

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

RAY C. AND CAROL W. PITTMAN.

Petitioners,

vs.

No.: _____

SCOTT A. VERHINES, New Mexico
State Engineer,

Respondent,

and

AUGUSTIN PLAINS RANCH, LLC,

Real Party in Interest.

ORIGINAL PROCEEDING IN MANDAMUS

**VERIFIED PETITION FOR WRIT OF MANDAMUS
AND REQUEST FOR STAY**

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Compliance with Rule 12-504(g)(3) NMRA: Counsel certifies that he prepared this
Petition in Times New Roman font and that it contains 5,914 words.

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LIST OF EXHIBITS

- Exhibit A: 2007 Application to Appropriate Underground Water (excerpts)
- Exhibit B: 2014 Application to Appropriate Underground Water (excerpts)
- Exhibit C: March 30, 2012, State Engineer Order Denying 2007 Application
- Exhibit D: November 14, 2012 Memorandum Decision of Summary Judgment
- Exhibit E: April 2, 2012, State Engineer Press Release
- Exhibit F: August 19, 2014, Court of Appeals Order dismissing APR's appeal on 2007 Application
- Exhibit G: August 1, 2014, Supplemental Brief of the State Engineer on the issue of Mootness
- Exhibit H: Berrendo Application
- Exhibit I: Attachment B to APR's Original 2007 Application
- Exhibit J: State Engineers' Answer Brief regarding 2007 Application
- Exhibit K: Letters from Rio Rancho attached to 2014 Application
- Exhibit L: Court of Appeals Order requiring the parties to submit supplemental briefs on the issue of mootness
- Exhibit M: Protestants' Supplemental Brief on the issue mootness.
- Exhibit N: OSE Letter of status of the 2014 Application
- Exhibit O: Letter regarding investment in APR's proposed water project

Ray C. and Carol W. Pittman (“Petitioners”) submit this Petition under Article VI, Section 3 of the New Mexico Constitution. Petitioners respectfully request the Court to order the New Mexico State Engineer to reject an application to appropriate 54,000 acre-feet of groundwater per year (“54,000 AFY”) that the Augustin Plains Ranch, LLC (“APR”) submitted to the Office of the State Engineer (“OSE”) on July 14, 2014 (“2014 Application”). The 2014 Application is identical in all material respects to an earlier failed application that APR originally submitted on October 9, 2007 (“2007 Application”). The State Engineer has a duty to reject the 2014 Application for the same reasons that he ultimately denied the 2007 Application—the Application expresses no present intent to appropriate water and thus cannot serve as the basis of a permit to appropriate water or a water right.

SUMMARY OF THE CASE

I. The 2014 Application is materially identical to the 2007 Application.

The 2007 and 2014 Applications (attached as Exhibits A and B, respectively) describe the same speculative project in which APR seeks to monopolize a tremendous amount of public water,¹ not for any particular beneficial use, but for the purpose of possible future sales to unspecified third parties in a large area of the State. APR proposes to pipe water to unspecified locations in one

¹ 54,000 AFY is approximately equal to half the amount of water consumed each year by the entire City of Albuquerque.

to seven New Mexico counties. APR itself will not use the water, nor has any third party agreed to use it. In fact, APR's Applications do not reveal how, where, how much, or by whom the requested water will be used. Under each Application, all or none of the water might be discharged into the Rio Grande for use in Texas; all or none might be used by municipalities in one to seven counties; or all or none might be used for agricultural, commercial or industrial purposes by governmental entities, individuals or businesses in one or more of seven counties.

II. The issue presented is purely legal and of great public importance.

This Petition is based solely on the attached exhibits and undisputed material facts enumerated below. The issue presented is purely legal and worthy of this Court's consideration, because it implicates fundamental constitutional questions of great public importance. Petitioners ask the Court to determine whether public water shall remain open to appropriation for beneficial use, as required by New Mexico's Constitution; or, whether public water can be monopolized by speculators, not for their own use, but for profitable sales in future markets. APR's 2007 Application drew over 900 Protestants from almost every sector of New Mexico's population, including Petitioners and hundreds of other individuals, acequias, irrigation and conservation districts, corporations, and local, state, federal, and tribal governments. [Exhibit E] Millions of dollars and the future of New Mexico's public water are at stake. APR is seeking investors and claims to

have already spent three million dollars of investors' money on a potentially unlawful project. [Exhibit B at 13; Exhibit O] *See Young & Norton v. Hinderlider*, 1910-NMSC-061, ¶24, 15 N.M. 666, 110 P. 1045 (public interest requires protecting investors "against making worthless investments in New Mexico.")

III. The State Engineer has a non-discretionary duty to deny the 2014 Application for the same reasons that the District Court held that he had "no choice but to reject" the 2007 Application.

Both the State Engineer and a District Court determined that the 2007 Application was invalid on its face (Exhibits C and D, respectively), because the Application failed to designate any particular purpose or place of beneficial use or end user. In the words of the State Engineer:

The application was denied because it was vague, over broad, lacked specificity, and the effects of granting it cannot reasonably be evaluated; problems which are contrary to public policy.

[Exhibit E] In upholding the State Engineer's denial, the District Court held:

The [2007] application violates the underground water permitting statute and contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

[November 14, 2012, Memorandum Decision on Motion for Summary Judgment ("Memorandum Decision") (Exhibit D)] The District Court also ruled that the State Engineer had a non-discretionary duty to reject the 2007 Application:

Because [APR] failed to specify beneficial uses and places of use in its application and chose to make general statements covering nearly all possible beneficial uses and large swaths of New Mexico for its

possible places of use, *the State Engineer had no choice but to reject the application*. The application does not reveal a present intent to appropriate water, but merely to divert it and explore specific appropriations later.

[Exhibit D at 20 (emphasis added)]

The Memorandum Decision remains in effect. Although APR appealed the Decision, the Court of Appeals dismissed the appeal at the request of APR and the State Engineer just two days before oral argument. [Exhibit F] The State Engineer and APR successfully argued that APR's 2014 Application rendered the appeal on the 2007 Application moot. The State Engineer also told the Court of Appeals that he will evaluate APR's 2014 Application "without regard to his prior decision" on the substantively identical 2007 Application. [Exhibit G]

The States of Nevada, Utah, and Colorado have the same basic water law as New Mexico, and the Supreme Courts in each of these States have confirmed that beneficial use – not speculation – is the basis of a water right. These decisions are grounded in the common law "principle of beneficial use," which "is based on imperative necessity ... and aims fundamentally at definiteness and certainty" *State ex rel. Martinez v. City of Las Vegas*, 2004 NMSC 9, ¶ 34, 135 N.M. 375 (internal quotes omitted). New Mexico's constitutional and statutory pronouncements concerning beneficial use are merely declaratory of this common law, and therefore, must be interpreted in conformity with its principles.

Consistent with the common law, the Legislature required applications to set forth sufficient information to demonstrate the applicant's specific intent to appropriate water for beneficial use. Among other things, all applications must disclose "(2) the beneficial use to which the water *will be applied*" and "(6) the place of the use for which the *water is desired*." NMSA 1978, § 72-12-3(A)(2001) (emphasis added). APR's 2007 and 2014 Applications fail to comply with these statutory requirements, and therefore, they fail to express the requisite intent to appropriate water. Petitioners respectfully request the Court to order the State Engineer to promptly reject APR's 2014 Application, as required by law. NMSA 1978, § 72-12-3(C) ("No application shall be accepted by the state engineer unless it is accompanied by all the information required by" Section 72-12-3(A)).

IV. A writ of mandamus and stay are necessary and will not interfere with any pending administrative proceeding.

The State Engineer's representations to the Court of Appeals regarding the 2007 Application and the issue of mootness show that he will not promptly reject APR's 2014 Application, as mandated by law, unless ordered to do so by this Court. Moreover, the State Engineer has accepted similar invalid applications and commenced administrative hearings on such applications. [Exhibits A and H] These hearings involve two lengthy multi-party proceedings—an administrative proceeding before the Office of the State Engineer ("OSE") and another *de novo* proceeding before a district court, the outcome of which may be appealed as of

right to the Court of Appeals. APR's highly controversial 2007 Application was in active litigation for seven years and would still be active today had the Court of Appeals not dismissed the case. Petitioners seek a writ of mandamus to avoid the same prolonged, expensive, and wasteful litigation regarding the 2014 Application.

The State Engineer has not published notice of the 2014 Application or commenced any administrative hearing regarding it. Therefore, the requested writ will not violate separation of powers, because it will not interfere with any existing administrative proceeding. Petitioners request a stay to maintain this *status quo* and to prevent irreparable harm. Neither the State Engineer nor APR will be harmed if the stay is granted.

UNDISPUTED MATERIAL FACTS

1. In its 2007 Application, as amended (Exhibit A), and again in the 2014 Application (Exhibit B), APR requests a permit to divert and consume 54,000 AFY to be pumped from 37 wells located on APR's property in Catron County. [Exhibit A at 1 and 4; Exhibit B at 2]

2. The 54,000 AFY of water APR requested in each Application is not based on any particular need for water or beneficial use. As described by APR in its original 2007 Application, the number is based on an estimated amount of water in aquifer storage. [Exhibit I]

3. In the 2007 and 2014 Applications, APR seeks a permit that is not limited to any specific beneficial use. In each Application, APR seeks the right to provide water to third parties for almost any possible use, as follows:

A. The 2007 Application identifies potential purposes of use as “domestic,” “livestock,” “irrigation,” “municipal,” “industrial,” “commercial,” “environmental, recreational, subdivision and related; replacement and augmentation.” [Exhibit A at 1 ¶5 (purpose of use)] APR also states:

The purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the [seven county] area designated in Attachment B.

[Exhibit A at 2 ¶7; *see also* Exhibit I at 2 (describing alleged “extraordinary potential uses”)]

B. The 2014 Application identifies the potential purposes of use as “municipal,” “industrial,” “commercial,” “offset of surface water depletions, replacement, sale and/or lease.” [Exhibit B at 1 ¶2] APR also states:

The water will be put to use by municipal, industrial and other users along the pipeline route

...

This [2014] Application is being filed in order to obtain a permit to appropriate 54,000 acre-feet per year from 37 wells. The water will be transported by pipeline from the points of diversion to various users [in seven counties] along the pipeline route shown on Exhibit 4 to the Attachment.

[Exhibit B at 3 ¶¶ 5(g) and 6]

4. In the 2007 and 2014 Application, APR identifies the “place of use” as follows:

Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.

[Exhibit A at 7; Exhibit B at 2, 15]

5. After the State Engineer accepted the 2007 Application and notice was published, more than 900 persons objected:

The application originally had over 900 protestants, including the NM Interstate Stream Commission, the Middle Rio Grande Conservancy District, US Bureau of Reclamation; NM Dept of Game and Fish, Gila and Cibola National Forests, Catron County, Socorro County, Luna Irrigation Ditch, Monticello Irrigation District, several adjoining ranches, over 100 individuals and the Pueblos of: Santa Ana, Zuni, San Felipe, Isleta, Sandia, Acoma, Kewa (Santo Domingo) and the Navajo Nation.

[Exhibit E]

6. Petitioners along with approximately 80 other objectors (collectively referred to as “Protestants”) filed a motion to dismiss the 2007 Application, arguing that the Application was invalid on its face.

7. On March 30, 2012, the State Engineer granted Protestants’ motion and denied the 2007 Application. The State Engineer characterized an application for a permit to appropriate water as “a request for final action,” such that the applicant must be “ready, willing and able to proceed to put water to beneficial

use” at the time of filing. [Exhibit C at 3-4 ¶¶17-19] The 2007 Application failed to meet this criteria and was thus too vague to consider:

The face of the [2007] Application requests almost all possible uses of water ... at various unnamed locations within [seven counties] ... but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation

[Exhibit C at 2-3 ¶8; *id.* at 4 ¶24 (2007 Application “should not be considered”); *see also* Exhibit E (“The [2007] application was denied because it was vague, over broad, lacked specificity”); Exhibit J at 32-35 (answer brief of State Engineer arguing that neither OSE nor Protestants could ascertain APR’s intended use of water from APR’s vague 2007 Application).]

8. Further explaining his reasons for denying the 2007 Application as facially invalid, the State Engineer described “reasonable applications” as “those that identify a clear purpose for the use of the water” and “include specifics as to the end user of the water.” [Exhibit E at 2]

9. Like the 2007 Application, the 2014 Application does not “identify a clear purpose of use” or the “end user of the water.” [Exhibit B] Although the 2014 Application includes two letters from the City of Rio Rancho, neither letter commits the City to purchasing any amount of water. [Exhibit K (“Should [APR] ... succeed in the application process and successfully put in place a delivery system to deliver water to Rio Rancho, Rio Rancho would most certainly consider [becoming a] ... customer for this water.”)]

10. After the State Engineer denied the 2007 Application “without prejudice” [Exhibit C at ¶ 25], APR appealed to the Seventh Judicial District. Protestants filed a motion for summary judgment against the APR, again arguing that the 2007 Application was invalid on its face.

11. On November 14, 2012, the District Court issued a Memorandum Decision granting Protestants’ motion. [Exhibit D] The District Court characterized the “sole issue on appeal” as “whether the State Engineer was justified in denying [the 2007] application ... without holding an evidentiary hearing.” [Exhibit D at 1] As already described, the District Court held that the State Engineer had “no choice but to reject the application” because it “does not reveal a present intent to appropriate water” [Exhibit D at 20]

12. On January 3, 2013, APR appealed the District Court’s ruling to the Court of Appeals.

13. In answer to APR’s claim that it could delay disclosing any specific purpose or place of beneficial use until an evidentiary hearing was held, the State Engineer told the Court of Appeals: “This is not the way the application and protest process is intended to work.” [Exhibit J at 34]. The State Engineer also stated that “an application [to appropriate water] must set out the elements of [the] water right that would actually be permitted.” [Exhibit J at 32]

14. APR's 2014 Application does not "set out" the intended purpose or place of beneficial use or the other "elements" of any specific water right. APR again proposes to delay designating any specific purpose or place of use until an evidentiary hearing is held, and it proposes that this hearing be conducted in two stages:

A. In "Stage 1," the parties (APR, the State Engineer, and dozens of Protestants) would litigate "hydrological issues" only, before they know how, where, how much, or by whom water would actually be used. [Exhibit B at 14]

B. In "Stage 2," APR would finally reveal "the individual purposes of use, places of use and amounts for each use." *Id.* Stage 2 would occur as many as 12 months after Stage 1. *Id.* No deadline would be imposed on either the beginning or duration of Stage 1.

15. On July 14, 2014, APR filed its 2014 Application with the State Engineer. [Exhibit B] After learning of the 2014 Application through a newspaper article, the Court of Appeals on its own motion ordered the parties to file simultaneous supplemental briefs on whether the 2014 Application rendered APR's appeal on the 2007 Application moot. [Exhibit L]

16. On August 1, 2014, the State Engineer filed a supplemental brief asserting that the 2014 Application superseded the 2007 Application and rendered the appeal on the 2007 Application moot. [Exhibit G] The State Engineer also

informed the Court that his prior denial of the 2007 Application had no relevance to his consideration of the substantively identical APR's 2014 Application:

The State Engineer's decision on the [2007] application is no longer relevant, since *the State Engineer will review APR's [2014] application without regard to his prior decision*, just as he would review any new application to appropriate water.

[Exhibit G at 2] Finally, the State Engineer requested the Court of Appeals to vacate the District Court's Memorandum Decision. [Exhibit G at 3] The Court of Appeals did not grant the State Engineer's request. The Memorandum Decision, therefore, remains in effect.

17. Protestants also filed a supplemental brief on the issue of mootness. They argued that the appeal was not moot, because the 2007 and 2014 Applications are substantively identical, and therefore, gave rise to the identical controversy among the parties. [Exhibit M]

18. On August 19, 2014, based solely on the representations of the State Engineer and APR regarding the 2014 Application, the Court of Appeals dismissed APR's appeal as moot. [Exhibit F]

19. On September 5, 2014, after the State Engineer and APR had persuaded the Court of Appeals that the mere filing of the 2014 Application justified dismissal of the appeal, OSE staff represented to counsel that APR's 2014 Application had not yet been "reviewed for completeness." [Exhibit N]

20. Petitioners were among the Protestants who filed the dispositive motions leading to the denial of APR's 2007 Application by the State Engineer and on appeal by the District Court. They reside next to APR's property in Catron County, New Mexico, and own water rights that they allege will be impaired by APR's proposed water project.

ARGUMENT

The Court has original jurisdiction to hear petitions for writ of mandamus under Article VI, Section 3 of the New Mexico Constitution. "This Court will exercise its original jurisdiction in mandamus when the petitioner presents a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal." *State ex rel. King v. Lyons*, 2011-NMSC-004, 20-32, 149 N.M. 330. This Petition meets the *Lyons* standards.

I. THE ISSUE PRESENTED IS PURELY LEGAL AND IMPLICATES FUNDAMENTAL CONSTITUTIONAL QUESTIONS OF GREAT PUBLIC IMPORTANCE.

Every person who desires to establish a water right in a declared underground basin must first apply to the State Engineer for a permit to appropriate groundwater. NMSA 1978, § 72-12-3(A). The issue presented is whether these

applications must, on their face, request a specific amount of water that “will be applied” to a specific purpose and place of beneficial use; or, whether it is sufficient to request as much water as possible and list numerous possible uses and end users within a large area of the state. The latter approach, which APR has taken, would allow the applicant to speculate in future water markets and ultimately sell water to the highest bidder(s). If the State Engineer were to approve such an application, as written, he would effectively grant the applicant a profitable monopoly in public water, allowing it to dictate how, where, when, and by whom a tremendous amount of water is used and at what price.

The issue presented implicates fundamental constitutional questions of great public importance and interest. As the District Court held regarding the 2007 Application, APR’s failure to designate any specific purpose or place of use or end user “contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.” [Exhibit C at 14] APR’s 2014 Application is substantively no different than its 2007 Application. The public’s strong reaction to the 2007 Application, which drew over 900 objectors, demonstrates the importance of the issue presented and the public’s interest in the issue. [Exhibit E] Moreover, the Supreme Courts of Colorado, Utah and Nevada have all addressed the issue and all have ruled against speculation in favor of beneficial use.

A. APR's 2014 Application contradicts the principle of beneficial use.

As declared in New Mexico's Constitution, "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; NMSA 1978, § 72-12-2 (1953) (same declaration regarding underground water basins). Just like its 2007 Application, APR's 2014 Application contradicts the declared principle of beneficial use, because the 54,000 AFY requested is not based on, measured by, or limited to any beneficial use. As described by the District Court regarding the 2007 Application:

[APR's] plan for the use of 54,000 afy reveals no definiteness or certainty other than the purpose of the application being the creation of a pipeline served by 37 wells, with the actual uses to be figured out later.

[Exhibit D at 27] Based on the face of the 2014 Application, one can only speculate about how, where, and by whom a tremendous amount of public water might be used. This uncertainty contradicts the "principle of beneficial use," which "aims fundamentally at definiteness and certainty" *Las Vegas*, 2004 NMSC 9, ¶ 34.

The Supreme Courts in other prior appropriation states have addressed the issue of speculation verses beneficial use. These Courts uniformly hold that speculative water projects, in which the would-be appropriator has no intent to use water itself and no contract to provide water to a third party, violate the principle of beneficial use. *Bacher v. Office of the State Eng'r of Nev.*, 122 Nev. 1110, 1119,

146 P.3d 793, 799 (Nev. S.Ct. 2006) (“Precluding applications by persons who would only speculate on need ensures satisfaction of the beneficial use requirement that is so fundamental to our State's water law jurisprudence”); *Butler, Crockett & Walsh Dev. Corp. v. Pinecrest Pipeline Operating Co.*, 2004 UT 67, ¶51, 98 P.3d 1 (Utah S.Ct. 2004) (“a diversion of water merely to serve purposes of speculation or monopoly will not constitute beneficial use”); *Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co.*, 197 Colo. 413, 417, 594 P.2d 566, 568 (1979) (“Our constitution guarantees a right to appropriate, not a right to speculate”). In a case originating in New Mexico, the Tenth Circuit Court of Appeals cited *Vidler* in ruling that Albuquerque “cannot take the water now with a mere hope of possible sales in the future.” *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1134 (10th Cir. 1981).

B. APR’s 2014 Application contradicts public ownership of water.

“Unappropriated water” is “declared” by New Mexico’s Constitution “to belong to the public and to be subject to appropriation for beneficial use” N.M. Const. art. XVI, § 2; NMSA 1978, §§ 72-12-1 (same declarations regarding underground water basins). APR’s 2007 and 2014 Applications contradict this declared principle of public ownership of water, because approval of the Applications as written would grant APR “incidents of ownership over public water,” giving APR the power to control how, where, and by whom the water is

appropriated. [Exhibit D at 31-32] The State Engineer cannot grant any private entity such control over how the public uses its own water without breaching the trust in which the State holds this water. *See State ex rel. Bliss v. Dority*, 1950-NMSC-066, ¶11, 55 N.M. 12 (“The public waters of this state are owned by the state as trustee for the people”); *see also New Mexico v. GE*, 467 F.3d 1223, 1243 (10th Cir. 2006) (describing New Mexico’s “codification of the public trust doctrine as to groundwaters”).

Over a century ago, this Court rejected a similar attempt to gain private control over public water, because:

Thus would the way for speculation and monopoly be opened and the main object of [prior appropriation] defeated.

Millheiser v. Long, 1900-NMSC-012, ¶31, 10 N.M. 99. Western states adopted prior appropriation specifically to prevent monopolization of essential water supplies:

The reasons that the doctrine of prior appropriation was adopted in all of the western states except California were ... to utilize scarce water [and] ... to prohibit the monopoly inherent in the riparian doctrine.

Cartwright v. Public Serv. Co. 1958-NMSC-134, ¶129, 66 N.M. 64, *overruled* by *City of Las Vegas*, 2004 NMSC 9 (J. Federici dissenting). The United States Supreme Court described the common law of prior appropriation, which has long applied to federal lands, as follows:

[The] right to water by prior appropriation ... must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual.

Basey v. Gallagher, 87 U.S. 670, 683 (1875). More recently, the Colorado Supreme Court held that prior appropriation “circumscribes monopolist pitfalls” by “making the public's water resource available to those who [have] actual need for water, in order to curb speculative hoarding.” *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited (In re Application for Water Rights)*, 170 P.3d 307, 313 (Colo. S.Ct. 2007). APR's 2014 Application cannot be approved, as written, without contradicting these fundamental principles.

II. THE STATE ENGINEER HAS A NON-DISCRETIONARY DUTY TO REJECT APR'S 2014 APPLICATION.

As held by the District Court regarding the 2007 Application, the State Engineer has “no choice but to reject the” 2014 Application. [Exhibit D at 20] The State Engineer's non-discretionary duty to reject the Application is grounded in the fundamental principle of beneficial use declared in New Mexico's Constitution and statutes, as cited above. “[B]eneficial use of water ... is of the greatest importance to the state ...,” *Kaiser Steel Corp. v. W. S. Ranch Co.*, 1970-NMSC-043, ¶ 15, 81 N.M. 414, and the “principle of beneficial ... aims fundamentally at definiteness and certainty” *Las Vegas*, 2004 NMSC 9, ¶ 34.

Every person desiring to appropriate groundwater in a declared underground basin must first apply to the State Engineer for a permit, which is the necessary “first step” to establishing a water right. *Hanson v. Turney*, 2004-NMCA-069, ¶9, 136 N.M. 1. Under prior appropriation, water rights are defined and limited by specific elements of beneficial use, including the amount, purpose and place of use. NMSA 1978, § 72-4-19(1953). Accordingly, a permit issued by the State Engineer sets out the specific elements of beneficial use, including the amount, purpose and place of use, which will define and limit the applied-for water right. 19.27.1.10 NMAC (“The application and permit limit the nature and extent of the water right”); 19.26.2.7 NMAC (a permit “authorizes the diversion of water from a specific point of diversion, for a particular beneficial use, and at a particular place of use”); *Hanson*, 2004-NMCA-069, ¶9.

The State Engineer told the Court of Appeals that “an application [to appropriate water] must set out the elements of [the] water right that would actually be permitted.” [Exhibit J at 32] This correct statement of the law is based on the express application submittal requirements established by the Legislature, as follows:

In the application, the applicant shall designate:

- (1) the particular underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated;
- (2) the beneficial use to which the water will be applied;

- (3) the location of the proposed well;
- (4) the name of the owner of the land on which the well will be located;
- (5) the amount of water applied for;
- (6) the place of the 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.

NMSA 1978, § 72-12-3(A). The remaining essential element of the applied-for water right – priority – relates back to the date the application was filed, “subject to the acceptance of the application and the issuance of a permit by the state engineer and the timely application of water to beneficial use.” § 19.27.1.9 NMAC.

The Legislature imposed a non-discretionary duty on the State Engineer to reject applications that fail to comply with statutory submittal requirements:

No application *shall* be accepted by the state engineer unless it is accompanied by all the information required by Subsections A and B of [Section 72-12-3].

NMSA 1978, § 72-12-3(C) (emphasis added); *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22, 146 N.M. 24 (“‘shall’ indicates that the [statutory] provision is mandatory”). Moreover, the State Engineer imposed on himself a duty to “promptly” reject non-compliant applications and to notify the applicant of required changes. 19.27.1.11 NMAC. If the applicant refiles a

corrected application within 30 days of notice, its application retains the priority of the original filing; otherwise, it is treated like a new application. *Id.*

Pursuant to the foregoing authorities, the State Engineer has a duty to “promptly” reject APR’s Application, because the Application does not designate any specific purpose or place of “beneficial use to which water will be applied.” Instead, the Application vaguely describes several possible uses to which 54,000 AFY *might* be applied by various third parties in one or more of seven counties. As held by the District Court, this uncertainty regarding APR’s intended use of water violates statutory submittal requirements and contradicts the principle of beneficial use declared in New Mexico’s Constitution and statutes.

As repeatedly held by this Court, New Mexico’s constitutional and statutory enactments regarding beneficial use are “declaratory” of the common law of prior appropriation. *See, e.g., Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 20, 147 N.M. 523; *City of Albuquerque v. Reynolds*, 1962-NMSC-173, ¶37, 71 N.M. 428. Declaratory statutes, such as those governing the appropriation of water in New Mexico, do “not take away the common law in relation to the same matter.” *State v. Trujillo*, 1928-NMSC-016, ¶11, 33 N.M. 370.² Accordingly, these statutes “must

² This holding in *Trujillo* was cited in the *Yeo v. Tweedy*, 1929-NMSC-033, ¶8, 34 N.M. 611, in which the Court held the first groundwater code “declaratory” of the common law.

be interpreted in conformity with [the common law] principles” that they declare.

Bell v. Dennis, 1939-NMSC-045, ¶14, 43 N.M. 350.

Under the common law, the appropriator’s intent to apply water to a specific purpose and place of beneficial use together with notice of that intent are key elements of every appropriation:

Appropriation of water is held to be the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable purpose.

Turley v. Furman, 1911-NMSC-030, ¶10, 16 N.M. 253. “Many times this Court has held that the priority of right is based upon the intent to take a specified amount of water for a specified purpose and [one] can only acquire a perfected right to so much water as [one] applied to beneficial use.” *Cartwright v. Public Serv. Co.*, 1958-NMSC-134, ¶139 (J. Federici, dissenting). Following application of water to the “specified purpose,” the priority of the resulting right related back to the date on which notice of the appropriator’s intent was first provided. *Farmers Dev. Co. v. Rayado L. & I. Co.*, 1923-NMSC-004, ¶26, 28 N.M. 357; *State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, ¶¶ 12-14, 68 N.M. 467.

Under the groundwater code, the common law elements of intent and notice must be satisfied solely by the filing and publication of a permit application. NMSA 1978, §§ 72-12-3(A) and (D); § 19.27.1.9 NMAC. Therefore, the State Engineer must reject APR’s 2014 Application, because the Application on its face

shows no intent to “take a specified amount of water for a specified purpose” The Application shows only a general intent to speculate, to obtain a large amount of water to serve essentially any purpose that might arise anywhere in a vast area of the State. Such a vague intent has never been sufficient to establish a water right, and accordingly, cannot serve as the basis of a permit to appropriate water. Moreover, notice of APR’s intent to appropriate water cannot be provided by publishing APR’s 2014 Application, because the Application on its face expresses no such intent. And, without the requisite notice, there is no basis for relating priority back to the filing of APR’s 2014 Application. Accordingly, the State Engineer has no discretion but to reject APR’s 2014 Application.

III. PETITIONER’S HAVE NO OTHER MEANS TO EXPEDITIOUSLY RESOLVE THE ISSUE PRESENTED.

Petitioners and hundreds of other objectors sought resolution of the issue presented for seven years in connection with APR’s 2007 Application. They finally succeeded in vindicating the principle of beneficial use in the administrative hearing before the State Engineer and, again, on *de novo* appeal before the District Court. They also fully briefed the issue on direct appeal in the Court of Appeals and were prepared to argue their cause in this Court on writ of certiorari. But less than two months before oral argument, APR filed its 2014 Application. APR and the State Engineer used this filing to persuade the Court of Appeals to dismiss APR’s Appeal, thus evading a published decision that might have appropriately

limited the State Engineer's discretion and discouraged investment in APR's speculative water project (and all similar projects).

Accordingly, Petitioners have no other means to expeditiously resolve the issue presented. Notwithstanding the State Engineer's representation to the Court of Appeals that the 2014 Application had such legal significance that it mooted an appeal, the OSE now states that the "application is still being reviewed for completeness." [Exhibit N] *But see Santa Fe Pac. Trust, Inc. v. City of Albuquerque*, 2012-NMSC-028, ¶33, 285 P.3d 595 ("judicial estoppel [prevents] a party from playing fast and loose with the court") (internal quotes omitted). The OSE states further that no "time has been set" for publishing notice of the 2014 Application under Section 72-12-3(D) (Exhibit N). Moreover, even after notice is published, the administrative and judicial process will require years to play out, as the 2007 Application demonstrates. And even then, APR could file a *third* application, starting the process over again. Therefore, only this Court can expeditiously and finally resolve the issue presented.

IV. REQUEST FOR STAY

In order to maintain the *status quo* and prevent irreparable harm, Petitioners request the Court to enjoin the State Engineer from taking any action on the 2014 Application while the Court considers this Petition. The State Engineer has not ordered a pre-decision hearing on the 2014 Application, nor has he given APR the

right to a post-decision hearing by denying the Application. NMSA 1978, § 72-2-16(1973). Accordingly, under the *status quo*, the Court could grant the relief Petitioners request without interfering with a pending executive proceeding. *Cf. New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶1, 149 N.M. 42. Petitioners request a stay to preserve this *status quo* and prevent the irreparable harm that would result if Petitioners and hundreds of others are forced into multiple proceedings regarding the same speculative water project. *See Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶9, 128 N.M. 611 (“The object of the preliminary injunction is to preserve the *status quo* pending the litigation of the merits”); *De Soto v. De Jaquez*, 1940-NMSC-068, ¶4, 44 N.M. 564, (injunctive relief appropriate to prevent irreparable harm in the form of “a multiplicity of suits”).

Neither the State Engineer nor APR will be prejudiced if the *status quo* is maintained pending resolution of this Petition. No administrative proceeding has commenced and APR has no specific plans to use water.

V. REQUEST FOR RELIEF

Petitioners request the Court to order the State Engineer to promptly reject APR’s application pursuant to Section 72-12-3(C) and the other authorities cited above. Petitioners further request the Court to enjoin the State Engineer from taking any action on the 2014 Application during the pendency of this proceeding.

NEW MEXICO ENVIRONMENTAL LAW
CENTER

Attorneys for Petitioners

<p>Scott A. Verhines, P.E. NM State Engineer 130 South Capitol Street Concha Ortiz y Pino Building P.O. Box 25102 Santa Fe, NM 87504-5102</p>	<p>John B. Draper Draper and Draper LLC 325 Paseo del Peralta Santa Fe, NM 87501</p> <p><i>Attorneys for Augustin Plains Ranch, LLC</i></p>
<p>Honorable Gary King New Mexico Attorney General Tony Anaya Building 2550 Cerrillos Road Santa Fe, New Mexico 87505</p> <p><i>Attorney General</i></p>	

_____/s/_____
R. Bruce Frederick

Hc6-30427
#2502

File Number: RG 89943
(For OSE Use Only)

NEW MEXICO OFFICE OF THE STATE ENGINEER
AMENDED APPLICATION FOR PERMIT
TO APPROPRIATE UNDERGROUND WATER

1. APPLICANT

Name: Augustin Plains Ranch, LLC, a New Mexico LLC Work Phone: 505-982-3873
Contact: Everett Shaw Home Phone: _____
c/o Montgomery & Andrews, P.A.
Address: P. O. Box 2307
City: Santa Fe State: NM Zip: 87504

2. LOCATION OF WELLS (A, B, C, or D required, E or F if known)

See Attachment A for description and location of proposed wells.

A. 1/4 1/4 1/4 Section: _____ Township: _____ Range: _____ N.M.P.M.
in _____ County.

B. X = _____ feet, Y = _____ feet, N.M. Coordinate System _____
Zone in the _____ U.S.G.S. Quad Map _____

C. Latitude: _____ d _____ m _____ s Longitude: _____ d _____ m

D. East _____ (m), North _____ (m), UTM Zone 13, NAD _____ (27 or 83)

E. Tract No. _____, Map No. _____ of the _____ Hydrographic Survey

F. Lot No. _____, Block No. _____ of Unit/Tract _____ of the
_____ Subdivision recorded in _____ County.

G. Other: _____

H. Give State Engineer File Number if existing well: _____

I. On land owned by (required): Augustin Plains Ranch, LLC

3. WELL INFORMATION

Approximate depth See Attachment A feet; Outside diameter of casing _____ inches.

Name of well driller and driller license number Not yet determined

4. QUANTITY

Consumptive Use: 54,000 acre-feet per annum
Diversion Amount: 54,000 acre-feet per annum

5. PURPOSE OF USE

Domestic: X Livestock: X Irrigation: X Municipal: X Industrial: X
Commercial: X Other (specify): environmental, recreational, subdivision
and related; replacement and augmentation
Specific use: _____

Do Not Write Below This Line

File Number: _____
Form: wr-05

Trn Number: 407935

page 1 of 3

Lee Br... EXHIBIT A

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO

OFFICE OF STATE ENGINEER
SANTA FE, NEW MEXICO

2008 MAY 14 AM 11:12
2008 MAY -5 AM 11:30

NEW MEXICO OFFICE OF THE STATE ENGINEER
AMENDED APPLICATION FOR PERMIT
TO APPROPRIATE UNDERGROUND WATER

6. PLACE OF USE

See Attachment B for place of use description.

_____ acres of land described as follows:

Subdivision of Section (District or Hydrographic Survey)	Section (Map No.)	Township (Tract No.)	Range	Acres
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Who is the owner of the land? Augustin Plains Ranch, LLC.

7. ADDITIONAL STATEMENTS OR EXPLANATIONS:

This Amended Application is an amendment of Application No. RG-89943
filed October 12, 2007. The purpose of this Amended Application is to
provide water by pipeline to supplement or offset the effects of existing
uses and for new uses in the areas designated in Attachment B, in order to
reduce the current stress on the water supply of the Rio Grande Basin in New
Mexico. Any impairment of existing rights, in the Gila-San Francisco Basin,
the Rio Grande Basin, or any other basin, that would be caused by the
pumping applied for, will be offset or replaced.

ACKNOWLEDGEMENT

I, Saul Brenner, legal representative for Augustin Plains Ranch, LLC affirm
that the foregoing statements are true to the best of my knowledge and belief.

By: 
Saul Brenner

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO
2008 MAY 14 AM 11:12

Do Not Write Below This Line

File Number: 1689943
(For OSE Use Only)

NEW MEXICO OFFICE OF THE STATE ENGINEER
AMENDED APPLICATION FOR PERMIT
TO APPROPRIATE UNDERGROUND WATER

ACTION OF STATE ENGINEER

This application is approved/denied partially approved provided it is not exercised to the detriment of any other having existing rights, and is not contrary to the conservation of water in New Mexico nor detrimental to the public welfare; and further subject to the following conditions: _____

Witness my hand and seal this _____ day of _____, 20 _____

_____, State Engineer

By: _____

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO
2008 MAY 14 AM 11:12

Do Not Write Below This Line

File Number: _____
Form: wr-05

page 3 of 3

Trn Number: 407935

Lee R. Menger

**ATTACHMENT A TO AMENDED APPLICATION OF
AUGUSTIN PLAINS RANCH LLC: PROPOSED WELL LOCATIONS**

NO.	T	R	SEC.	QTR-QTR-QTR			LATITUDE N.			LONGITUDE W.			LSE
1	T1S	R9W	13	SW	NE	NE	34°	13'	29.779"	107°	43'	13.037"	7313
2			13	NW	SE	SE	34°	12'	58.958"	107°	43'	12.778"	7264
3			13	NE	SW	SW	34°	12'	58.177"	107°	43'	47.907"	7316
4			24	SW	NE	NE	34°	12'	35.848"	107°	43'	13.644"	7234
5			24	SE	NW	NW	34°	12'	36.275"	107°	43'	47.142"	7279
6			24	NE	SW	SW	34°	12'	6.665"	107°	43'	48.654"	7260
7			24	NW	SE	SE	34°	12'	5.993"	107°	43'	13.036"	7206
8	T2S	R9W	2	SW	NE	NE	34°	10'	1.772"	107°	44'	16.442"	7146
9			2	SE	NW	NW	34°	10'	0.982"	107°	44'	51.761"	7177
10			2	NE	SW	SW	34°	9'	31.664"	107°	44'	48.998"	7159
11			2	NW	SE	SE	34°	9'	32.342"	107°	44'	18.662"	7136
12			10	SW	NE	NE	34°	9'	7.181"	107°	45'	18.499"	7155
13			10	SE	NW	NW	34°	9'	7.200"	107°	45'	51.100"	7184
14			10	NE	SW	SW	34°	8'	40.493"	107°	45'	50.229"	7169
15			10	NW	SE	SE	34°	8'	40.850"	107°	45'	17.644"	7154
16			14	SW	NE	NE	34°	8'	17.728"	107°	44'	15.850"	7132
17			14	SE	NW	NW	34°	8'	17.186"	107°	44'	49.916"	7150
18			14	NE	SW	SW	34°	7'	43.544"	107°	44'	51.204"	7149
19			14	NW	SE	SE	34°	7'	43.653"	107°	44'	16.864"	7126
20			15	SW	NE	NE	34°	8'	15.697"	107°	45'	17.752"	7163
21			15	SE	NW	NW	34°	8'	15.832"	107°	45'	50.787"	7176
22			15	NE	SW	SW	34°	7'	44.814"	107°	45'	52.419"	7168
23			15	NW	SE	SE	34°	7'	44.043"	107°	45'	18.309"	7162
24			22	SW	NE	NE	34°	7'	21.076"	107°	45'	18.892"	7146
25			22	SE	NW	NW	34°	7'	20.532"	107°	45'	53.118"	7162
26			21	SW	NE	NE	34°	7'	21.630"	107°	46'	19.041"	7186
27			22	NW	SE	SE	34°	6'	52.325"	107°	45'	20.948"	7141
28			23	SW	NE	NE	34°	7'	22.957"	107°	44'	15.086"	7120
29			23	SE	NW	NW	34°	7'	21.062"	107°	44'	49.269"	7143
30			23	NE	SW	SW	34°	6'	53.305"	107°	44'	47.283"	7122
31			23	NW	SE	SE	34°	6'	53.777"	107°	44'	16.047"	7109
32			26	SW	NE	NE	34°	6'	32.564"	107°	44'	14.548"	7100
33			26	SE	NW	NW	34°	6'	32.477"	107°	44'	48.784"	7121
34			16	NW	SE	SE	34°	7'	45.577"	107°	46'	20.103"	7182
35			16	SW	NE	NE	34°	8'	14.721"	107°	46'	17.697"	7183
36			3	SW	NE	NE	34°	10'	1.553"	107°	45'	15.118"	7203
37			3	NW	SE	SE	34°	9'	30.586"	107°	45'	15.791"	7184

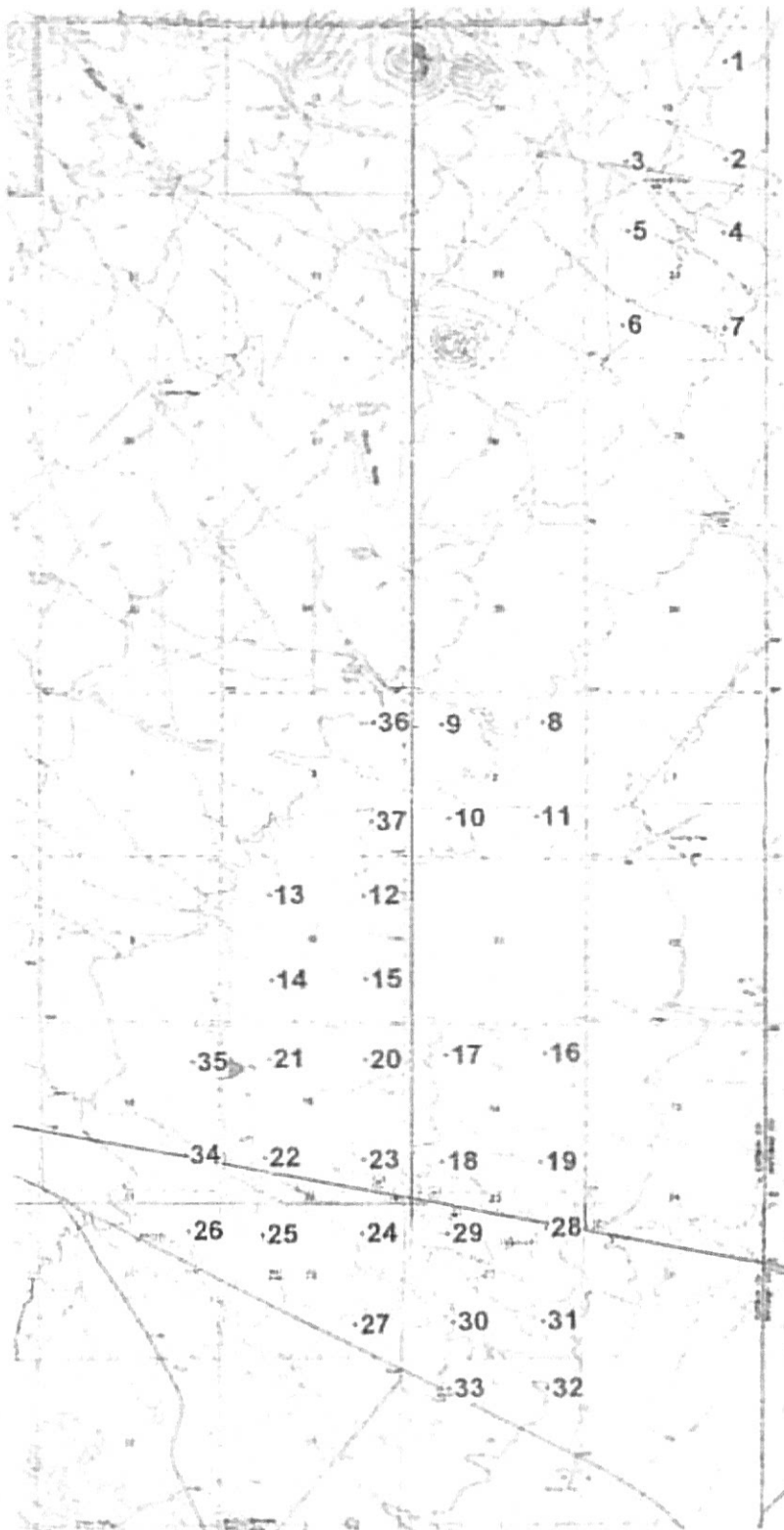
PROJECTED TD OF ALL WELLS:
CASING DIAMETER OF ALL WELLS:
EXPECTED YIELD OF EACH WELL:

3000 FT
20 IN
2000 GPM

2009 MAY 14 AM 11:12

STATE ENGINEER OFFICE
BOULEVARD, NEW MEXICO

Let AS, Meyer



T1S R9W

T2S R9W

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO
2008 MAY 14 AM 11:12

Exhibit 1
ATTACHMENT A

See B5, Manager

ATTACHMENT B TO AMENDED APPLICATION OF
AUGUSTIN PLAINS RANCH, LLC TO APPROPRIATE UNDERGROUND WATER
PLACES OF USE

The proposed places of use are:

A. Within the exterior boundaries of Augustin Plains Ranch ("Ranch"), which is located in Catron County, New Mexico. The location of Ranch is depicted on the attached boundary map as Exhibit 1 and further described as follows:

TOWNSHIP ONE SOUTH, RANGE NINE WEST, N.M.P.M.

W/2, NE/4, W/2 SE/4, SE/4 SE/4	Section 20
W/2, SE/4, W/2 NE/4, SE/4 NE/4	Section 21
All	Section 27
All	Section 28
E/2, E/2 W/2	Section 24
All	Section 33
E/2	Section 34

TOWNSHIP TWO SOUTH, RANGE NINE WEST, N.M.P.M.

All	Section 3
All	Section 4
S/W SE/4	Section 7
E/2, S/2 SW/4	Section 8
All	Section 10
All	Section 14
NE/4, N/2 SE/4, E/2 NW/4	Section 15
S/2, N/2 W/2	Section 17
S/2 W/2, NE/4 SE/4	Section 18
N/2 NE/4, SE/4 NE/4, NE/4 NW/4, NE/4 SE/4 S/2 SW/4	Section 23
All that portion which lies north of U.S. Highway No.60 EXCEPT NE/4 NE/4, NE/4, N/2 NW/4	Section 26 Section 21
SW/4 NW/4, N/2 S/2, SE/4 SE/4	Section 22

TOWNSHIP ONE SOUTH, RANGE NINE WEST, N.M.P.M.

S/2	Section 1
All	Section 12
All	Section 13

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ALBUQUERQUE, NEW MEXICO
2008 MAY 14 AM 11:12

And B, Mary

All	Section 14
All	Section 15
All	Section 16
SW/4 SE/4	Section 20
NE/4 NE/4	Section 21
All	Section 22
All	Section 23
All	Section 24
W/2 W/2	Section 29
All	Section 32
W/2	Section 34

TOWNSHIP TWO SOUTH, RANGE NINE WEST, N.M.P.M.

NW/4 SW/4	Section 1
Lots 1, 2, 3, 4, S/2 W/2, S/2	Section 2
W/2 NW/4, SW/4, S/2 SE/4	Section 15
All	Section 16
S/2 N/2	Section 17
Lot 1, NE/4 NW/4, N/2 NE/4, SE/4 NE/4	Section 18
NE/4, N/2 NW/4, SE/4 NW/4	Section 22
SW/4 NE/4, SE/4 NW/4, W/2 NW/2, W/2	
SE/4, SE/4 SE/4, N/2 SW/4	Section 23
NE/4 NE/4	Section 26

B. Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO
2008 MAY 14 AM 11:12

See B5, merger

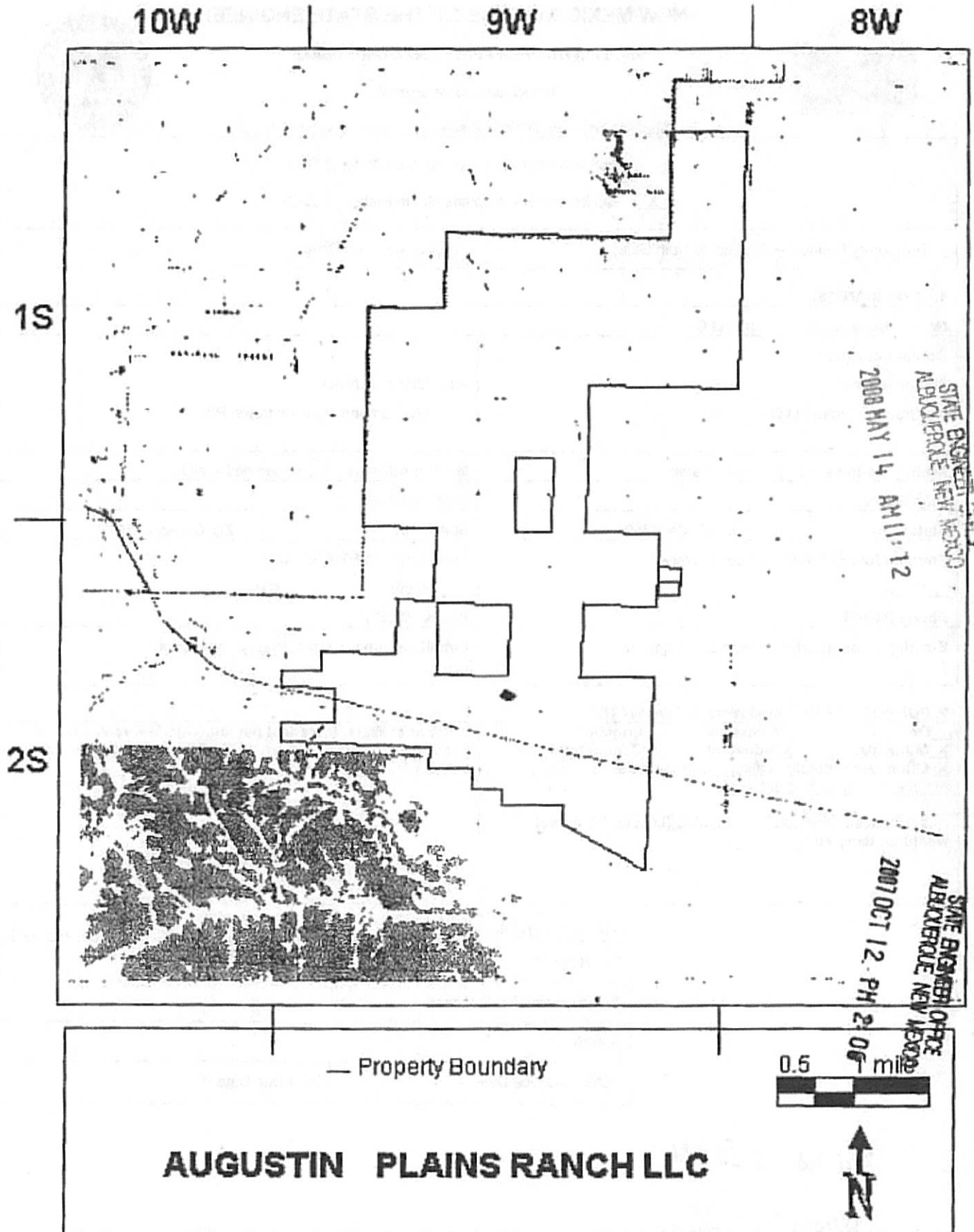


EXHIBIT 1
ATTACHMENT B

File No.



NEW MEXICO OFFICE OF THE STATE ENGINEER

APPLICATION FOR PERMIT TO APPROPRIATE

(check applicable boxes):

For fees, see State Engineer website: <http://www.ose.state.nm.us/>



☐ Application to Appropriate Surface Water (72-5-1)

☒ Application to Appropriate Groundwater (72-12-3)

☐ Temporary Request – Requested Start Date:

Requested End Date:

1. APPLICANT(S)

Name: Augustin Plains Ranch LLC

Contact or Agent:

Michel Jichlinski
c/o Draper & Draper LLC

-or- Michel Jichlinski
c/o Montgomery & Andrews, P.A.

Mailing Address: 325 Paseo de Peralta

Mailing Address: 325 Paseo de Peralta

City: Santa Fe

City: Santa Fe

State: NM Zip Code: 87501

State: NM Zip Code: 87501

Phone: (505) 570-4590 (Draper & Draper)

Phone: (505) 986-2637 (M&A)

☐ Home ☐ Cell

☐ Home ☐ Cell

Phone (Work):

Phone (Work):

E-mail (optional): john.draper@draperllc.com

E-mail (optional): jwechsler@montand.com

2. PURPOSE OF USE AND AMOUNT OF WATER

☐ Domestic ☐ Livestock ☐ Irrigation
☒ Municipal ☒ Industrial ☒ Commercial
☒ Other Use (specify): Offset of surface water depletions,
replacement, sale, and/or lease

Describe a specific use if applicable (i.e. sand & gravel
washing, dairy etc):

Amount of Water (acre-feet per annum): If more details are
needed, type "See Comments" in "Other" field below, and
explain in Additional Statements Section.

Diversion: 54,000

Consumptive Use: 54,000

Other (include units):

FOR USE INTERNAL USE

Application for Permit, Form wr-05, Rev 4/12/12

File Number:	Trn Number:
Trans Description (optional):	
Sub-Basin:	
PCW/LOG Due Date:	PBU Due Date:

2014 JUL 14 PM 3:52

OFFICE OF STATE ENGINEER
SANTA FE, NEW MEXICO

EXHIBIT B

3. COUNTY WHERE WATER RIGHT WILL BE USED

Parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties. Please see Attachment for additional detail.

4. POINT(S) OF DIVERSION (POD)

<input type="checkbox"/> Surface POD OR <input checked="" type="checkbox"/> Ground Water POD (Well)			
Name of ditch, acequia, or spring:			
Stream or water course:		Tributary of:	
If application proposes a new point of diversion involving a diversion dam, storage dam, main canal, and/or pipeline, complete Attachment 2. <input type="checkbox"/> Check here if Attachment 2 is included in this application packet.			
POD Location Required: Coordinate location must be reported in NM State Plane (NAD 83), UTM (NAD 83), or Latitude/Longitude (Lat/Long – WGS84). District II (Roswell) and District VII (Cimarron) customers, provide a PLSS location in addition to above.			
<input type="checkbox"/> NM State Plane (NAD83) (FEET) <input type="checkbox"/> NM West Zone <input type="checkbox"/> NM East Zone <input type="checkbox"/> NM Central Zone		<input type="checkbox"/> UTM (NAD83) (METERS) <input type="checkbox"/> Zone 12N <input type="checkbox"/> Zone 13N	
<input type="checkbox"/> Lat/Long (WGS84)(to the nearest 1/10 th of second)			
POD Number:	X or Easting or Longitude:	Y or Northing or Latitude:	Provide if known: -Public Land Survey System (PLSS) <i>(Quarters or Halves, Section, Township, Range) OR</i> -Hydrographic Survey Map & Tract; OR -Lot, Block & Subdivision; OR -Land Grant Name
1	107 43 13.037	34 13 29.779	T1S R9W S13 SW NE NE
2	107 43 12.778	34 12 58.958	T1S R9W S13 NW SE SE
3	107 43 47.907	34 12 58.177	T1S R9W S13 NE SW SW
4	107 43 13.644	34 12 35.848	T1S R9W S24 SW NE NE
5	107 43 47.142	34 12 36.275	T1S R9W S24 SE NW NW
NOTE: If more PODS need to be described, complete form WR-08 (Attachment 1 – POD Descriptions)			
Additional POD descriptions are attached: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No If yes, how many <u>32</u> ?			
Point of Diversion is on Land Owned by: Applicant			
Other description relating point of diversion to common landmarks, streets, or other: The wells will be located on Augustin Plains Ranch, north and south of U.S. Highway 60, East of Datil, New Mexico. Please see Exhibit 3 to the Attachment for a map illustrating the locations of the wells.			
Note: The following information is for wells only. If more than one (1) well needs to be described, provide attachment.			
Approximate depth of well (feet): 2000		Outside diameter of well casing (inches): 20	
Driller Name: Licensed New Mexico Drilling Contractor		Driller License Number: N/A	

FOR OSE INTERNAL USE

Application for Permit, Form wr-05

File Number:	Trn Number:
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5. PLACE(S) OF USE
List each individually

(not applicable __)

a. _____ Acres of Irrigated Land Described as Follows (if applicable):

b. Legally Described By:

___ Public Land Survey System (PLSS)
___ Hydrographic Survey Report or Map
___ Irrigation or Conservation District Map
___ Subdivision

PLSS Quarters or Halves,
and/or
Name of Hydrographic Survey or District,
and/or
Name and County of Subdivision

c.
PLSS
Section
and/or
Map No.
and/or
Lot No.

d.
PLSS
Township
and/or
Tract No. (Please list each
tract individually)
and/or
Block No.

e.
PLSS Range

f.
Acres

Please see Attachment

g. Other description relating place of use to common landmarks, streets, or other: The water will be put to use by municipal, industrial and other users along the pipeline route shown on Exhibit 4 to the Attachment. Please see the Attachment for additional details.

h. Place of use is on land owned by (required): Please see Attachment

i. Are there other sources of water for these lands? No__ Yes__ describe by OSE file number Please see Attachment

Note: If on Federal or State Land, please provide copy of lease.

6. ADDITIONAL STATEMENTS OR EXPLANATIONS

This Application is being filed in to obtain a permit to appropriate 54,000 acre-feet per year from 37 wells. The water will be transported by pipeline from the points of diversion to various users along the pipeline route shown on Exhibit 4 to the Attachment. Applicant intends to construct enhanced recharge facilities which will collect runoff that would otherwise evaporate in the Plains of Augustin. This water will augment the groundwater in the aquifer and offset the amount that is pumped from Applicant's wells. Applicant requests for these enhanced recharge projects in an amount to be determined at the hearing. As part of this Application, Applicant Augustin Plains

FOR OSE INTERNAL USE

Application for Permit, Form wr-05

File Number:

Trn Number:

Ranch is requesting a two stage hearing process. Applicant will offset all depletions of surface flows. Please see Attachment for additional statements and explanations.

FOR OSE INTERNAL USE

Application for Permit, Form wr-05

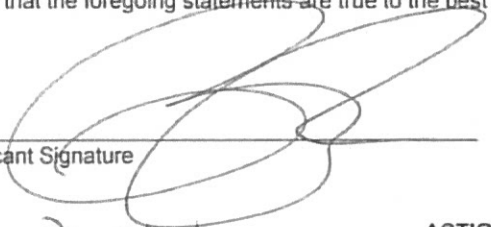
File Number:

Trn Number:

ACKNOWLEDGEMENT

I, Rich Radice
Print Name(s)

Affirm that the foregoing statements are true to the best of (my, our) knowledge and belief.


Applicant Signature

Applicant Signature

President
Augustin Plains Ranch, LLC

ACTION OF THE STATE ENGINEER

This application is:

☐ approved ☐ partially approved ☐ denied

provided it is not exercised to the detriment of any others having existing rights, and is not contrary to the conservation of water in New Mexico nor detrimental to the public welfare and further subject to the attached conditions of approval.

Witness my hand and seal this _____ day of _____ 20_____, for the State Engineer,

_____, State Engineer

By: _____
Signature

Print

Title: _____
Print

FOR OSE INTERNAL USE

Application for Permit, Form wr-05

File Number:

Trn Number:



NEW MEXICO OFFICE OF THE STATE ENGINEER



ATTACHMENT 1 POINT OF DIVERSION DESCRIPTIONS

This Attachment is to be completed if more than one (1) point of diversion is described on an Application or Declaration.

a. Is this a:

Move-From Point of Diversion(s)
Move-To Point of Diversion(s)

b. Information on Attachment(s):

Number of points of diversion involved in the application: **37**
Total number of pages attached to the application:

Surface Point of Diversion **OR** **Well**

Name of ditch, acequia, or spring:

Stream or water course:

Tributary of:

c. Location (Required):

Required: Move to POD location coordinate must be either New Mexico State Plane (NAD 83), UTM (NAD 83), or Lat/Long (WGS84)

NM State Plane (NAD83)
(feet)

UTM (NAD83)
(meters)

NM West Zone
NM Central Zone
NM East Zone

Zone 13N
Zone 12N

Lat/Long—
(WGS84)
1/10th of second

**OTHER (allowable only for move-from
descriptions - see application form for format)**
PLSS (quarters, section, township, range)
Hydrographic Survey, Map & Tract
Lot, Block & Subdivision
Grant

POD Number: **6**

X or Longitude **107 43 48.654**
Y or Latitude **34 12 6.665**

Other Location Description: **T1S R9W S24 NE SW
SW**

POD Number: **7**

X or Longitude **107 43 13.036**
Y or Latitude **34 12 5.993**

Other Location Description: **T1S R9W S24 NW SE
SE**

POD Number: **8**

X or Longitude **107 44 16.442**
Y or Latitude **34 10 1.722**

Other Location Description: **T2S R9W S2 SW NE
NE**

POD Number: **9**

X or Longitude **107 44 51.761**
Y or Latitude **34 10 0.982**

Other Location Description: **T2S R9W S2 SE NW
NW**

POD Number: **10**

X or Longitude **107 44 48.998**
Y or Latitude **34 9 31.664**

Other Location Description: **T2S R9W S2 NE SW
SW**

POD Number: **11**

X or Longitude **107 44 18.662**
Y or Latitude **34 9 32.342**

Other Location Description: **T2S R9W S2 NW SE
SE**

POD Number: **12**

X or Longitude **107 45 18.499**
Y or Latitude **34 9 7.181**

Other Location Description: **T2S R9W S10 SW NE
NE**

FOR OSE INTERNAL USE

Form wr-08

POD DESCRIPTIONS - ATTACHMENT 1

File Number:

Trn Number:

Trans Description (optional):

POD Number: 13	X or Longitude 107 45 51.100 Y or Latitude 34 9 7.200	Other Location Description: T2S R9W S10 SE NW NW
POD Number: 14	X or Longitude 107 45 50.229 Y or Latitude 34 8 40.493	Other Location Description: T2S R9W S10 NE SW SW

FOR OSE INTERNAL USE

Form wr-08

POD DESCRIPTIONS - ATTACHMENT 1

File Number:	Trn Number:
Trans Description (optional):	



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Surface Point of Diversion **OR** **Well**

Name of ditch, acequia, or spring:

Stream or water course:

Tributary of:

c. Location (Required):

Required: Move to POD location coordinate must be either New Mexico State Plane (NAD 83), UTM (NAD 83), or Lat/Long (WGS84)

NM State Plane (NAD83)
(feet)

UTM (NAD83)

(meters)

NM West Zone

Zone 13N

NM Central Zone

Zone 12N

NM East Zone

Lat/Long—
(WGS84)
1/10th of second

**OTHER (allowable only for move-from
descriptions - see application form for format)**
PLSS (quarters, section, township, range)
Hydrographic Survey, Map & Tract
Lot, Block & Subdivision
Grant

POD Number: **15**

X or Longitude **107 45 17.644**

Y or Latitude **34 8 40.850**

Other Location Description: **T2S R9W S10 NW SE
SE**

POD Number: **16**

X or Longitude **107 44 15.850**

Y or Latitude **34 8 17.728**

Other Location Description: **T2S R9W S14 SW NE
NE**

POD Number: **17**

X or Longitude **107 44 49.916**

Y or Latitude **34 8 17.186**

Other Location Description: **T2S R9W S14 SE NW
NW**

POD Number: **18**

X or Longitude **107 44 51.204**

Y or Latitude **34 7 4.544**

Other Location Description: **T2S R9W S14 NE SW
SW**

POD Number: **19**

X or Longitude **107 44 16.864**

Y or Latitude **34 7 43.653**

Other Location Description: **T2S R9W S14 NW SE
SE**

POD Number: **20**

X or Longitude **107 45 17.752**

Y or Latitude **34 8 15.697**

Other Location Description: **T2S R9W S15 SW NE
NE**

POD Number: **21**

X or Longitude **107 45 50.787**

Y or Latitude **34 8 15.832**

Other Location Description: **T2S R9W S15 SE NW
NW**

FOR OSE INTERNAL USE

Form wr-08

POD DESCRIPTIONS - ATTACHMENT 1

File Number:

Trn Number:

Trans Description (optional):

POD Number: 22	X or Longitude 107 45 52.419 Y or Latitude 34 7 44.814	Other Location Description: T2S R9W S15 NE SW SW
POD Number: 23	X or Longitude 107 45 18.309 Y or Latitude 34 7 44.043	Other Location Description: T2S R9W S15 NW SE SE

FOR OSE INTERNAL USE

Form wr-08

POD DESCRIPTIONS - ATTACHMENT 1

File Number:	Trn Number:
Trans Description (optional):	



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Stream or water course:

Tributary of:

c. Location (Required):

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NM State Plane (NAD83)
(feet)

UTM (NAD83)

(meters)

NM West Zone

Zone 13N

NM Central Zone

Zone 12N

NM East Zone

Lat/Long—
(WGS84)
1/10th of second

OTHER (allowable only for move-from descriptions - see application form for format)
PLSS (quarters, section, township, range)
Hydrographic Survey, Map & Tract
Lot, Block & Subdivision
Grant

POD Number: **24**

X or Longitude **107 45 18.892**

Y or Latitude **34 7 21.076**

Other Location Description: **T2S R9W S22 SW NE
NE**

POD Number: **25**

X or Longitude **107 45 53.118**

Y or Latitude **34 7 20.532**

Other Location Description: **T2S R9W S22 SE NW
NW**

POD Number: **26**

X or Longitude **107 46 19.041**

Y or Latitude **34 7 21.630**

Other Location Description: **T2S R9W S21 SW NE
NE**

POD Number: **27**

X or Longitude **107 45 20.948**

Y or Latitude **34 6 52.325**

Other Location Description: **T2S R9W S22 NW SE
SE**

POD Number: **28**

X or Longitude **107 44 15.086**

Y or Latitude **34 7 22.957**

Other Location Description: **T2S R9W S23 SW NE
NE**

POD Number: **29**

X or Longitude **107 44 49.269**

Y or Latitude **34 7 21.062**

Other Location Description: **T2S R9W S23 SE NW
NW**

POD Number: **30**

X or Longitude **107 44 47.283**

Y or Latitude **34 6 53.305**

Other Location Description: **T2S R9W S23 NE SW
SW**

FOR OSE INTERNAL USE

Form wr-08

POD DESCRIPTIONS - ATTACHMENT 1

File Number:

Trn Number:

Trans Description (optional):

POD Number: 31	X or Longitude 107 44 16.047 Y or Latitude 34 6 53.777	Other Location Description: T2S R9W S23 NW SE SE
POD Number: 32	X or Longitude 107 44 14.548 Y or Latitude 34 6 32.564	Other Location Description: T2S R9W S26 SW NE NE

FOR OSE INTERNAL USE

Form wr-08

POD DESCRIPTIONS - ATTACHMENT 1

File Number:	Trn Number:
Trans Description (optional):	



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Surface Point of Diversion OR **Well**

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Stream or water course:

Tributary of:

c. Location (Required):

Required: Move to POD location coordinate must be either New Mexico State Plane (NAD 83), UTM (NAD 83), or Lat/Long (WGS84)

NM State Plane (NAD83)
(feet)

UTM (NAD83)

(meters)

NM West Zone

Zone 13N

NM Central Zone

Zone 12N

NM East Zone

Lat/Long-
(WGS84)
1/10th of second

OTHER (allowable only for move-from

descriptions - see application form for format)

PLSS (quarters, section, township, range)

Hydrographic Survey, Map & Tract

Lot, Block & Subdivision

Grant

POD Number: **33**

X or Longitude **107 44 48.784**

Y or Latitude **34 6 32.477**

Other Location Description: **T2S R9W S26 SE NW**

NW

POD Number: **34**

X or Longitude **107 46 20.103**

Y or Latitude **34 7 45.577**

Other Location Description: **T2S R9W S16 NW SE**

SE

POD Number: **35**

X or Longitude **107 46 17.697**

Y or Latitude **34 8 14.721**

Other Location Description: **T2S R9W S16 SW NE**

NE

POD Number: **36**

X or Longitude **107 45 15.118**

Y or Latitude **34 10 1.553**

Other Location Description: **T2S R9W S3 SW NE**

NE

POD Number: **37**

X or Longitude **107 45 15.791**

Y or Latitude **34 9 30.586**

Other Location Description: **34 9 30.586**

POD Number:

X or Longitude

Y or Latitude

Other Location Description:

POD Number:

X or Longitude

Y or Latitude

Other Location Description:

POD Number:

X or Longitude

Y or Latitude

Other Location Description:

FOR OSE INTERNAL USE

Form wr-08

POD DESCRIPTIONS - ATTACHMENT 1

File Number:

Trn Number:

ATTACHMENT 2
TO AUGUSTIN PLAINS RANCH LLC APPLICATION
FOR PERMIT TO APPROPRIATE GROUNDWATER

I. OVERVIEW OF THE PROJECT

Augustin Plains Ranch LLC (“APR” or “Applicant”) is a New Mexico company which owns a ranch located in the San Augustin Plains near Datil, NM (“Ranch”). The overall purpose of this Application is to obtain approvals 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, industrial, commercial, instream, offset of surface water depletions, replacement, and other uses at locations along the length of the pipeline. The project will provide a new water resource in the State’s most populated area, supplying economic and environmental benefits to the population. In addition, Applicant intends to construct enhanced water recharge facilities which will collect runoff that would otherwise evaporate in the Plains of Augustin. This water will augment the groundwater in the aquifer and partially offset the effects of pumping from Applicant’s wells. Applicant requests credit for the enhanced recharge facilities in an amount to be determined at the hearing.

A description of the project is contained in Exhibit A to this Attachment (“Project Description”).

Applicant has already invested over \$3 million in the development of the project. Activities have included investment and investigation in the following areas:

Hydrologic:

- Acquired land necessary for the project layout
- Drilled two test wells to a maximum depth of 1,500 ft and conducted pump tests in each well
- Tested water quality from two test wells
- Drilled one borehole to a depth of 3,000 ft
- Contracted with nationally recognized hydrologists who conducted an initial analysis of the aquifer and developed a preliminary groundwater model

Engineering:

- Contracted with nationally recognized engineering firms as well as a pipe manufacturer to develop and evaluate the project’s preliminary engineering and cost estimates
- Contracted with a nationally recognized environmental firm to evaluate the project’s impacts and benefits, identify permitting requirements, and propose an optimal routing for the pipeline

Stakeholder Involvement:

- Held discussions with all major water users in the Middle Rio Grande
- Identified end-users of project water
- Public presentations on the project, including town hall meetings designed to inform local residents of the project's objectives and preliminary design, to the New Mexico Association of Counties, the Interstate Stream Commission, the New Mexico Legislature Water and Natural Resources Committee, the Association of Commerce and Industry, and other stakeholders

Financial:

- Contracted with senior economic and financial analysts with knowledge of the Middle Rio Grande water resources and infrastructure finance requirements to evaluate the project's economic and financial feasibility and develop a financial model
- Worked with several infrastructure investors, including publicly traded investment banks and private equity, to assess the financial model and evaluate the project's feasibility

Applicant recognizes that additional investigation and analysis is necessary, which Applicant is ready, willing and able to undertake as part of the hearing. In addition, Applicant is in position to obtain all financing necessary to put the water to beneficial use within a reasonable time. For example, Exhibit B presents a letter from current investors attesting to their willingness to support the financing of the project through all phases of development, a letter from a leading investment bank attesting to the bankability of the project, and a certificate attesting to the inclusion of the project in the list of the 100 top global infrastructure projects at the 6th Annual Global Infrastructure Leadership Forum.

II. PROPOSED HEARING PROCEDURE

Pursuant to the statutory and regulatory authority of the State Engineer, and consistent with prior practice, the Applicant requests a two-stage process for consideration of this Application by the State Engineer.

Stage 1:

The first stage ("Stage 1") consists of an evaluation of the hydrological issues related to the Application, including the amount of water available for appropriation without impairing other water rights, and the amount of enhanced recharge. It would include advertisement of the Application and the opportunity for protests. The hearing during Stage 1 will allow for the presentation of exhibits and expert testimony on the hydrologic issues. Conservation of water and public welfare will also be addressed in Stage 1 to the extent they relate to the hydrologic issues. Stage 1 would result in an initial order on the hydrologic issues.

Stage 2:

Once the order on the hydrologic issues is entered, 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 for each use. Stage 2 would begin when Applicant submits an Amended Application with additional detail regarding the types and places of use for the water based on the order on the hydrologic issues. The information contained in the Amended Application will be included in a second advertisement to the public and 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 the public welfare, or being contrary to conservation of water within the State.

Applicant 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. Bifurcating the hearing on the Application into two stages will allow the State Engineer to make a determination on hydrologic issues, and enable Applicant to use the initial order to finalize plans for the ultimate disposition of the water. The revised information on the places of and purposes of use will be included in the Amended Application and will be re-advertised to ensure that all interested parties in both the move-from and move-to locations have a full opportunity to evaluate the Application and participate if they choose. Applicant recognizes that it will not be entitled to apply water to beneficial use until the successful conclusion of both Stage 1 and Stage 2, and final action on this Application is not requested from the State Engineer until the conclusion of Stage 2.

III. ADDITIONAL INFORMATION FOR SECTIONS OF THE APPLICATION

2. Purpose of Use and Amount of Water

The purposes of use of the Application are municipal, industrial, commercial, offset, replacement, and sale. The 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.

3. County Where Water Right Will Be Used

The counties in which the applied for water will be used are Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe. Extant statutes define each of the seven counties, with a description of each county by legal subdivision. *See* NMSA 1978, §§ 4-1-1 to -2 & Compiler's notes (Bernalillo County), § 4-23-1 (Sandoval County), § 4-26-1 (Santa Fe County), § 4-2-1 (Catron County), § 4-27-1 (Sierra County), § 4-28-1 (Socorro County), § 4-32-1 (Valencia County). The place of use of the water within those counties is limited to those portions of those counties that are situated within the geographic boundaries of the Rio Grande Basin. *See* 19.27.49 NMAC.

4. Points of Diversion ("PODs")

The groundwater points of diversion are 37 wells located on Augustin Plains Ranch, as more particularly shown on Exhibit C to this Attachment.

5. Places of Use

The water will be provided to municipal, industrial, commercial and other users who will connect to the pipeline and use water along the route presented in Exhibit D. Exhibit E contains a letter of support from one such municipal entity. The preliminary engineering of the pipeline is discussed in the Project Description. The 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. The terms of delivery and use of the water for the end-users will be provided as part of Stage 2. Water will be accounted for in a manner acceptable to the State Engineer.

LIST OF EXHIBITS

Exhibit A: Project Description

Exhibit B: Investors Letters

Exhibit C: POD Map

Exhibit D: Routing Analysis

Exhibit E: Rio Rancho Letters

Exhibit A to Groundwater Application Attachment 2



The Augustin Plains Ranch Water Production and Distribution Project

Project Description

July 2014

Exhibit A to Groundwater Application Attachment 2

**EXHIBIT A TO
ATTACHMENT 2**



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1. EXECUTIVE SUMMARY

The demand for water in the Middle Rio Grande ("MRG") already surpasses its availability, and the the inadequacy of present supplies continues to increase every year. The Augustin Plains Ranch ("APR") project will develop a new source of water for the Middle Rio Grande Valley. This will be accomplished by supportable use of the aquifer located under the San Augustin Plains in western New Mexico. The project will provide water to New Mexicans where it is needed most, while improving river habitat and water quality in the Rio Grande, using renewable energy such as hydropower and solar energy.

The supply of APR water

APR owns land on the Augustin Plains in Western New Mexico with access to an aquifer that initial studies indicate can produce 54,000 acre-ft. of water per year without impairment of prior water rights, subject to appropriate conditions of approval.

The project, as developed in hydrological and engineering studies, will supply new water to the state in an environmentally sustainable way. It will include:

- a well field
- hydroelectric and solar power generation facilities
- a pipeline over 140 miles in length, along existing highway rights-of-way
- a system of structures to enhance the recharge of the aquifer

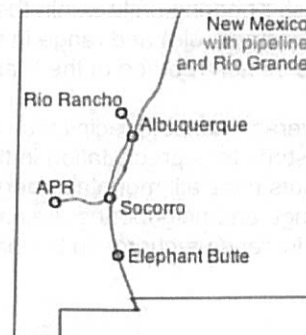


Figure 1: Project Sketch

The need for APR water

New Mexico is suffering from a lack of water. The future requirements of local, state, and federal parties are well documented while the sources for the water have generally not been identified. The importance of developing new water resources and precipitation capture and aquifer storage was recently endorsed by the overwhelming majority of participants in a recent New Mexico First Town Hall Meeting¹. APR plans to meet this need by conveying water via pipeline for use in the Middle Rio Grande.

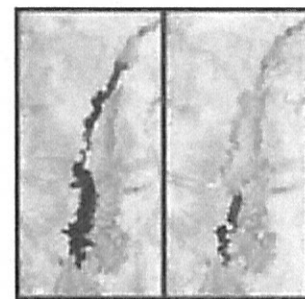


Figure 2: Elephant Butte Reservoir 1991 and 2011

¹ New Mexico First, "A Town Hall on Water Planning Development and Use", Recommendation #10, April 15-16 2014



The Property

Augustin Plains Ranch owns over 17,000 acres in the Plains of San Augustin. A large aquifer is accessible from the property which is suitable for development as a new water resource.

The project's location in the Augustin Plains has several advantages for a water project. The aquifer is large, and of good water quality. The area has relatively high rainfall for New Mexico, from which clean rainwater can be harvested to enhance the natural recharge of the basin.

Available Water

According to the Southwest New Mexico Regional Water Plan, the Augustin Plains Subbasin (APSB) has a total volume of approximately 50 Million acre-feet (AF) of groundwater in storage. The same report estimates the annual natural recharge of the basin at approximately 18,000 acre-feet per year (AFY). Water bearing units within the APR area are composed of Quaternary age alluvial sediments (approx. 2 million yrs. old) and range in thickness from several hundred feet in the western portion to over 4,500 ft. in the eastern portion of the Plains of San Augustin.

Average annual precipitation in the tributary drainage area west of APR is approximately 15 in. /yr. Historic total precipitation in the entire Augustin Plains basin has been of 1.6 Million AFY. The Ranch abuts the Datil mountain range and is strategically located as it intercepts the principal canyon exiting the range and neighboring drainages. The project will include the construction of artificial recharge structures to increase recharge in the basin.

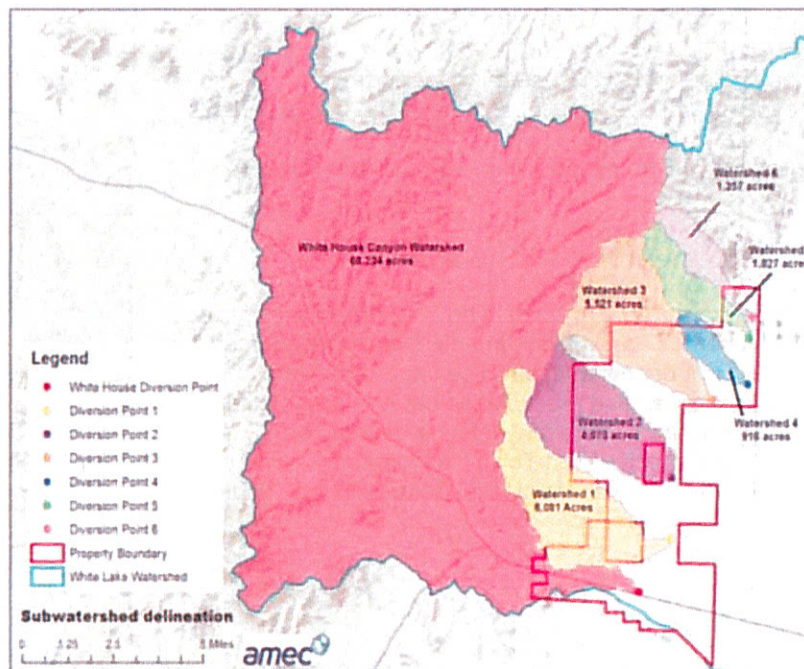


Figure 3: Watersheds of Augustin Plains Ranch



Preliminary Hydrologic Testing

APR has drilled two wells to depths of 840 ft. and 1500 ft. on the Ranch, and conducted pump tests on each. A stratigraphic borehole was also drilled to a depth of 3500 ft. The Well Records for all three are on file with the Office of the State Engineer (OSE). Preliminary analysis indicates that the quantity of water applied for is available.

Water produced from two test wells has been analyzed by an independent laboratory and has proved to be of excellent quality.

Energy Resources

The project will be powered by renewable, clean energy.

Hydropower: The project property is at an elevation of 7,125 ft., while the Albuquerque metropolitan area lies at 5200 ft. The elevation drop is sufficient to allow for gravity flow of the water to Albuquerque and the production of hydropower. This will account for most of the project's energy needs.

Solar power: New Mexico generally enjoys good conditions for the production of solar power and the project property is situated in one of the State's best locations. The remainder of the project's energy needs will be produced by solar energy.

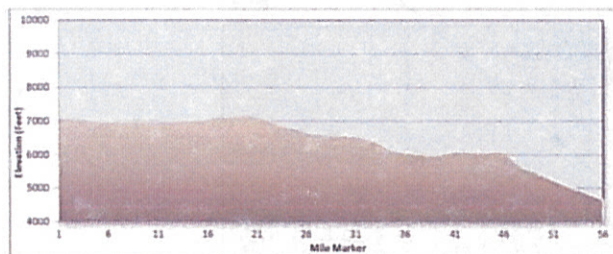


Figure 2. Preferred Route A Datil to Socorro elevation profile

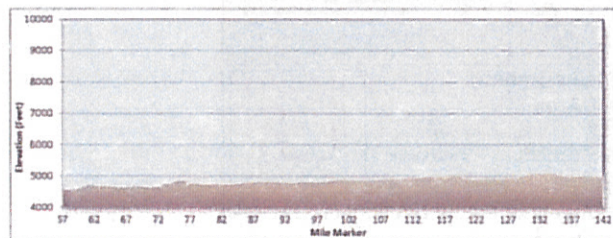


Figure 3. Preferred Route A Socorro to Albuquerque elevation profile

Figure 4: Pipeline Route Profile

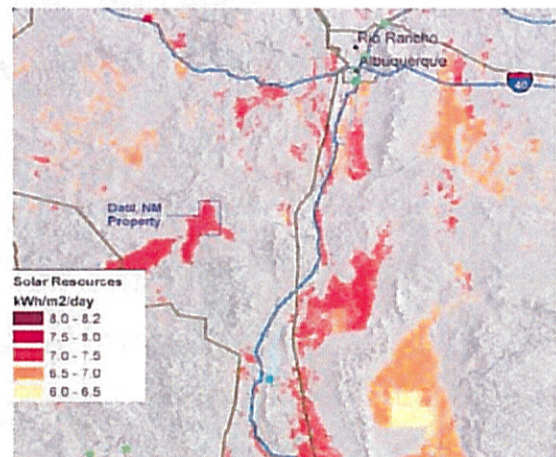


Figure 5: Area Solar Potential



Pipeline

APR will deliver water at various points along a pipeline which will extend from the Ranch to Rio Rancho, first eastward along Route 60, and then northward along Interstate 25. The route is shown below. The water will be delivered to users the pipeline route. .

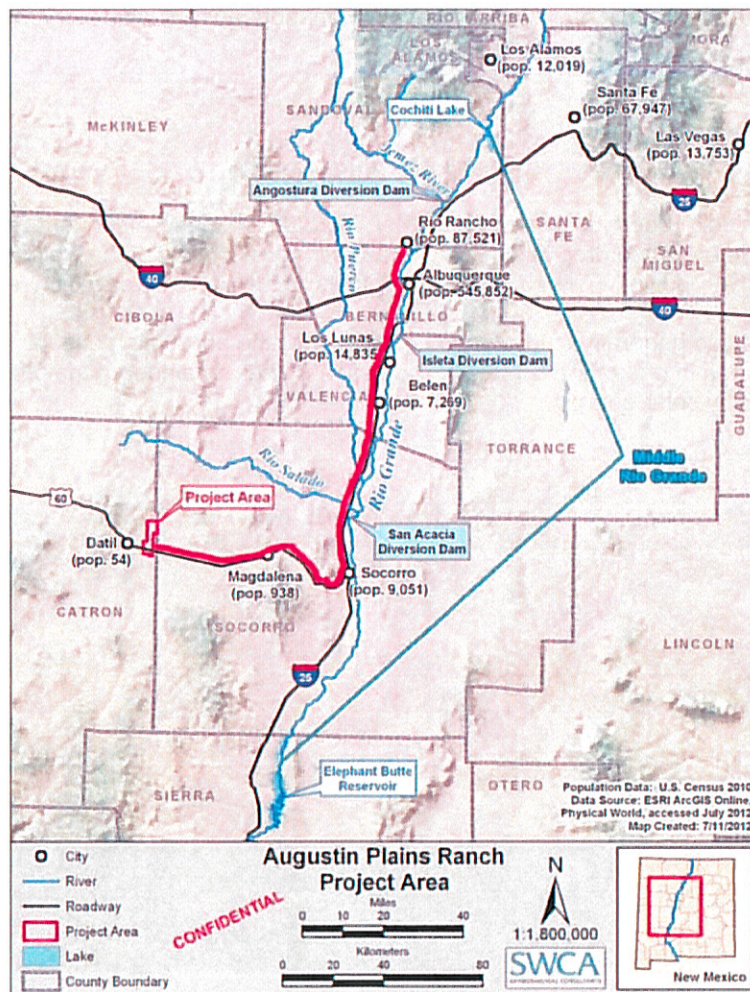


Figure 6: Pipeline Route



2. WATER USES

Project Benefits

This project has broad potential benefits for the State of New Mexico, for its citizens and for several of its institutions. The construction and operation of the project will directly create jobs and economic activity, participating users will benefit from increased, more consistent and cheaper water supply, and the augmentation of the Rio Grande, either through return flows or direct supply, will benefit the population throughout the valley and the State as a whole.

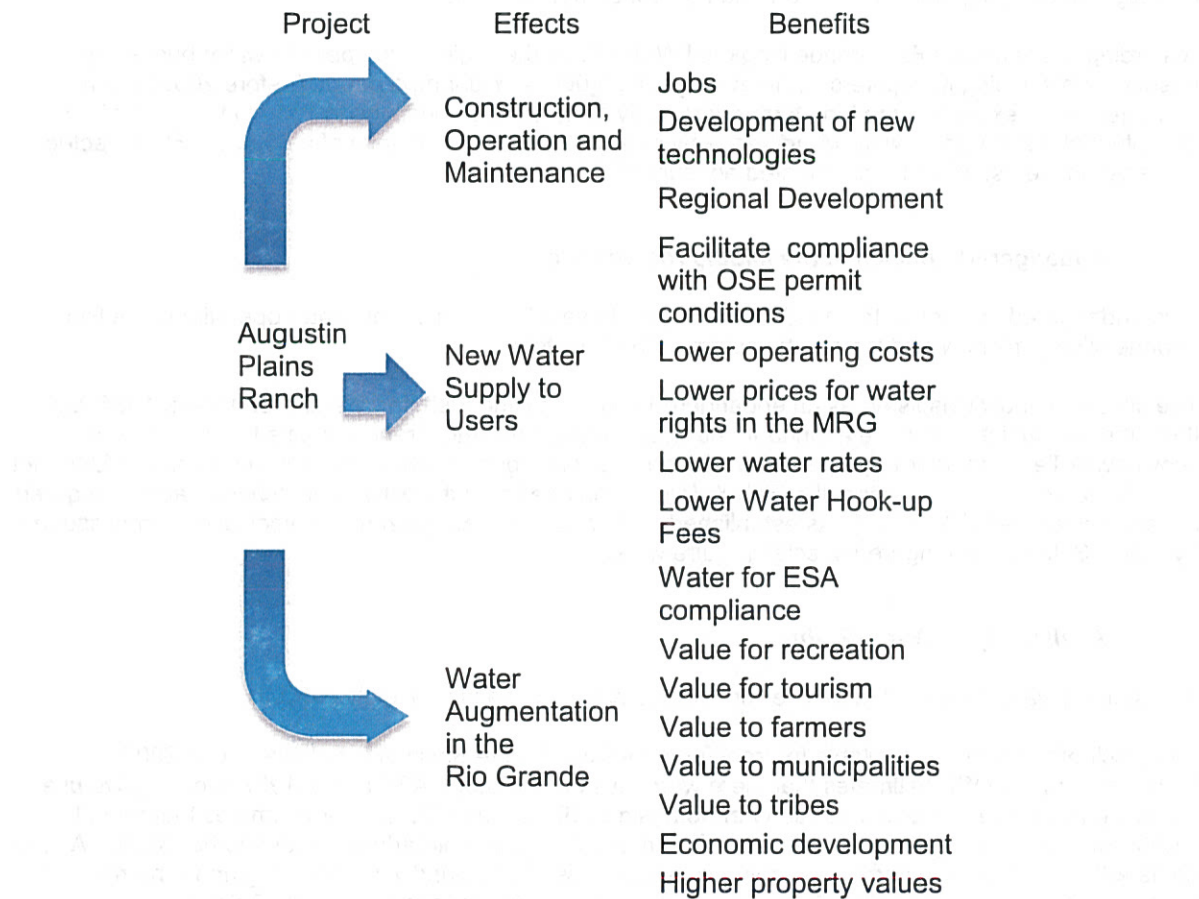


Figure 7: Project Benefits



Water Availability in the Middle Rio Grande

It is widely recognized that New Mexico's water supplies are over-utilized and, in the case of groundwater, dwindling. A regional drought has plagued the Southwest for the past decade, exacerbating water shortages, impacting the local and regional economies, and stressing the rivers and riparian habitats.

Stakeholders have litigated on the management of the limited water. Even after the current drought ends, New Mexico's water supply will continue to present a serious challenge to the state.

More than half of New Mexico's population lives in the MRG, mostly concentrated in the greater Albuquerque metropolitan area. In this region, state and federal agencies must manage supplies for endangered species, other wildlife, and human consumptive needs.

According to the Middle Rio Grande Regional Water Plan, the region overspent its water budget by unsustainably mining its aquifers by an average of 55,000 AFY during a period (before 2000) when average rainfall exceeded the long term average by 15 to 18%. Projections to 2050 in the Water Plan indicate that water withdrawals will increase by nearly 120,000 AFY in spite of a 65,000 AFY projected decrease in the use of water by irrigated agriculture.

Endangered Species in the Middle Rio Grande

Two endangered species in the middle Rio Grande have a large impact on water operations: the Rio Grande silvery minnow and the southwestern willow flycatcher.

The silvery minnow was listed as an endangered species by the Fish and Wildlife Service in 1994. By then, the fish, which was once abundant and widespread in the Rio Grande and its tributaries from Brownsville Texas to near Espanola New Mexico, was only found between Cochiti Dam and the Elephant Butte Reservoir delta. Likewise, the Fish & Wildlife Service listed the willow flycatcher as an endangered species under the ESA in 1995. As established in litigation and recognized in biological opinions issued by USFWS, these endangered species require water.

Availability of Water Rights

Transferring water rights in the Middle Rio Grande has become increasingly difficult.

The stock of water rights available for transfer in the Rio Grande Basin is very limited: In a 2007 Memorandum the OSE estimates that there were less than 100,000 AFY of pre-1907 consumptive use surface rights in the entire Middle Rio Grande basin in 1919. The OSE further estimates that roundly 21,000 AFY of these rights have been transferred out of irrigation already and that another 38,000 AFY of rights will have to be transferred in coming years as a result of groundwater pumping under permits that have already been issued by the OSE. The sum of these two categories of pre-1907 rights—already transferred and projected to be transferred—comprises approximately sixty per cent of the total stock of valid irrigation rights estimated above. Moreover there is no guarantee that the 38,000 AFY of irrigation rights needed to satisfy existing permit conditions is available for efficient and economically viable transfer.

There are also additional legal impediments which will further restrict the water rights market in New Mexico. For example, until recently, county subdivisions in New Mexico could be based on water



obtained from domestic wells. In practice, some developers were selling the water rights associated with their lands, and relying on smaller domestic wells for county approval of their subdivisions. The New Mexico Legislature recently eliminated this practice. Subdivisions are now required to obtain a new State Engineer permit or a commitment from an existing water utility with sufficient water rights. By eliminating the ability of subdivision developers to rely on domestic wells, the new legislation puts further pressure on the water rights market.

APR's plan to build a pipeline to the Albuquerque metropolitan area contributes to solving this problem by bringing new water to the place where it is needed.

Water Users in the MRG

Overview

APR has analyzed the demand for water in the MRG. Even under conservative growth assumptions, future requirements for new water sources in Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe counties largely exceed 54,000 AFY and could be several times this amount under drought conditions.

The following paragraphs present a summary of public information on the demand for water in selected areas.

Rio Rancho

Rio Rancho's 2013 capital plan summarizes the city's water situation as follows:²

The city's acquisition liability is approximately 16,000 acre feet within the next 50 years under two OSE permits authorizing diversion (pumping) of up to 24,000 acre feet per year. The 2003 OSE permit requires acquisition of 728 acre feet of water rights every five years period through 2063....The 1979 permit requires an estimated rights acquisition of 56.7 acre feet per year.

In other words, the city is authorized to pump now, even though the volumes that it pumps are not presently offset by water rights which it owns. As discussed above, such water rights are not readily available in the Middle Rio Grande and the San Augustin Plains project would provide significant relief to the community. In addition to these legal requirements, Rio Rancho will likely need to purchase water rights in order to grow. The table below presents conservative growth numbers, although city officials have presented a requirement of up to 50,000 AFY for a population of 300,000³.

² Rio Rancho, "2013-2018 Infrastructure and Capital Improvement Plan", July 25, 2012, p. 137. Accessed from <http://ci.rio-rancho.nm.us/documents/24/313/Tab%208%20Water%20FY13%20CIP.PDF>

³ Presentation by Larry Webb, 57th Annual New Mexico Water Conference, Las Cruces September 2012



Year	Population	Yearly acre-foot use
2012	90,000	15,000
2025	144,000	24,000
2035	210,000	35,000

Figure 8: Actual and Projected Rio Rancho Water Use

In short:

- In 2012, Rio Rancho's population was close to 90,000, and the city pumped 15,000 AF.
- By 2025, the city may count 144,000 people and may need to pump all the 24,000 AF that it currently has legal rights to pump. This uses the growth projections from the 2010 Comprehensive Plan,⁴ and the current 15,000 AFY usage.⁵
- By 2035, under the same assumptions, the city may hit 210,000 people, and the extra people will require pumping an additional 11,000 AFY.

Albuquerque

The Albuquerque/Bernalillo County Water Utility Authority (ABCWUA) provides water and sewer services to the City of Albuquerque, and several surrounding areas. As the successor to the Water Department of the City of Albuquerque, ABCWUA has rights to 48,000 AFY of water from the San Juan-Chama Project. However, this resource is subject to the availability of water in the Upper Colorado Basin.

The San Juan-Chama Project can be imperiled by drought either in the Upper Colorado Basin or in New Mexico. If there is drought in the Upper Colorado Basin, which supplies the San Juan-Chama project with water, then less water may flow through that project. The Bureau of Reclamation has warned that this is a real possibility.⁶ Also native Rio Grande water is necessary to enable full use of the imported Project water.

The graphic below, from ABCWUA's asset management plan,⁷ shows that ABCWUA will need to increase its groundwater supplies. According to the same plan, Albuquerque proposes to increase recharge of the aquifer by 22,000 AFY.

⁴ Rio Rancho, "Comprehensive Plan", November 2010, p. PH-1 Accessed from [http://ci.rio-rancho.nm.us/documents/20/39/232/6-Pop-Housing%20Element-\(schbl\).PDF](http://ci.rio-rancho.nm.us/documents/20/39/232/6-Pop-Housing%20Element-(schbl).PDF)

⁵ City of Rio Rancho, Official Statement for Water and Wastewater System Refunding Revenue Bonds, Series 2013, April 24, 2013, p. 28. Accessed from <http://emma.msrb.org/ER663539-ER515225-ER917834.pdf>

⁶ John Fleck, "Drought May Cut Chama Water Deliveries", Albuquerque Journal, December 5, 2012. Accessed from <http://www.abqjournal.com/main/2012/12/05/news/drought-may-cut-chama-water-deliveries.html>

⁷ Albuquerque Bernalillo County Water Utility Authority, "Asset Management Plan", 2011, p. 52. Accessed from <http://www.abcwua.org/pdfs/amp2011.pdf>

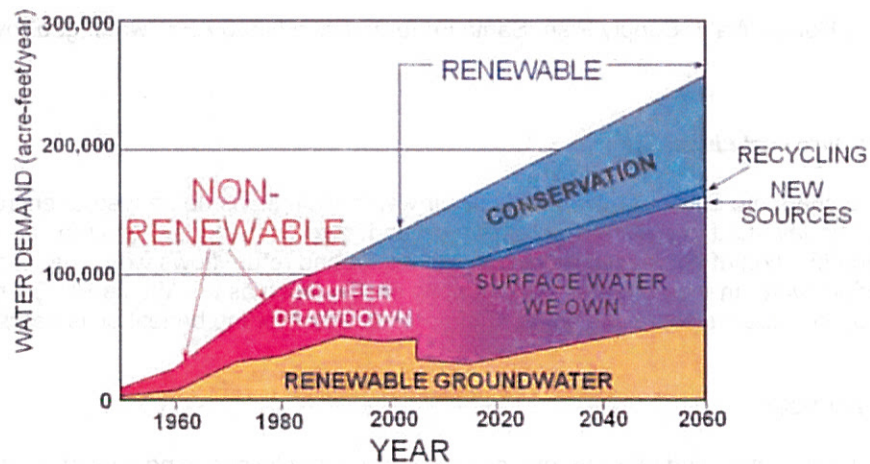


Figure 9: ABCWUA Water Budget

Other Municipalities

Municipalities along the pipeline

Other municipalities along the pipeline route have additional water needs. For example, last year, the well in Magdalena ran dry.⁸ As this emergency situation demonstrates, these communities could greatly benefit from a safe and plentiful source of water.

Santa Fe

Santa Fe is active in the water rights market because of its growth and real estate policies. Because Santa Fe ordinances require developers to bring water rights to the City in order to obtain building permits, the developers themselves purchase the water rights in the market and transfer them to the City. The combination of relative affluence and City requirements has led developers in Santa Fe to pay premium prices for water rights to ensure prompt fulfillment of their needs.

The city's website states:⁹

⁸ Susan Montoya Brian, "Magdalena runs out of water due to drought", Las Cruces Sun-News from the Associated Press, June 5, 2013. Accessed from http://www.lcsun-news.com/las_cruces-news/ci_23395674/magdalena-runs-out-water-due-drought

⁹ Santa Fe, "Water Right Purchasing Program". Accessed from <http://www.santafenm.gov/index.aspx?NID=2311>.



"The City of Santa Fe is interested in purchasing Middle Rio Grande Valley pre-1907 priority date surface water rights. If you have water rights to sell, please contact Dale Lyons at 955-4204. The City's current offer is \$12,000 per acre foot (consumptive use)."

In its 2008 Long Range Water Supply Plan, Santa Fe forecasts a 5,500 AFY "water gap" by the year 2045¹⁰.

Agriculture and Livestock

Farmers and ranchers are affected by drought. Their water allotment is decreased or entirely eliminated at times, and they have had to switch to expensive groundwater pumping, switch crops or stop producing entirely. The combination of decreased municipal diversions and return flows would benefit agricultural users. In addition, water management and distribution entities such as the Middle Rio Grande Conservancy District could elect to use some of the project water for the benefit of its users.

Instream Uses

The Bureau of Reclamation and other federal agencies are currently spending tens of millions of dollars purchasing water, pumping water into the Rio Grande, augmenting flows through other activities, managing endangered species, and participating in various lawsuits.

The Bureau supplements and conserves water in the Rio Grande from two principal sources: the San Juan-Chama Project (SJCP) and the Low-Flow Conveyance Channel (LFCC).

In the case of the SJCP, the Bureau of Reclamation leases water from SJCP participants who may be receiving more than they need in that year. For instance, in May of 2013, the Bureau of Reclamation leased 40,000 acre-ft. of SJCP water.¹¹ However, water like this is only available in years when the SJCP has supplementary water, or when SJCP participants have stored that water from previous years, and the USBR has warned that there may be less than the allocated amounts of water in the SJCP in some years.

¹⁰ City of Santa Fe, "Long-Range Water Supply Plan", September 2008, p. 3-4. Accessed from <http://www.santafenm.gov/DocumentView.asp?DID=3056>

¹¹ Dennis Domrzalski, "ABCWUA will lease water to feds to keep Rio Grande flowing", Albuquerque Business First, May 31, 2013. Accessed from <http://www.bizjournals.com/albuquerque/news/2013/05/31/abcwua-will-lease-water-to-feds.html>. Also Albuquerque Bernalillo County Water Authority, File C-13-12, passed 5/22/2013. Accessed from <http://abcwua.legistar.com/LegislationDetail.aspx?ID=1429016&GUID=79686C7A-814E-41B9-BC35-DB2005F3DAE4>

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BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE APPLICATION BY)
AUGUSTIN PLAINS RANCH, LLC FOR PERMIT)
TO APPROPRIATE GROUNDWATER IN THE)
RIO GRANDE UNDERGROUND WATER BASIN)
OF NEW MEXICO)

Hearing No. 09-096

OSE File No. RG-89943

OFFICE OF THE
STATE ENGINEER
HEARINGS UNIT
SANTA FE, NM

ORDER DENYING APPLICATION

This matter came on before Andrew B. Core, the State Engineer's designated Hearing Examiner, at a hearing held on February 7, 2012, in Courtroom 1 of the Socorro County Courthouse in Socorro, New Mexico to consider a Motion to Dismiss Application (Motion 1), filed by a group of approximately 80 Protestants represented by New Mexico Environmental Law Center (ELC Group) on February 11, 2011 and a Motion to Dismiss Application for Permit to Appropriate Underground Water (Motion 2), filed by Protestant Middle Rio Grande Conservancy District (MRGCD) on February 11, 2011. The parties appeared as follows: John B. Draper, Esq., and Jeffrey J. Wechsler, Esq., represented Applicant Augustin Plains Ranch, LLC (Ranch); R. Bruce Fredrick, Esq., represented Protestant ELC Group; Steven Hernandez, Esq., represented Protestant MRGCD; Jennifer M. Anderson, Esq., represented Protestant Kokopelli Ranch, LLC; Kate Hoover represented Protestant Navajo Nation; Seth Fullerton, Esq., represented Protestant Last Chance Water Co.; George Chandler, Esq., represented Protestant Monticello Community Ditch Association; Janis E. Hawk, Esq., represented Protestant Pueblo of Acoma; Christopher Shaw, Esq., represented Protestant NM Interstate Stream Commission; Samuel D. Hough, Esq., represented Protestant Pueblo of Santa Ana; Richard Mertz, Esq., represented Protestant University of New Mexico; Sherry J. Tippet, Esq., represented Protestants Luna Irrigation Ditch, Cuchillo Valley Acequia Association and Salomon J. Tafoya; Ron Shortes, Esq., represented Protestants Shortes XX Ranch, Board of County Commissioners for Catron County, Sandra Carol Coker, Ronald Goecks, Cynthia S. Lee, John Pemberton, Darnell & Montana Pettis, and the Walkabout Creek Ranch; and Stacey J. Goodwin, Esq., and Jonathan Sperber, Esq., represented the Water Rights Division of the Office of the State Engineer.

During the period from February 15, 2011 to May 17, 2011, several parties to the captioned matter each filed briefs questioning the adequacy of the Application, joinders to the motions to dismiss, responses to the motions to dismiss, and replies to the responses. Having examined all of the pleadings and considering the arguments presented at hearing, the Hearing Examiner finds the following and recommends to the State Engineer the following Order denying the subject Application.

1. The State Engineer has jurisdiction of the parties and subject matter.
2. The jurisdiction of the State Engineer is invoked pursuant to Articles 2, 5 and 12 of Chapter 72 NMSA 1978.
3. The relief sought by Motion 1 and Motion 2 are, in effect, the same.
4. A separate hearing for each of the motions is unwarranted.
5. NMSA section 72-12-3(A) states (in relevant parts): "In the application, the applicant **shall** designate: ...(2) the beneficial use to which the water will be applied; and ...(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." (emphasis added)
6. NMSA section 72-12-7(C) states (in relevant part): "If 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...."
7. NMSA section 72-5-7 states (in relevant part): "[The state engineer] may also refuse to consider or approve any application or notice of intention to make application ... if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state."
8. The face of the subject amended Application requests almost all possible uses of water, both at the Ranch location and at various unnamed locations within "Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin..." but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation of whether the proposed appropriation would impair existing rights or would not be contrary to the

conservation of water within the state or would not be detrimental to the public welfare of the state.

9. The Notice of Publication for the subject amended Application suggests that 4,440 acres of land on the Ranch property would be irrigated from the proposed 37 wells, but applying the requested 54,000 acre-feet per year of proposed diversion to that acreage would result in a crop irrigation requirement (CIR) of approximately 12.16 acre-feet of water per acre per year.
10. Within the Rio Grande Underground Water Basin, the usual administrative practice of the State Engineer is to recognize a CIR of 3 acre-feet of water per acre per year diversion.
11. Applying 12.16 acre-feet of water per acre per year to any land within the Rio Grande Underground Water Basin would be contrary to sound public policy.
12. Attachment B to the subject Application states (in relevant part): "there are extraordinary potential uses of the water that could support the State of New Mexico as a whole. These include providing water to the State of New Mexico to augment its capacity to meet compact deliveries to the State of Texas on the Rio Grande at Elephant Butte dam."
13. The New Mexico Interstate Stream Commission is the only entity authorized to administer "compact deliveries to the State of Texas on the Rio Grande at Elephant Butte dam."
14. The New Mexico Interstate Stream Commission is not a co-applicant to the subject Application.
15. Attachment B to the subject Application states (in relevant part): "Preliminary studies indicate the water resources could be utilized to support municipalities in the region, including Datil, New Mexico, Magdalena, New Mexico and Socorro, New Mexico."
16. Of the listed municipalities, none is a co-applicant to the subject Application.
17. An application is, by its nature, a request for final action.
18. 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.
19. 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.

20. The face of the subject Application does not make it clear whether irrigation is contemplated only on any lands within the Ranch, or at some other, unnamed, locations.
21. Consideration of an application that lacks specificity of purpose of the use of water or specificity as to the actual end-user of the water would be contrary to sound public policy.
22. Consideration of an application to pump groundwater from a declared underground water basin which will then be released into a natural stream or watercourse without specific identification of delivery points and methods of accounting for that water would be contrary to sound public policy.
23. To consider or approve an Application that, on its face, is so vague and overbroad that the effects of granting it cannot be reasonably evaluated is contrary to sound public policy.
24. In keeping with NMSA section 72-5-7, Application RG-89943, filed with the State Engineer on October 12, 2007 and on May 5, 2008, should not be considered by the State Engineer.
25. Application RG-89943, filed with the State Engineer on October 12, 2007 and on May 5, 2008, should be denied without prejudice to filing of subsequent applications.
26. Hearing 09-096 should be dismissed.

ORDER

Application RG-89943, filed with the State Engineer on October 12, 2007 and on May 5, 2008, is denied and Hearing No. 09-096 is dismissed.

Andrew B. Core

Andrew B. Core
Hearing Examiner

I ACCEPT AND ADOPT THE ORDER OF THE HEARING EXAMINER,
THIS 30th DAY OF March, 2012


Scott A. Verhines

SCOTT A. VERHINES, P.E.
NEW MEXICO STATE ENGINEER



CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Order was mailed to all parties of record this 30th day of March 2012. A complete copy of the service list may be obtained at the OSE website, www.ose.state.nm.us. Click on the "Help Me Find" menu, scroll down to "Hearing Information" then click on "Augustin Plains Ranch, LLC Service List - HU No. 09-096. This service list will be updated as necessary.



Reyna Aragon, Administrator
(505) 827-1428

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

No. D-728-CV-2012-008

Judge: Reynolds

**AUGUSTIN PLAINS RANCH, LLC,
Applicant/Appellant,**

vs.

**SCOTT A. VERHINES, P.E.,
New Mexico State Engineer/Appellee,**

and

**KOKOPELLI RANCH, LLC, *et al.*,
Protestants/Appellees.**

MEMORANDUM DECISION ON MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on a motion for summary judgment filed by Protestants against Augustin Plains Ranch, LLC (“Applicant”). Pursuant to *Lion’s Gate Water v. D’Antonio*, 2009-NMSC-57, ¶ 23, 147 N.M. 523, 226 P.3d 622, “a district court is limited to a de novo review of the issue before the State Engineer.” See N.M. Const. art. XVI, § 5. The sole issue on appeal is whether the State Engineer was justified in denying Applicant’s application for an underground water permit, without holding an evidentiary hearing.

I. STANDARD OF REVIEW

Under Rule 1-056, NMRA, “[s]ummary judgment is appropriate where there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. Where reasonable minds will not differ as to an issue of material fact, the court may

properly grant summary judgment. All reasonable inferences are construed in favor of the non-moving party.” *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, ¶ 16, 141 N.M. 21, 150 P.3d 971 (citations omitted).

II. MATERIAL FACTS

The only facts under consideration in this appeal are two documents: Applicant’s amended application (Exhibit “C” to Protestants’ Memorandum in Support of Motion for Summary Judgment), and an e-mail modification of the amended application (Exhibit “D” to Protestants’ Memorandum in Support of Motion for Summary Judgment), because Applicant argues that the amended application, as modified, supersedes the original application filed on October 12, 2007 (Exhibit “B” to Protestants’ Memorandum in Support of Motion for Summary Judgment). It may reasonably be inferred that an amended application supplants an original application; therefore, the original application will not be analyzed.

If the amended application, as modified, violates New Mexico law, the motion should be granted, and the State Engineer’s decision should be affirmed. Otherwise, the motion should be denied with a remand to the State Engineer to hold an evidentiary hearing on the application.

A. The Amended Application

On May 5, 2008, Applicant filed with the Office of State Engineer (“OSE”) an Amended Application for Permit to Appropriate Underground Water, replacing an earlier application submitted to the OSE on October 12, 2007, collectively identified as Application RG-89943, to divert and use waters from the San Agustin Basin in Catron County, New Mexico. Paragraph 1 of the amended application, on an OSE application

form, asks for the applicant's name, contact information and address, which Applicant answered.

Paragraph 2 is entitled "Location of Wells." Applicant typed, "See Attachment A for description and location of proposed wells." Attachment A details locations of 37 proposed wells on Applicant's ranch in Catron County, New Mexico.

For Paragraph 3, "Well Information," Applicant typed, "See Attachment A," which lists the top depth of the wells (3000 feet), the casing diameter (20 inches), and the expected yield of each well (2000 gallons per minute). For the name of the well driller and driller license number, Applicant typed, "Not yet determined."

Paragraph 4 is entitled, "Quantity," for which Applicant typed "54,000" acre-feet per annum for both consumptive use and diversion amount.

Paragraph 5, "Purpose of Use," lists various purposes with blanks following each purpose: domestic, livestock, irrigation, municipal, industrial, commercial and "other (specify)." Applicant checked each blank and added other purposes of use in the line following "other": environmental, recreational, subdivision and related; replacement and augmentation. Applicant left blank Paragraph 5's last line, "Specific use: _____."

On the first line below Paragraph 6's heading, "Place of Use," Applicant typed, "See Attachment B for place of use description," and left blank the spaces in the following lines:

_____ acres of land described as follows:

Subdivision of Section (District or Hydrographic Survey)	Section (Map No.)	Township (Tract No.)	Range	Acres
--	----------------------	-------------------------	-------	-------

_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

Attachment B, "Places of Use," states that "the proposed places of use are: A. Within the exterior boundaries of Augustin Plains Ranch ("Ranch"), which is located in Catron County, New Mexico. The location of the Ranch is depicted on the attached boundary map as Exhibit 1 and further described as follows" Attachment B then provides a page and a half of legal description for the ranch. Following that legal description, Attachment B states other proposed places of use:

B. Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.

A question at the bottom of Paragraph 6 asks, "Who is the owner of the land?" Applicant answered, "Augustin Plains Ranch, LLC."

The final paragraph of the OSE form, Paragraph 7, is entitled, "Additional Statements or Explanations," with blank lines provided for an applicant to complete.

Applicant wrote:

This Amended Application is an amendment of Application No. RG-89943 filed October 12, 2007. The purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B, in order to reduce the current stress on the water supply in the Rio Grande Basin in New Mexico. Any impairment of existing rights, in the Gila-San Francisco Basin, the Rio Grande Basin, or any other basin, that would be caused by the pumping applied for, will be offset or replaced.

The statements in the completed form were then acknowledged as being true to the best of the knowledge and belief of the signatory, a legal representative of Applicant.

B. Modification to the Amended Application

On June 26, 2008, an attorney for Applicant sent to the OSE an e-mail, with a heading of “Modified Application” and with a subject line of “Augustin Plains Ranch Application – Irrigated Acreage on the Ranch.” The substance of the e-mail reads as follows:

Please accept the following as a modification of the Augustin Plains Ranch, LLC Amended Application for Permit to Appropriate Underground Water, filed May 5, 2008. With regard to the purpose and place of use, to the extent that the applied-for water will be used for irrigation on Augustin Ranch, the irrigation will be limited to 120 acres in each of the following quarter sections: [Thereafter follows a description of 37 quarter sections]

More specifically, to the extent that the applied-for water will be used for irrigation on Augustin Ranch, the irrigation will be limited to 120 acres within a 1,290 foot radius of each of the 37 well locations listed on Attachment A to the Amended Application. The total acreage to be irrigated on the Ranch will be 4440 acres.

Modified Application (Exhibit D to Protestants’ Memorandum in Support of Motion for Summary Judgment).

III. DISCUSSION

The right to use water in New Mexico is based upon the New Mexico Constitution, which expresses the water law of prior appropriation existing at the constitution’s adoption a century ago: “Although ‘[t]he water in the public stream belongs to the public,’ *Snow v. Abalos*, 18 N.M. 681, 693, 140 P. 1044, 1048 (1914), unappropriated water is ‘subject to appropriation for beneficial use.’ N.M. Const. art. XVI, § 2. Once appropriated, ‘[p]riority of appropriation shall give the better right.’ N.M. Const. art. XVI, § 2.” *State v. City of Las Vegas*, 2004-NMSC-009, ¶ 28, 135 N.M. 375, 89 P.3d 47.

Applicant seeks to establish a water right, “a process that takes a period of time.” *Hanson v. Turney*, 2004-NMCA-069, ¶ 8, 136 N.M. 1, 94 P.3d 1, citing *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 473, 362 P.2d 998, 1002-03 (1961) (accepting that it may require years to commence an appropriation, drill a well, install equipment, and dig ditches, all as prerequisite to applying the water to a beneficial use), and *Millheiser v. Long*, 10 N.M. 99, 106-07, 61 P. 111, 114 (1900) (noting that the building of ditches, flumes, and other works are necessary to divert water and apply it to beneficial use).

A. Statutory Procedure for Obtaining a Groundwater Permit

Under New Mexico law, there is a statutory procedure for establishing the right to use water, beginning with obtaining a water permit for surface water pursuant to Chapter 72, Article 5, NMSA 1978, and for underground water pursuant to Chapter 72, Article 12, NMSA 1978. As stated in *Hanson v. Turney*, “A water permit is an inchoate right, and ‘is the necessary first step’ in obtaining a water right. See *Green River Dev. Co. v. FMC Corp.*, 660 P.2d 339, 348-51 (Wyo. 1983). It is ‘the authority to pursue a water right, a conditional but unfulfilled promise on the part of the state to allow the permittee to one day apply the state’s water in a particular place and to a specific beneficial use under conditions where the rights of other appropriators will not be impaired.’ *Id.* at 348.” *Hanson v. Turney*, 2004-NMCA-069, ¶ 9.

After declaring that underground waters with reasonably ascertainable boundaries belong to the public and are available for beneficial use, which is the basis, the measure and the limit of the right to use underground waters (NMSA 1978, §§ 72-12-1, 2), the Legislature prescribes the method for obtaining an underground water permit in NMSA 1978, § 72-12-3 (2001). Subsection A of Section 72-12-3 requires applicants seeking to

appropriate underground water for beneficial use to designate the following in their applications:

- (1) the particular underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated;
- (2) the beneficial use to which the water will be applied;
- (3) the location of the proposed well;
- (4) the name of the owner of the land on which the well will be located;
- (5) the amount of water applied for;
- (6) the place of the 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.

NMSA 1978, § 72-12-3(A) (2001).

No application can be accepted by the State Engineer unless all of the information required by Subsection A accompanies the application. Section 72-12-3(C). Upon the filing of an application, the State Engineer causes notice of the application to be published for three consecutive weeks in newspapers in the county where the well will be located and in each county where the water will be placed to beneficial use. Section 72-12-3(D). Objections may be filed within ten days of the last notice. *Id.* Subsection D then limits the persons who may object to the application:

Any person, firm or corporation or other entity objecting that the granting of the application will impair the objector's water right shall have standing to file objections or protests. Any person, firm or corporation or other entity objecting that the granting of the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state and showing that the objector will be substantially and specifically affected by the granting of the application shall have standing to file objections or protests; provided, however, that the state of New Mexico or any of its branches, agencies, departments,

boards, instrumentalities or institutions, and all political subdivisions of the state and their agencies, instrumentalities and institutions shall have standing to file objections or protests.

NMSA 1978, § 72-12-3(D) (2001).

If no objections or protests are filed, the State Engineer is required “to grant the application and issue a permit to the applicant to appropriate all or a part of the waters applied for, subject to the rights of all prior appropriators from the source,” if he finds that there are unappropriated waters or if 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. Section 72-12-3(E).

The State Engineer has two options for applications that are opposed or if he is of the opinion that the permit should not be issued. “He may deny the application without a hearing or, before he acts on the application, may order that a hearing be held.” Section 72-12-3(F).

If the State Engineer decides to grant an application, then the water user has “a reasonable time after an initial appropriation to put water to beneficial use, known as the doctrine of relation. *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 470-71, 362 P.2d 998, 1001 (1961); *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. at 824-25. ‘If the application to beneficial use is made in proper time, it relates back and completes the appropriation as of the time when it was initiated.’ *Hagerman Irrigation Co.*, 16 N.M. at 180, 113 P. at 825.” *State v. City of Las Vegas*, 2004-NMSC-009, ¶ 35, 135 N.M. 375, 89 P.3d 47. Thus, if the application in this case had been approved by the State Engineer, upon the actual appropriation of water to beneficial use, Applicant’s priority date would have been the date of his original application.

B. State Engineer's Decision

After accepting Applicant's original and amended application, as modified, the State Engineer published notices in a number of counties. Over 900 protests were filed. An OSE hearing examiner considered motions to dismiss and held a hearing on those motions. *See* Scheduling Order (Exhibit "E" to Protestants' Memorandum in Support of Motion for Summary Judgment). He then entered an "Order Denying Application," approved by the State Engineer on March 20, 2012 (Exhibit "A" to Protestants' Memorandum in Support of Motion for Summary Judgment).

The hearing examiner's findings and recommendations comprise 26 paragraphs. The first four deal with the State Engineer's jurisdiction, the relief sought and the lack of a need for separate hearings on the various motions to dismiss. Paragraph 5 points to several of the requirements in Section 72-12-3(A) relevant to the hearing officer's decision: "In the application, the applicant **shall** designate: . . . (2) the beneficial use to which the water will be applied; and . . . (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." (emphasis added by the hearing examiner)

After citing the State Engineer's statutory authority to deny a permit without a hearing (Paragraphs 6-7), in Paragraph 8 the hearing examiner finds the amended application to be facially invalid vis-à-vis the place of use and the beneficial use to which the water will be applied:

The face of the subject amended Application requests almost all possible uses of water, both at the Ranch location and at various unnamed locations within "Any areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin. . . ," but does not identify a purpose of use at any one location with sufficient specificity to allow for reasonable evaluation of whether the proposed

appropriation would impair existing rights or would not be contrary to the conservation of water in the state or would not be detrimental to the public welfare of the state.

Order Denying Application, ¶ 8.

While finding later in his decision that it is unclear whether irrigation is contemplated only on the Ranch (Paragraph 20), in Paragraphs 9-10, the hearing examiner discusses the amount of water proposed to be used for irrigation, assuming it is all to be used on the Ranch. By dividing the 54,000 acre-feet of water per acre per year (afy) requested by Applicant by the number of acres to be irrigated on the Ranch (4,440), the hearing officer finds that the application calls for a crop irrigation requirement (CIR) of 12.16 afy, much more than the three afy usually recognized by the State Engineer in his administrative practice. Therefore, applying 12.16 afy “to any land within the Rio Grande Underground Water Basin would be contrary to sound public policy.” Order Denying Application, ¶ 11.

Paragraphs 12 and 13 quote statements in the original application regarding potential uses for compact deliveries and for supporting municipalities. The hearing examiner notes that neither the Interstate Stream Commission, the only entity authorized to administer compact deliveries to the State of Texas, nor any municipality is a co-applicant. Order Denying Application, ¶¶ 13-16.

Stating that “an application is, by its nature, a request for final action,” and that “[i]t 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 hearing examiner finds that “[t]he 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.”

Order Denying Application, ¶¶ 17-19. The hearing examiner concludes it would be against sound public policy to consider an application that lacks specificity of purpose of the use of water, the actual end-user, specific identification of delivery points or methods of delivery. Order Denying Application, ¶¶ 21-22.

In its closing paragraphs, the Order Denying Application determines that the application is so vague and overbroad that it cannot be reasonably evaluated, contrary to public policy, that the application should not be considered, pursuant to NMSA 1978, § 72-5-7 (1985), that the application should be dismissed without prejudice to filing of subsequent applications, and that the hearing should be dismissed. Order Denying Application, ¶¶ 22-26.

IV. ANALYSIS

A. The State Engineer was required to deny the application if it violated New Mexico law.

The State Engineer has the authority to deny underground water permits without a hearing, NMSA 1978, § 72-12-3(F) (2001), a section in the groundwater permitting statutes which the State Engineer cites, albeit incorrectly, in his Order Denying Application, ¶ 6. Applicant argues that once the OSE accepted the application and published notice, the State Engineer could not reject the application without a hearing. Applicant's Response in Opposition to Motion for Summary Judgment, at 14-15. Section 72-12-3(C) provides that no application can be accepted by the State Engineer unless all of the information required by Subsection A accompanies the application. The OSE staff did determine that the form had been completed with all the information required, but it was within the State Engineer's authority, pursuant to Section 72-12-3(F), to deny the application without a hearing. The duties from the two subsections differ. The first

under Subsection C is an administrative task by OSE staffers to make sure an application is complete before proceeding to publication and submission to a hearing examiner for review. The hearing examiner then analyzes the substance of an application in light of New Mexico water law and the issues raised by protestants, if any.

If the acceptance by the OSE under Subsection C requires the hearing examiner under Subsection F to hold an evidentiary hearing, the statutory language in Subsection F allowing him to deny an application without a hearing would be negated. “[W]e must interpret the statute according to common sense and reason, *Sandoval v. Rodriguez*, 77 N.M. 160, 420 P.2d 308 (1966); give its words their usual and ordinary meaning unless a contrary intent is clearly indicated, *State ex rel. Duran v. Anaya*, 102 N.M. 609, 698 P.2d 882 (1985); give effect to every part of the statute, *Weiland v. Vigil*, 90 N.M. 148, 560 P.2d 939 (Ct. App.), cert. denied, 90 N.M. 255, 561 P.2d 1348 (1977); and construe it as a harmonious whole. *General Motors Acceptance Corp. v. Anaya*, 103 N.M. 72, 703 P.2d 169 (1985).” *Varoz v. New Mexico Bd. of Podiatry*, 104 N.M. 454, 456, 722 P.2d 1176 (S. Ct. 1986).

Section 72-12-3(F) provides the statutory authority for the State Engineer to deny an application without a hearing, but the State Engineer also cites a surface water statute as his authority to deny an underground water application, NMSA 1978, § 72-5-7 (1985), which provides in pertinent part that the State Engineer “may also refuse to consider or approve any application or notice of intention to make application . . . if, in his opinion, approval would be contrary to the conservation of water within the state or detrimental to the public welfare of the state.” *Order Denying Application*, ¶ 7; *see also Order Denying Application*, ¶ 24.

At oral argument on appeal, counsel for the State Engineer referred to *City of Albuquerque v. Reynolds*, 71 N.M. 428, 437, 379 P.2d 73, 79 (1962) as support for the State Engineer's policy of applying a statute found only in one part of the water code to both surface and groundwater issues. *City of Albuquerque v. Reynolds* does provide support for this policy for substantive issues once a water right is secured, but it does not provide support for confusing the procedural processes to obtain surface and groundwater permits. As quoted in *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶ 21, 143 N.M. 142, 173 P.3d 749, "There does not exist one body of substantive law relating to appropriation of stream water and another body of law relating to appropriation of underground water. The legislature has provided somewhat different administrative procedure [sic] whereby appropriators' rights may be secured from the two sources but the substantive rights, when obtained, are identical." *City of Albuquerque v. Reynolds*, 71 N.M. 428, 437, 379 P.2d 73, 79 (1962)." Accordingly, the surface water statute governing administrative procedures has no bearing on the State Engineer's decision to deny the underground water application in this case.

Section 72-12-3(F) does not explain under what circumstances the State Engineer may deny an application. The 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, 125 N.M. 302, 961 P.2d 147. If the application is facially invalid, that is, that on its face the application violates New Mexico law, the State Engineer had no authority to act other than to reject the application.

B. The application violates the underground water permitting statute and contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

In reviewing the State Engineer's decision de novo, this Court has determined that the application had to be denied by the State Engineer for the following reasons: (1) the application fails to specify the beneficial purpose and the place of use of water, contrary to NMSA 1978, § 72-12-3(A)(2),(6) (2001); and (2) the application contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

In this de novo review, this Court will not examine the argument of Protestants (Memorandum in Support of Protestants' Motion for Summary Judgment, at 12-13) that the application violated statutory notice provisions, because that is a secondary issue that would only be addressed if the application passed the threshold issue of facial validity. See *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, 147 N.M. 523, 229 P.3d. 622.

In *Lion's Gate*, the Supreme Court held that the State Engineer was barred from considering secondary issues such as impairment and conservation of water if as a threshold issue he determined that there was no water available to appropriate. *Id.*, 2009-NMSC-057, ¶ 27 ("If the State Engineer makes a pre-hearing determination that water is unavailable for appropriation, secondary issues that must otherwise be considered before a permit to appropriate water can be granted become irrelevant, because the State Engineer is required to reject the application without reaching those issues.")

Likewise in this de novo appeal, the State Engineer's decision was based on the application itself rather than the secondary issue of potential protestants' rights to notice. Under Section 72-12-3(F), the State Engineer can deny an application regardless

of protests if he determines, as he did here, that the threshold issue of validity vis-à-vis New Mexico water law requires him to reject an application on its face.

1. The application fails to specify the beneficial purpose and the place of use of water, contrary to NMSA 1978, § 72-12-3(A)(2),(6) (2001).

The statutory provision outlining the requirements for an underground water permit application is NMSA 1978, § 72-12-3 (2001). Subsection (A)(2) requires an applicant to designate “the beneficial use to which the water will be applied.” Applicant listed eleven uses in its amended application. Subsection (A)(6) requires an applicant to designate “the place of the use for which the water is desired.” For its proposed places of use Applicant identified 37 quarter sections on its ranch and “[a]ny areas within Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties that are situated within the geographic boundaries of the Rio Grande Basin in New Mexico.” Amended Application, Attachment B.

The State Engineer determined that the eleven proposed uses, in conjunction with the broad descriptions for place of use, were not sufficiently specific to allow the State Engineer to determine whether the application should be granted, because it was unclear where the water would be used and for what purpose. The State Engineer could not fulfill his statutory duty to evaluate “whether the proposed appropriation would impair existing rights or would not be contrary to the conservation of water in the state or would not be detrimental to the public welfare of the state.” Order Denying Application, ¶ 8.

On appeal, Applicant argues that nothing in the regulations or statutes prohibits an applicant from identifying multiple beneficial uses. Applicant’s Response in Opposition to Protestants’ Motion for Summary Judgment, at 10-11. Applicant also argues that the seven counties and the watershed boundaries of the Rio Grande are definite enough to

provide “sufficient information to allow interested parties to identify the legal subdivision where the water will be put to use.” Applicant’s Response in Opposition to Protestants’ Motion for Summary Judgment, at 12-13. Throughout its Response to Protestants’ Motion for Summary Judgment, Applicant argues that the application should be treated as a court complaint and be given the benefit of the doubt as to specificity until the case is heard on its evidentiary merits.

Unlike civil complaints brought under the original jurisdiction of a district court, this matter arises from a statutory permitting procedure before the State Engineer, requiring analysis of the statute governing the granting of an underground water permit. There is a dispute as to whether the statute requires specificity, and if so, whether the amended application meets the statutory specificity requirement. It is not clear, however, from a plain reading of Sections 72-12-3(A)(2) and (6) what the Legislature intended in regard to the level of specificity mandated. Therefore, the Court “must resort to construction and interpretation to ascertain legislative intent.” *Vaughn v. United Nuclear Corp.*, 98 N.M. 481, 485, 650 P.2d 3 (Ct. App. 1982).

As stated in *State v. Nick R.*, 2009-NMSC-050, ¶ 16, 147 N.M. 182, 218 P.3d 868, “The first step in any statutory construction is to try ‘to determine and give effect to the Legislature’s intent’ by analyzing the language of the statute,” quoting *Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.2d 3.

The language of Sections 72-12-3(A)(2) and (6) employ a singular noun for an application’s required beneficial “use” and “place” of use. The singular does not mean, however, that the statute requires an applicant to seek only one use in only one place per

application. There is a rule of statutory construction that states, “Use of the singular number includes the plural, and use of the plural number includes the singular.” NMSA 1978, § 12-2A-5(A) (1997), cited by *State v. McClendon*, 2001-NMSC-023, ¶ 16, 130 N.M. 551, 28 P.3d 1092.

Just because the underground water permitting statute may allow for designation of multiple uses and places of use does not mean that all or nearly all possible uses and huge areas of land for places of use can be stated in an application without being rejected for vagueness. There is no question that if no beneficial use or place of use was selected, then the application would have to be denied. In fact, it would have been rejected earlier by OSE staff pursuant to Section 72-12-3(C) as being incomplete. On the other end of the spectrum is when all of the choices for place of use are checked off and even more are added. By choosing all of the named options and including several more, there was no narrowing down or selection of use in the application itself, there was just an “all of the above” approach. As for place of use, designating “any” area within the seven-county Middle Rio Grande watershed opened up great uncertainty as to where Applicant’s pipeline would go and where it would be actually used, because the word “any” is a general term rather than specific.

Under Applicant’s view of the permit process, identifying the actual, specific use and actual, definite place of use would not be required until later in the process, which Applicant intimates would be developed through an evidentiary hearing, a hearing the State Engineer denied. If, however, an underground water permit application requires specificity, then the amended application failed to specify, that is, that it failed to particularize, Applicant’s plans for actual beneficial use of water and the actual place of

use for the water, thereby making it impossible for the State Engineer to perform his statutory duty of determining whether to grant the application and issue a permit. *See Tri-State Generation & Transmission Ass'n v. D'Antonio*, 2011-NMCA-015, ¶¶ 12-13, 149 N.M. 394, 249 P.3d 932, *reversed on other grounds*, *Tri-State Generation & Transmission Ass'n v. D'Antonio*, No. 32,704, slip op. (N.M. S. Ct. Nov. 1, 2012) (“The . . . permitting . . . statutes . . . require the State Engineer to evaluate factors such as beneficial use, availability of unappropriated water, and impairment of existing rights. In order to evaluate beneficial use, the State Engineer must assess the quantity, place of use, and purpose to which water has actually been applied. *See State ex rel. Martinez v. McDermett*, 120 N.M. 327, 330, 901 P.2d 745, 748 (Ct. App. 1995).”)

Other subsections of the statute can be read *in pari materia* with Subsection (A)(2) to determine whether “beneficial use” and “place of use” must be stated with specificity. *See State v. Gurule*, 2011-NMCA-042, ¶ 12, 149 N.M. 599, 252 P.3d 823 (“[A]s a rule of statutory construction, we read all provisions of a statute and all statutes *in pari materia* together in order to ascertain the legislative intent. *Roth v. Thompson*, 113 N.M. 331, 334, 825 P.2d 1241, 1244 (1992).”)

That the underground water permitting statute calls for specificity of beneficial use and place of use is supported by Subsection (A)(1), which requires applicants to designate “the **particular** underground stream, channel, artesian basin, reservoir or lake from which water will be appropriated.” NMSA 1978, § 72-12-3(A)(1) (2001) (emphasis added). Further, in Subsection D, in order to have standing, objectors to an application must prove that they “**will be** substantially and **specifically** affected by the granting of the application.” NMSA 1978, § 72-12-3(D) (2001) (emphasis added). It would be

anomalous for an applicant to be allowed to give general statements of intent to appropriate water for beneficial use yet require specificity for objectors. That over 900 protests were filed in this case demonstrates the absurdity of this result, if Applicant's interpretation of the statute were allowed to stand. "We do not construe a statute in a manner that is contrary to the intent of the legislature or in a manner that would lead to absurd or unreasonable results. *State v. Padilla*, 1997-NMSC-22, P6, 123 N.M. 216, 937 P.2d 492; *State v. Shafer*, 102 N.M. 629, 637, 698 P.2d 902, 910 (stating that statutes must be construed according to the purpose for which they were enacted and not in a manner which leads to absurd or unreasonable results)." *State v. Romero*, 2002-NMCA-106, ¶ 8, 132 N.M. 745, 55 P.3d 441.

New Mexico courts have long considered specificity to be a statutory requirement for an underground water permit. *Hanson v. Turney*, *supra* ("A water permit is . . . 'the necessary first step' in obtaining a water right. . . to one day apply the state's water in a **particular place** and to a **specific beneficial use**." (citations omitted); *Mathers v. Texaco, Inc.*, 77 N.M. 239, 248, 421 P.2d 771 (S. Ct. 1977) ("Here the applicant, Texaco, has **expressly specified the particular use** for which the water is to be appropriated and the **precise lands** to which the same is to be applied to accomplish the purpose of such use.") (emphasis added); *Cartwright v. Public Serv. Co.*, 66 N.M. 64, 110, 343 P.2d 654 (1959) (Federici, D.J., dissenting) ("The appropriator acquires only the right to take from the stream a given quantity of water for a **specified purpose**, *Snow v. Abalos*, 18 N.M. 681, 140 P. 1044, *supra*. Many times this Court has held that the priority of right is based upon the intent to take a **specified amount** of water for a **specified purpose** and he can

only acquire a perfected right to so much water as he applied to beneficial use.”)
(emphasis added)

Because Applicant failed to specify beneficial uses and places of use in its application and chose to make general statements covering nearly all possible beneficial uses and large swaths of New Mexico for its possible places of use, the State Engineer had no choice but to reject the application. The application does not reveal a present intent to appropriate water, but merely to divert it and explore specific appropriations later. See *State ex rel. Reynolds v. Miranda*, 83 N.M. 443, 493 P.2d 409 (S. Ct. 1972), citing *Harkey v. Smith*, 31 N.M. 521, 247 P. 550 (1926), for the proposition that the intent, diversion and use of water must coincide for an effective appropriation.

The lack of specificity for beneficial use and place of use is also demonstrated by analysis of another portion of the application and the State Engineer’s denial. The State Engineer denied the application based in part on his determination that applying 12.16 afy “to any land within the Rio Grande Underground Water Basin would be contrary to sound public policy.” Order Denying Application, ¶ 11. Although the State Engineer stated that the usual CIR approved by the OSE is 3 afy, he did not state that no other applications that exceed that amount had been approved by the OSE. There is not enough information in the Order Denying Application for this Court to state with certainty that the amount applied to irrigation by Applicant would actually be 12.16 afy and that that amount would be, as a matter of law, excessive.

The State Engineer’s difficulty in analyzing the application stems from the application’s inherent ambiguity. The application is uncertain as to what amounts, if any, would be used for irrigation on Applicant’s ranch because the application states its

purpose is to provide a pipeline for new and existing uses on the Rio Grande. That statement in Paragraph 7 of the application about a pipeline contradicts the modification to the amended application, which suggests that the 37 wells might provide irrigation to their respective 37 quarter sections, to the extent there would be any irrigation on the ranch resulting from the grant of a water permit. Because of the confusion between the application's stated pipeline purpose and the uncertain amounts to be used for irrigation on the ranch, the current application is invalid for lack of clarity.

The dismissal without prejudice allows Applicant to submit an application that meets the statutory requirement of specificity for beneficial use and place of use. But 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. *See Applicant's Response in Opposition to Motion for Summary Judgment*, at 28.

Contrary to Applicant's theory, the history and purpose of the underground water permitting statute, NMSA 1978, § 72-12-3 (2001), underscore the requirement of an actual, specific plan to be outlined in an application. When interpreting statutes, "we seek to give effect to the Legislature's intent, and in determining intent we look to the

language used and consider the statute's history and background.” *Lion's Gate Water v. D'Antonio*, 2009-NMSC-057, ¶ 23, 147 N.M. 523, 229 P.3d. 622 (citations omitted).

In *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 362 P.2d 988 (1961), the Supreme Court, faced with the question of the priority date of a well, explored the history of groundwater statutes in light of the doctrine of relation. “Long in his *Treatise on the Law of Irrigation* (2d Ed.) 126, describes the doctrine in these words: ‘The rights of an appropriator of water do not become absolute until the appropriation is completed by the actual application of the water to the use designed; but where he had pursued the work of appropriation with due diligence, and brought it to completion within a reasonable time, as against other appropriators, his rights will relate back to the time of the commencement of the work’” *State ex rel. Reynolds v. Mendenhall*, 68 N.M. at 470.

Mendenhall traces New Mexico's application of the doctrine of relation for surface water from the territorial cases of *Keeney v. Carillo*, 2 N.M. 480 (1883) (doctrine applied to waters of a spring, stream or cienega) and *Millheiser v. Long*, 10 N.M. 99, 61 P. 111 (1900) (applying the doctrine in “holding that a valid appropriation was accomplished when, after an intention had been formed, notice of such intent given, and the works constructed, water was diverted and put to beneficial use within a reasonable time”). *State ex rel. Reynolds v. Mendenhall*, 68 N.M. at 471.

Among other precedents, *Mendenhall* cites *Farmers' Dev. Co. v. Rayado Land & Irrigation Co.*, 28 N.M. 357, 213 P. 202 (1923), a case examining the common law of appropriation, the first territorial permitting statutes of 1905 that permissively replaced procedures for obtaining a water right under the common law of appropriation, and the

1907 territorial water code that mandated that permits replace the former common law rules of appropriation in securing a water right.

Mendenhall cites all these cases because the Supreme Court faced a problem as to how to determine the priority date for underground waters without clear statutory authority. The underground water statutes enacted first in 1927 and again in 1931 did not explicitly mention the doctrine of relation, whereas the 1907 water code covering surface waters did. After declaring that all surface waters belong to the public and are subject to appropriation for beneficial use, NMSA 1978, § 72-1-1 (1907), the Legislature explicitly declared that the doctrine of relation applied to appropriated surface waters: “All claims to the use of water initiated thereafter [after March 19, 1907] shall relate back to the date of the receipt of an application therefor in the office of the territorial or state engineer, subject to compliance with the provisions of this article, and the rules and regulations established thereunder.” NMSA 1978, § 72-1-2 (1907).

The Supreme Court in *Mendenhall* held that the doctrine of relation was implicitly the law for underground waters because the general law of appropriation applies equally to surface and ground water. *State ex rel. Reynolds v. Mendenhall*, 68 N.M. at 472, citing *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929) and *Pecos Valley Artesian Conservancy Dist. v. Peters*, 52 N.M. 148, 193 P.2d 418 (1948).

With a statutory permit, an appropriator, whether for surface or underground waters, has a clearly defined priority date, which is the date the application was received by the State Engineer, a great innovation in western water law in the late 19th and early 20th centuries. Samuel C. Wiel, in his landmark work, **Water Rights in the Western States**, described how permitting statutes grew out of the pre-existing laws and were

generally declaratory thereof, but the statutes provided an advantage over the older law by providing certainty as to which person had the priority of time and therefore priority of right. *See* N.M. Const. art. XVI, § 2, “Priority of appropriation shall give the better right.”

A permitting statute would “fix the procedure whereby a certain definite time might be established as the date at which title should accrue by relation.” Wiel, **Water Rights in the Western States**, §§ 368-69, pp. 398-99 (3d. ed. 1911). As Wiel noted in Section 368, both the old law and the new permitting statutes did not countenance anyone acting “the dog in the manger,” a reference to Aesop’s fable of a dog that blocks cattle from feeding, even though the dog itself has no appetite for hay. Wiel wrote, “Many attempted to secure monopoly of waters by merely posting notices or making a pretense at building canals, ditches, etc., and tried by this means to hold a right to the water against later comers who *bona fide* sought to construct the necessary works for its use.” *Id.*, § 368. *See also Cartwright v. Public Serv. Co.*, 66 N.M. at 110 (Federici, D. J., dissenting), referencing state policy prohibiting “the dog in the manger” tactics, quoting with approval *Harkey v. Smith*, 31 N.M. 521, 531, 247 P. 550 (1926) (“[N]o dog in the manger’ policy can be allowed in this state. [U]nless these waters can be and are beneficially used by plaintiffs, the defendants or others may use the same.”)

If its application had been approved, Applicant would have had a priority date of October 12, 2007, the date of the original application’s receipt by the OSE, after Applicant had applied the waters to beneficial use. In the meantime, however, while Applicant was deciding exactly how and where to apply the waters approved, Applicant would have had tentative priority over anyone else who after October 12, 2007 wanted to

use the same waters or waters hydrologically related thereto. For many years, Applicant would have been the dog in a very big manger, an entire underground water basin.

To place the size of Applicant's claim in perspective, this Court takes judicial notice of a New Mexico appellate decision describing the Pecos River settlement agreement among the Carlsbad Irrigation District, the State of New Mexico, the United States and other entities. This major settlement agreement, described in *State ex rel. Office of State Engineer v. Lewis*, 2007-NMCA-008, ¶¶ 44-45, 141 N.M. 1, 150 P.3d 375, "judicially establishes the maximum allowable annual diversion and storage rights of the United States and the CID, and the CID's right to deliver water for the members of the CID," in the amount of 50,000 afy. Applicant's claim over water, in the amount of 54,000 afy, is larger than the maximum water supply available for the Carlsbad Irrigation District's many users. 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.

In reviewing the application in light of the permitting statute's language, context, history and purpose, there is no genuine issue of material fact as to the application's invalidity regarding purpose and place of use. As admitted by Applicant, "[h]ow and whether Augustin will be able to put water to beneficial use is an issue that cannot be determined from the Application alone." Applicant's Response in Opposition to Motion for Summary Judgment, at 25. With no details for all of the required elements of a water permit, the State Engineer could not perform his statutory duties under NMSA 1978, § 72-12-3(E) (2001) of determining whether the proposed appropriation would impair

existing rights, be contrary to the conservation of water, or be detrimental to the public welfare. As a matter of law, the State Engineer could not allow an applicant to hold up other uses of water under the doctrine of relation, when the applicant broadly claims a huge amount of water for any use and generalizes as its place of use “any area” in seven counties in the Middle Rio Grande Basin, covering many thousands of square miles.

2. The application contradicts beneficial use as the basis of a water right and the public ownership of water, as declared in the New Mexico Constitution.

The State Engineer relied in part on “sound public policy” as grounds for summarily denying Applicant’s permit application. Order Denying Application, ¶¶ 21-23. Applicant argues that “the State Engineer lacks authority to deny an application that otherwise meets the statutory requirements on the basis of public policy.” Applicant’s Response in Opposition to Motion for Summary Judgment, at 17-18. A sound public policy at the heart of this case is the prior appropriation doctrine. *See Hydro Resources Corp. v. Gray*, 2007-NMSC-061, ¶ 17 (“New Mexico follows the doctrine of prior appropriation.”) *See also, Walker v. United States*, 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (discussing distinctions between the prior appropriation doctrine of the arid West and the riparian rights doctrine found primarily in the wetter East).

At the founding of this state, the people of New Mexico elevated the prior appropriation doctrine to constitutional status. N.M. Const. art. XVI, §§ 2, 3. Two fundamental elements of the prior appropriation doctrine are that the waters in the State of New Mexico belong to the public and that beneficial use is the basis, the measure and the limit of the right to the use of water. *Id.* Both of these elements of the prior appropriation doctrine are undermined if Applicant’s theory of securing water rights is allowed to stand.

Beneficial use is the basis, the foundation, for the establishment of rights to the use of water in New Mexico, “a fundamental principle in prior appropriation.” *State ex rel. Martinez v. City of Las Vegas*, 2004-NMSC-009, ¶ 33, 135 N.M. 375, 89 P.3d 47. In reaffirming the principle of beneficial use that had been undercut by the expansion of the pueblo rights doctrine in *Cartwright v. Public Serv. Co.*, 66 N.M. 64, 343 P.2d 654 (1959), the Supreme Court in 2004 reiterated that “[t]he principle of beneficial use is based on ‘imperative necessity,’ *Hagerman Irrigation Co. v. McMurry*, 16 N.M. 172, 181, 113 P. 823, 825 (1911), and ‘**aims fundamentally at definiteness and certainty.**’ *Crider*, 78 N.M. at 315, 431 P.2d at 48 (quotation marks and quoted authority omitted).” (emphasis added) Thus, not only does the underground water permitting statute require specificity, the constitutional mandate of beneficial use as the basis of a water right requires specificity of the actual place and use of water, along with all the other definite elements required to create a water right.

Applicant’s plan for the use of 54,000 afy reveals no definiteness or certainty other than the purpose of the application being the creation of a pipeline served by 37 wells, with the actual uses to be figured out later. Under this plan, diversion would supplant beneficial use as the fundamental principle of water use in New Mexico. One would only have to apply for a permit to divert a given quantity of water, no matter how large, and that person would then have a prior claim to the water over anyone else who actually had a specific plan for the water’s beneficial use.

Over a century ago, that plan was attempted when some irrigators diverted the entire flow of the Hondo River but failed to apply it to beneficial use before other irrigators had beneficially used the waters in the stream. The Territorial Supreme Court

in *Millheiser v. Long*, 10 N.M. 99, 104, 61 P. 111, 114 (1900) reversed a district court's determination of the parties' rights "according to priority of diversion, rather than priority of appropriation to a beneficial use." "Diversion," the Supreme Court noted, "is still but an element of that appropriation, and not equivalent to it." *Id.* From that day to the present, it has been the law in New Mexico that diversion alone is not beneficial use. See *State of New Mexico ex rel. Turney v. United States of America et al. and Baca* (Subfile Defendant), No. 30,824, slip. op. at 15-16 (N.M. Ct. App. October 24, 2012), citing *State ex rel. Martinez v. McDermott*, 120 N.M. 327, 331, 901 P.2d 745, 749 (Ct. App. 1995) for the proposition that "diversion alone is not beneficial use."

Applicant seeks to become the purveyor of water via pipeline to users along the Rio Grande. Admittedly, there is stress on the existing uses of water in New Mexico, and if diversion alone were the requirement for establishing priority of the use of water, Applicant's plan as stated in his amended application might suffice: "The purpose of this Amended Application is to provide water by pipeline to supplement or offset the effects of existing uses and for new uses in the areas designated in Attachment B, in order to reduce the current stress on the water supply in the Rio Grande Basin in New Mexico." Beneficial use, however, is still the basis for a water right, not diversion. Therefore, the application is invalid as a matter of law.

Even if there was such a radical shift from beneficial use to diversion as the basis for a water right, a proposition, like the pueblo rights doctrine, "as antithetical to the doctrine of prior appropriation as day is to night," *Cartwright*, 66 N.M. at 110, 343 P.2d at 686 (Federici, D.J., dissenting), quoted in *State v. City of Las Vegas*, 2004-NMSC-009, ¶ 38, a major pipeline project such as envisioned by Applicant to "reduce the current

stress on the water supply in the Rio Grande Basin” would effectively transfer the ownership of much of the waters in the San Agustin Basin to a private entity. Via its pipeline, Applicant would be the middleman conveying a large amount of the state’s waters to beneficial users, and perhaps to the state itself for Rio Grande compact deliveries, if those uses were first approved by Applicant and then ratified by the OSE.

But the public, not private entrepreneurs, own the water of this state. There is ample appellate authority emphasizing the public’s ownership of New Mexico’s waters. As quoted in the *Cartwright* dissent, “This Court said as late as 1947, in the case of *State ex rel. State Game Commission v. Red River Valley Company*, 51 N.M. 207, 224, 182 P.2d 421, 432: ‘. . . It is all yet public water until it is beneficially applied to the purposes for which its presence affords a potential use.’” *Cartwright*, 66 N.M. at 110. See also *The Albuquerque Land and Irrigation Co. v. Gutierrez*, 10 N.M. 177, 61 P. 357 (1900) (rejecting the riparian doctrine and holding that there is no private ownership of public streams in New Mexico); *Tri-State Generation & Transmission Ass’n v. D’Antonio*, No. 32,704, slip op. at 12 (N.M. S. Ct. Nov. 1, 2012) (“[W]ater belongs to the state which authorizes its use. The use may be acquired but there is no ownership in the corpus of the water. . . . **The state as owner of water has the right to prescribe how it may be used** The public waters of this state are owned by the state as trustee for the people.”) (citations omitted) (emphasis added)

Under its diversion plan for the 37 wells on its ranch, Applicant, rather than the state initially, would have the right to prescribe which entities and projects would be allocated a share in the 54,000 afy that could be pumped from the underground basin, with the final approval, of course, by the State Engineer, over the years as those projects

were conceived and given detail. The plan, if the application had been approved, would have removed the unappropriated waters in the San Agustin Basin from their character as public water, as described in *Red River Valley, supra*, prior to its being “beneficially applied;” the underground waters’ potential use would be enough to create Applicant’s claim of prior rights by a proposal for diversion alone, leaving the details of actual use for the future and under the direction of Applicant, who would thereby be a co-approver with the State Engineer for determining the beneficial uses for the underground waters.

This plan is reminiscent of that of Nathan Boyd at the turn of the last century for a dam and diversion of practically all of the waters in the Rio Grande flowing through the Mesilla and El Paso Valleys to be then sold to the local irrigators, a plan that was ultimately frustrated on technical grounds by the New Mexico territorial courts and the U.S. Supreme Court. *See United States v. Rio Grande Dam & Irrigation Co.*, 13 N.M. 386, 85 P.393 (1906), *affirmed by Rio Grande Dam & Irrigation Co. v. United States*, 215 U.S. 266, 54 L. Ed. 190, 30 S. Ct. 97 (1909); *see generally*, Phillips, Hall & Black, *Reining in the Rio Grande*, pp. 88-92 (2011).

In its Sur-Reply, Applicant likens its application to that of the Interstate Stream Commission (ISC) for a change of use/place of use for the waters of the Ute Reservoir, also known as Ute Lake, which application is attached as Exhibit A to Applicant’s Sur-Reply. Both applications seek to transport a large quantity of water through pipelines and both claim all possible uses of water for their ultimate users, but that is where the comparison ends.

The ISC, a state entity created by statute in 1935, is governed by Chapter 72, Article 14 of the New Mexico Code Annotated. Among its duties are the duties “to

develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise.” NMSA 1978, § 72-14-3 (1935). The ISC is also empowered to sell, lease and otherwise dispose of its waters from its water projects. *See* NMSA 1978, § 72-14-26 (1955). In 1950, the ISC became the state representative of the Canadian River Compact with the states of Texas and Oklahoma. In 1951, the New Mexico Legislature ratified the Canadian River Compact, opening the way for the ISC to impound the waters of the Canadian River below the Conchas Dam for conservation storage in Ute Reservoir of up to 200,000 acre-feet for subsequent release for multiple beneficial uses to satisfy future needs of the people of New Mexico. *See* NMSA 1978, § 72-15-2 (1951); *Oklahoma v. New Mexico*, 501 U.S. 221, 111 S. Ct. 2281, 115 L. Ed. 2d 207 (1991).

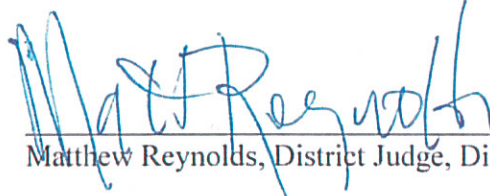
After many decades of preparation and obtaining funding, the ISC’s Ute pipeline project is nearing completion, as evidenced by its application for change of use/place of use granted in 2010. In the meantime, Ute Reservoir has served a beneficial use, among others, as a state park owned by the ISC: “The New Mexico interstate stream commission owns this lake. . . .” 18.17.3.21(P) NMAC.

Without ruling on the validity of the ISC’s application, which is not an issue before this Court, it is clear that Applicant is not the owner of the waters deep below its ranch in the San Agustin Basin and that Applicant has not already applied its waters to beneficial use as the ISC has, yet Applicant seeks to obtain incidents of ownership over the underground water basin by deciding who can use the waters and at what cost. Applicant attempts to privatize the powers of the ISC without any of the responsibilities of this public entity serving the owner of this state’s waters, the New Mexico public.

If Applicant's plan for a major diversion project were approved, the people of New Mexico would thereby receive a benefit, according to Applicant, of a steady water supply that could accommodate many existing and new uses along the Rio Grande at a time when there is growing stress on this precious resource. But Applicant's offer would come at a heavy price, that price being the relinquishment of the public's constitutionally guaranteed ownership of the state's waters. Under de novo review, this Court finds that, as a matter of law, the application violates the sound policy of public ownership in the waters of this state as declared in the New Mexico Constitution.

V. CONCLUSION

There are no genuine issues of material fact, and Protestants are entitled to judgment as a matter of law. The State Engineer's Order Denying Application is affirmed. Counsel for the State Engineer shall prepare the order reflecting this decision.


Matthew Reynolds, District Judge, Div. II



For immediate release:

April 2, 2012

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New Mexico State Engineer Denies Augustin Plains Ranch LLC Application

(SANTA FE, New Mexico) – The New Mexico State Engineer made a decision today to deny an application submitted by Augustin Plains Ranch LLC.

In October, 2007, the application was filed to obtain a permit to drill 37 wells to pump 54,000 acre/feet of water per year for all purposes of use, including delivery into the Rio Grande.

The application was amended in 2008, changing the maximum depth of the wells from 2,000 feet to 3,500 feet. The application originally had over 900 protestants, including the NM Interstate Stream Commission, the Middle Rio Grande Conservancy District, US Bureau of Reclamation; NM Dept of Game and Fish, Gila and Cibola National Forests, Catron County, Socorro County, Luna Irrigation Ditch, Monticello Irrigation District, several adjoining ranches, over 100 individuals and the Pueblos of: Santa Ana, Zuni, San Felipe, Isleta, Sandia, Acoma, Kewa (Santo Domingo) and the Navajo Nation. A motion hearing on Motions to Dismiss was held in Socorro on February 7, 2012.

The application was denied because it was vague, over broad, lacked specificity, and the effects of granting it cannot reasonably be evaluated; problems which are contrary to public policy.

Individuals who protested the application by Augustin Plains Ranch LLC argued that the drawdown of water could impact their wells and would have an adverse impact on their rural, agricultural lifestyle. Groups that protested, ranging from the Middle Rio Grande Conservancy District to the Navajo Nation to the Monticello Community Ditch Association, challenged the feasibility and reasonableness of transporting groundwater from a remote rural region of the state to the Rio Grande when no end user for the water has been identified.

(MORE)

As is standard practice, the denial is without prejudice, meaning the applicant can re-file if they chose to do so, and have the option of appealing the decision by the State Engineer in District Court.

"I've approached this appropriation with a thorough eye for the overall impacts this would have on New Mexicans," said State Engineer Scott Verhines. "As our society becomes increasingly dense in urban areas, we remain encouraging to innovations in water movement around the state. However, reasonable applications are those that identify a clear purpose for the use of the water, include reasonable design plans, and include specifics as to the end user of the water. All applications demand intense scrutiny with all decisions made based on sound science, reason and caution, as it is our obligation to New Mexico to effectively and transparently manage, allocate and protect its water resources. Along with the proof of clear demand for the water in one area, and an absence of harm to those in the basin area from which the water is taken, a commitment to proper backing and contractual arrangements must also be in place."

The Office of the State Engineer is charged with administering the state's water resources. The State Engineer has power over the supervision, measurement, appropriation and distribution of all surface and groundwater in New Mexico, including streams and rivers that cross state boundaries. The State Engineer is also Secretary of the Interstate Stream Commission.

#

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **AUGUSTIN PLAINS RANCH, LLC,**

3 Applicant-Appellant,

4 v.

5 **SCOTT A. VERHINES, P.E.,**

6 New Mexico State Engineer-Appellee,

7 and

8 **KOKOPELLI RANCH, LLC, et al.,**

9 Protestants-Appellees.

10 **ORDER**

11 Appellant, Augustin Plains Ranch, LLC filed a Clarification of Appellant's
12 Position on Supplemental Briefing representing that it "has no intention of pursuing
13 an evidentiary hearing on the merits of the [p]rior [a]pplication, or seeking any other
14 relief with respect to the [p]rior [a]pplication" that is the subject of this appeal.
15 Appellant asserts that an opinion from this Court concerning the prior application has
16 been rendered "unnecessary" because its new application has replaced and
17 superceded the prior application. Appellant's position accords with that of the State
18 Engineer who has represented to the Court that, in light of the fact that Appellant has
19 filed a new application that replaces and supercedes the prior application, the present

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE

FILED

AUG 19 2014

NO. 32,705

Wendy F. Jones

1 appeal is moot. We read Appellant's Clarification to constitute a request to this Court
2 to dismiss its appeal.

3 The **COURT ORDERS** that the Appeal in Cause No. 32,705 is dismissed.
4 The **COURT FURTHER ORDERS** that the hearing before this Court set for August
5 21, 2014, at 10:00 a.m. is vacated.

6 
7 JONATHAN B. SUTIN, Judge

8 
9 LINDA M. VANZI, Judge

10 
11 M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v.

No. 32,705

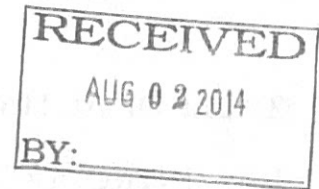
SCOTT A. VERHINES, P.E.,

New Mexico State Engineer-Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants-Appellees.



COURT OF APPEALS OF NEW MEXICO
FILED

AUG 01 2014

Wendy F. Jones

APPELLEE NEW MEXICO STATE ENGINEER'S
SUPPLEMENTAL BRIEF ON MOOTNESS

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STATEMENT OF COMPLIANCE

Pursuant to this Court's Order dated July 23, 2014, the body of this Supplemental Brief does not exceed five (5) pages in length.

TABLE OF AUTHORITIES

New Mexico Cases

<u>Eldorado at Santa Fe, Inc. v. Cook</u> , 1991-NMCA-117, 13 N.M. 33, 822 P.2d 672	2, 4
<u>Gunaji v. Macias</u> , 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008	1, 3
<u>Howell v. Heim</u> , 1994-NMSC-103, 188 N.M. 500, 882 P.2d 541	1
<u>Lion's Gate Water v. D'Antonio</u> , 2009-NMSC-057, 147 N.M. 523, 226 P.3d 622	4
<u>Mowrer v. Rusk</u> , 1980-NMSC-113, 95 N.M. 48, 618 P.2d 886.....	1
<u>Rio Arriba Cnty. Bd. of Educ. v. Martinez</u> , 1964-NMSC-227, 74 N.M. 674, 397 P.2d 471	3

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Section 72-12-3, NMSA 1978	3
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I. INTRODUCTION

Appellee, the New Mexico State Engineer (State Engineer) submits this supplemental brief in accordance with the New Mexico Court of Appeal's (Court) Order filed on July 23, 2014. As the Court's Order notes, Appellant Augustin Plains Ranch, LLC (APR) submitted for filing a new application to appropriate water with the State Engineer on July 14, 2014. APR's submission of a new application renders the issue before this Court on appeal moot. There is no longer a live controversy regarding whether APR was entitled to an evidentiary hearing on its original application. As a result, the Court should dismiss the appeal, remand the case to the district court with instructions to vacate its decision and dismiss the case, and direct APR to withdraw its original application.

II. ARGUMENT

A. The Court Should Not Decide Issues That Are Moot

The New Mexico Supreme Court has held that appeals in which the issue presented has become moot should be dismissed. Howell v. Heim, 1994-NMSC-103, ¶ 7, 188 N.M. 500, 882 P.2d 541 (citing Mowrer v. Rusk, 1980-NMSC-113, ¶ 13, 95 N.M. 48, 618 P.2d 886). "A case is moot when no actual controversy exists, and the court cannot grant actual relief." Gunaji v. Macias, 2001-NMSC-028, ¶ 9, 130 N.M. 734, 31 P.3d 1008 (internal quotation marks and citations omitted).

APR's Brief in Chief frames the issue presented on appeal as "whether the district court erred in upholding the State Engineer's refusal to consider the full merits of the application." BIC 1. Specifically, APR contends that under the statutory scheme, the State Engineer was required to hold an evidentiary hearing to allow APR an opportunity to present evidence in support of the application that is the subject of this appeal. BIC 12.

An actual controversy no longer exists as a result of the new application APR submitted for filing with the State Engineer on July 14, 2014, which replaces and supersedes the original application. APR's original application is no longer available for consideration by the State Engineer, since APR has chosen to no longer pursue it as evidenced by submitting for filing a corrected application. 19.27.1.11 NMAC. The State Engineer's decision on the existing application is no longer relevant, since the State Engineer will review APR's new application without regard to his prior decision, just as he would review any new application to appropriate water. Accordingly, the State Engineer's administrative action with respect to the original application is not a live controversy because that application has been replaced. *See Eldorado at Santa Fe, Inc. v. Cook*, 1991-NMCA-117 at ¶¶ 9, 16-17, 13 N.M. 33 at 35, 37, 822 P.2d 672 at 674, 676.

Even if the Court were to decide the appeal in APR's favor, it could not grant APR the relief it seeks since it has chosen to abandon the application that is

the basis for this appeal. A decision by this Court to remand the case to the State Engineer with instructions to hold an evidentiary hearing on the existing application would be pointless, since APR has abandoned the original application and should, in fact, withdraw it.

The Court should dismiss the appeal since the issue has been rendered moot. See Rio Arriba Cnty. Bd. of Educ. v. Martinez, 1964-NMSC-227, ¶¶ 9, 12, 74 N.M. 674, 397 P.2d 471 (noting that no appellate relief is available “where the questions involved, either by time or circumstances, have become moot” (internal quotation marks and citation omitted)); Gunaji, 2001-NMSC-028, ¶ 9.

B. If the Court Dismisses the Appeal, the District Court Opinion Should be Vacated and APR Directed to Withdraw Its Original Application

The State Engineer respectfully requests that, if the Court dismisses the appeal on the basis of mootness, it remand the case to the district court with instructions to vacate that court’s decision and direct APR to withdraw its application that is the subject of this appeal.


To the extent that the district court’s decision addresses issues that have now been mooted with the submission of new application, its opinion is a prohibited advisory opinion regarding administrative review of a withdrawn application. APR’s new application must proceed through the statutory review process set out in Section 72-12-3, NMSA 1978. The State Engineer’s prior decisions on a different application have no bearing on the review process for the

new application. Since advisory opinions are prohibited, the Court should direct the district court to vacate its opinion on the existing application, dismiss the district court appeal, and remand the original application to the State Engineer for withdrawal. See Lion's Gate Water v. D'Antonio, 2009-NMSC-057, ¶¶ 32, 36, 147 N.M. 523, 535-536, 226 P.3d 622, 634-635; Eldorado at Santa Fe, Inc., *supra*.

III. CONCLUSION

For the reasons set forth above, the State Engineer requests that the Court dismiss the appeal, remand the case to the district court with instructions to dismiss the case and vacate its opinion, and direct APR to withdraw the application that is the subject of this appeal.

Respectfully submitted,



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I certify that on August 1, 2014, I caused a true and correct copy of Appellee New Mexico State Engineer's Supplemental Brief On Mootness to be served by first-class United States mail, postage prepaid, on the following:

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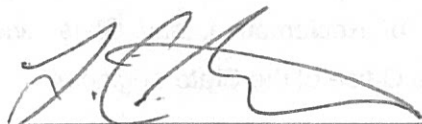
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By: _____



L. Christopher Lindeen

BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE APPLICATIONS BY)	Hearing No. 09-086, 09-087,
BERRENDO, LLC, ET. AL., FOR PERMIT TO)	09-088, 09-089 and 09-090
CHANGE PLACE AND PURPOSE OF USE OF)	
GROUNDWATER IN THE FORT SUMNER)	CONSOLIDATED
UNDERGROUND WATER BASIN IN THE)	
STATE OF NEW MEXICO)	

ORDER DENYING APPLICATIONS

This matter came on before Andrew B. Core, the State Engineer's designated Hearing Examiner, at a hearing held on December 1, 2010, in the State Capital Building in Santa Fe, New Mexico to consider a Motion to Dismiss Applications or In the Alternative Motion for Republication (Motion to Dismiss), filed by Protestant Pecos Valley Artesian Conservancy District (PVACD) on September 13, 2010. The parties appeared as follows: John B. Draper, Esq., and Jeffrey J. Wechsler, Esq., represented Applicants Berrendo LLC, VP Bar, Sunnyside Dairy, LLC, Peters Properties, LLC, Fallon Living Trust and Finney Farms, Inc.; Jennifer M. Anderson, Esq., represented Protestant Village of Fort Sumner; Steven Hernandez, Esq., represented Protestant Carlsbad Irrigation District; Seth Fullerton, Esq., represented Protestant Last Chance Water Co.; A. J. Olsen, Esq., represented Protestant PVACD; Alvin F. Jones, Esq., represented Protestants Berrendo Cooperative Water Users Assn., NM Farm & Livestock Bureau, Roswell Chamber of Commerce, Roswell-Chavez County Economic Development Corp., Town of Hagerman, and Town of Dexter; Albert L. Pitts, Esq., represented Protestants City of Roswell, City of Artesia, Eddy County Board of County Commissioners and County of Chaves; Amy Atchley, legal assistant, appeared for the NM Commissioner of Public Lands; Keitha Leonard, Esq., represented Protestant NM Interstate Stream Commission; Protestant Representative Dennis Kintigh appeared *pro se* on his own behalf; Joshua Mann, Esq., and Christopher B. Rich, Esq., represented Protestant U.S. Department of Interior, Bureau of Reclamation; and Chris Lindeen, Esq., represented the Water Rights Division of the Office of the State Engineer.



During the period from September 27, 2010 to November 24, 2010, several parties to the captioned matter each filed motions which incorporated and adopted the PVACD Motion to Dismiss (Berrendo Cooperative Water Users Assn, NM Farm & Livestock Bureau, Roswell Chamber of Commerce, Roswell-Chavez County Economic Development Corp., Town of Dexter, Town of Hagerman, City of Roswell, City of Artesia, Eddy County Board of County Commissioners and County of Chaves); one party filed a Motion to Request Hearing Examiner to Order Applicants to Amend Applications (Village of Fort Sumner); the Applicants filed an Opposition to the PVACD Motion to Dismiss; the Applicants filed an Opposition to Additional Motions to Dismiss Applications or In the Alternative Motion for Republication and to Set Order Designating Hearing Location Aside; the Applicants filed a Response in Opposition to Village of Fort Sumner's Motion to Request Hearing Examiner to Order Applicants to Amend Applications; the Water Rights Division (WRD) of the Office of the State Engineer (OSE) filed a response to the PVACD Motion to Dismiss; the WRD filed a response to the Village of Fort Sumner's Motion to Request Hearing Examiner to Order Applicants to Amend Applications; a group of parties filed a response to the Applicants Opposition to Additional Motions to Dismiss Applications or In the Alternative Motion for Republication and to Set Order Designating Hearing Location Aside (City of Roswell, City of Artesia, Eddy County Board of County Commissioners and County of Chaves); and the Village of Fort Sumner filed a reply to WRD's response to the Village of Fort Sumner's Motion to Request Hearing Examiner to Order Applicants to Amend Applications. Having examined all of the pleadings and considering the arguments presented at hearing, the Hearing Examiner finds the following and recommends to the State Engineer the following Order denying the subject Applications.

1. The PVACD Motion to Dismiss and the subsequent motions which incorporated and adopted the PVACD Motion to Dismiss are, in effect, identical.
2. The relief sought by the Village of Fort Sumner's Motion to Request Hearing Examiner to Order Applicants to Amend Applications is essentially of the same nature as the alternative portion of the PVACD Motion to Dismiss and the subsequent motions which incorporated and adopted the PVACD Motion to Dismiss.

3. A separate hearing for each of the motions noted in findings 1 and 2 is unwarranted.
4. NMSA section 72-12-7A states (in relevant part): "The owner of a water right may change the location of his well or change the use of water, but only upon application to the state engineer and upon showing that the change will not impair existing rights and will not be contrary to the conservation of water within the state and will not be detrimental to the public welfare of the state." (emphasis added)
5. NMSA section 72-12-7C states (in relevant part): "If 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...."
6. The face of the subject Applications states that: "Berrendo LLC has an option to purchase the subject water right(s) from the co-applicant(s)." (emphasis added)
7. The face of the subject Applications states (in relevant part): "Some or all of the water transported by pipeline into the Rio Grande Basin may be applied to first beneficial use through the City of Santa Fe Water System. Whether and on what terms the water will be delivered to the City of Santa Fe Water System are under discussion with the City." (emphasis added)
8. The face of the subject Applications states (in relevant part): "Water delivered to the Rio Grande Basin will be delivered to the City of Rio Rancho...for use and reuse to extinction, as well as to other users and other uses to be specified before final action is requested on the application." (emphasis added)
9. An application is, by its nature, a request for final action.
10. It is reasonable to expect that, upon filing an application, the Applicant(s) are ready, willing and able to proceed to put water to beneficial use.
11. The statements on the face of the subject Applications indicate that the Co-Applicants are not ready, willing and able to proceed to put water to beneficial use.
12. The face of the subject Applications does not make it clear whether irrigation is contemplated on any lands within the described move-to locations, or only at the

move-from locations.

13. The face of the subject Applications requests almost all possible uses of water at the suggested move-to locations but does not identify a purpose of use at any one move-to location with sufficient specificity to allow for reasonable evaluation of whether the proposed transfer would impair existing rights or would not be contrary to the conservation of water within the state or would not be detrimental to the public welfare of the state.
14. Consideration of an application that lacks specificity of purpose of the use of water or specificity as to the actual end-user of the water would be contrary to sound public policy.
15. Consideration of an application wherein no Co-Applicant is an owner of move-to lands; or has contractual permission from any move-to landowners; or is an entity with governing control or authority that would enable them to put water to beneficial use within the move-to area, would be contrary to sound public policy.
16. The face of the subject Applications suggests that: "Unconsumed return outflow from first uses and some first-use water will be delivered to the Rio Grande at a point to be specified." (emphasis added)
17. Consideration of an application to pump groundwater from one declared underground water basin which will then be released into a natural stream or watercourse within the boundaries of another declared underground water basin without specific identification of delivery points and methods of accounting for that water would be contrary to sound public policy.
18. To consider or approve applications that, on their face, are so vague and overbroad that the effects of granting them cannot be reasonably evaluated is contrary to sound public policy.
19. Applications FS-1, FS-2 & FS-2-X, FS-3-A, FS-3 et al, FS-21-1C, FS-21 & FS-22 Comb-A, FS-23-1, FS-23-2, and FS-1200 & FS-1200-S; FS-72, FS-73, FS-74, FS-75, and FS-79; FS-154, FS-154-S, FS-155, FS-156, FS-157, FS-158, FS-160, FS-161, and FS-162; FS-159, FS-163, FS-181, and FS-258; and FS-193 and FS-196, all filed with the State Engineer on February 23, 2009, should be denied without prejudice to filing of subsequent applications.

ORDER

Applications FS-1, FS-2 & FS-2-X, FS-3-A, FS-3 et al, FS-21-1C, FS-21 & FS-22 Comb-A, FS-23-1, FS-23-2, and FS-1200 & FS-1200-S; FS-72, FS-73, FS-74, FS-75, and FS-79; FS-154, FS-154-S, FS-155, FS-156, FS-157, FS-158, FS-160, FS-161, and FS-162; FS-159, FS-163, FS-181, and FS-258; and FS-193 and FS-196, all filed with the State Engineer on February 23, 2009, are denied and Hearing No. 09-086, 09-087, 09-088, 09-089 and 09-090 Consolidated is dismissed.

Andrew B. Core

Andrew B. Core
Hearing Examiner

I ACCEPT AND ADOPT THE ORDER OF THE HEARING EXAMINER,

THIS 8th DAY OF February, 2011

John R. D'Antonio, Jr.
JOHN R. D'ANTONIO, JR., P.E.
NEW MEXICO STATE ENGINEER



ATTACHMENT B – PURPOSE OF USE
TO APPLICATION FOR PERMIT TO APPROPRIATE UNDERGROUND WATER

Augustin Plains Ranch, LLC (“The Ranch”) has assembled a team of top New Mexico water resources experts to analyze the water resources below the ranch property it has owned for around thirty (30) years. To analyze the geohydrology of the groundwater in storage, The Ranch engaged John Shomaker and Mike Darr, both highly respected geohydrologists. They have done modeling of the basin and their initial modeling concludes that the basin contains an extraordinary amount of potable groundwater in storage that could sustain diversions of 54,000 acre-feet per annum for a period of 300 years.

However, development of this water is subject to limitations of the prior appropriation doctrine. These limitations include full protection of the neighboring Rocky Mountain Elk Foundation property that relies on groundwater for its important operations, protection of other existing neighboring agricultural users and protection of all other existing uses for windmills and related domestic uses. Most importantly, the development of the resource can have no effect on any water moving in a westerly direction as part of the Gila-San Francisco watershed. That basin is fully appropriated by decree of the United States Supreme Court and is already subject to strict constraints on use. Finally, evaluation of any application requires a thorough policy analysis of the optimum use of this water over time. The Ranch believes that the State Engineer could impose conditions on the use of water under a permit to avoid impairment to all other existing users.

To ensure protection of existing users and to support the policy development required for utilization of this resource, The Ranch intends to utilize the expertise of these hydrologists to do further testing and modeling of the resource and to work extensively with the Office of the State Engineer to develop uniform basin criteria to be applied not only to this application but to all

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO
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future applications within this region of the basin. Out of this process will come a balanced approach that allows beneficial use of the resource without impairing the rights of others including the option of artificial recharge alternatives.

Nationally recognized resource economist F. Lee Brown, Phd. has been retained to evaluate the economic feasibility of utilization of the resource for providing alternative benefits to The Ranch as well as to the State as whole. Preliminary studies indicate the water resources could be utilized to support municipalities in the region, including Datil, New Mexico, Magdalena, New Mexico and Socorro, New Mexico. The firm of Brownstein, Hyatt, Farber & Shreck has been retained to evaluate the feasibility of a project on site for real estate development and has concluded this is a feasible use of water for the project. Utilization of the ranch for commercial agricultural purposes has also been evaluated and found to be feasible.

Finally, there are extraordinary potential uses of the water that could support the State of New Mexico as a whole. These include providing water to the State of New Mexico to augment its capacity to meet compact deliveries to the State of Texas on the Rio Grande at Elephant Butte dam. The resource could also be utilized also to offset effects of ground water pumping on the Rio Grande in lieu of retirement of agriculture. The highly acclaimed engineering firm of Bohannon-Houston, Inc. has been retained to evaluate the potential cost of a pipeline to the Rio Grande to provide water to areas between The Ranch and the Rio Grande as well as to augment flows in the Rio Grande.

All of the above information will be developed and made available to the public and all affected parties as the application moves forward before the New Mexico State Engineer in the manner proscribed by State Engineer policy and regulations.

ATTACHMENT B – PURPOSE OF USE

STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO
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IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

AUGUSTIN PLAINS RANCH, LLC,

Applicant-Appellant,

v.

No. 32,705

SCOTT A. VERHINES, P.E.,

New Mexico State Engineer-Appellee,

and

KOKOPELLI RANCH, LLC, et al.,

Protestants-Appellees.

ANSWER BRIEF OF APPELLEE NEW MEXICO STATE ENGINEER

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
CATRON COUNTY, STATE OF NEW MEXICO
MATTHEW G. REYNOLDS, DISTRICT JUDGE

Pursuant to Rule 214(B)(1) NMRA, the State Engineer respectfully requests oral argument to allow for elaboration on the application review process.

DL Sanders, Chief Counsel
Jonathan Sperber
Tracy Hofmann
Special Assistant Attorneys General
for the New Mexico State Engineer
Post Office Box 25102
Santa Fe, New Mexico 87504-5102
Tel: (505) 827-6150
Fax: (505) 827-3887

VIII. AN APPLICATION MUST BE SUFFICIENTLY SPECIFIC TO ALLOW PERSONS TO DETERMINE WHETHER TO OBJECT

APR would have this Court believe that an application to appropriate groundwater submitted to the State Engineer requires no more detail than the notice pleading required for a civil complaint. [BIC 46]. APR asserts, again without supporting authority, that an application only requires basic information because an applicant is automatically entitled to an evidentiary hearing at which the application can be developed. *Id.* This approach is inconsistent with the statutes and rules, which specify the information required for a sufficiently completed application. § 72-12-3(A). By State Engineer rule, an application must set out the elements of water right that would actually be permitted. *See* 19.27.1.10 NMAC (“The application and permit limit the nature and extent of the water right.”)

Without the requirement of a complete, detailed and particularized application, the public is denied the information it needs to make an informed decision regarding whether to protest an application. Only with this information can existing water right owners determine whether their water rights may be impaired if a permit is issued. As previously noted, existing water right owners must demonstrate that they have standing in order to object to applications to appropriate groundwater. Section 72-12-3(D) confers standing only on water right owners (1) whose rights may be impaired by the granting of an application, and (2)

who object on the grounds that granting the application will be contrary to the conservation of water within the state or detrimental to the public welfare of the state in the event if they can demonstrate that they will be “substantially and specifically affected by the granting of the application.” (emphasis added). In addition, the rule governing application protests provides that “[a]ny person deeming that the granting of an application would be detrimental to his rights may protest in writing the proposal set forth in the application.” 19.27.1.14 NMAC. This demands that every protest must set forth the reasons why an application should not be approved. *Id.*

Thus, for a water right owner to analyze whether to expend resources and time to protest, applications must be sufficiently specific so that potential protestants can identify the reason for which they object to the application. Vague or incomplete applications deny water right owners the opportunity to make such an analysis and effectively deny them standing to object, since they cannot file sufficiently specific protests. 19.25.2 NMAC (03/11/1998, as amended through 08/30/2013).

Here, over 900 Protestants objected on the grounds that the Application should not be approved because it was so vague that they did not know whether they should file a protest and, if so, what they should protest. [1 RP 65, 165]. In fact, the Application was so vague that it is difficult to assess whether any of the

Protestants actually determined that granting it would be detrimental to their rights before filing their objections. Many of the Protestants may have filed their objections simply as a protective measure. If more concrete information later became available that would allow them to assess if the purposes of use would negatively impact their rights, they would not have missed the opportunity to object. *See* § 72-12-3(D) (requiring objections to the granting of an application to be filed within ten days after last publication of notice).

The Application's vagueness is further evidenced by the State Engineer's uncertainty about APR's intended use of the water right. The State Engineer found that if APR planned to utilize the water rights in one of the ways proposed in the Application, it would potentially have a consumptive irrigation requirement (CIR) of 12.61 acre feet, which would be an impermissible result under New Mexico law because it would constitute waste. [3 RP 661 ¶¶ 9-11]. The Application did not state on its face that the permit would actually put water to use in that manner, though, leading to the State Engineer's query about the possible CIR. If the State Engineer could not determine the intended use of water from the Application, then it follows that neither could lay persons.

This is not the way the application and protest process is intended to work. It is simply not in the public interest for WRD to accept applications that are not

sufficiently specific for potential protestants to assess whether they should—or even may—protest the application.

IX. APR COULD SIMPLY REFILE ITS APPLICATION WITH THE INFORMATION REQUIRED BY LAW

Neither the State Engineer's denial of the Application nor the district court's decision upholding the denial has caused APR an injury that requires this Court's intervention. Instead of appealing the State Engineer's decision to the district court and later filing an appeal with this Court, APR could simply have submitted a new application to the State Engineer that comports with law. Instead of refileing, however, APR suggests that the process may suffer from some unstated constitutional infirmity and it attempts to craft an unsupported argument that it has a right to a statutory evidentiary hearing when none exists. In the absence of any legal support for APR's argument that it was entitled to an evidentiary hearing under Section 72-12-3, the Court should not address the argument. *See State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 513 (stating that the Supreme Court will not review issues raised in appellate briefs that are unsupported by authority and consist of a mere conclusory reference).

APR states that it has taken “steps to develop evidence in support of its Application and expended significant sums of money and resources drilling a test hole and a production well, beginning the necessary hydrologic analysis, and preparing for an evidentiary hearing before the State Engineer.” [BIC 4], *see also*



Greggory D. Hull
Mayor

June 18, 2014

Michel Jichlinski, Principal
Augustine Plains Ranch, LLC
8070 Goergia Avenue, Suite 113
Silver Spring, MD 20910

RE: Augustine Plains Ranch, LLC

Dear Mr. Jichlinski,

Rio Rancho has a priority of developing/identifying a long term solution/plan to our current and future water needs. Securing a long term supply of water to our community is of great importance.

Should Augustin Plains Ranch, LLC succeed in the application process and successfully put in place a delivery system to deliver water to Rio Rancho, Rio Rancho would most certainly consider engaging Augustin Plains Ranch, LLC as a customer for this water.

Sincerely,

A handwritten signature in blue ink that reads 'Greggory D. Hull'.

Greggory D. Hull
Mayor

**EXHIBIT E TO
ATTACHMENT 2**

EXHIBIT K



April 18, 2014

Michel Jichlinski, Principal
Augustin Plains Ranch, LLC
8070 Georgia Avenue, Suite 113
Silver Spring, MD 20910

RE: Augustin Plains Ranch, LLC

Dear Mr. Jichlinski,

As you know, Rio Rancho currently has a need for several thousand acre feet of water, therefore the City of Rio Rancho supports the applications for changes of place and purpose of use of Augustin Plains Ranch.

If Augustin Plains Ranch is successful in its application, we are interested in discussing with Augustin Plains Ranch moving water into Rio Rancho's water utility system to serve Rio Rancho's municipal, industrial and commercial uses.

Sincerely,

A handwritten signature in black ink, appearing to read 'Keith Riesberg', with a long, sweeping horizontal line extending to the right.

Keith Riesberg
City Manager

1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **AUGUSTIN PLAINS RANCH, LLC,**

3 Applicant-Appellant,

4 v.

NO. 32,705

5 **SCOTT A. VERHINES, P.E.,**

6 New Mexico State Engineer-Appellee,

7 and

8 **KOKOPELLI RANCH, LLC, et al.,**

9 Protestants-Appellees.

COURT OF APPEALS OF NEW MEXICO
ALBUQUERQUE
FILED

JUL 23 2014

Windy Flores

10 **ORDER**

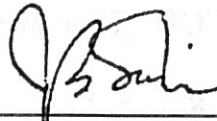
11 This matter is before the Court pursuant to the Court's own motion and is based
12 on the following.

13 This case was submitted to the panel on April 1, 2014. The panel has learned
14 that Appellant Augustin Plains Ranch, LLC has filed a new application with the
15 Office of the State Engineer. See Albuquerque Journal, Section C1, July 16, 2014.

16 **IT IS THEREFORE ORDERED** that the parties shall file supplemental
17 simultaneous briefs with this Court by August 1, 2014, and the briefs shall be limited
18 to five pages. The supplemental briefs shall address the effect of the new application
19 on the pending appeal in this Court. Specifically, the parties should address whether
20 the new application renders this case moot because there is no longer a controversy.

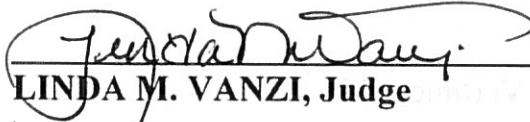
EXHIBIT L

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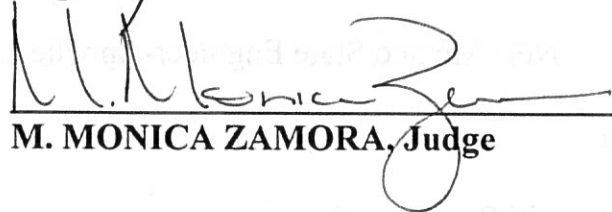
JONATHAN B. SUTIN, Judge

3
4



LINDA M. VANZI, Judge

5
6



M. MONICA ZAMORA, Judge

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Augustin Plains Ranch, LLC,

Applicant-Appellant,

v.

Case No. 32,705

Scott A. Verhines, P.E.,

New Mexico State Engineer-Appellee,

and,

Kokopelli Ranch *et al.*,

Protestant-Appellees.

**SUPPLEMENTAL BRIEF OF PROTESTANT-APPELLEES
DEMONSTRATING THAT THIS APPEAL IS NOT MOOT**

The Protestant-Appellees (“Protestants”) submit this supplemental brief pursuant to the Court’s July 23, 2014, Order, which the Court issued after learning that the Augustin Plains Ranch, LLC (“the Ranch”) filed “a new application with the Office of the State Engineer” (“OSE”).¹ The relevant parts of the Ranch’s “new” application are attached to this brief: Exhibit A is the application form and Exhibit B is “Attachment 2” to the application. The Order requires “the parties [to]

¹ The administrative status of the new and old applications is unclear. The Ranch has not withdrawn the old application, and the OSE has authority to summarily dismiss the new application without publication or hearing. NMSA 1978, § 72-12-3(C) and (F) (2001).

file supplemental simultaneous briefs ... [that] address whether the new application renders this case moot because there is no longer a controversy.”

This appeal is not moot. As the Exhibits A and B show, the “new” application is not new. It is in all material respects identical to the application under appeal (“old application”). Both the new and old applications request to appropriate 54,000 acre feet of groundwater per year via 37 deep wells in Catron County; both request a permit to appropriate this water for virtually any purpose any place in one or all of seven New Mexico counties; and both call for a pipeline from Catron County to Santa Fe County. Exhibit A 1-3; Exhibit B 1-4. Thus, a controversy among the parties still exists, one which this appeal can completely resolve.

ARGUMENT

I. THE RANCH’S NEW APPLICATION DOES NOT RENDER THIS APPEAL MOOT OR JUSTIFY DISMISSAL.

This appeal will decide whether the State Engineer properly denied the Ranch’s application to appropriate 54,000 acre feet of underground water from 37 wells located on its property in Catron County. The Ranch proposes to pipe water from Catron County to Santa Fe to serve any future need for water that might arise in seven New Mexico counties. AB 1-2, 13-15. Protestants filed a motion to dismiss the application, alleging that it was impermissibly vague and thus failed to

show an actual intent to appropriate water. The State Engineer granted the motion after conducting a hearing. AB 2-5.

The district court upheld the State Engineer's denial on summary judgment. The court held that the Ranch's application was invalid on its face, because the application failed to designate a particular purpose or place of beneficial use. AB 6-13. This violated statutory application requirements, but it also violated fundamental principles of prior appropriation, including beneficial use and public ownership of unappropriated water. AB 6-13. The Ranch appealed on the merits and also claimed denial of due process. The issues have been fully briefed and oral argument is scheduled for August 21.

This appeal is not moot and should not be dismissed. An appeal is moot only if there is "no actual controversy ... for which a ruling by the court will grant relief" *Republican Party v. N.M. Taxation & Revenue Dep't*, 2012-NMSC-026, ¶10, 283 P.3d 853. Moreover, the Court may "review moot cases that present issues of substantial public interest or which are capable of repetition yet evade review." *Gunaji v. Macias*, 2001-NMSC-028, 130 N.M. 734, 31 P.3d 1008. "It is sufficient that the issue be capable of repetition in some future lawsuit; the identity of the parties is irrelevant." 2001-NMSC-028, ¶11.

The Ranch's "new" and old applications are materially identical, and therefore, they give rise to the same legal controversy. Other applications have

presented this same controversy, and it will continue to arise in future applications until finally resolved judicially. *See, e.g.*, Exhibit C 3-4 (“Berrendo” application denied by State Engineer for failure to designate a particular beneficial use). This Court can resolve the controversy and grant Protestants complete relief by declaring that all applications to appropriate public water must designate the actual places where the requested water will be used and the intended purposes of use.

This is an issue of great public interest. “Water has constitutional significance” in New Mexico, *Bybee v. City of Albuquerque*, 1995-NMCA-061, ¶ 10, 120 N.M. 17, 896 P.2d 116, and the State Engineer is the trustee responsible for administering public water. AB 12-13. Protestants maintain that all applications to appropriate public water must designate a definite place and purpose of use, not mere possibilities. This is required to demonstrate the requisite intent to appropriate, provide meaningful public notice, and justify relating priority back to the filing of the application.

“An authoritative determination” on the level of specificity required in applications to appropriate public water is needed to guide the State Engineer, applicants, and the public. *Mowrer v. Rusk*, 1980-NMSC-113, ¶13, 95 N.M. 48, 618 P.2d 886. A determination by this Court that the Ranch’s application is unlawfully vague will enable the OSE to reject similar applications without

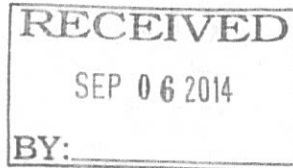
hearing, thus saving tens of thousands of dollars in notice and hearing costs.² This would also help guide investors by clarifying basic legal requirements regarding the appropriation of water in New Mexico.³ *Young & Norton v. Hinderlider*, 1910-NMSC-061, ¶24, 15 N.M. 666, 110 P. 1045 (public interest requires protecting investors “against making worthless investments in New Mexico.”) Finally, a ruling for Protestants would prevent those who have no present need for water from monopolizing an essential public resource, thus keeping public water available for appropriation by those who have actual present needs for water. AB 9-11.

Conclusion

The Ranch’s “new” application does not render this appeal moot. It presents the same controversy and demonstrates that the issues in this appeal are capable of repetition yet evading review. WHEREFORE, Protestants respectfully request the Court to determine that the “new” application does not render this appeal moot, hold oral argument on August 21, and decide this appeal.

² The Ranch’s old application drew over 900 protestants, each of whom OSE had to serve notice by certified mail. NMSA 1978, § 72-2-17(A)(1965).

³ The Ranch’s investors have allegedly invested over three million dollars in an application that the State Engineer and district court deemed facially invalid.



STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER

DISTRICT I

SCOTT A. VERHINES, P.E.
STATE ENGINEER

5550 San Antonio Dr. NE
Albuquerque, NM 87109
(505) 383-4000

September 5, 2014

Via First Class Mail

R. Bruce Frederick
New Mexico Environmental Law Center
1405 Luisa Street, Suite 5
Santa Fe, NM 87501

Re: New Mexico Inspection of Public Records Act Request - Office of the State Engineer, District I
Office, Albuquerque, New Mexico Records.

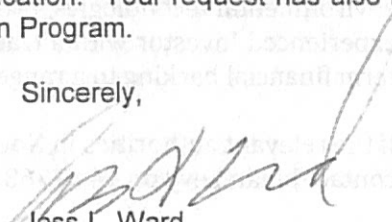
Dear Mr. Fredrick:

On September 2, 2014, we received your email, in which you asked, when will the OSE publish notice of the new application filed by Augustin Plains Ranch? You further requested to "inspect all public records containing or referencing communications between the OSE and the Ranch regarding its new application."

As to your question, no Notice for Publication has been issued to the applicant, nor has a time been set to do so. The application is still being reviewed for completeness.

As to your IPRA request, the Office of the State Engineer will need until Friday, September 20, 2014 to gather and provide you with copies of all the public records containing or referencing communications between the OSE and the Ranch regarding its new application. Your request has also been forwarded to the custodian of records for the Litigation & Adjudication Program.

Sincerely,


Jess L. Ward
District I Manager

cc: Greg Ridgley, General Counsel
David J. De Herrera, IPRA Manager

EXHIBIT N

ADVANCE INVESTMENTS LIMITED

(Registered Number: 53821)

Administration Address:

PO Box 119
Martello Court
Admiral Park
St Peter Port
Guernsey GY1 3HB
Channel Islands

Tel: (01481) 211000
Fax: (01481) 211001

Michel Jichlinski
Augustin Plains Ranch, LLC
8070 Georgia Avenue Suite 113
Silver Spring
MD 20910
USA

20 June 2014

Dear Michel,

Augustin Plains Ranch

Advance Investments Limited ("Advance"), has been an investor in the Augustin Plains Ranch project since 2011 and considers it a core investment in its private equity portfolio.

We have analysed the plans by Augustin Plains Ranch LLC for a project to develop a water resource in the property owned by the company in the Augustin Plains, for the benefit of the people of New Mexico, and believe that the project will be economically viable.

In the event that the application by Augustin Plains Ranch LLC to the Office of the State Engineer proceeds to the hearing phase, Advance will continue participating in the financing of the development costs of the project under mutually acceptable terms.

Advance is part of a private investment group with interests in clean tech, environmental technologies, property and consumer businesses. The group is an experienced investor with a track record of over twenty years of providing long term financial backing to a range of corporations.

If the relevant authorities in New Mexico would like to discuss this further please contact Julian Levy on +44 7768 877 787.

Yours sincerely
For Advance Investments Limited



Director

**EXHIBIT B TO
ATTACHMENT 2**

EXHIBIT O