

BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE CORRECTED APPLICATION FILED BY AUGUSTIN PLAINS RANCH, LLC, FOR PERMIT T APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN IN THE STATE OF NEW MEXICO))))))	HU No. 17-005 OSE File No. RG-89943 POD-1 through POD-37
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**PROTESTANT HAND'S RESPONSE TO APPLICANT'S
EXPEDITED REQUEST FOR POST-DECISION EVIDENTIARY HEARING**

COMES NOW Helen A. Hand in her individual capacity, and as Co-Trustees of the Hand Living Trust (collectively "Hands"), and file this Response to the Applicant's Expedited Request for Post-Decision Evidentiary Hearing filed on August 24, 2018, and state as follows:

1. In his order on the Augustin Plain Ranch's ("APR") original Application, the State Engineer determined that "it is reasonable to expect that, upon the filing of an application, the Applicant is ready, willing and able to proceed to put water to beneficial use." See ¶ 18, Order Denying Application, OSE File No. RG-89943, March 30, 2012.

2. In response to APR's Corrected Application, the Hands filed a protest that specifically asserted:

APRs proposals to divert and use 54,000 afy of groundwater from wells located directly adjacent to the Hands' ranch are contrary to the public welfare of the State because they are speculative . . .

See protest letter dated September 28, 2016, ¶ 3.

3. The Community Protestants filed their Motion for Summary Judgment requesting the Corrected Application be dismissed on September 26, 2017. Their motion presented undisputed facts to show the Corrected Application does not sufficiently designate places of beneficial use for the water to be used and the Applicant could not show it was able to put water to

beneficial use. The motion argued that the Corrected Application should be dismissed because it was speculative and violated New Mexico Law (at 18-24).

4. The Hands joined in the Community Protestants' motion for summary judgment on November 7, 2017.

5. In its response to the Community Protestants' motion filed on October 30, 2017, the Applicant failed to provide any additional facts to overcome the Community Protestants' claims regarding speculation. It merely argued that the evidence it included with the Corrected Application was sufficient to overcome any alleged violations of New Mexico law.

6. In its November 28, 2017 reply to the Water Rights Division's response to the Community Protestants' motion, the Applicant again failed to provide any additional facts to overcome the Community Protestants' claims regarding speculation. Again, it merely argued that the evidence it included with the Corrected Application was sufficient to overcome any alleged violations of New Mexico law, and suggested new standards for the Hearing Examiner to use in evaluating speculation at an evidentiary hearing on the Corrected Application.

7. In briefing and at oral argument on the Community Protestants' motion, the Applicant did not provide any new evidence, through affidavits or otherwise, to show that the Applicant is actually able to use the water it has requested for appropriation.

8. The Applicant had ample opportunity to show disputed facts sufficient to overcome summary judgment, but it failed to do so.

9. In accordance with his authority under 19.25.2 NMAC and 19.25.2.6 NMAC, the Hearing Examiner found that no genuine issues of disputed material fact existed and summary judgment on the issue of speculation was justified as a matter of law. *See* Report and Recommendation Granting Motions for Summary Judgment, August 1, 2018, ¶ 12.

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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

PARTIES ENTITLED TO NOTICE

Hearing No. 17-005

A complete list of parties entitled to notice (service list) is located on the Office of the State Engineer's website, <http://www.ose.state.nm.us/HU/AugustinPlains.php>. The service list will be updated as necessary. Revised 4/24/18

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10. Having failed to provide any facts in dispute, after an ample opportunity to do so, the Applicant cannot now claim it is entitled to a post-decision evidentiary hearing in response to the entry and enforcement of a summary judgment against it. Granting such relief would simply be giving the Applicant another bite-at-the-apple, result in more delay and cost for the parties and, most importantly, render all motions for summary judgment seeking dismissal superfluous.

11. A post-decision evidentiary hearing to weigh facts relevant to speculation would prejudice the Hands because this matter has been stayed and no discovery has yet been undertaken.

12. The proper issue for appeal is not whether the Applicant should have been entitled to an evidentiary hearing on the issue of speculation, but whether the undisputed facts supported summary judgment and the dismissal of the Corrected Application as a matter of law.

WHEREFORE, the Hands respectfully request the Hearing Examiner deny the Applicants' Expedited Request for Post-Decision Evidentiary Hearing.

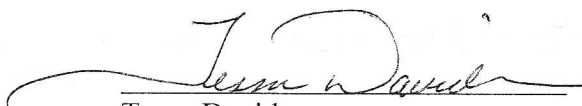
Respectfully submitted,

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By 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of August, 2018, the foregoing pleading was emailed to those parties listed on the attached Parties Entitled to Notice, revised 4/24/18.


Tessa Davidson