

BEFORE THE NEW MEXICO STATE ENGINEER

**IN THE MATTER OF THE
CORRECTED APPLICATION FILED
BY AUGUSTIN PLAINS RANCH,
LLC., FOR PERMIT TO
APPROPRIATE GROUNDWATER IN
THE RIO GRANDE UNDERGROUND
WATER BASIN IN THE STATE OF
NEW MEXICO**

Hearing No. 17-005

**OSE File No. RG-89943 POD 1
through POD 37**

**APPLICANT'S EXPEDITED REQUEST FOR
POST-DECISION EVIDENTIARY HEARING**

COMES NOW Applicant Augustin Plains Ranch, LLC ("Augustin" or "Applicant"), and respectfully requests a post-decision hearing pursuant to NMSA 1978, Section 72-2-16 on Augustin's Corrected Application for Permit to Appropriate Groundwater in the Rio Grande Underground Water Basin in the State of New Mexico ("Corrected Application"). Augustin also seeks an expedited ruling on this request. To facilitate an appeal, if the Hearing Examiner denies this Expedited Request, Augustin asks that the order clarify that the Report and Recommendation Granting Motions for Summary Judgment (filed Aug. 1, 2018) ("Report") constitutes a denial of a post-decision hearing, or otherwise precludes a post-decision hearing. In support of this request, Augustin states the following:

1. The State Engineer accepted the Corrected Application and issued notices for publication in August 2016.
2. On July 31, 2018, the State Engineer accepted and adopted the Hearing Examiner's Report granting summary judgment for Protestants and denying Augustin's Corrected Application.

3. No evidentiary hearing was held prior to the July 31, 2018 decision as contemplated by NMSA 1978, Section NMSA 1978, § 72-2-17. *See also* 19.25.2.22 NMAC.

4. On August 6, 2018, Augustin received the Report by certified mail.

5. NMSA 1978, Section 72-2-16 provides a statutory right to a post-decision “full evidentiary hearing” by “any person aggrieved by the decision,” so long as the decision was made without a prior evidentiary hearing and the request for hearing “is made in writing within thirty days after receipt by certified mail of notice of the decision.” *D’Antonio v. Garcia*, 2008-NMCA-139, ¶ 8, 145 N.M. 95 (“We concluded that because the party appealed the state engineer’s decision within the thirty-day period prescribed by Section 72-2-16, the state engineer was required to hold a post-decision hearing.”). *See also, Lion’s Gate Water v. D’Antonio*, 2009-NMSC-057, ¶ 25, 147 N.M. 523 (concluding that “the State Engineer [may] employ his or her authority to efficiently dispose of applications without a hearing whenever he or she determines that water is unavailable to appropriate. However, an aggrieved applicant may request a post-decision hearing before the State Engineer if that request is timely.”).

6. Augustin has satisfied the requirements set forth in Section 72-2-16 and is therefore entitled to a post-decision evidentiary hearing. First, this request was timely filed within 30 days of receipt by certified mail of the Report. Second, Augustin was aggrieved by the Hearing Examiner’s decision to summarily deny the Corrected Application. Third, the State Engineer issued its decision without holding a hearing in which Augustin was afforded “an opportunity to appear *and present evidence* and argument on all issues involved.” NMSA 1978, § 72-2-17(B)(1) (emphasis added). *See also* 19.25.2.22 NMAC (“Evidentiary hearings on the merits of a pending matter are formal, recorded proceedings at which the testimony of witnesses is taken under oath and exhibits are presented for consideration of the hearing examiner for admission as evidence in

the record.... The parties shall have a reasonable opportunity to cross-examine the witnesses of opposing parties.”); *Derringer v. Turney*, 2001-NMCA-075, ¶ 15, 131 N.M. 40 (determining that the Section 72-2-16 hearing requirement is not satisfied by the written pleadings of parties and instead requires “the opportunity to appear and present evidence and argument on all issues involved.”); *D’Antonio*, 2008-NMCA-139, ¶ 8 (defining the hearing required by *Derringer* as “a full evidentiary hearing”); *id.* at ¶ 9 (“The hearing granted by Section 72-2-16 is a procedural right that is intended to ensure that the state engineer affords an appropriate degree of process to the parties before a final decision is entered.”).

7. Augustin therefore requests that the Hearing Officer hold “a full evidentiary hearing,” *D’Antonio*, 2008-NMCA-139, ¶ 8, on the merits of the Corrected Application in accord with Section 72-2-17, 19.25.2.22 NMAC, and controlling caselaw. *See, e.g.*, Applicant’s Consolidated Response in Opposition to the ELC Protestants Motion for Summary Judgment at 25-28. Pursuant to NMSA 1978, Section 72-2-17(A)(1), Augustin hereby waives the right to a hearing within 60 days, and requests that a scheduling conference be set to establish a reasonable schedule acceptable to the State Engineer and Protestants.

8. Because of the requirement to exhaust administrative remedies prior to seeking appeal, *see Lion’s Gate Water*, 2009-NMSC-057, ¶ 24, our Courts have made clear that the statutory time limit for perfecting notice of the appeal set forth in NMSA 1978, Section 72-7-1 does not commence until the State Engineer has either held a hearing and entered his decision or denied the request for hearing. *See Lion’s Gate Water*, 2009-NMSC-057, ¶ 32 (stating “no appeal can be made to district court until the state engineer has held a hearing and entered his decision in the hearing”); *Derringer*, 2001-NMCA-075, ¶ 16 (“the thirty days for Derringer to serve his

notices of appeal began to run when he received the state engineer's denial of his request for a hearing"); *see also* NMSA 1978, § 72-2-16 ("Hearings required before appeal").

9. At the same time, Augustin is mindful of the State Engineer's statement that "briefing and oral argument in a hearing before the State Engineer's hearing examiner, following the filing of a Motion for Summary Judgment," satisfied the Section 72-2-16 requirement to hold a hearing. If correct, the time limit for noticing the appeal commenced when Augustin received the Report on August 6, 2018. *See* Report at ¶¶ 6-12; *Headen v. D'Antonio*, 2011-NMCA-058, ¶ 17, 149 N.M. 667 (discussing cases where the agency determined that administrative proceedings were complete). Put another way, it appears that the State Engineer has already decided that Augustin is not entitled to an evidentiary hearing, and the matter is ripe for an appeal.

10. However, Augustin is struggling to square this language with *Derringer* and *D'Antonio*. For example, the Report addresses the issue of a *pre-decision hearing*, but does not explicitly address the right to a *post-decision hearing*, and the *D'Antonio* Court makes clear that "the right to a post-decision hearing after a grant of summary judgment" is conditioned "on a party's timely request." 2008-NMCA-139, ¶ 9.

11. Out of an abundance of caution, and to ensure that Augustin does not waive any right to appeal this issue, Augustin is seeking clarification and/or confirmation of the State Engineer's position. Accordingly, Augustin requests a post-decision hearing. Alternatively, if this Expedited Request is denied, the State Engineer should clarify and confirm that Paragraphs 6 through 12 of the Report should be understood to be a denial of a post-decision hearing. Augustin further requests that the Hearing Examiner issue a decision on this request by Friday, August 30, 2018, to allow time for Augustin to perfect service of notice of the appeal of the Report within the thirty day limit in the event that this request is denied. *See Anthony Water & Sanitation District*

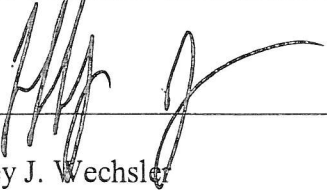
v. *Turney*, 2002-NMCA-095, ¶ 11, 132 N.M. 683 (requiring that “the State Engineer and all other parties must be served a notice of appeal within thirty days after receipt of the final decision of the State Engineer.”); *see also* copy of the Notice of Appeal attached hereto as Exhibit A (identifying one of the appellate issues as the “denial of a full evidentiary hearing”).

12. Due to the tight time-frame for Augustin to perfect an appeal of the Report, if Augustin does not receive a decision by August 30, 2018, Augustin will have no choice but to deem this request for a post-decision hearing denied, refused, or unacted upon, and will complete the required steps to perfect its appeal, including the issue of whether Augustin was improperly denied an evidentiary hearing. *See* NMSA 1978, § 72-7-1(A) (allowing an appeal for “any decision, act, *or refusal to act* of the state engineer” (emphasis added)); Exhibit A. Including the issue of Augustin’s right to a post-decision evidentiary hearing will allow the district court to address all of the relevant issues in a single appeal.

WHEREFORE Augustin respectfully requests that the Hearing Examiner grant the Expedited Request for a post-decision hearing. If this request is denied, Augustin asks for clarification or confirmation that the Report constitutes a denial of a post-decision hearing, or otherwise precludes a post-decision hearing. In any event, Augustin requests that the Hearing Examiner issue his decision on this Expedited Request by Friday, August 30, 2018, to afford sufficient time for Augustin to comply with statutory time limits to perfect its appeal to district court, should the State Engineer deny this Expedited Request.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, a copy of the foregoing was sent via U.S. Mail to all Parties Entitled to Notice as located on the Office of the State Engineer's website, <http://www.ose.state.nm.us/HU/AugustinPlains.php>, revised 04/24/18.

I further certify that consistent with the Joint Notice for Consent to Electronic Service, a copy of the foregoing was sent via electronic mail to the following parties:

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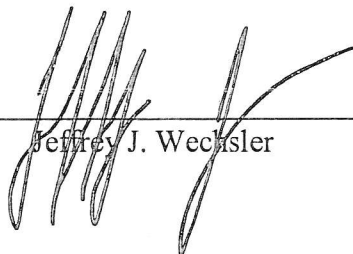
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**STATE OF NEW MEXICO
CATRON COUNTY
SEVENTH JUDICIAL DISTRICT COURT**

**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**

Augustin Plains Ranch, LLC,

Applicant/Appellant,

v.

Dist. Ct. No. _____

Tom Blaine, P.E.,

New Mexico State Engineer/Appellee,

and

Catron County Board of County Commissioners, Socorro County Commission, Kokopelli Ranch, LLC, John & Helen A. Hand and The Hand Living Trust, Last Chance Water Company, Monticello Properties, LLC, Double Springs Ranch, LLC, Gila Mountain Ranches, LLC, John Hubert Richardson Rev. Trust, Richardson Family Farms, LLC, City of Truth or Consequences, Cuchillo Valley Community Ditch Association, Salomon Tafoya, Apache Ranch – Kenneth R. Brumit, New Mexico Farm & Livestock Bureau, Catron County Farm & Livestock Bureau, State of New Mexico Commissioner of Public Lands, Pueblo of Sandia, Pueblo of Santa Ana, Wildearth Guardians, Pecos Valley Artesian Conservancy District, Pueblo of Zuni, Pueblo of San Felipe, University of New Mexico, Navajo Nation, Advocates for Community & Environment, New Mexico Interstate Stream Commission, Pueblo of Isleta, 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

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Protestants/Appellees.

**NOTICE OF APPEAL DE NOVO
FROM ORDER OF THE STATE ENGINEER**

Applicant/Appellant Augustin Plains Ranch, LLC, pursuant to NMSA 1978, Section 72-7-1, hereby appeals de novo from the Report and Recommendation Granting Motions for Summary Judgment accepted and adopted by the State Engineer on July 31, 2018, in the above-referenced New Mexico State Engineer proceeding, including, without limitation, denial of a full evidentiary hearing.

Dated August 13, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies this 13th day of August, 2018 that service of this Notice of Appeal De Novo from Order of the State Engineer is being accomplished in part by publication and in part by personal service pursuant to NMSA 1978 Section 72-7-1.

John B. Draper