

BEFORE THE NEW MEXICO STATE ENGINEER)	
IN THE MATTER OF THE APPLICATION BY)	Hearing No. 09-096
AUGUSTIN PLAINS RANCH, LLC FOR)	
PERMIT TO APPROPRIATE GROUNDWATER)	OSE File No. RG-89943
IN THE RIO GRANDE UNDERGROUND)	
WATER BASIN OF NEW MEXICO)	

MOTION TO DISMISS APPLICATION

Augustin Plains Ranch, Inc. (“the Corporation”) filed amended Application No. RG-89943 (“the Application”), requesting to take 54,000 acre-feet of groundwater per year (“AFY”) from the Rio Grande Underground Water Basin (“Rio Grande Basin”). The Corporation seeks this water for the purpose of either using or selling it. It identifies no particular beneficial use in its Application and the “place of use” is anywhere within a vast area comprising approximately 12 million acres.

The enormous amount of water requested by the Corporation is not based on, measured by, or limited to any particular beneficial use, as required by New Mexico’s Constitution. Because of this, and because other critical information is missing from the Application, neither the State Engineer nor the parties in this case can adequately determine whether or to what extent the “proposed appropriation” will impact existing water rights, be contrary to the conservation of water, or be detrimental to public welfare. As a result, the State Engineer cannot rationally or lawfully issue a permit to the Corporation without violating his statutory duties and denying procedural due process to existing water rights owners. Moreover, as a matter of law, the Corporation’s attempt to monopolize a water supply for purposes of speculation and possible future water sales is *not* beneficial use and thus cannot form the basis of a permit to appropriate water.

Therefore, the parties identified in the signature line below (“Residents”) request the Hearing Examiner to terminate this proceeding and recommend dismissal of the Application.¹ The grounds for this Motion are further set out in detail below.

I. STANDARD OF REVIEW:

This motion tests the legal sufficiency of the Application and should be decided under the same standard that courts apply to motions to dismiss under Rule of Civil Procedure 12(b)(6). See, e.g., N.M. Life Ins. Guar. Association v. Quinn & Co., 111 N.M. 750, 753, 809 P.2d 1278, 1281 (1991) (“A motion to dismiss tests the legal sufficiency of the complaint. In considering a motion to dismiss for failure to state a claim upon which relief can be granted, we must accept as true all well-pleaded facts and question only whether the plaintiff might prevail under any state of facts provable under the claim.”) As a matter of law, and for the reasons set out below, the lack of specificity in the Application and the Corporation’s clear speculative intent preclude the State Engineer from approving the Application. NMSA 1978, § 72-12-3 (2001) (requiring the State Engineer to evaluate the impacts that a “proposed appropriation” will have on existing water rights, conservation of water and public welfare). Therefore, the Application must be dismissed.

II. THE CORPORATION’S APPLICATION.

In its Application, the Corporation requests authorization from the State Engineer to divert and consume 54,000 AFY of groundwater from the Rio Grande Basin. [Exhibit 1 ¶ 4.] Instead of designating the “Location of Well,” as required on the State Engineer’s standard application form, the Corporation pluralized the form to read “Location of Wells” and directs the reader to “Attachment A.” [Exhibit 1 ¶ 2.] Attachment A, in turn, identifies the proposed

¹ In addition to the parties for which an appearance has already been entered, the New Mexico Environmental Law Center hereby enters its appearance on behalf of Mike Loya, Don Brooks and Joan Brooks.

location of thirty-seven wells. [Exhibit 1, Attachment A.] Each proposed well will be drilled to a total depth of 3000 feet, have a diameter of 20 inches, and be capable of producing 2000 gallons of water per minute (“gpm”). Id.

In the “Purpose of Use” section of the Application, the Corporation places a “check” by every type of possible beneficial use identified on the form application and adds additional uses.

[Exhibit 1 ¶ 5.] Thus, the Corporation seeks the option to use water for any or all of the following purposes:

Domestic, Livestock, Irrigation, Municipal, Industrial, Commercial, environmental, recreational, subdivision and related, replacement and augmentation.

Id. No specific amount of water is related to any particular use. In the “Additional Statements or Explanations” section of the form, the Corporation expands further on the potential uses of water:

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.

Id. Thus, the Corporation seeks the option to take 54,000 AFY to serve any use or purpose whatsoever.

The “Place of Use” identified on “Attachment B” to the Application is similarly expansive. Attachment B identifies the “place of use,” first, as anywhere “within the exterior boundaries of” of the Corporation’s sprawling “ranch,” which consists of all or part of forty-three (43) surveyed sections of land.² And second:

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.

² Each section is a square mile.

[**Exhibit 1, Attachment B.**] The “place of use” designated in the Application thus comprises roughly 12 million acres. Although the Corporation represents on the Application that it is the “owner” of all this land, [**Exhibit 1 ¶ 6**], it clearly is not.³ In any event, on the face of its Application, the Corporation seeks the option to use or sell 54,000 AFY for any purpose anywhere within a vast area of New Mexico.

III. THE APPLICATION MUST BE DISMISSED BECAUSE IT FAILS TO DESIGNATE SPECIFIC ELEMENTS OF BENEFICIAL USE, AS REQUIRED TO DEFINE A WATER RIGHT UNDER NEW MEXICO’S CONSTITUTION, STATUTES, AND REGULATIONS.

The State Engineer cannot approve the Application because it fails to identify the specific elements necessary to define a single water right, as required by New Mexico law. The failure to identify these elements in the Application is not a mere technicality. The lack of specificity prevents the State Engineer from determining whether the “proposed appropriation” will impair existing water rights, be contrary to conservation of water, or be detrimental to public welfare. It also prevents him from providing effective notice of the Corporation’s “proposed appropriation” and thus denies procedural due process to Residents and other water rights owners. Furthermore, it is unclear whether or where irrigation water rights will be established under the Application, and, if they are established, it is unclear who will own them. This uncertainty, moreover, will lead to litigation and make administration and adjudication of water rights difficult or impossible. Therefore, as further explained in detail below, the Application must be dismissed.

³ For example, the undersigned attorney owns land within the designated place of use.

A. A Water Right Is Defined By Specific Elements Of Beneficial Use.

Under the law of prior appropriation, as declared and confirmed in New Mexico's Constitution and numerous other authorities, "beneficial use [is] the basis, the measure and the limit of the right to the use of water." N.M. Const. Art. XVI, § 3; NMSA 1978, § 72-1-2 (1941). This "principle of beneficial use 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, 89 P.3d 47. In keeping with the principles of "definiteness and certainty," each "right to the use of water," *i.e.* each water right, must be defined by specific "elements" of beneficial use, including a specific "amount, purpose, ... and place of use, and as to water used for irrigation," by the "specific tracts of land to which [the right] shall be appurtenant." NMSA 1978, § 72-4-19 (1953). Thus, under the regulations of the State Engineer, a "water right" means:

The legal right to appropriate water for a specific beneficial use. The elements of a water right generally include owner, point of diversion, place of use, purpose of use, priority date, amount of water, periods of use, and any other element necessary to describe the right.

§ 19.26.2.7 (EE) NMAC; see also § 19.26.2.7 (X) NMAC (in the case of groundwater, the "point of diversion" is the well). Although a permit is *not* itself a water right, its only purpose is to authorize the permittee to establish a water right consistent with the specific elements designated in the permit application. In other words, a "permit" is:

A document issued by the state engineer that authorizes the diversion of water from *a specific* point of diversion, for *a particular* beneficial use, and at *a particular* place of use, in accordance with the conditions of approval. A permit allows the permittee to develop a water right through the application of water to beneficial use, in conformance with the permit's conditions of approval. A permit in itself does not constitute a water right.

§ 19.26.2.7 (W) NMAC (emphasis added); see also *Hanson v. Turney*, 2004 NMCA 69, ¶ 9, 136 N.M. 1, 94 P.3d 1 (holding that a permit “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”) (internal citation and quote omitted). Thus, acquisition of a permit is a mandatory pre-condition to establishing a specific water right, a water right that is expressly defined by and limited to particular elements.

B. An Application To Appropriate Water Must Describe With Specificity All Elements of the Desired Water Right.

Consistent with the forgoing legal principles, an application to appropriate groundwater must specifically “designate ... the beneficial use to which the water will be applied,” “the location of the proposed well,” “the amount of water applied for,” “the place of the use for which the water is desired,” and “the description of the land to be irrigated and the name of the owner of the land.” NMSA 1978, § 72-12-3(A)(2001). It is particularly important to designate “the land to be irrigated” because, unlike every other type of water right, irrigation water rights are by law made “appurtenant” to the land that is irrigated. Thus:

[All] waters appropriated for irrigation purposes, except as otherwise provided by written contract between the owner of the land and the owner of any ditch, reservoir or other works for the storage or conveyance of water, shall be appurtenant to specified lands owned by the person, firm or corporation having the right to use the water

NMSA 1978, § 72-1-2 (1941); see also *Walker v. United States*, 2007 NMSC 38, ¶ 23, 142 N.M. 45, 162 P.3d 882 (“The sole exception to the general rule that water rights are [property rights] separate and distinct from the land is water used for irrigation.”) As a general rule, the person who owns the irrigated land will also own the water right—even if he is not the one who diverts the water—and any transfer of his land will automatically carry with it all appurtenant water

rights. Id.; NMSA 1978, § 72-5-22 (1953) (“the transfer of title of land in any manner whatsoever shall carry with it all rights to the use of water appurtenant thereto for irrigation purposes, unless previously alienated in the manner provided by law”); Snow v. Abalos, 18 N.M. 681, 695-696, 140 P. 1044, 1049 (1914) (“the water right, is appurtenant to specified lands, and inheres in the owner of the land; that the right is ...owned and exercised by the individual, and, the officers of the community Acequia, in diverting the water act only as the agents of the appropriator.”) Accordingly, an application must identify both the lands that will have appurtenant water rights and the owner of those lands.

C. The Application Must Be Dismissed Because The Corporation Failed To Designate The Specific Elements Of A Water Right.

The Corporation’s failure to designate the specific elements of a water right in its Application violates the law governing applications as well as the fundamental principles of “definiteness and certainty.” Instead of “designating” a particular beneficial use in its Application, the Corporation requests the State Engineer to grant it the option of selling or using water for *any* beneficial use. Instead of designating a particular place of beneficial use, the Corporation requests the option of using water on its own lands or selling it to third parties for use anywhere on roughly 12 million acres. As a result, the “amount of water” requested by the Corporation is not based on a particular need for water at a particular place, but is instead merely a very large, arbitrary number that is based on something other than beneficial use. This violates the New Mexico Constitution, which mandates that beneficial use be the basis, the measure and the limit of a water right. Accordingly, the Application must be dismissed.

The Corporation also failed to designate “the location of *the* proposed well” in its Application, designating instead the location of thirty-seven separate wells. As a result, no particular well, *i.e.*, no particular point of diversion, can be associated with any particular

beneficial use, amount of water, or place of use. On the contrary, any given well or wells could be associated with any given purpose of use, amount of water, or place of use. Moreover, it is unclear whether the Corporation is seeking to establish thirty-seven separate water rights, with each right associated with a single well, or one water right having thirty-six “supplemental wells” or alternate points of diversion. In either case, the Application violates New Mexico law and must be dismissed.

On the one hand, if the Corporation seeks to establish thirty-seven separate water rights through the issuance of a single permit, its Application violates State Engineer regulations. An applicant may only establish one water right under any given permit, and that water right must be defined by clear and specific elements, including a specific “point of diversion” consisting of a single well. See, e.g., §19.26.2.7 (W) NMAC (defining “permit” as a “document ... that authorizes the diversion of water from *a specific* point of diversion” and that “allows the permittee to develop *a* water right”)(emphasis added); § 19.27.1.10 NMAC (requiring that “the annual amount of the appropriation permitted under one [permit] application ... be limited to the annual amount that can reasonably be expected to be produced and applied to beneficial use from a single well.”) On the other hand, if the Corporation seeks to establish a single water right with one main well and thirty-six supplemental wells, its Application violates NMSA § 1978, 72-12-24 (1959) and § 19.27.1.27 NMAC, which require separate applications and public notice for each supplemental well. Again, the Application on its face violates New Mexico law and must be dismissed.

The Corporation, moreover, failed to sufficiently identify “*the land to be* irrigated,” stating instead:

[To] the extent that the applied-for water will be used for irrigation on [corporate lands], 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.

[**Exhibit 2**—June 26, 2008, Email from Wechsler to Anderson (emphasis added)] This email shows that the Corporation is not committing to irrigate its own lands. Rather, it merely seeks an option to do so. At the same time, it also seeks the option to sell all or part of the requested 54,000 AFY to third-parties, some of whom might use the water to irrigate their own land, which may be located anywhere within the vast area identified in the Application. Thus, based on the Application, one cannot determine with any certainty whether or where irrigation water rights will become appurtenant. Furthermore, if irrigation water rights *are* established through the Application, it is unclear who will own them, which is yet another defect in the Application requiring dismissal.

The Corporation's failure to comply with the law has resulted in a vague Application. Although this vagueness serves the Corporation's obvious desire for maximum flexibility, it utterly violates the fundamental principles on which the prior appropriation system is based, namely definiteness and certainty. The lack of specificity also has practical implications. It will lead to litigation and make administration and adjudication of water rights impossible, because one cannot determine exactly what, where or whose water rights may be established through the Application. For all these reasons, the Application is legally defective on its face and must be dismissed.

D. The Application Must Be Dismissed Because It Fails To Provide Critical Information Necessary To Determine Impacts To Existing Water Rights, Conservation Of Water And Public Welfare.

In evaluating the Application, the State Engineer has a mandatory statutory duty to determine whether the "proposed appropriation" will (1) "impair existing water rights from the source," (2) be "contrary to conservation of water within the state," or (3) be "detrimental to the

public welfare of the state.” NMSA 1978, § 72-12-3(E) (2001); Tri-State Generation & Transmission Ass'n v. D'Antonio, 2010 N.M. App. LEXIS 124, 12-13 (2010) (“The State Engineer must further evaluate applications to ensure that the proposed use will not impair existing rights, is not contrary to conservation of water within the state, and is not detrimental to the public welfare.”) The State Engineer must also determine that the amount of water requested is reasonable and that it will be applied to a specific beneficial use within a reasonable time. See, e.g., Martinez ¶ 35 (“water users have a reasonable time after an initial appropriation to put water to beneficial use”). Because the Corporation failed to describe the specific elements of a water right in its Application, and because the options sought by the Corporation are practically limitless, the State Engineer cannot rationally evaluate the Application and it must be dismissed.

The State Engineer cannot determine an amount of water to approve, or whether the Application is contrary to the conservation of water or detrimental to public welfare, nor can he determine whether water will be applied to beneficial use within a reasonable time. He can only lawfully make these determinations on the sole basis of beneficial use, and the Corporation has failed to designate any specific beneficial use. Neither can the State Engineer determine the issue of impairment. An impairment analysis would require the State Engineer to know, for example, whether the Corporation will pipe all or part of the 54,000 AFY to the Rio Grande for use in Texas, or whether it will use all or part of the 54,000 AFY on its ranch, thus potentially recharging the affected aquifer(s) with return flow.

The problems arising from the Corporation’s vague Application are the same as those associated with the State Engineer’s discredited dedication program. For years the State Engineer approved appropriations of groundwater that were hydrologically connected to surface water, and that would thus deplete surface flows, so long as the applicant agreed to later obtain

and retire adequate surface water rights to offset the depletion. In 1994, the Attorney General evaluated the State Engineer's dedication policy and concluded that it was unlawful. Without knowing exactly which surface water rights would be retired, the State Engineer could not adequately perform his statutory evaluation:

Absent the critical information about the location and specifics of the water rights to be retired, it is impossible for the State Engineer to make a finding that the new appropriation-plus-retirement is not contrary to the conservation of water and will not be detrimental to the public welfare. NMSA 1978, § 72-12-3. Similarly, it is impossible for the State Engineer to find that the new appropriation-plus-retirement will not impair any existing rights because whether there will be impairment depends upon the location and nature of the rights to be retired. Id. Moreover, since the public notice describes only the new permit application and not the surface water rights to be retired, the public is never notified of a key part of the transaction and cannot meaningfully participate in the process. In the absence of adequate public notice, comment, and opportunity to protest, the State Engineer cannot fully evaluate impacts on existing water rights, public welfare, and water conservation.

1994 N.M. AG LEXIS 8, 12-13 (1994). Similarly, in the absence of information about the specific purpose, place and amount of beneficial use of water, "the State Engineer cannot fully evaluate [the Application's] impacts on existing water rights, public welfare, and water conservation." Thus, as a matter of law, the State Engineer must dismiss the Application for the same reasons that he abandoned the dedication policy.

E. The Application Must Be Dismissed Because State Engineer Cannot Approve The Application Without Denying Procedural Due Process Rights To Water Rights Owners.

The State Engineer must give water rights holders and others meaningful notice of the Corporation's proposed appropriation, so that they may protect their rights:

Upon the filing of an application, the state engineer shall cause to be published in a newspaper that is published and distributed in the county where the well will be located and in each county where the water will be ... put to beneficial use or where other water rights may be affected ... a notice that the application has been filed and that objections to the granting of the application may be filed within ten days after the last publication of the notice. 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.

NMSA 1978, § 72-12-3(D) (2001). Because the Application fails to provide critical information about how, when or where water will be applied to beneficial use, or even which beneficial use(s) will be accomplished through the Application, the State Engineer cannot provide meaningful notice and thus cannot afford water rights holders procedural due process. The Attorney General reached the same conclusion with respect to the State Engineer's discredited dedication policy:

[No] notice and opportunity to protest were ever afforded for people who might claim that the proposed retirement was not adequate to prevent impairment of existing rights. At the time the permit was issued, the particular rights to be retired were not identified, so that it would have been premature to argue that retirement would not prevent impairment. Yet at the time the retirement rights were identified and a notice of retirement was filed, it was too late to protest the permit and no one would have the right to protest the retirement.

This failure to provide adequate notice and an opportunity to protest for people whose rights might be impaired by the permit-plus-retirement is a violation of those people's rights to procedural due process. Eldorado at Santa Fe, Inc. v. Cook, 113 N.M. 33, 36, 822 P.2d 672 (Ct. App. 1991) (failure to follow notice procedures violated water rights holders' due process rights); Nesbit v. City of Albuquerque, 91 N.M. 455, 458, 575 P.2d 1340 (1977) (due process requires notice of zoning change which changes fundamental character of property).

1994 N.M. AG LEXIS 8, 17-18 (1994). As written, the Application and notice fail to provide specific information about how much water the Corporation might use or sell for a particular beneficial use, when it might use or sell this water, or where it might use or sell this water. Accordingly, the State Engineer must dismiss the Application because he cannot issue any permit without denying procedural due process to water rights owners. Id.

IV. THE APPLICATION MUST BE DISMISSED BECAUSE THE CORPORATION DOES NOT SEEK TO APPLY WATER TO BENEFICIAL USE, BUT ONLY TO MONOPOLIZE A WATER SUPPLY FOR SPECULATIVE PURPOSES.

New Mexico's Constitution and laws confirm that all "unappropriated water" in this State "belong[s] to the public and [is] subject to appropriation for beneficial use," not just by a privileged few, but by everyone. N.M. Const. Art. XVI, § 2. This is the essence of "prior appropriation," which is a system of law that "aims fundamentally at definiteness and certainty," Martinez ¶ 34, and at achieving "maximum benefits" for the greatest number. Id ¶ 36; see also Millheiser v. Long, 10 N.M. 99, 117, 61 P. 111 (1900) (it is the "general policy of the entire modern [prior appropriation] system" that the "greatest good shall accrue to the greatest number"; cf. David B. Schorr, Appropriation as Agrarianism: Distributive Justice in the Creation of Property Rights, 32 Ecology L.Q. 3, *3 ("The unofficial codes of the Colorado mining districts, conventionally thought to be the source of the [prior appropriation] doctrine's 'first in time, first in right' principle, focused primarily on rules designed to ensure wide distribution of property.") Because the Corporation's Application is diametrically opposed to these fundamental principles, it must be dismissed.

In Martinez, the New Mexico Supreme Court struck down the Pueblo Rights Doctrine, which purportedly granted the Town of Las Vegas a perpetual, unlimited right to take as much water from the Gallinas River as it needed. The Court held that this claim could not prevail, because it was wholly at odds with the law of prior appropriation. In so holding, the Court decisively reversed its former majority opinion on the issue, expressed in Cartwright v. Public Serv. Co., 66 N.M. 64, 343 P.2d 654 (1959), and embraced Justice Federici's scathing dissent in that case. Martinez ¶ 38 ("We therefore agree with the dissent in Cartwright that the ever-expanding quality of the pueblo water right 'is as antithetical to the doctrine of prior

appropriation as day is to night.”) In his dissent, Justice Federici explained the fundamental reasons that New Mexico and other arid states adopted the prior appropriation system:

The reasons that the doctrine of prior appropriation was adopted in all of the western states except California were twofold. First, to utilize scarce water, **and second to prohibit the monopoly inherent in the riparian doctrine.**

Cartwright at 107, 343 P.2d at 684 (J. Federici, dissenting, emphasis added). Justice Federici continued:

It was pointed out in Albuquerque Land & Irrigation Company v. Gutierrez, 10 N.M. 177, 61 P. 357, supra, there is no such thing as private ownership in the waters of public streams while so flowing. 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. See, also, Harkey v. Smith, 1926, 31 N.M. 521, 531, 247 P. 550, 553, where this Court stated: **“no ‘dog in the manger’ policy can be allowed in this state**, unless these waters can be and are beneficially used by plaintiffs, the defendants or others may use the same.”

Id. at 109-110, 343 P.2d at 684 (J. Federici, dissenting) (emphasis added).

Under the law of prior appropriation, the Corporation cannot use a vague and indefinite Application to play “dog in the manger”⁴ with respect to an enormous supply of water; nor can the State Engineer lawfully allow anyone to monopolize a vast public resource for speculative purposes. Id.; see also Schorr, supra (“... the statutes of the Colorado Territory, the water-rights provisions of the state constitution of 1876, and early judicial decisions culminating in the leading [prior appropriation] case of Coffin v. Left Hand Ditch Co. [6 Colo. 443 (1882)], were mainly concerned to prevent control of water by capitalists, and did so by breaking the common-law monopoly of riparian owners and opening access to the resource to all *bona fide* users”); Turley v. Furman, 16 N.M. 253, 266, 114 P. 278, 283 (1911) (condemning “the Turley irrigation

⁴ This once common phrase refers to a person who prevents others from enjoying something that he has no need for.

project” because it “will be both waterless and valueless, a purely speculative proposition, obnoxious to irrigation laws”); Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 121 (1912) (holding that the right to use water under the prior appropriation doctrine “must be exercised ... so [as not] to deprive a whole neighborhood or community of its use and vest an absolute monopoly in a single individual”); cf. Young & Norton v. Hinderlider, 15 N.M. 666, 677, 110 P. 1045, 1050 (N.M. 1910) (“It is ... obviously for the public interest that investors should be protected against making worthless investments [in proposed irrigation projects] in New Mexico, and especially that they should not be led to make them through [the Territorial Engineer’s] official approval of unsound enterprises”).

As illustrated in the case of Millheiser v. Long, the requirement of “beneficial use” prevents, and is intended to prevent, anyone from monopolizing an entire water supply for speculative purposes. In Millheiser, defendants Long and Truxton “took possession of a large ditch” that was capable of diverting the entire surface flow of the Rio Hondo. Millheiser at 116, 61 P. at 117. Their aim was to gain control over an entire water supply, not for their own use, but in hopes of selling water to third parties for profit. Id. They argued that their intent and ability to *divert* “all the water” was sufficient under the law to create a right to *own* “all the water,” a free public resource, for the purpose of selling it to others. Based on the principle of beneficial use, the Court disagreed:

Under [the] construction of the law [advocated by speculators Long and Truxton], the first person who diverts the water from the stream, may have a monopoly of all the water of any stream, by simply making this ditch large enough to conduct it from the usual channel. There need be but one appropriation, and all other settlers upon such stream must pay tribute to the person making the first diversion. This is not the law governing water rights in this Territory where the waters of natural streams are declared to be free to those who apply them to a beneficial use, until all are thus appropriated. Mr. McKinney in his work on irrigation has this to say on this subject:

'Under the later decisions relative to the capacity of the ditch being the limit of the extent of the appropriator's rights in and to the waters of a stream, it is held to be against the general policy of the entire modern system of the doctrine of appropriation that the greatest good shall accrue to the greatest number. For if this was the law upon the subject a person might lay claim to the water of whole rivers for the ostensible purpose of irrigating immense tracts of land, which with the utmost diligence would take years to accomplish; and although others might intervene and attempt to appropriate the water of a stream, they could only lay claim to it for a temporary period of time, and until the works of the first appropriator were eventually completed, and they would then be deprived of their appropriation.'

Millheiser at 116-117, 61 P. at 117. Based on this analysis, the Court held that speculators could not transform the mere ability and desire to divert an entire stream into *de facto* ownership of that stream, because:

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

Id. at 117, 61 P. at 117.

The Corporation is no different than Long and Truxton. It seeks to monopolize an entire water supply through its alleged ability to extract 54,000 AFY via 37 deep, large-diameter wells, just as Long and Truxton sought to do the same through a large capacity ditch. Therefore, just as Long and Truxton's mere speculative "intention ... to sell" water to third parties "rather than apply [it] to their own" use could not establish water right, the Corporation's identical intention cannot form the basis of a permit under New Mexico law.⁵ Id. at 119, 61 P. at 118. As a matter of law, hoarding water for possible future sales is not "beneficial use."

This same conclusion also holds true under the law of Colorado, whose basic law of prior appropriation is the same as New Mexico's. Lindsey v. McClure, 136 F.2d 65, 69 (10th Cir.

⁵ Although the Corporation seeks the option to irrigate 4440 acres of its own land, the State Engineer cannot approve the Application even for this limited purpose. First, irrigation is only one of many possible uses under the Application and no specific amount is requested for irrigation. Second, 37 wells and 54,000 AFY cannot be approved under one application and certainly are not necessary to irrigate 4440 acres. § 19.27.1.10 NMAC. Third, if the Corporation desires to narrow its request to irrigation of its own lands, this would materially change its Application; therefore, it must submit an entirely new application along with public notice of its new intent.

N.M. 1943) (“Colorado and New Mexico have the same basic water law.”) In Colorado River Water Conservation Dist. v. Vidler Tunnel Water Co., 197 Colo. 413, 594 P.2d 566 (1979), the Vidler Tunnel Water Company (“Vidler”) requested a “conditional water right” to divert and store water, not for its own beneficial use, but for potential future sales to third parties. A conditional water right is essentially the same as a permit under New Mexico law. Id. at 416, 594 P.2d at 567 (“A conditional water right is the “right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based.”) In denying the company’s request, the Colorado Supreme Court held:

Our constitution guarantees a right to appropriate, not a right to speculate. The right to appropriate is for use, not merely for profit. As we read our constitution and statutes, they give no one the right to preempt the development potential of water for the anticipated future use of others not in privity of contract, or in any agency relationship, with the developer regarding that use. To recognize conditional decrees grounded on no interest beyond a desire to obtain water for sale would -- as a practical matter -- discourage those who have need and use for the water from developing it. Moreover, such a rule would encourage those with vast monetary resources to monopolize, for personal profit rather than for beneficial use, whatever unappropriated water remains. Twenty-five years ago this Court emphatically rejected the “claim that mere speculators, not intending themselves to appropriate and carry water to a beneficial use or representing others so intending, can by survey, plat, and token construction compel subsequent *bona fide* appropriators to pay them tribute by purchasing their claims in order to acquire a right guaranteed them by our Constitution.” Denver v. Northern Colorado Water Dist., 130 Colo. 375, 408, 276 P.2d 992, 1009 (1954).

Id. at 417, 594 P.2d at 568. In so holding, the Colorado Court did not create a new doctrine unique to Colorado, but merely applied the fundamental principles of prior appropriation described above. See City of Thornton v. Bijou Irrigation Co., 926 P.2d 1, 67 (Colo. S.Ct. 1996) (“Although Vidler has most often been cited as defining the anti-speculation doctrine, we did not articulate a new legal requirement in that case, but rather merely applied longstanding principles of Colorado water law”); see also Jicarilla Apache Tribe v. United States, 657 F.2d

1126, 1134 (10th Cir. 1981) (“We do not deny that Albuquerque could take the quantity authorized in order to provide its purchasers for beneficial use But it cannot take the water now with a mere hope of possible sales in the future”) (citing Vidler).

The Corporation’s Application is fundamentally no different than Vidler’s request for a speculative conditional water right. Nor is it different than Long and Truxton’s attempt to monopolize an entire water supply in order to profit from sales of free public water. In all cases, the purported appropriator is not seeking to divert water for its own beneficial use. He is merely speculating, hoping to make a profit by monopolizing a free public water supply and selling it to third parties. This has never been allowed under New Mexico law, or any other prior appropriation state, because it goes against the bedrock principles of prior appropriation and beneficial use. As a matter of law, therefore, the State Engineer cannot approve the Application and it must be dismissed.

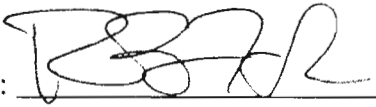
V. CONCLUSION.

The vague Application filed by the Corporation violates the law of prior appropriation and cannot be approved. The Corporation is *not* requesting the right to apply water to a particular beneficial use, as required by law. It is instead requesting the right to monopolize an enormous supply of water, not for its own use, but for purposes of profit and speculation. The Application must be dismissed.

WHEREFORE, Residents respectfully request the Hearing Officer to recommend dismissal of the Application and termination of this proceeding.

Respectfully submitted:

NEW MEXICO ENVIRONMENTAL LAW CENTER

By: 

R. Bruce Frederick
Douglas Meiklejohn
Jon Block
Eric Jantz
1405 Luisa Street, Ste. 5
Santa Fe, NM 87505
(505) 989-9022
bfr frederick@nmelc.org

Attorneys for: Abbe Springs Homeowners Ass'n, Manuel & Gladys Baca, Robert and Mona Bassett, Sam and Kristin McCain, Ray C. and Carol W. Pittman, Mary Catherine Ray, Stephanie Randolph, Daniel Rael, Kenneth Rowe, Kevin & Priscilla L. Ryan, John and Betty Schaefer, Janice Simmons, Susan Schuhardt, Jim Sonnenberg, Anne Sullivan, Margaret Thompson & Roger Thompson, Donald and Margaret Wiltshire, Mike Loya, Don and Joan Brooks, Max Padget, Janice Przybyl, John H. Preston & Patricia A. Murray Preston, Dennis and Gertrude O'Toole, Wanda Parker, Barney and Patricia Padgett, Karl Padgett, Walter and Diane Olmstead, Kenneth Mroczek, Peter John and Regina M. Naumnik, Robert Nelson, Jeff McGuire, Michael Mideke, Anne Schwebke Bill Schwebke, Christopher Scott Sansom, M. Ian Jenness, Margaret Jenness, Patti earPaw, Thomas Betras, Jr., Lisa Burroughs, Bruton Ranch, LLC, Jack W. Bruton, David & Terri Brown, Ann Boulden, Charles & Lucy Cloyes, Michael D. Codini, Jr., Randy Coil, Coil Family Partnership, James & Janet Coleman, Thomas A. Cook, Gloria Weinrich, Randy Cox, Owen Lorentzen, Robert MacKenzie, Maureen M. MacArt & James Wetzig, Douglas Marable, Thea Marshal, Sonia Macdonald, Gary and Carol Hegg, Patricia Henry, Tom Csurilla, Sandy How, Amos Lafon, Cleda Lenhardt, Homestead Landowners Assoc., Eric Hofstetter, Catherine Hill, Marie Lee, Rick and Patricia Lindsey, Victoria Linehan, Gila Conservation Coalition, Michael Hasson, Don and Cheryl Hastings, Patricia Eberhardt, Roy Farr, Paul and Rose Geasland, Louise & Leonard Donahue, Ray and Kathy Sansom, John and Eileen Dodds, Bryan and Beverley Dees, Michael & Ann Danielson, Wildwood Highlands Landowners Assoc., Nancy Crowley, Roger and Dolores (Jeanne) Daigger.

CERTIFICATE OF SERVICE: I certify that I served a copy of the foregoing paper on the parties entitled to service on the 11th day of February, 2011.



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 Sys _____
Zone in the _____ Gran _____
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

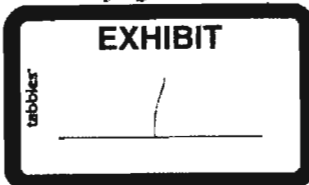
5. PURPOSE OF USE

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



Lee B... Manager

STATE ENGINEER OFFICE
MONTGOMERY & ANDREWS, P.A.
2008 MAY 14 AM 11:12
OFFICE OF STATE ENGINEER
SANTA FE, NEW MEXICO
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 a firm that the foregoing statements are true to the best of my knowledge and belief.

BY: 
 Saul Brenner

STATE ENGINEER OFFICE
 AUGUSTIN PLAINS RANCH
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File Number: 8689993
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**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

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File Number: _____
Form: WR-05

page 3 of 3

Trn Number: 407935

Lee B. Manger

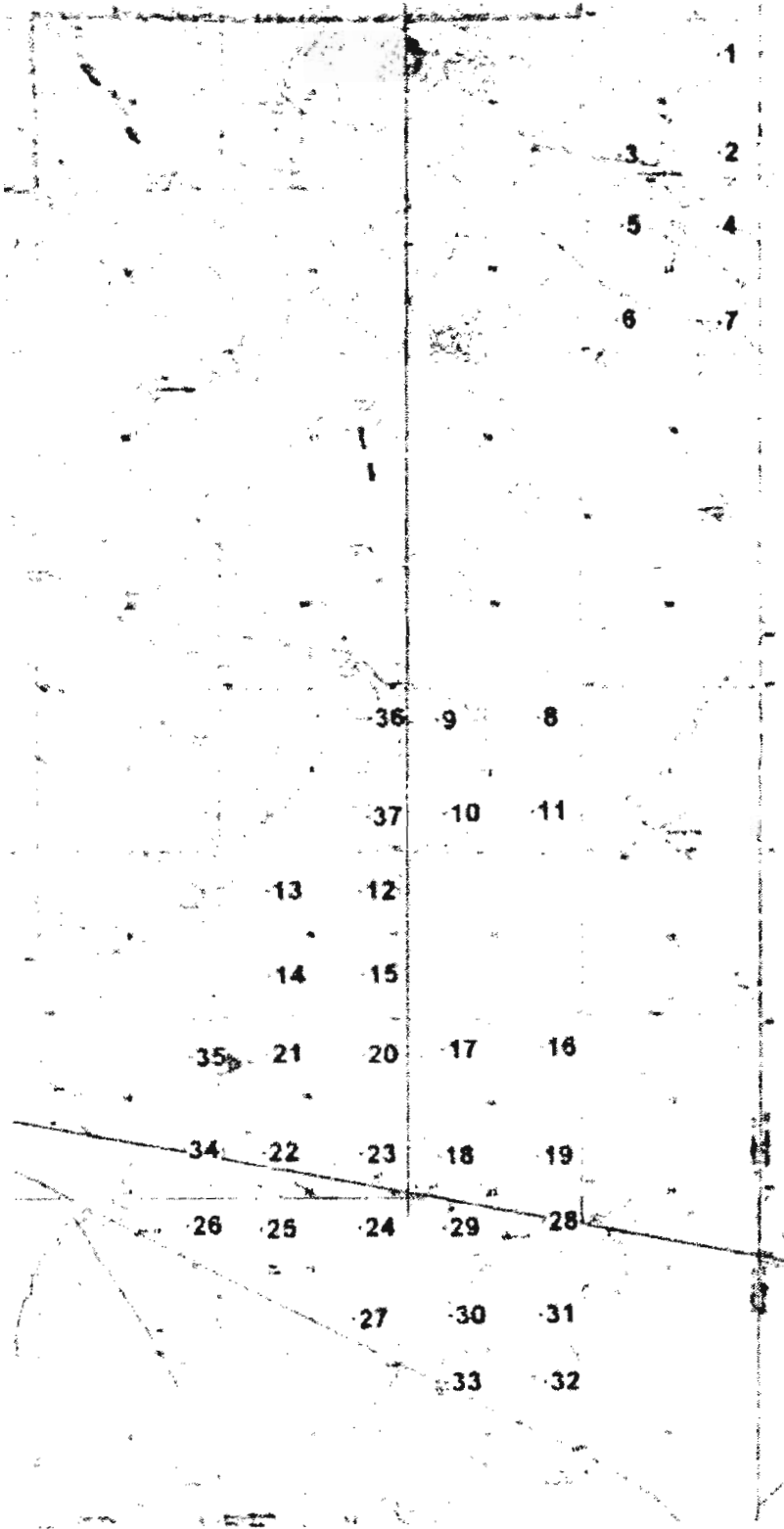
**ATTACHMENT A TO AMENDED APPLICATION OF
AUGUSTIN PLAINS RANCH LLC: PROPOSED WELL LOCATIONS**

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'	6.993"	107°	43'	13.036"	7208
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"	7185
36			3	SW	NE	NE	34°	10'	1.553"	107°	45'	15.118"	7205
37			3	NW	SE	SE	34°	9'	30.586"	107°	45'	15.791"	7188

PROJECTED TD OF ALL WELLS: 3000 FT
 CASING DIAMETER OF ALL WELLS: 20 IN
 EXPECTED YIELD OF EACH WELL: 2000 GPM

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And AS, Manager



T1S R9W

T2S R9W

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Exhibit 1
ATTACHMENT A

Lee B. Manger

**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,	Section 26
NE/4, N/2 NW/4	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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And. B. ...

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.

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Gene B. Morgan

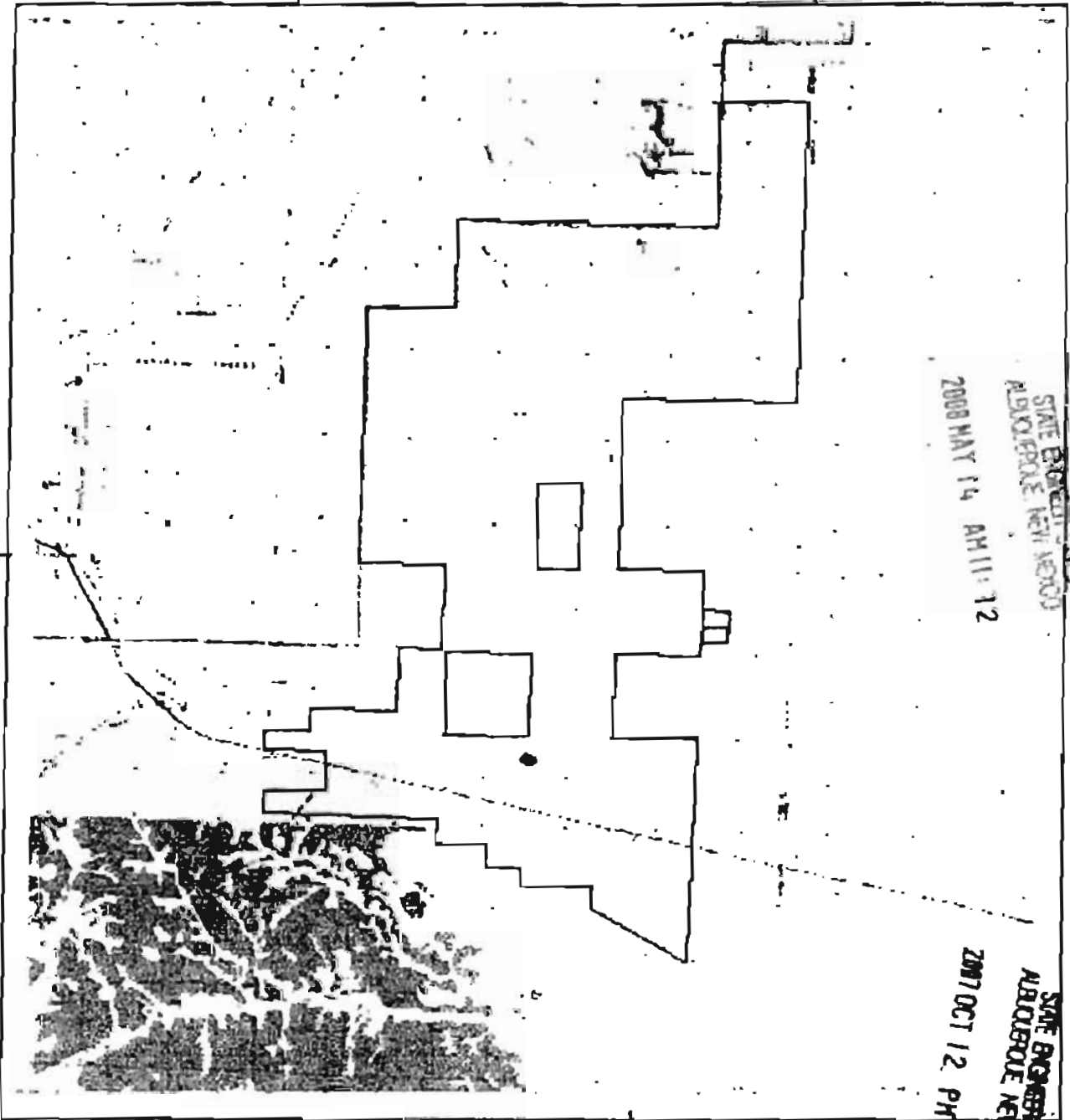
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— Property Boundary



AUGUSTIN PLAINS RANCH LLC

EXHIBIT 1
 ATTACHMENT B

Attachment to Application RG-89943 (Amended)_Irrigated acreage
From: Jeffrey wechsler [Jwechsler@montand.com]
Sent: Thursday, June 26, 2008 3:12 PM
To: Anderson, David B., OSE
Cc: John B. Draper
Subject: Augustin Plains Ranch Application - Irrigated Acreage on the Ranch

David,

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:

T1S R9W Sec. 13: Northeast Quarter, Southeast Quarter, and Southwest Quarter
T1S R9W Sec. 24: Northeast Quarter, Northwest Quarter, Southeast Quarter, and Southwest Quarter
T2S R9W Sec. 2: Northeast Quarter, Northwest Quarter, Southeast Quarter, and Southwest Quarter
T2S R9W Sec. 3: Northeast Quarter and Southeast Quarter
T2S R9W Sec. 10: Northeast Quarter, Northwest Quarter, Southeast Quarter, and Southwest Quarter
T2S R9W Sec. 14: Northeast Quarter, Northwest Quarter, Southeast Quarter, and Southwest Quarter
T2S R9W Sec. 15: Northeast Quarter, Northwest Quarter, Southeast Quarter, and Southwest Quarter
T2S R9W Sec. 16: Northeast Quarter and Southeast Quarter
T2S R9W Sec. 21: Northeast Quarter
T2S R9W Sec. 22: Northeast Quarter, Northwest Quarter, and Southeast Quarter
T2S R9W Sec. 23: Northeast Quarter, Northwest Quarter, Southeast Quarter, and Southwest Quarter
T2S R9W Sec. 26: Northeast Quarter and Northwest Quarter

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.

Please contact John Draper at 986-2525 or me at 986-2637 if you would like to discuss.

Best regards,
Jeff
Jeffrey J. wechsler
Attorney at Law
Montgomery & Andrews, P.A.
325 Paseo de Peralta (87501)
P. O. Box 2307
Santa Fe, NM 87504-2307
jwechsler@montand.com
(505) 986-2637
(505) 982-4289 (fax)

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