

BEFORE THE NEW MEXICO STATE ENGINEER  
 PART OF THE  
 STATE ENGINEER  
 HALL OF THE  
 LEGISLATIVE

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

Hearing No. 17-005  
 OSE File No. RG-89943 POD1  
 through POD 37

WATER RIGHTS DIVISION'S RESPONSE TO CATRON COUNTY'S BOARD OF  
 COUNTY COMMISSIONERS' MOTION FOR SUMMARY JUDGMENT

The Water Rights Division of the Office of the State Engineer ("WRD") hereby responds to *Catron County Board of County Commissioners Motion for Summary Judgment and Memorandum in Support*, ("CC MSJ"), filed by the Catron County Board of Commissioners ("the Board"). The WRD respectfully submits that CC MSJ should be denied because there are genuine issues of material fact and because the Board's concerns about a two part proceeding are premature, as no such proceeding has yet been requested.

The Board also raises the issue of speculation. CC MSJ at 11. Under present New Mexico law, the application filed by Augustin Plains Ranch (APR) is complete. The State Engineer, however, may consider that New Mexico should undertake the kind of fuller analysis of the law of anti-speculation that has developed in Colorado. On this topic, the WRD refers the Hearing Examiner to the discussion of Colorado law in the Water Rights Division's Response to the NMELC Protestant's Motion for Summary Judgment, filed October 30, 2017.

**I. Response to Statement of Material Facts**

"Summary judgment is appropriate where there is no genuine issue of material fact." *Pollock v. State Highway and Transp. Dept.*, 127 N.M. 521, 523, 984, P.2d 768 770 (Ct. App.

1999). The burden of establishing a prima facie case that there is no genuine issue of material fact is on the moving party. *Id.* The Board has failed to meet this prima facie burden. Serious disputes exist as to many of the statements listed by the Board in its motion.

Some of these disputes reflect the CC MSJ's treatment of the corrected application filed in April of 2016 ("the Application") as if it were identical, for legal purposes, to the initial application filed in December of 2014 ("the initial application"). *E.g.*, CC MSJ, p. 5 ("The current Application suffers from the same facial flaws as the earlier version and should therefore be dismissed"). This is incorrect. There are a variety of ways in which the Application is more specific than the initial application, which makes it legally distinguishable from the initial application. For example, where the initial application was void of details, the Application includes detailed technical descriptions of how the water will be withdrawn at the points of diversion, conveyed to, and delivered at, the places of use. (Application, Exhibits A, C, D, and G.)

The inclusion of these changes, as well as other changes WRD has described below in its response to particular erroneous claims in the CC MSJ, has made the Application sufficiently specific for acceptance by the WRD in accord with applicable statutes and regulations.

The WRD submits the following specific responses, corresponding to the numbered facts at pp. 3-5 of the CC MSJ's statement of allegedly undisputed<sup>1</sup> material facts:

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<sup>1</sup> The CC MSJ does not in fact allege that the items on its "Statement of Material Facts" are "undisputed." CC MSJ, p. 3. It is unclear whether the CC MSJ is implicitly arguing that these are the *only* material facts, or whether it merely inadvertently left out a word. The WRD assumes the latter.

1. **Admitted** that the two dates mentioned appear on the Application cover page; **Denied** to the extent that this fact can be read to suggest that the Application and initial application are legally identical.
2. **Admitted** as to the stated purposes of use; **Denied** as incomplete as to the amount of water, given that the Application refers the reader to further information included in an attachment.
3. **Denied** as incomplete, given that the Application refers the reader to further information included in an attachment.
4. **Admitted** that 37 wells are identified in the Application; **Denied** with respect to any implication of vagueness in the characterization of the locations of those wells, which the Application gives with specificity.
5. **Denied** that the Application is not sufficiently specific to be considered complete for purposes of analysis by the State Engineer; **Denied** also as incomplete because Paragraph 5 refers the reader to further information included in an attachment; **Admitted** that the quoted language occurs in the document.
6. **Admitted** that the quoted language occurs in the document; **Denied** as to any suggestion that this particular language of “overall purpose” is the only evidence in the Application of its purpose. *E.g.* Application, Attachment 2, Exhibit A.
7. **Denied** that the Application is not sufficiently specific to be considered complete for purposes of analysis by the State Engineer; **Admitted** that the quoted language occurs in the Application, but **Denied** as to materiality. The promise of more information at a later stage in the proceeding is immaterial to the issue of whether the Application is, as it presently stands, sufficiently specific to be accepted as complete.

8. **Admitted** that the Application contains a request for a two stage process; **Denied** as to materiality—a proposed division into two stages is immaterial to the question of whether the Application is, as it stands, sufficiently specific to be accepted as complete; **Denied** that the suggestion of a two stage process constitutes an admission that the Application is, as it stands, sufficiently specific to be accepted as complete. *See* CC MSJ, p. 9 (asserting wrongly, on the basis of the request for a two stage process, that the Application “states on its face that it does not contain sufficient information [for the State Engineer to analyze it]”).
9. **Admitted** that the quoted language occurs in the Application; **Denied** as to materiality—a proposed division into two stages is immaterial to the question of whether the Application is, as it stands, sufficiently specific to be accepted as complete; **Denied** that the suggestion of a two stage process constitutes an admission that the Application is, as it stands, sufficiently specific to be accepted as complete. *See* CC MSJ, p. 9 (asserting wrongly, on the basis of the request for a two stage process, that the Application “states on its face that it does not contain sufficient information [for the State Engineer to analyze it]”).
10. **Admitted** that the quoted language occurs in the Application; **Denied** as to materiality. The promise of more information at a later stage in the proceeding is immaterial to the issue of whether the Application is, as it presently stands, sufficiently specific to be accepted as complete; **Denied** that the suggestion of a two stage process constitutes an admission that the Application is, as it stands, sufficiently specific to be accepted as complete. *See* CC MSJ, p. 9 (asserting wrongly, on the basis of the request for a two

stage process, that the Application “states on its face that it does not contain sufficient information [for the State Engineer to analyze it]”).

11. **Denied.** The initial application was for eleven purposes of use, namely: domestic, livestock, irrigation, municipal, industrial, commercial, environmental, recreational, subdivision, replacement, and augmentation. The Application recites only two purposes of use, namely: municipal and commercial water sales. The added specificity in the Application as to beneficial use makes it possible for the State Engineer to analyze it and thus renders it complete under existing New Mexico law.
12. **Denied.** The initial application gave a proposed place of use of, “within the exterior boundaries of Catron County, Socorro County, and Augustin Plains Ranch.” The proposed place of use identified in the Application is much more specific. It includes the municipal water service areas of Magdalena, Socorro, Belen, Los Lunas, the Albuquerque Bernalillo County Water Utility Authority, and Rio Rancho; as well as commercial sales in parts of Catron, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties within the Rio Grande Basin. The added specificity in the Application as to place of use makes it possible for the State Engineer to analyze it and thus renders it complete under existing New Mexico law.
13. **Denied** as being a disputed statement of law.

As the New Mexico Supreme Court has stated, “[s]ummary judgment is an extreme remedy that should be imposed with caution. ... If there is the slightest doubt as to the existence of material factual issues, summary judgment should be denied.” *Ocana v. American Furniture Co.*, 135 N.M. 539, 549, 91 P.3d 58, 68 (N.M.2004) (internal quotations and citations omitted). In the instant case, there is a significant dispute as to multiple material facts as detailed above.

Accordingly, summary judgment is not appropriate at this time, and the State Engineer could deny the CC MSJ for that reason.

## **II. The Challenge to the Two Stage Process is Premature and Irrelevant**

The CC MSJ discusses at length a “Proposed Hearing Procedure” offered within the Application under which the hearing process would be divided into two stages. Application, Attachment 2, Section II; CC MSJ, pp. 8-12. Although it would be within the Hearing Examiner’s broad authority to adopt such a procedure, *see* NMAC 19.25.2.13(A) (2) and (3) (powers of the Hearing Examiner to set administrative proceedings), the Hearing Examiner has not yet done so. A pre-emptive attack on a proposed procedure that may never happen is therefore premature.

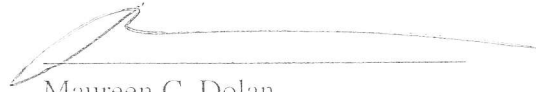
Certain language in the CC MSJ suggests that the Board reads the proposed two stage procedure as an admission that the Application is not sufficiently specific as it presently stands to be accepted as complete. *E.g.* CC MSJ, p. 9 (asserting wrongly, on the basis of the request for a two stage process, that the Application “states on its face that it does not contain sufficient information [for the State Engineer to analyze it]”); *also see* CC MSJ, p. 11 which claims that “the Applicant admits that the Application does not include all of the information mandated by statute.”

The Application makes no such admission. The fact that the Application proposes a two stage process in the second stage of which more information will be offered does not constitute an admission that the statute is not satisfied by the present state of information. The issue before the Hearing Examiner is whether the Application, *as it presently stands*, is sufficiently specific to meet the statutory standards of existing New Mexico law so as to be accepted as complete. It is. The two stage proposal is simply irrelevant.

### III. Conclusion

For the above reasons, the CC MSJ may be denied.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Motion for Summary Judgment was mailed to all parties this 30<sup>th</sup> day of October, 2017. A complete copy may be located on the Office of the State Engineer website, <http://www.ose.state.nm.us/HU/AugustinPlains.php>. The service list will be updated as necessary.

  
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