

BEFORE THE NEW MEXICO STATE ENGINEER

2017 OCT 16 PM 3 35

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
through POD 37

OFFICE OF THE
STATE ENGINEER
POD
HEARINGS UNIT
SANTA FE, NM

CATRON COUNTY BOARD OF COUNTY COMMISSIONERS
MOTION FOR SUMMARY JUDGMENT AND
MEMORANDUM IN SUPPORT

COMES NOW the Catron County Board of County Commissioners (the Board), by and through undersigned counsel of record, and hereby moves for summary judgment and dismissal of the Application for Augustin Plains Ranch, LLC, (Application) filed with the Office of State Engineer on December 23, 2014 and April 28, 2016. The Board has joined in the Community Protestants' Motion for Summary Judgment and Memorandum in Support and hereby incorporates the Motion and Memorandum as part of this Motion as though set forth fully herein. In further support of this Motion, the Board states as follows.

INTRODUCTION

The Catron Board of Commissioners (the Board) "has a vested interest to (1) protect and enhance the public health, safety, and welfare of the citizens of the County of Catron, (2) protect the tax base and encourage the economic stability of the County of Catron, (3) protect the quantity and quality of water resources in the county for its citizens, base industries of agriculture and forestry industries and other businesses for future growth, and (4) ensure that all water users in the county are secure in their water rights." (Catron County Resolution 024-2012, attached hereto as Exhibit 1). Because of the Board's interest in and concern about protecting the water resources located within the County, the Board adopted a specific public welfare statement for water in Catron County, in addition to the existing public welfare statement in the

Southwest Regional Water Plan. *Id.* The Board is particularly concerned about public welfare when a proposal is made to export water out of the County because of the potential impact of such actions on the citizens and businesses of Catron County.

The Augustin Plains Ranch, which is the point of diversion identified in the Application, lies within the boundaries of Catron County. The Application seeks permission to pump 54,000 acre-feet per year of groundwater to be transported out of Catron County to unnamed locations for largely unidentified uses along a pipeline that will run from the Ranch to the Albuquerque metropolitan area. The Application identifies the purpose of use as municipal and commercial water sales but no actual users or place of use have been identified. Instead of identifying the actual beneficial use to which the water will be put and the actual place where the water will be put to beneficial use, Augustin Plains Ranch (APR or the Applicant) is proposing a two stage process whereby the Applicant would receive a decision from the State Engineer as to the amount of water available for appropriation and then, using that decision, would market the water in order to find users for the water. APR has not provided any statutory or legal basis for the proposed two stage process.

As part of the Board's vested interest in protecting the quantity and quality of water resources in the County, the Board has filed a protest against the Application in this matter. The Board requests that the Application be dismissed because the Application, on its face, does not meet the requirements for a valid application to appropriate groundwater. The speculative nature of the requested appropriation is contrary to established New Mexico water law, which requires a present intent to appropriate water for beneficial use. Furthermore, the consideration by the State Engineer of an application that lacks specificity as to the beneficial use of the water, and that fails to identify an actual place of use and end user for the water, would be contrary to sound

public policy and to the conservation of water within the Catron County and the State of New Mexico.

STATEMENT OF MATERIAL FACTS

1. The Application for Augustin Plains Ranch, LLC was filed December 23, 2014 and April 28, 2016. (Application Cover page).
2. The stated purpose of use is “Municipal” and “Other Use: Commercial Water Sales.” The amount of water to be diverted is 54,000 acre feet per annum. (Application at ¶2).
3. The Application identifies “parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties” as the counties where the water will be used. (Application at ¶3).
4. The points of diversion are identified as 37 wells located on the Augustin Plains Ranch, north and south of U.S. Highway 60, east of Datil, New Mexico. (Application at ¶4).
5. Paragraph 5 of the Application does not identify a place or places of use. Paragraph 5.g states: “The water will be put to use by municipal, industrial and other users along the pipeline route shown on Exhibit D to Attachment 2. The water used for municipal purposes will be put to use within the authorized service areas of the municipalities listed in Attachment 2. The water used for bulk sales will be put to use by limited municipal and investor-owned utilities, commercial enterprises, and government agencies in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, and Santa Fe Counties, as shown on Attachment 1 of Exhibit G.”
6. Attachment 2 to the Application states that the “overall purpose” of the Application “is to obtain approval from the State Engineer for a permit to appropriate 54,000 acre-feet per year (AFY) from 37 wells to be drilled on the Ranch. Applicant proposes to convey the water through a pipeline from the Ranch near Datil in Catron County to the Albuquerque

metropolitan area. The water will be used for municipal purposes and commercial sales for uses at locations along the length of the pipeline.”

7. The Application does not identify any specific municipal or commercial sales and does not identify any specific places of use. Instead, the Applicant states that “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. Amounts pumped and the amounts recharged will be metered and reported in a manner acceptable to the State Engineer.” (Application, Attachment 2 at Section III).

8. The Applicant proposes a “two-stage process” for consideration of the Application by the State Engineer. (Application, Attachment 2 at Section II).

9. The first stage would “consist of an evaluation of the hydrological issues related to the Corrected Application, including the amount of water available for appropriation without impairing other water rights, and the amount of enhanced recharge.” For Stage 1, the Applicant proposes to limit considerations of conservation of water and public welfare to “the hydrologic issues.” Stage 1 would result in “an initial order on the hydrologic issues.” (Application, Attachment 2 at Section II).

10. After the completion of Stage 1, the Applicant “requests that it be given up to twelve (12) months to adjust and finalize the individual purposes of use, places of use and amounts of each use. Stage 2 would begin when the Applicant submits an Amended Application with additional details regarding the types and places of use for the water based on the order on the hydrologic issues.” (Application, Attachment 2 at Section II).

11. The Application does not identify with specificity “the beneficial use to which the water will be applied,” as required by NMSA §72-12-3.A(2).

12. The Application does not identify with specificity “the place of the use for which the water is desired,” as required by NMSA §72-12-3.A(6).

13. The Application, on its face, does not meet the requirements for an application to appropriate groundwater for beneficial use, as set forth in NMSA §72-12-3.A.

ARGUMENT

Augustin Plains Ranch (APR) has filed an application for a permit to appropriate 54,000 acre feet of groundwater per year from 37 wells to be drilled on land owned by APR. (Application ¶6 and Attachment 2). The current Application is APR’s second attempt to obtain a permit for the proposed project. As set forth in the Community Protestants’ Motion for Summary Judgment and Memorandum in Support, both the New Mexico State Engineer and the Seventh Judicial District Court dismissed an earlier version of the Application as facially invalid because it failed to identify, with specificity, the beneficial use to which the water will be applied and failed to state, with specificity, the place of use for which the water is desired. The current Application suffers from the same facial flaws as the earlier version and should also be dismissed.

An applicant seeking to appropriate underground water for beneficial use is required to provide specific information to the Office of State Engineer (OSE), including “(2) the beneficial use to which the water will be applied...[and] (6) the place of use for which the water is desired.” NMSA §72-12-3.A. Pursuant to §72-12-3(F), the State Engineer has the statutory authority to deny an application, with or without a hearing, “[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.” As Judge Reynolds stated in the Memorandum Decision on Motion for Summary Judgment, in which he upheld the State Engineer’s dismissal of APR’s

prior application, “[t]he State Engineer is an administrative officer whose office is created by statute, NMSA 1978, §72-2-1 (1982), and whose authority is thereby ‘limited to the power and authority that is expressly granted and necessarily implied by statute.’ *In re Application of PNM Elec. Servs.*, 1998-NMSC-017, ¶10.” (Memorandum Decision at 13).¹ If an application to appropriate groundwater does not, on its face, meet the requirements of §72-12-3.A and violates New Mexico law, “the State Engineer [has] no authority to act other than to reject the application.” *Id.*; *Lion’s Gate Water v. D’Antonio*, 2009-NMSC-057, ¶27, 147 N.M. 523.

1. The Application must be dismissed because it does not contain the information required pursuant to §72-12-3.A.

The Application does not meet the requirements for identifying the beneficial use to which the appropriated water will be put. The Application identifies the purpose of use as “municipal” and “commercial water sales,” without any additional information as to where the water will be used, who will be using the water, the amount of water that will be used by any specific individual or entity, how the water will be diverted and delivered, or, indeed, any other information that would allow the State Engineer to determine if the Application meets the statutory and legal requirements for the appropriation of groundwater, including whether granting the application would result in impairment or detriment to existing water rights, whether granting the application would be detrimental to public welfare of the state, and whether granting the application would be contrary to the conservation of water within the state. §72-12-3.E; *see also* August 10, 2017 Scheduling Order at ¶4.

The Application does not identify a specific place of use for the water. Instead, the place of use is described as follows:

¹ The Memorandum Decision is Exhibit 3 to the Community Protestants’ Memorandum in Support of Their Motion for Summary Judgment.

“The water will be put to use by municipal, industrial and other users along the pipeline route shown in Exhibit D to Attachment 2. The water used for municipal purposes will be put to use within the authorized service areas of the municipalities listed in Attachment 2. The water used for bulk sales will be put to use by limited municipal and investor-owned utilities, commercial enterprises, and government agencies in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties as shown on Attachment 1 of Exhibit G.”

Application at ¶5.g; *see also* Attachment 2, Section III. The Application identifies seven counties as the place of use-Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe.

Recognizing that identifying the entirety of seven counties poses problems in terms of identifying the place of use, APR attempts to address this problem by stating that “[t]he place of use of water within these counties is limited to those portions of these counties that are situated within the geographic boundaries of the Rio Grande Basin.” (Attachment 2, Section III.3). While that may limit the geography somewhat, the proposed place of use still encompasses a huge amount of land within the State of New Mexico with no actual, specified place of use.

Under “Places of Use,” the Application identifies “Place of Use for Water for Municipal Purposes” and “Legal Description of Areas of Commercial Water Sales.” (*Id.* at Section III.5). The Application identifies Magdalena, Socorro, Belen, Los Lunas, Albuquerque Bernalillo County Water Utility Authority and Rio Rancho as the places where “Applicant intends to provide water for municipal purposes.” (*Id.*). And yet, not one of these municipal entities has entered into any type of agreement with APR to use the water for beneficial purposes. For the commercial sales, APR states that it “plans to conduct commercial water sales in the parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe counties that are situated within the geographic boundaries of the Rio Grande basin...All water sales will be wholesale or bulk sales. Bulk customers will connect to the pipeline and use water along the route presented in Exhibit D.” No actual commercial water sales customers have been identified.

The Application includes two letters from the City of Rio Rancho, which are nothing more than an indication that, if APR “is successful in its application,” the City would be “interested in discussing with APR” the use of the water. (Attachment 2, Exhibit E). There is no commitment of any kind on the part of Rio Rancho. The contracts attached to the Application are nothing more than samples-possible contracts that might be used if, at some time in the future, APR manages to find users for the vast amount of water that it is seeking to appropriate. The Application does not include any executed contracts or any documentation showing that any of the six municipal entities identified users of the water for municipal purposes actually intend to use the water. Nor is there any evidence of actual customers or users for the commercial water sales. Not one municipality or commercial water sales customer has joined APR as a co-applicant.

The Application itself acknowledges that APR has not properly identified either “the beneficial use to which the water will be applied” or “the place of use for which the water is desired,” demonstrating that APR does not have a current intention to put the water to beneficial use. Under “Purpose of Use and Amount of Water,” the application states 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.” (Attachment 2, Section III.2). Under “Places of Use,” the Application states 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.” (*Id.* at Section III.5).

APR proposes a “two-stage process for consideration” of the Application. (Attachment 2, Section II). The first stage would address hydrological issues, “including the amount of water

available for appropriation without impairing other water rights, and the amount of enhanced recharge....Conservation of water and public welfare will also be addressed in Stage 1 to the extent they relate to hydrologic issues. Stage 1 would result in an initial order on the hydrologic issues.” *Id.* APR then proposes that, after receiving an order on hydrologic issues, APR “be given up to twelve (12) months to adjust and finalize the individual purposes of use, places of use and amounts for each use.” APR would submit an “Amended Application” that would provide the actual information regarding purpose and place of use, and which would be advertised with “a second opportunity to protest.” “Stage 2 consists of consideration of whether the detailed purposes and places of use can be approved without impairment of other rights, detriment to public welfare, or being contrary to conservation of water within the State.” *Id.*; *see also* Attachment 2, Section III.2. APR further states that it “intends to put the full amount of applied-for water to beneficial use within a reasonable amount of time pursuant to the prior appropriation doctrine and applicable statutes and regulations” but acknowledges that it does not, as part of this Application, have the required information on the places and purposes of use for the water. *Id.*

APR has submitted an application that states, on its face, that it does not contain sufficient information for the State Engineer to decide if the application should be granted pursuant to §72-12-3. Instead of submitting an application to appropriate groundwater that meets the specific requirements of §72-12-3, APR is asking the State Engineer to ignore the applicable statutory requirements, hold a hearing and render a decision on the “evaluation of the hydrological issues,” and then allow APR to use that “decision” to solicit actual users for the water it intends to appropriate. Under the approach proposed by APR, the consideration of “hydrological issues” would be entirely unconnected to any actual, specific beneficial use or

actual, specific place of use. In other words, APR wants to have multiple opportunities to meet the requirements for a valid application for the appropriation of 54,000 acre feet of groundwater. There is nothing in the statutory provisions or in New Mexico case law that supports such an approach. The State Engineer does not have statutory authority to move forward on an application that, on its face, does not meet the applicable statutory requirements. The Application must be dismissed.

2. The Application should also be dismissed based on sound public policy.

Sound public policy, in the form of the prior appropriation doctrine, demands that the Application be denied. The doctrine of prior appropriation is set forth in the New Mexico Constitution, and includes the fundamental propositions that the waters of the State belong to the public and beneficial use is the basis, the measure and the limit of to the right to the use water in the State of New Mexico. N.M. Const. art. XVI, §§2, 3; NMSA §72-12-2. Both of these elements will be undermined if APR's approach is allowed to stand.

The New Mexico Supreme Court has reiterated that the doctrine of beneficial use is based on "imperative necessity," "aims fundamentally at definiteness and certainty," and "promotes economical use of water, while also protecting the important interest of conservation." *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶34, 135 N.M. 375. The Application, in combination with the proposed staging of the application process, does not show an "imperative necessity," does not provide any "definiteness and certainty," does not promote the economical use of water, and does not promote conservation. Instead, APR proposes that the State Engineer determine how much water is available for appropriation and then APR will attempt to find a use for the water and, if such a use can be found, will provide the actual information about the proposed beneficial use of the water. This proposal turns the idea of beneficial use, which is the

very foundation of New Mexico's water law, on its head. Instead of proposing a specific beneficial use and then demonstrating that water is available for that use, APR proposes to find out how much water is available and then find a use for the water.

As stated above, Catron County, acting through its Board, has a vested interest in protecting the quantity and quality of water resources in the county on behalf of its citizens and businesses and industries located in the County. As set forth in Resolution 024-2012, it is the Board's position that the County's public welfare should be safeguarded by the State Engineer when evaluating water rights applications, particularly applications that call for the transfer of water resources outside of the County's boundaries. It is not in the interest of public welfare, conservation or sound public policy for the State Engineer to move forward on an Application to appropriate 54,000 acre feet of water when the Applicant admits that the Application does not include all of the information mandated by statute.

It is also not in the interest of public welfare or sound public policy to separate "hydrological issues" from the actual beneficial use, including actual amount of water to be used in a particular place. An integral part of the "hydrological issues" is the amount of water that APR is proposing to transfer out of Catron County. That information can only be determined based on actual, quantified proposed uses of the water. Without that information, it is impossible to determine the actual amount of water that will be pumped, the effect of the pumping on existing water rights, and the impact of proposed recharge amounts. Any analysis of "the amount of water available for appropriation without impairing other water rights, and the amount of enhanced recharge," as proposed by APR, that is conducted without actual information regarding amounts and places of use, is simply speculative.

The two stage process that is being proposed by APR would require both the OSE and the protestants to spend a substantial amount of time and money on “hydrological issues” that are completely removed from any actual proposed beneficial use. APR is essentially seeking an advisory opinion as to the available groundwater resources before it has a concrete plan for the beneficial use of the water. There is no statutory or legal basis for such a course of action and it is potentially very detrimental to the interests of the protestants and their ability to adequately challenge the Application.

The Application, rather than being evidence that the Applicant is “ready, willing and able to proceed to put water to beneficial use,” is an attempt by APR to tie up a huge amount of groundwater in Catron County while it seeks potential customers for that water. (*See* Order Denying Application, Exhibit 1 to Community Protestants’ Memorandum in Support of Motion for Summary Judgment, ¶¶18, 19 (“It is reasonable to expect that, upon filing an application, the Applicant is ready, willing and able to proceed to put water to beneficial use. The statements on the face of the subject Application make it reasonably doubtful that the Applicant is ready, willing and able to proceed to put water to beneficial use”). As noted by Judge Reynolds, in denying the previous application,

“the application under review just outlines general potential uses and places of use; it does not describe what actually *is* to be the purpose and place of use. Rather than being the ‘first step’ in obtaining a water right, the application demonstrates that Applicant is merely contemplating possible steps, like a player holding onto a chess piece before committing to a particular move. Under Applicant’s theory, the statutory permit process is ‘inherently flexible,’ allowing a water user to make broad statements of use and place of use and lay claim to whatever amount of water a basin can bear, and then during the permit process that broad claim can be narrowed down by the State Engineer through evidentiary hearings.”

(Memorandum Decision at 21). The current application suffers from the same problems as the previous application. Although the proposed uses have been narrowed to municipal and

commercial water sales, the Application still does not demonstrate an actual, concrete plan that can be adequately and fully evaluated pursuant to the applicable statutory provisions and case law.

APR is seeking to appropriate 54,000 acre feet of water, which an enormous amount of water. As noted by Judge Reynolds, it is larger than the maximum water supply available for the Carlsbad Irrigation District's many users. (Memorandum Opinion at 25). "This illustration from one watershed demonstrates the enormous potential available for Applicant to monopolize the waters that would have otherwise been available to other users wishing to apply the underground waters of the San Agustin Basin to beneficial use." *Id.* APR, by proposing to pump 54,000 acre feet of water per year from 37 wells and then transport it via a pipeline, is seeking to become "the middleman conveying a large amount of the state's waters to beneficial users...but the public, not private entrepreneurs, own the water of this state." (*Id.* at 29). If the Application were granted as it has been submitted, APR would gain control over an substantial portion of the groundwater of Catron County and APR, rather than the State of New Mexico, would have the right to decide, through private contracts, how the water would be allocated. Such an outcome is not in the public interest, is not in the interest of the citizens of Catron County, and is contrary to the most fundamental principles of New Mexico water law.

CONCLUSION

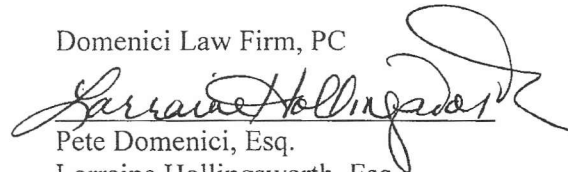
The Application is an attempt by APR to gain control over a substantial portion of the groundwater located in Catron County without meeting the applicable statutory requirements. The clearly speculative nature of APR's proposal is contrary to well-established principals of New Mexico water law and is contrary to sound public policy. The Application is based on nothing more than the hope of APR that it will eventually, at some point in the future, find actual

users for the 54,000 acre feet of groundwater that it is seeking to appropriate. Without specific information regarding the actual beneficial use to which the water will be applied and without specific information about the place of use for the appropriated water, the State Engineer cannot fulfill his statutory duty to determine "that the proposed appropriation would not impair existing water rights from the source, is not contrary to conservation of water within the state and is not detrimental to the public welfare of the state." NMSA §72-12-3.E. There is no statutory provision that allows the OSE to hold a hearing and render a decision on an application that, on its face, does not comply with the requirements of §72-12-3. The Application must be denied, just as APR's previous application was denied.

WHEREFORE, the Board requests that the Application be dismissed in its entirety.

Respectfully submitted,

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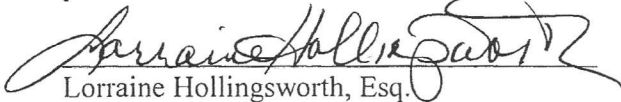
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by U.S. mail on all parties identified in the Parties Entitled to Notice, attached hereto.



Lorraine Hollingsworth, Esq.

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 10/5/17

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STATE OF NEW MEXICO
CATRON COUNTY
RESERVE, NEW MEXICO 87830

RESOLUTION 024-2012

***RESOLUTION OF THE BOARD OF THE COUNTY OF CATRON, NEW MEXICO
CATRON COUNTY DECLARATION OF PUBLIC WELFARE POLICY FOR RETAINING
WATER USE AND CONSRVATION IN CATRON COUNTY***

WHEREAS, the State of New Mexico has enacted laws which empower the Board of County Commissioners to develop plans for water conservation and use to protect the public health, safety, convenience, and welfare (NMSA 72-1-9); and,

WHEREAS, the Catron County Board of Commissioners has a vested interest to (1) protect and enhance the public health, safety, and welfare of the citizens of the County of Catron; (2) protect the tax base and encourage the economic stability of the County of Catron; (3) protect the quantity and quality of water resources in the county for its citizens, base industries of agriculture and forestry industries and other businesses for future growth; and (4) ensure that all water users in the county are secure in their water rights; and,

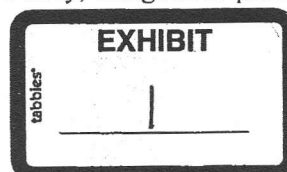
WHEREAS, public welfare of water resources is safeguarded by the State Engineer through active management of the state's limited water resources in the decision-making process used to evaluate new appropriations and transfer of water rights. Prior to any transfer of water rights, the State Engineer must assess the potential impacts on the public welfare (NMSA 72-5-5.1; 72-5-6; 72-5-7; 72-5-23; 72-12-3; 72-12-7); and,

WHEREAS, the State of New Mexico requires regional water plans to give an "adequate review of . . .the effect on the public welfare" (NMSA 72-14-44); and,

WHEREAS, the Board of County Commissioners has determined that the existing public welfare statement in the Southwest Regional Water Plan does not sufficiently address the specific public welfare for Catron County; and,

WHEREAS, the Board of County Commissioners has determined that inter-basin water transfers, exported from inside the county to outside the boundaries of Catron County, may be detrimental to the health, safety and public welfare of Catron County; and,

WHEREAS, the Board has determined that an immediate need exists to secure and protect the beneficial users of the water resources located within Catron County, New Mexico by formulating the Catron County Public Welfare Policy, designed to provide consistency with the



Southwest Regional Water Plan; and, to assist the State Engineer decision-making by providing more specificity for evaluating and protecting public welfare within Catron County.

THEREFORE BE IT RESOLVED BY THE BOARD OF COUNTY COMMISSIONERS, hereby, adopts the Catron County's Public Welfare Policy attached as Exhibit; and,

BE IT FURTHER RESOLVED, Public Welfare Policy is herein defined as that which promotes, sustains and improves the quality and quantity of water resources within the boundaries of Catron County, and therefore, the quality of life of the citizens and property owners and the natural environment of the County; and,

BE IT FURTHER RESOLVED, the purpose of this Catron County Water Policy is to declare and specify Catron County Public Welfare statements as a supplement to the Southwest Regional Water Plan (SWRWP). The Catron County Public Welfare Policy is consistent with the SWRWP and provides further specificity and guidance regarding Catron County's Public Welfare Policy; and,

BE IT FURTHER RESOLVED, that the Catron County Public Welfare Policy is set forth to provide guidance to the State Engineer decision-making when considering inter-basin water rights transfers to outside the boundaries of Catron County; and,

BE IT FURTHER RESOLVED, the Board of Catron County Commissioners asserts that the County's Public Welfare should be safeguarded by the State Engineer when evaluating new inter-basin water rights transfers to outside the county in order to protect water resources quantity and quality, prevent impairment and promote conservation. Catron County petitions the State Engineer to consider Catron County's Public Welfare Policy in the following sections, attached:

1. Catron County Public Welfare Guiding Principles;
2. Catron County Public Welfare Policy Positions; and
3. Catron County Public Welfare Criteria for Evaluation Consideration

BE IT FURTHER RESOLVED, the Board of County Commissioners incorporates the public welfare policy as a supplement to Catron County Water Plan; and,

BE IT FURTHER RESOLVED, that the State Engineer be notified of adoption of Catron County Public Welfare Resolution; and,

BE IT FURTHER RESOLVED, that Catron County may in the future develop basin-specific public welfare statements to be incorporated into the Catron County Public Welfare Policy and the County Water Plan; and,

PASSED, ADOPTED, AND APPROVED at Reserve, Catron County, New Mexico this 21st day of December, 2011 in regular session by the Board of County Commission.

**BOARD OF COUNTY COMMISSIONERS
CATRON COUNTY, NEW MEXICO**

ATTEST:

/s/
Sharon Armijo, Clerk

/s/
Hugh B. McKeen, Chairman

/s/
Richard McGuire, Member

/s/
Glyn Griffin, Member

Exhibit:

Catron County Public Welfare Policy for Water Use and Conservation
-Supplement to the Southwest Regional Water Plan and the Catron County Water Plan-

A. Introduction

The purpose of this Catron County Water Policy is to declare and specify Catron County Public Welfare statements as an addendum to the County's existing water plans and policies and as a supplement to the Southwest Regional Water Plan (SWRWP). The Catron County Public Welfare policy is consistent with the SWRWP and provides further specificity and guidance regarding Catron County's Public Welfare policy, following the same format of the State Engineer's regional water plan public welfare statements.

Catron County shares the same purposes and objectives as stated in the State Engineer's Regional Water Planning Handbook:

- Water planning, the budgeting of an essential and finite resource, is, of course, valuable in itself. In addition, these regional water plans may have specific applications, which will affect how they are developed.
- New Mexico has taken a unique approach to planning to protect and preserve its water supply. The Legislature recognized and directed that water planning is most effectively done at the local level.
- The planning process should encourage local people to express local concerns and discuss the difficult decisions faced by every community in New Mexico.
- The State Engineer's mandate is to supervise the measurement, appropriation and distribution of the state's water. The State Engineer's mandate includes considering the public welfare of the state. Public welfare and conservation considerations may differ, depending upon local conditions and factors, as well as statewide impacts.

The Catron County public welfare statement is set forth to provide guidance to the State Engineer when considering inter-basin water rights and/or water resources transfers outside the boundaries of Catron County. Public Welfare policies should promote, sustain, and improve the quality and quantity of water resources, and therefore the *quality* of life of the citizens and property owners and the natural environment of Catron. This is not a static statement, but an iterative and evolving declaration, that is continuously monitored by the public to ensure that it accurately reflects the welfare of the public, remembering that there are unknown users and perspectives concerning our water resources that will need to be given a voice in the future.

B. GENERAL STATEMENT

Water has many important values to the people, which need to be appreciated and fairly balanced to ensure the overall safety, security and well being for Catron County citizens. The Catron County Board of Commissioners' primary legal responsibility is to protect the health, safety and welfare of its citizens. As such, the Catron County Commission declares this Public Welfare Policy statement for managing the water resources for the beneficial use for the County. Quality

of life and public welfare include, but are not limited to local customs and cultures, the agrarian character of community, the health of the natural environment, and the immediate and long-term socio-economic well being of Catron County, for conservation and use of natural resources.

C. PROCESS

As a background to Public Welfare policy, there are key legal principles to consider. Water in New Mexico belongs to the public of the State of New Mexico (72-12-18 NMSA 1978); owners of water rights have a usufructuary right; i.e., the right to appropriate the water to beneficial use, as defined by the State of New Mexico. Another important principle is the Doctrine of Prior Appropriation, which is a State of New Mexico Constitutional provision. It states that prior or earlier appropriations have seniority or priority over later appropriations, otherwise stated as "first in-kind, first in-use." The first appropriator on a water source has the right to use the water in the system necessary to fulfill his/her water right. A junior appropriator cannot use water to satisfy his water right if it will injure or impair the senior appropriator (72-1-2 NMSA 1978). Priority in time shall be given the better right. Finally, Beneficial Use: Article XVI of the NM Constitution, Section 3, and NMSA 72-1-2 state that beneficial use shall be the basis, the measure and the limit of the right to the use of water.

1. State of New Mexico Public Welfare Policy:

Public Welfare is safeguarded by the State Engineer through active management of the state's limited water resources in the decision-making process used to evaluate new appropriations and transfer of water rights. A strong decision-making process supports public welfare. Public Welfare is equal in importance to the other two statutory criteria: impairment and conservation. Transfer of water rights must be open to all affected stakeholders and use the best available science. The process must provide reasonable and timely notice to allow participation by all parties. The evaluation of water rights appropriation by the State Engineer must consider both the positive and negative impacts of such water rights appropriations.

In 1985, the New Mexico Legislature amended the water code to mandate that the State Engineer review water appropriations, such as new water rights or water right transfers, to insure proposals are not contrary to conservation of water or detrimental to the public welfare of the State (NMSA 72-5-5.1; 72-5-6; 72-5-7; 72-5-23; 72-12-3; 72-12-7). Should a water right application appear to be contrary to a regionally defined public welfare criterion, the State Engineer could rely on this criterion to deny or place a condition on an application? In this way, the public welfare statement is a potential mechanism for protecting regional values.

2. Southwest Regional Water Plan Public Welfare Policy:

In 1987, the New Mexico Legislature passed a law that established a process for regional water planning. That law required regional water plans to give an "adequate review of . . . the effect on the public welfare" (NMSA 72-14-44). The local governments of Southwest New Mexico

completed their latest Southwest Regional Water Plan in 2004, adopting the following definition of Public Welfare for the Southwest Planning Region:

The Southwest Regional Water Planning Steering Committee recognizes the unique values of the diverse ecology of the Gila Basin and other surface water resources in the region. In implementation of the alternatives and recommendations put forth in this plan, the Steering Committee recommends use of the best available science to fully assess the ecological impacts of any water utilization project in Southwest New Mexico, including the Gila River, its tributaries and associated riparian corridors, and to also consider the traditions, cultures and customs affecting historic uses of and future demands for water in the Region.

3. Catron County Public Welfare Policy:

In 1985, the New Mexico Legislature enacted NMSA 72-1-9, which provides local water planning by counties that promotes the public welfare at the local level. It is supported by Consuelo Bokum's paper, *Implementing the Public Welfare Requirement in New Mexico's Water Code*, which states "public welfare as defined in the regional and state plans or by elected officials in land use planning." Catron County Public Welfare Policy is designed for County decisions, and to provide consistency with the SWRWP, and, to assist the State Engineer, by providing more specificity for evaluating and protecting public welfare within Catron County.

D. FUTURE USE OF CATRON COUNTY WATER RESOURCES CONSISTENT WITH THE PUBLIC WELFARE

Catron County believes the Public Welfare should be safeguarded by the State Engineer through active management of its limited water resources in the decision-making process used to evaluate new appropriations and transfer of water rights.

The Public Welfare criterion is of equal importance to the other two statutory criteria, no impairment, and conservation. Catron County requests that the State Engineer consider:

1. Catron County Public Welfare Policy Guiding Principles;
2. Catron County Public Welfare Policy Positions; and
3. Catron County Public Welfare Policy Criteria for State Engineer Evaluation Consideration

1. Catron County Public Welfare Guiding Principles

Water rights are essential for use and enjoyment of the citizens of Catron County, as well as to Catron County government. Possession and exercise of these rights affect the cultural, social and economic welfare of our people and determine the future of the County. As such, Catron County Public Welfare requires that the use of the water resources in Catron County be consistent with six guiding principles. The Catron County Board of Commissioners:

- a. Has a vested interest in seeing all water users in the county are secure in their water rights to protect and enhance the public health, safety, and welfare of the citizens of the County

of Catron; protecting the tax base, encouraging the economic stability of the County of Catron; and, encouraging the agriculture and forestry industries and other businesses for the future growth;

b. Declares that the Doctrine of Prior Appropriations as the primary means for safeguarding the Public Welfare of the citizens of Catron County;

c. Respects the essential role of water in maintaining our customs and cultural values;

d. Strives to maintain and improve the health of our region's water resources. A major benefit to water users in Catron County is to slow the rate of flow and keep as much water within Catron County as possible;

e. Encourages conservation and efficient use of our limited water resources;

g. Supports the rural agricultural economy, the base industry in the county.

2. Catron County Public Welfare Policy

a. Government actions should ensure that water rights remain in their respective water basins; and, not impair or destroy pre-existing water rights that remain in the county.

b. Proper management of watersheds is critical because it supplies the majority of the agricultural, domestic, and industrial water use in this water-short area.

c. An adequate supply of clean water is essential to the health of the County's residents and to the continued growth of the County's economy. Every aspect of the County's economy depends on a dependable and clean supply of water.

d. Agencies must analyze the effects of their actions on water quality, watershed yields, and timing of the yields. Action, lack of action, or permitted uses that result in significant or long-term decreases in water quality or quantity will be opposed by the County.

e. It is imperative that the quality and quantity of water are not reduced below current levels.

f. The County supports projects that will improve water quality and increase the amount and dependability of the water supply.

g. All potential reservoir sites and delivery system corridors shall be protected from any federal or state action that would inhibit their future use for such purposes.

h. There should be no net loss of the private water rights base.

i. The County supports livestock grazing, timber production and other managed uses of watersheds and holds that, if properly managed; multiple use is compatible with watershed management.

j. Beneficial use is the basis for the appropriation of water in the state of New Mexico.

k. An immediate need exists to secure, protect, and expand current and future irrigation uses in the basins and watersheds located within Catron County, New Mexico.

l. In its effort to meet the needs of all water demands, Catron County has recognized the need for water conservation and has developed policies for the conservation of water. The objective of these policies include extending the water supply for current and future generations of county residents, reducing risk of water shortages, and maintaining and improving the health of rivers, groundwater, and watersheds.

3. Catron County Public Welfare Criteria for State Engineer Evaluation Consideration

Catron County requests that the State Engineer consider the following competing water demands when evaluating new appropriations and transfers of water rights and/or resources to outside Catron County boundaries, including, but not limited to, health and safety concerns, economic interests, agricultural interests, environmental interests, social and cultural interests, aesthetic interests, recreational interests, and municipal and domestic interests.

a. When considering public welfare in proposed inter-basin water transfer applications within Catron County to outside the county, the State Engineer should review and consider the Southwest Regional Water Plan Public Welfare statements.

b. When considering public welfare in proposed inter-basin water transfer applications within Catron County to outside the county, the State Engineer should review and consider Catron County Public Welfare statements specified in section "D-1" and D-2" above.

c. When considering public welfare in proposed water inter-basin transfer applications within Catron County to outside the county, the State Engineer should review and consider the water-related policies and plans of the Quemado, Rio Salado and San Francisco Soil and Water Conservation Districts, Catron County Acequias Commission, specific community ditches and acequias, and, the Village of Reserve.

d. When considering application health and safety concerns, the State Engineer should:

- Strive to maintain and improve the quality of our water resources as a basic human right to safe drinking water.
 - Prevent public nuisance, herein defined as creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either: (1) Injurious to public health, safety or welfare; or (2) interferes with the exercise and enjoyment of public rights, including the right to use groundwater within the boundaries of Catron County.
 - Recognize that Catron County suffers from the effects of prolonged drought conditions, which may continue into the indefinite future. The County recognizes the connection between prolonged drought conditions and increased risk of catastrophic wildfires, as well as other emergency conditions that may occur due to insufficient access to immediate water needs.
 - Assess the effects on the ability to obtain sufficient water for large structural and wildfires and that sufficient water to fight wildfire and to address other drought-caused emergencies must be secured, and funds to do so must be available, in order to protect the welfare of the citizens of Catron County.
 - Assess the effects on the possibility of depletion and subsidence of groundwater, especially in areas of the county where there is no surface water, and, where residents and livestock producers rely exclusively on ground water. Any substantial draw down of the ground waters can have significant adverse effects on resident water availability, water flow, and associated water quality.
- e. When considering economic interests, the State Engineer should:
- Evaluate both the positive and negative impacts of the transfer of water rights on the area of origin. Any reduction of existing water supplies in the county could have a significant negative impact on public welfare, and would severely limit future growth potential for the county.
 - Consider any new diversion of water at the proposed level to be a significant cost to Catron County, not only to the existing water rights holders but for the future of the County. Will there be any water available for economic development in Catron County—a low-income county—in the future? Will there be any water available for future private domestic use? This is not simply an issue of availability of water rights for the future, but the availability of the water itself.
- f. When considering agricultural interests, strive to foster a vibrant and efficient agricultural ecosystem, recognizing that agriculture has economic, ecologic, historic and cultural values.
- g. When considering environmental interests, the State Engineer should consider:
- Catron County Land Plan policies for protecting the environment.
 - Consider potential effects on groundwater depletion, sedimentation, and other water quality problems. Reduction of groundwater impacts natural springs, as their recharge sources are eliminated, and it additionally negatively impacts riparian areas. Lowering of the water table reduces water available to vegetation. These groundwater depletions have direct negative/adverse impacts on the health of wildlife and wildlife habitat and therefore have impacts on wildlife-based industries, such as

guiding, outfitting, hunting and other recreational uses of the forest. Such depletions also impact forests and woodlands, rendering these already drought-stricken areas even more vulnerable to catastrophic wildfire.

h. When considering social and cultural interests, the State Engineer should:

- Protect water use that supports the diversity of communities, cultures and traditions existing in our region.
- Recognize that the most senior water rights holders in New Mexico are typically acequias and agricultural water users. This is true with respect to water rights holders in Catron County. Typically junior water right holders include municipalities, residential and recreational water users. All water rights in Catron County existing today, whether acequias, agricultural users, municipality, residential or other rights holders, are senior to new applications by virtue of having been appropriated and put to beneficial use prior to any water rights which may be obtained by new applicants.

i. When considering aesthetic interests, the State Engineer should strive to support Catron County's aesthetic values as a part of the county's customs and cultures and as defined in the County's Comprehensive Land Plan, to maintain and improve the agriculture along the flowing waters and ditches in our communities.

j. When considering municipal and domestic needs, the State Engineer should strive to sustain an adequate water supply to meet those needs. The State Engineer should make water-use decisions based on local land-use policies.

k. When considering any changes in water appropriations associated with inter-basin water transfers to outside of Catron County, the State Engineer should:

- Consider its obligation to protect pre-existing water rights before impairment occurs in Catron County.
- Consider that existing water rights impairment cannot be remedied by offsetting or replacing water if there is not enough water elsewhere to offset or replace water removed from any of the county's water basins. New Mexico is a desert state. Water that is removed from a New Mexico basin is not necessarily replenished as it is in other states. Note, the 1973 State Engineer Hydrology Report #57 states that the San Agustin Basin is a "leaky" basin that discharges water to the Rio Grande, as well as to the Gila Basin, and that the basin is not necessarily fully recharged by rainwater. Thus, sufficient water withdrawal above a certain amount will not only negatively impact the total volume of water in the San Agustin or San Francisco basins but that of adjacent basins as well.

l. When considering public welfare in proposed inter-basin water transfers from within the county to transfer water outside the county, Catron County Commission requests that the State Engineer inform the County and cooperates with the County in the evaluation of public welfare.