BEFORE THE NEW MEXICO STATE ENGINEER

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

OCT 27 2017

OFFICE OF THE STATE ENGINEER
PODDING UNIT
SANTA FE, NEW MEXICO

Hearing No. 17-0015
OSE File No. RG-89943 POD1
through POD 37

WATER RIGHTS DIVISION'S MOTION FOR LEAVE TO RESPOND TO APPLICANT'S RESPONSE TO CATRON COUNTY'S MOTION FOR SUMMARY JUDGMENT

THE WATER RIGHTS DIVISION of the Office of the State Engineer (WRD) moves the Hearing Examiner for leave to respond to the Applicant's Response to Catron County Motion for Summary Judgment, filed November 8, 2017, (Applicant's Catron County Response) for the following reasons:

1. In Applicant's Catron County Response, Applicant raises for the first time novel legal theories regarding the hearing procedures and statutory duties of the State Engineer.

2. The Hearing Examiner should have the benefit of WRD's perspective in his deliberation on those issues.

3. WRD's Response to Applicant's Catron County Response is attached, should the Hearing Examiner grant this motion.

Respectfully submitted:

Maureen C. Dolan
Martha C. Franks
Felicity Strachan
Administrative Litigation Unit
Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-3824
Attorneys for Water Rights Division

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to Respond to Applicant's Response to Catron County's Motion for Summary Judgment was mailed to all parties this 27th day of November, 2017. A complete copy Request to Docket Application 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.

Theresa L. Vargas
Administrative Litigation Unit

PARTIES ENTITLED TO NOTICE

APPLICANTS	
Jeffrey J. Wechsler Montgomery & Andrews, P.A. 325 Paso de Peralta Santa Fe, NM 87501 Tel.: (505) 982-3873 jwechsler@montand.com John Draper Draper & Draper LLC 325 Paso de Peralta Santa Fe, NM 87501 Tel.: (505) 570-4590 John.draper@draperllc.com *Attorneys for Applicant Augustin Plains Ranch, LLC*	
PROTESTANTS	
Jeffrey Albright, Esq. Lewis Roca Rothgerber Christie LIP 201 Third Street, N.W., Suite 1950 Albuquerque, NM 87102 JAlbright@lrrc.com LBaca@lrrc.com AEdwards@lrrc.com *Attorneys for Kokopelli Ranch, LLC*	Pete Domenici, Esq. Lorraine Hollingsworth, Esq. Domenici Law Firm, P.C. 320 Gold Ave., S.W., #1000 Albuquerque, NM 87102-3228 Tel.: (505) 883-6250 pdomenici@domenicilaw.com lhollingsworth@domenicilaw.com *Attorney for Monticello Properties, LLC, Double Springs Ranch, LLC, Gila Mountain Ranches, LLC, John Hubert Richardson Revocable Trust and Richardson Family Farms, LLC; Co-counsel with Adren R. Nance, Esq for Catron County Board of Commissioners*
Adren Robert Nance, Esq. Nance Pato & Stout, LLC P.O. Box 507 Reserve, NM 87830 adren@npslawfirm.com *Attorney for Catron County Board of County Commissioners (Co-counsel with Domenici Law Firm,) and Socorro County Commission*	John L. Appel, Esq. Coppler Law Firm, P.C. 645 Don Gaspar Santa Fe, NM 87505 Tel.: (505) 988-5656 jappel@coppler.com *Attorney for City of Truth or Consequences*

Tessa T. Davidson, Esq. Davidson Law Firm, LLC P.O. Box 2240 Corrales, NM 87048 Tel.: (505) 792-3636 ttd@tessadavidson.com *Attorney for John & Helen A. Hand and The Hand Living Trust*	Peter Thomas White, Esq. 125 E. Palace Ave., #50 Santa Fe, NM 87501-2367 Tel.: (505) 984-2690 Pwhite9098@aol.com *Attorney for Cuchillo Valley Community Ditch Association and Salomon Tafoya*
James C. Brockmann, Esq. Stein & Brockmann, P.A. P.O. Box 2067 Santa Fe, NM 87504-2067 Tel.: (505) 983-3880 jcbrockmann@newmexicowaterlaw.com *Attorney for Last Chance Water Company*	Alvin F. Jones, Esq. Olivia R. Mitchell, Esq. Henninghausen & Olsen, L.L.P. P.O. Box 1415 Roswell, NM 88202 Tel.: (575) 624-2463 ajolsen@h2olawyers.com jroehlk@h2olawyers.com *Co-counsel for New Mexico Farm & Livestock Bureau and Catron County Farm & Livestock Bureau*
Stephen G. Hughes, Esq. P.O. Box 1148 Santa Fe, NM 87504-1148 tesuquelaw@gmail.com *Attorney for State of New Mexico Commissioner of Public Lands*	A.J. Olsen, Esq. Jonathan E. Roehlk, Esq. Henninghausen & Olsen, L.L.P. P.O. Box 1415 Roswell, NM 88202 Tel.: (575) 624-2463 ajolsen@h2olawyers.com jroehlk@h2olawyers.com *Co-counsel for Pecos Valley Artesian Conservancy District*
Jessica R. Aberly, Esq. Aberly Law Firm 2222 Uptown Loop, N.E., #3209 Albuquerque, NM 87110 Tel.: (505) 977-2273 aberlylaw@swcp.com *Attorney for Pueblo of Sandia*	Karl E. Johnson, Esq. Veronique Richardson, Esq. Johnson Barnhouse & Keegan, LLP 7424 Fourth St., N.W. Los Ranchos of Albuquerque, NM 87107-6628 Tel.: (505) 842-6123 vrichardson@indiancountrylaw.com kjohnson@indiancountrylaw.com *Attorney for Pueblo of Santa Ana*
Jane Marx, Esq. 2825 Candelaria Road, N.W. Albuquerque, NM 87107 Tel.: (505) 344-1176; Cell: (505) 453-5071 janemarx@earthlink.net *Attorney for Pueblo of Zuni and Pueblo of San Felipe*	Samantha Ruscavage-Barz, Esq. 516 Alto Street Santa Fe, NM 87501 Tel.: (505) 401-4180 sruscavagebarz@wildearthguardians.org *Attorney for Wildearth Guardians*

Wayne G. Chew, Esq. Wayne G. Chew P.C. P.O. Box X Albuquerque, NM 87125-1536 Tel.: (505) 842-6363; Fax: (505) 842-8607 wgchew@wgchewlaw.com *Attorney for Apache Ranch – Kenneth R. Brumit*	Kim Bannerman, Esq. P.O. Box 25102 Santa Fe, NM 87504-5102 *Attorney for New Mexico Interstate Stream Commission*
P.J. Hart Office of University Counsel University of New Mexico 1 University of New Mexico MSC 05 3440 Albuquerque, NM 87131-0001 *Attorney for University of New Mexico*	David Mielke, Esq. Sonosky, Chambers, Mielke & Brownell, LLP 500 Marquette Avenue, N.W., Suite 660 Albuquerque, NM 87102 Tel.: (505) 247-0147 dmielke@abqsonosky.com Sjones@abqsonosky.com *Attoreny for Pueblo of Isleta*
M. Kathryn Hoover, Esq. Lisa Yellow Eagle, Esq. Navajo Nation Department of Justice Water Rights Unit P.O. Drawer 2010 Window Rock, AZ 86515 928-871-7510 khoover@nmdol.org Lyelloweagle@nndoj.org *Co-Counsel for Navajo Nation*	Simeon Herskovits, Esq. Iris Thornton, Esq. Advocates for Community & Environment P.O. Box 1075 El Prado, New Mexico 87529 Tel.: (575) 758-7202 simeon@communityandenvironment.net *Co-Counsel for San Augustin Water Coalition (SAWC)*
Douglas Meiklejohn, Esq. Jaimie Park, Esq. Jon Block, Esq. Eric Jantz, Esq. New Mexico Environmental Law Center 1405 Luisa Street, Suite 5 Santa Fe, NM 87505 Tel.: (505) 989-9022 dmeiklejohn@nmelc.org jpark@nmelc.org *Co-Counsel for NMELC Group*	

Manuel and Gladys Baca; Robert and Mona Bassett; Patti BearPaw; Sue Berry-Fox; (Babe) Ann Boulden; Donald and Joan Brooks; David and Terri Brown; Jack Bruton and Bruton Ranch, LLC; Lisa Burroughs and Thomas Betras, Jr.; Charles and Lucy Cloyes; Michael D. Codini, Jr.; Randy Coil; James and Janet Coleman; Thomas A. Cook; Wildwood Highlands Landowners Association; Randy Cox; Nancy Crowley; Tom Csurilla; Elk Ridge Pass Development Company, LLC; Top of the World Land Company, LLC; Roger and Dolores Daigger; Michael and Ann Danielson; Bryan and Beverly Dees; John and Eileen Dodds; Louise and Leonard Donahe; Patricia Eberhardt; Roy Farr; Paul and Rose Geasland; Gila Conservation Coalition Center for Biological Diversity and Gila Watershed Alliance; Mary

Rakestraw Greiert; Michael Hasson; Don and Cheryl Hastings; Gary and Carol Hegg; Patricia Henry; Catherine Hill; Eric Hofstetter; Sandy How; M. Ian and Margaret Jenness; Amos Lafon; Marie Lee; Cleda Lenhardt; Rick and Patricia Lindsey; Victoria Linehan; Owen Lorentzen; Mike Loya; Sonia MacDonald; Robert and Susan MacKenzie; Douglas Marable; Thea Marshall; Sam and Kristin McCain; Jeff McGuire; Michael Mideke; Kenneth Mroczek and Janice Przylbyl Mroczek; Peter Naumnik; John Naumnik; Regina Naumnik; Robert Nelson; Veronika Nelson; Walter and Diane Olmstead; Dennis and Gertrude O'Toole; Karl Padgett, Max Padget & Leo Padgett; Barney and Patricia Padgett; Wanda Parker; Ray and Carol Pittman; John Preston and Patricia Murray Preston; Daniel Rael; Stephanie Randolph; Mary C. Ray; Kenneth Rowe; Kevin and Priscilla Ryan; Ray and Kathy Sansom; Christopher Scott Sansom; John and Betty Schaefer; Susan Schuhardt; Ann and Bill Schwebke; Janice Simmons; Jim Sonnenberg; Margaret and Roger Thompson; Gloria Weinrich; James Wetzig and Maureen M. MacArt; Donald and Margaret Wiltshire and Wildwood Landowners Association; Joseph and Janet Siomiak; Homestead Landowners' Association, Kristin Ekvall; Bette Dugie; Abbe Springs Homeowners Association; and Anne Sullivan.

Andres Aragon HC62, Box 625-7 Datil, NM 87821	Barbara and Eddie Aragon 523 W. Reinken Ave. Belen, NM 87002
Frank Baker P.O. Box 156 Datil, NM 87821-0156	John A. Barnitz Box 768 Magdalena, NM 87825
Sandy Bartelsen Wildwood Subdivision Lot 40 Datil, NM 87821	Victor Anspach HC 61, Box 15 Datil, NM 87821
Allen Bassler, M.D Wanda Bassler P.O. Box 497 Datil, NM 87821	Ann Bauer P.O. Box 248 Magdalena, NM 87825
Clark & Midge Bishop 20 Falcon Crest, HC 61 Box 3917 Datil, NM 87821	Frederick J. Bookland P.O. Box 227 Magdalena, NM 87825
Theresa J. Bottomly P.O. Box 1773 Socorro, NM 87801	Eric D. Bottomly P.O. Box 2493 Corrales, NM 87048-2493
Mary Annette Boulden P.O. Box 528 Datil, NM 87821	Dorothy Brook P.O. Box 1925 Socorro, NM 87801
Kat Brown 1380 Rio Rancho Blvd., #280 Rio Rancho, NM 87124	Baxter B. Brown & Sherry L. Fletcher 602 Broadway T or C, NM 87901

Jack Brunacini and Janice Brunacini P.O. Box 225 Magdelena, NM 87825	Ron & Mahona Burnett Flying V. Ranch P.O. Box 786 Datil , NM 87821
Jay B. Carroll P.O. Box 574 Pie Town, NM 87827	James Cherry 805 Kelly Road Magdelena, NM 97925
Joshua and Sarah Chong 112 Field Terrace Lansdale, PA 19446	Sandra Coker Carol Coker P.O. Box 2 Datil, NM 87821-0002
Cyndy and Charles Costanza P.O. Box 81 Datil, NM 87821	Dean Crane P.O. Box 83 Magdelena, NM 87825
Barbara Daitch, CPA P.O. Box 31 Datil, NM 87821	David and Martha Dalbey HC 61, Box 1526 Datil, NM 87821
Lloyd Daniels 15829 West 933 Road Park Hills, OK 74451	Hara Davis P.O. Box 433 Cliff, NM 88028
Caroll Dezavelle P.O. Box 968 Magdalena, NM 87825	Thomas Dolan P.O. Box 653 Pie Town, NM 87827
Patsy J. Douglas 300 Grant Socorro, NM 87801	Monte Edwards P.O. Box 301 Datil, NM 87821
Henry Edwards P.O. Box 1000 Datil, NM 87821	Elena Farr P.O. Box 1000 Datil, NM 87821
Karen Farr P.O. Box 1000 Datil, NM 87821	Sam Farr P.O. Box 1000 Datil, NM 87821
Farr Cattle Company Roy T. Farr, President Dana Farr-Edwards P.O. Box 1000 Datil, NM 87821	Freddy and Yvonne Ferguson P.O. Box 767 Datil, NM 87821

Lucy Fowles P.O. Box 124 Datil, NM 87821	Nelson Garber P.O. Box 774 Datil, NM 87821
Suzanne Garrigues 506 Greenwood Road Baltimore, MD 21204	Connie Gibson P.O. Box 83 Magdelena, NM 87825
O.R. and Sharon Gigante 15 Turquoise Trail Datil, NM 87821	Fancher Gotesky P.O. Box 616 Magdelena, NM 87825
Raymond and Linda Gray HC 61, Box 1515 Datil, NM 87821	Randall Greenwood P.O. Box 26 Aragon, NM 87820
Amber Guin Bertie Guin P.O. Box 417 Magdalena, NM 87825-0417	James Hall P.O. Box 800 Magdalena, NM 87825
James M. Hall, M.D. Linn Kennedy Hall P.O. Box 740 Datil, NM 87821	John Hand P.O. Box 159 Datil, NM 87821
John Hanrahan and Ruth Hanrahan P.O. Box 730 Pie Town, NM 87827	Mary Horn 4905 Haines Ave. N.E. Albuquerque, NM 87110
Fred Hunger and Leslie Hunger HC 61, Box 1528 Datil, NM 87821	Dallas Hurt P.O. Box 143 Fairacres, NM 88033
Dennis Inman P.O. Box 148 Quemado, NM 87829	Karl and Ann Kohler P.O. Box 1034 Magdalena, NM 87825
Linda Major P.O. Box 206 Magdalena, NM 87825	Major Ranch Realty Randell Major P.O. Box 244 Magdelena, NM 87825

Randell & Mary Lynn Major P.O. Box 244 Magdelena, NM 87825	Connie May Karl E. May P.O. Box 138 Reserve, NM 87830
Gary L. McKennon 11112 Huerfano, N.E. Albuquerque, NM 87123	Lynn Daniel Montgomery 240 Camino De Las Huertas Placitas, NM 87043
Montosa Ranch Dale Armstrong P.O. Box 326 Magdalena, NM 87825	Janet Mooney 2003 Wolf Creek Pass Lewisville, TX 75077-7546
Nick and Laurene Morales 6330 Roadrunner Loop Rio Rancho, NM 87144	Jamie O'Gorman P.O. Box 594 Datil, NM 87821
John Pemberton, Jr. P.O. Box 395 Quemado, NM 87829	Georgianna Pena-Kues 3412 Calle Del Monte, N.E. Albuquerque, NM 87106-1204
Darnell L. Pettis Montana Pettis P.O. Box 63 Magdalena, NM 87825	Estate of Paul Rawdon c/o Barbara Rawdon P.O. Box 285 Grants, NM 87020
Karen Rhoads P.O. Box 822 Cobb, CA 95426	L. Randall Roberson P.O. Box 217 Datil, NM 87821
David and Sara Robinson HC 64 Box 700 Magdalena, NM 87825	Cordelia Rose P.O. Box 281 Glenwood, NM 88039
Jim and Mary Ruff 1212 North Drive Socorro, NM 87801	Floyd Sanders Luera Ranch, LLC P.O. Box 1144 Magdalena, NM 87825
Dr. Robert Sanders P.O. Box 646 Datil, NM 87821	Rudy Saucedo P.O. Box 2557 Las Cruces, NM 88004
Saulsberry Lazy V7 Ranch, LLC Regor Saulsberry, PE 1031 Saulsberry Road Datil, NM 87821	Mikel Schoonover 1244 Canter Road Escondido, CA 92027-4449

Geraldine Schwabb 902 Cuba Rd. Socorro, NM 87801	Scott A. and Samantha G. Seely 4520 Valley Road Shermans Dale, PA 17090
Shortes XX Ranch Ron Shortes, General Manager P.O. Box 533 Pie Town, NM 87827	David P. Smith Nancy H. Smith P.O. Box 114 Magdalena, NM 87825
Robert and Elaine Smith P.O. Box 287 Datil, NM 87821	Socorro Soil & Water Conservation District 103 Francisco de Avondo Socorro, NM 87801
Ellen S. Soles 2521 North Mail Street Flagstaff, AZ 86004	Mark and Sue Sullivan P.O. Box 607 Datil, NM 87821
Sally Taliaferro P.O. Box 725 Datil, NM 87821	Marjory Traynham P.O. Box 375 Datil, NM 87821
Brett Traynor P.O. Box 3 Monticello, NM 87939	Anthony Trennel 76 Piñon Hill Pl., N.E. Albuquerque, NM 87122
Judith and Joe Truett P.O. Box 211 Glenwood, NM 88039	US Department of the Interior Bureau of Indian Affairs Southwest Regional Office 1001 Indian School Road, N.W. Albuquerque, NM 87104
Charles A. Wagner and Charlene F. Wagner P.O. Box 252 Magdalena, NM 87825	Walkabout Creek Ranch George & Susan Howarth HC 61, Box 35; Mangas Route Datil, NM 87821
Teresa Winchester P.O. Box 1287 Magdalena, NM 87825	Max Yeh Percha Animas Watershed Assoc. P.O. Box 156 Hillsboro, NM 88042
Kristin Ekvall 1155 Innsbruck Street Livermore, CA 94550	Pete Zamora Box 565 Magdalena, NM 87825

BEFORE THE NEW MEXICO STATE ENGINEER

IN THE MATTER OF THE CORRECTED APPLICATION FILED BY AUGUSTIN PLAINS RANCH, LLC FOR PERMIT TO APPROPRIATE GROUNDWATER IN THE RIO GRANDE UNDERGROUND WATER BASIN IN THE STATE OF NEW MEXICO	Hearing No. 17-005 OSE File No. RG-89943 POD1 through POD 37

WATER RIGHTS DIVISION'S RESPONSE TO APPLICANT'S RESPONSE TO CATRON COUNTY'S MOTION FOR SUMMARY JUDGMENT

The Water Rights Division ("WRD") hereby responds to Applicant's Response to Catron County's Motion for Summary Judgment ("APR Response"). The WRD respectfully submits that because the Applicants have presented two novel legal theories regarding the statutory authority and duties of the State Engineer, this response may assist the State Engineer's further consideration of the pleadings submitted thus far in this matter.

Introduction

The APR Response includes two arguments that require an answer from WRD because of their potential implications to the State Engineer's administration of water in New Mexico. First, APR makes the unprecedented argument that New Mexico's Water Code, NMSA 1978, Ch. 72 (1907, as amended through 2015), requires further evidentiary hearings beyond the summary judgment process at the option of applicants, any time the State Engineer accepts an application. **[APR Response 2]** Second, APR argues that it has "proposed" – presumably on the basis of its Application and the Catron County Motion alone – a two-stage hearing process in which availability and impairment could be determined before any other issues. **[APR Response 7]** These arguments are incorrect. Because these arguments would, if accepted, change State Engineer procedures in a way contrary to good public policy, the WRD submits this response.

I. The Water Code's Requirements for Hearing Are Satisfied by a Summary Judgment Hearing

APR states that the New Mexico Water Code requires a "full evidentiary hearing." [**APR Response 2**] This reading of the code is wrong, and is based on overbroad conclusions about the plain language of the statutes and about how they interrelate. The WRD requests that the Hearing Examiner reject APR's position, as it would have bad effects on New Mexico law. It would mean that an applicant could insist on a hearing regardless of circumstances. *But see D'Antonio v. Garcia*, 2008-NMCA-139, 145 N.M. 95, 194 P.3d 126 (the court warns against reading the statute too broadly and thus allowing a party to use a supposed hearing requirement to frustrate State Engineer process).

It is not necessary to reach APR's broad, inaccurate characterization of New Mexico law, however, as APR's analysis is moot in this particular case: a summary judgment hearing meets the statutory requirements. A hearing that happens to end in summary judgment *does* afford the parties "an opportunity 'to appear and present evidence and argument on all issues involved.'" *Derringer v. Turney*, 2001-NMCA-075, ¶ 15, 131 N.M. 40, 45, 33 P.3d 40, 45, *quoting* § 72-2-17(B)(1).

A motion for summary judgment is by definition a motion based on facts. *See* Rule 1-056(C) NMRA. Rule 56(C) states, "The judgment sought shall be rendered forthwith if the *pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any*, show that there is no genuine issue of material fact." *Id.*, emphasis added. The absence of genuine issues of material fact, however, does not suggest the parties have presented no evidence. If a motion for summary judgment is successful, again, by definition, there are no additional relevant facts necessary to the determination, which would be made as a matter of law. *Id.* Summary judgment likewise addresses "all issues involved" (*see* § 72-2-17(B)(1) (1965)) for

the same reason. A hearing on a summary judgment motion meets the standard set out in Section 72-2-17(B).[1]

APR argues that *Derringer v. Turney* supports its position that the Water Code requires an evidentiary hearing beyond the summary judgment process, but APR mistakes the focus of the paragraph it cites. In the court's evaluation of what sort of hearing is required under NMSA 1978, §§ 72-2-16 and 72-2-17(B), its concern was whether the parties had an opportunity to appear in person (in an oral argument, for example). The court said only that written pleadings *alone* are insufficient: "In our view, written motions and responses do not satisfy the requirements clearly set forth in the statute," (referencing § 72-2-17(B)(1)), but it made no statement suggesting the insufficiency of, for example, a summary judgment *hearing*. *Derringer, supra* ¶ 15.

In *D'Antonio v. Garcia*, 2008-NMCA-139, 145 N.M. 95, 194 P.3d 126, ¶ 9, the New Mexico Court of Appeals confirmed that the ruling of *Derringer* was that a further evidentiary hearing was not statutorily required following a grant of summary judgment. The *Garcia* court went on to observe that the statute should not be read to require a hearing regardless of circumstances because that reading would allow parties before the State Engineer to intentionally frustrate the administrative process. *Garcia,* ¶ 10. The WRD does not allege any such intent with regard to the present litigants, but files the present pleading to bring this general concern before the Hearing Examiner. For the reasons given in *Derringer* and *Garcia,* the Hearing Examiner should reject APR's argument that the statutes require further hearing beyond the summary judgment process presently in place. *Section* 19.25.2.15(E) NMAC, which was promulgated in 2013, after *Derringer* and *Garcia*, states: "[m]otions for summary judgment that

[1] APR reads Section 72-2-17(B)(3) to require an opportunity to conduct cross-examinations. [APR Response 3] WRD notes the statute states that a party "may conduct cross-examinations…" but does not state a party "must" have an opportunity to do so. NMSA 1978, § 72-2-17(B)(3).

are dispositive of any administrative or enforcement matter shall not be granted by the hearing examiner without a hearing." This section ensures that any hearing requirement in the New Mexico Water Code will be fulfilled through a summary judgment process such as the one in which the Hearing Examiner is now engaged.

In citing to *Lion's Gate Water v. D'Antonio* 2009-NMSC-057, ¶¶ 25-27, 31, 147 N.M. 523, 535, 226 P.3d 622, APR not only ignores the present posture of summary judgment, it also takes the *Lion's Gate* case out of context. APR cites *Lion's Gate* for the proposition that "once an application has been accepted for filing and publication, 'the State Engineer must consider the full merits of an application.'" [**APR Response 4**, quoting *Lion's Gate Water v. D'Antonio*, ¶¶ 25-27.] The full quote from *Lion's Gate* is as follows:

> Only when the State Engineer makes an initial determination that water is unavailable to appropriate is the State Engineer, and consequently the district court, jurisdictionally limited to consideration of that issue. Otherwise, *following a determination that water is available to appropriate*, the State Engineer must consider the full merits of an application and every constituent issue would be reviewable de novo on appeal.

Id., ¶ 31, emphasis added. As this quotation reflects, the single issue in that case was the jurisdiction of the appellate court to consider issues outside of the availability of water when the availability of water was the only issue that the State Engineer had considered. The *Lion's Gate* court found that the State Engineer's processes could not be bypassed by expanding the issues in the case once it had reached the appellate court. *Lion's Gate* is wholly unrelated to the present situation.

In any event, the summary judgment process, which under 19.25.2.15(E) NMAC will include a hearing on summary judgment, constitutes "State Engineer consideration of the full merits of an application." Any other conclusion is an attack on the entire concept of summary judgment. When a summary judgment motion is granted it fully disposes of a case. It would be

absurd to suggest that a further evidentiary hearing is statutorily required even after there has been a finding that, on the basis of undisputed facts, the case could be fully resolved by dispositive motion.

APR's Response misinterprets both New Mexico statutes and applicable caselaw. The Water Code does not require further evidentiary hearings beyond the summary judgment process at the option of all applicants. Such an interpretation of New Mexico law would do away with the efficiency that the State Engineer's administrative hearings gain from early resolution of matters through dispositive motion. (*See e.g. Goffe v. Pharmaseal Laboratories, Inc.*, 1976-NMCA-123, ¶ 8, 90 N.M. 764, 768, 568 P.2d 600, 604: "The purpose of a summary judgment proceeding is to expedite litigation by determining whether a party possesses competent evidence to support his pleadings so as to raise genuine issues of material fact and if not to dispose of the matters at that state of the proceeding," citing *Agnew v. Libby*, 53 N.M. 56, 201 P.2d 775 (1949), *rev'd in part on other grounds*, 90 N.M. 753, 568 P.2d 589.) That summary judgment is granted with caution only emphasizes that when summary judgment motions are successful, no further process is necessary. *See Romero v. Philip Morris, Inc.*, 2010–NMSC–035, ¶ 8, 148 N.M. 713, 242 P.3d 280.

II. APR Has Not Moved to Set a Two-stage Hearing Process in this Matter

The Hearing Examiner has already set a schedule in his August 10, 2017 Scheduling Order. There is no pending motion to amend the Scheduling Order to set a two-stage hearing process in this matter. APR's mention of such a process in pleadings does not constitute a motion before the Hearing Examiner. If APR seeks a two-stage hearing process, it must make such a motion, which would allow the WRD and the other parties a full and fair opportunity to

respond. APR's arguments pertaining to such a proposal are therefore irrelevant to the Hearing Examiner's consideration of the pending motions for summary judgment.

Respectfully submitted:

Maureen C. Dolan
Martha C. Franks
Felicity Strachan
Administrative Litigation Unit
Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-3824
Attorneys for Water Rights Division