
6330 Roadrunner Loop
Rio Rancho, NM 87144

Janet Mooney
2003 Wolf Creek Pass
Lewisville, TX 75077-7546

Jamie O'Gorman
P.O. Box 594
Datil, NM 87821

Karen Rhoads
P.O. Box 822
Cobb, CA 95426-0822

Georgianna Pena-Kues
3412 Calle Del Monte, N.E.
Albuquerque, NM 87106-1204

L. Randall Roberson
P.O. Box 217
Datil, NM 87821

John Pemberton. Jr.
P.O. Box 395
Quemado, NM 87829

Rudy Saucedo
P.O. Box 2557
Las Cruces, NM 88004

Saulsberry Lazy V7 Ranch, LLC
Regor Saulsberry, PE
1031 Saulsberry Road
Datil, NM 87821

Estate of Paul Rawdon
c/o Barbara Rawdon
P.O. Box 285
Grants, NM 87020

Cordelia Rose
P.O. Box 281
Glenwood, NM 88039

Dr. Robert Sanders
P.O. Box 646
Datil, NM 87821

Mikel Schoonover
1244 Canter Road
Escondido, CA 92027-4449

Scott A. and Samantha G. Seely
4520 Valley Road
Shermans Dale, PA 17090

Shortes XX Ranch
Ron Shortes, General Manager
P.O. Box 533
Pie Town, NM 87827

Sally Taliaferro
P.O. Box 725
Datil, NM 87821

Robert and Elaine Smith
P.O. Box 287
Datil, NM 87821

Mark and Sue Sullivan
P.O. Box 607
Datil, NM 87821

Marjory Traynham
P.O. Box 375
Datil, NM 87821

Judith and Joe Truett
P.O. Box 211
Glenwood, NM 88039

Anthony Trennel
76 Piñon Hill Pl., N.E.
Albuquerque, NM 87122

Socorro Soil & Water Conservation District
103 Francisco de Avondo
Socorro, NM 87801
575-838-0078/

US Department of the Interior
Bureau of Indian Affairs
Southwest Regional Office
1001 Indian School Road, NW
Albuquerque, NM 87104

Brett Traynor
P.O. Box 3
Monticello, NM 87939

Pete Zamora
Box 565
Magdalena, NM 87825

Charles A. WagnerCharlene F. Wagner
P.O. Box 252
Magdalena, NM 87825

Walkabout Creek Ranch
George & Susan Howarth
HC 61, Box 35; Mangas Route
Datil, NM 87821

Max Yeh
Percha Animas Watershed Assoc.
P.O. Box 156
Hillsboro, NM 88042

Teresa Winchester
P.O. Box 1287
Magdalena, NM 87825

John A. Barnitz
Box 768
Magdalena, NM 87825

Barbara and Eddie Aragon
523 W. Reinken Ave.
Belen, NM 87002

Ann Bauer
P.O. Box 248
Magdalena, NM 87825

Kat Brown
1380 Rio Rancho Blvd. #280
Rio Rancho, NM 87124

Sandy Bartelsen
Wildwood Subdivision, Lot 40
Datil, NM 87821

Eric D. Bottomly
P.O. Box 2493
Corrales, NM 87048-2493

Joshua and Sarah Chong
112 Field Terrace
Lansdale, PA 19446

Frederick J. Bookland
P.O. Box 227
Magdalena, NM 87825

Patsy J. Douglas
300 Grant
Socorro, NM 87801

Jay B. Carroll
P.O. Box 574
Pie Town, NM 87827

Carroll Dezabelle
P.O. Box 968
Magdalena, NM 87825

Jim and Mary Ruff
1212 North Drive
Socorro, NM 87801

Cyndy and Charles Costanza
P.O. Box 81
Datil, NM 87821

Kristin Ekvall
1155 Innsbruck St.
Livermore, CA 94550

David P. Smith
Nancy H. Smith
P.O. Box 1114
Magdalena, NM 87825

Darnell L. Pettis
Montana Pettis
P.O. Box 63
Magdalena, NM 87825

David and Sara Robinson
HC 64 Box 700
Magdalena, NM 87825

Floyd Sanders
Luera Ranch, LLC
P.O. Box 1144
Magdalena, NM 87825

Connie May
Karl E. May
P.O. Box 138
Reserve, NM 87830

Ron & Mahona Burnett - Flying V. Ranch
P.O. Box 786
Datil , NM 87821

Ellen S. Soles
P.O. Box 420
Cliff, NM 88028

Geraldine Schwabb
902 Cuba Rd.
Socorro, NM 87801