IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
August 27, 2010

NO. 32,558

BOARD OF COUNTY COMMISSIONERS,
SANDOVAL COUNTY, NEW MEXICO,

Petitioner,

v.

HON. GEORGE P. EICHWALD,
Thirteenth Judicial District Court Judge,

Respondent,

and

TESORO PROPERTIES LLC.,
CARINOS PROPERTIES LLC., et al.,

Real Parties in Interest.

ORDER

WHEREAS, this matter came on for consideration by the Court upon petition for writ of prohibition or superintending control, and request for stay, and the Court having considered said petition and request, and being sufficiently advised, Justice Patricio M. Serna, Justice Petra Jimenez Maes, and Justice Richard C. Bosson concurring;

NOW, THEREFORE, IT IS ORDERED that the petition and request for stay hereby are **denied.**

IT IS SO ORDERED.

WITNESS, The Hon. Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 27th day of August, 2010.

(SEAL)

Madeline Garcia

Madeline Garcia, Chief Deputy Clerk

ATTEST: A TRUE COPY

Madeline Garcia

Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

THE BOARD OF COUNTY COMMISSIONERS,
SANDOVAL COUNTY, NEW MEXICO

Petitioners

vs. No.:_____

THE HONORABLE GEORGE P. EICHWALD,
THIRTEENTH JUDICIAL DISTRICT COURT JUDGE,

Respondent.

TESORO PROPERTIES LLC, et al.

Real-Parties In Interest.

VERIFIELD PETITION FOR WRIT OF PROHIBITION OR ALTERNATIVELY FOR WRIT OF SUPERINTENDING CONTROL AND REQUEST FOR STAY

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REAL PARTIES IN INTEREST

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JURISDICTION OF THE SUPREME COURT

This Court has supervisory and superintending control over all inferior courts in the State of New Mexico, as well as the authority to issue extraordinary relief to parties aggrieved by orders of inferior courts in the State of New Mexico and has original jurisdiction over this matter. NM Const., Art. VI § 3.

PROPRIETY OF THE WRIT IN THE SUPREME COURT

The Motions from which the Petitioner County seeks relief were filed in *Sandoval County v. Tesoro Properties et al.,* Thirteenth Judicial District Court, cause No. D-1329-CV-2009-2408. Petitioner seeks relief against the Hon. George P. Eichwald, District Judge of the Thirteenth Judicial District. There is no other Court in which such relief might be had.

REAL PARTIES IN INTEREST

The Real Parties In Interest are Tesoro Properties, LLC; Butera Properties, LLC; Carinos Properties, LLC; Recorp New Mexico Associates Limited Partnership; Recorp-New Mexico Associates Limited Partnership I; Recorp-New Mexico Associates Limited Partnership II; Recorp-New Mexico Associates Limited Partnership III and all unknown owners or claimants of the property involved.

THE GROUND UPON WHICH THE PETITION IS BASED

The County seeks a Writ of Prohibition or alternatively a Writ of

Superintending Control and a Stay preventing the district court from considering certain motions. The motions of the real parties in interests (hereinafter for brevity, "Recorp") and any relief which might be granted pursuant to the motions violate the Doctrine of Separation of Powers in the New Mexico Constitution, Art. III, § I, and exceeds the power of the District Court.

It is an improper attempt to involve the Court in matters that are purely legislative. The Territorial Supreme Court of New Mexico held the district judge belongs to the judiciary and the county commissions to the executive or legislative branch. *In re Sloan*, 5 N.M. 590, 5 Gild. 590, 25 P. 930 (1891), special concurrence by Justice Freeman.

I. INTRODUCTION AND FACTUAL AND LEGAL HISTORY

1. Petitioners are the Board of County Commissioners of Sandoval County, New Mexico (hereinafter "the Board"), a county created by statute in 1905. NMSA §4-23-1(1978). Recorp is a group of related entities who own approximately 11,683 acres of unimproved land in the Rio Puerco area of Sandoval County.

2. This case arose as an action in eminent domain. Recorp owns approximately 11,683 acres in the Rio Puerco area of Sandoval County. The County sought to condemn a total of 47.5771 acres in three different parcels. The district court denied the County's condemnation of 41.5208 acres on which two deep well

sites drilled by the County were located. Respondent granted the County's condemnation of 6.0563 acres in the same petition for a roadway known as Alice King Way. The County's Petition for Condemnation is attached hereto as Exhibit "1".

3. The district court found the County's notice of condemnation was inadequate for the deep well parcels and that the County failed to negotiate for the required twenty days respecting the deep well sites.

4. Although all the parcels for which the County sought condemnation were contained within the same Petition, and had been treated procedurally as only one condemnation action, the court found no defect of notice or negotiation for the 6.0563 acres sought for the Alice King Way road site. (Exhibit "2" Order from April 12, 2010 hearing).

5. Just compensation for all of the condemned property, based upon the County's appraisal, was deposited in the Registry of the Court and has not been withdrawn.

6. The County has not sought an interlocutory appeal of Respondent's action described in the preceding paragraphs denying the condemnation of the well sites.

7. No appraisal, evidence or counteroffer as to value has been tendered by

Recorp for Alice King Way, the parcel granted to the County by Respondent's Order (Exhibit "2").

8. The only issue remaining for the District Court is the value of Alice King Way. After the Preliminary Order of Entry "is made permanent, all subsequent proceedings shall only affect the amount of compensation allowable." NMSA § 42-2-6(C) (1978).

9. Sandoval County approved a Master Plan for the Recorp entities on October 5, 2006, to develop a community to be known as "Rio West" and entered into a Memorandum of Understanding (April 19, 2007) and a Development Agreement (July 17, 2007) with Recorp. The Development Agreement incorporated and subsumed the Memorandum of Understanding into the final document. (Exhibit E to Exhibit "3", Paragraph 23.4). (The Development Agreement and the subsumed Memorandum of Understanding are hereinafter referred to as the Development Agreement unless one or the other is otherwise distinguished).

10. The County and Recorp believe an aquifer of brackish water lies beneath portions of the Recorp property. The County intends to desalinate the water pursuant to the Development Agreement.

11. The Development Agreement allocates to Recorp 18,000 acre feet of

the water for "Rio West" if it is possible to obtain that amount from the aquifer.

12. Recorp has filed Notices of Intent with the State Engineer which it claims created "vast water rights" and contends the County is attempting to take this "water or water right." (Exhibit "A" to County's Exhibit "3" herein). (Also alleged in all sustentative pleadings filed in the District Court by Recorp).

13. The County filed a Statement Disclaiming any intent to condemn water or water rights. (Exhibit "4").

14. Petitioner believes all Real Parties In Interest are under common control and have but a single goal in mind, notwithstanding their various corporate identities.

15. The Recorp respondents in the eminent domain action have submitted a motion to district court for permission to file a breach of contract counterclaim and a motion to amend the unfiled counterclaim to seek injunctive relief. (Exhibits "5" and "6" attached hereto).

16. The parties have agreed to mediate the issues.

17. The Carinos respondents have filed a motion asking Respondent to order the Board of County Commissioners (hereinafter "the Board") to meet in special session and then recess into closed (executive) session for the mediation. (Exhibit "7").

18. Carinos asks Respondent to order the Board to require all members of the Board to attend mediation. The Board considered Carinos' Motion and the Commissioners have declined to attend the mediation.

19. The Board gave full settlement authority to the County Manager for the mediation (Exhibit "8").

20. Exhibit "3" hereto is Recorp's "OBJECTION TO PRELIMINARY ORDER OF ENTRY AND COUNTY'S PROPOSED DEPOSIT" filed by Recorp. This pleading has the Memorandum of Understanding and Development Agreement attached as Exhibits B and E and is submitted in its entirety. This pleading also contains the argument that Recorp owns the water in the aquifer by virtue of its Notices of Intent and contains the copies of the Notices of Intent as Exhibit A. (The County originally objected to the form of this pleading because of its numerous unnumbered paragraphs. The Respondent heard arguments on the form of the pleading, but never ruled on the County's objection. The County finally submitted a Response that simply answered the pleading sentence by sentence).

II. THE MOTION TO COMPEL THE BOARD TO CONVENE A SPECIAL SESSION FOR MEDIATION VIOLATES THE DOCTRINE OF SEPARATION OF POWERS

21. Recorp's request that the Court order the Board to convene in special session and then recess into a "closed session" for mediation seeks relief which is

beyond the power of the judiciary. The courts are without power to encroach upon legislative prerogative by judicial fiat. *State v. Steele*, 93 N.M. 470, 601 P2d 440 (1979).

22. The Judiciary lacks the power to order the County to perform a purely discretionary act. Convening a special meeting of the Board is a discretionary act. See also *State of New Mexico ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 199 N.M. 150, 889 P.2d 185 (1994), discussed more fully, *infra*.

23. The County's choice of who will represent it at mediation is a discretionary act. The only control given to the Court is in the local rule, NMRA LR-13-803(G) (2008), which states:

> "Attendance. Each counsel of record shall attend in person and shall ensure the attendance of all persons who have full and final settlement authority at the entire mediation conference." NMRA LR 13-803(G) (2008).

24. As shown by the affidavit of Sandoval County Manager Juan Vigil, attached as Exhibit "8", the County intends to fully comply with this rule.

25. Carinos asserts in its Reply to the County's Response to the Real Parties' Motion to Compel Mediation that the Board cannot delegate its legislative authority to the County Manager. See Exhibit "9". The Board can and does delegate authority to the County staff in litigation matters and does so in every lawsuit referred to mediation.

26. The determination to delegate settlement authority is itself a legislative function over which the Respondent has no authority.

27. Real Parties cite no law that forbids a delegation of the Board's power and authority in litigation. To carry Carinos' argument to its illogical conclusion, no governmental body could ever go to mediation without its entire governing body present for the mediation.

28. The Open Meetings Act NMSA §10-15.1, et seq (2009) provides for closed or executive sessions so counsel or staff for a local government can be prepared to mediate with full and final settlement authority. This is the method used by Sandoval County in all its State and Federal Court litigation.

29. Recorp asserts that a court may oversee discretionary acts of a legislative body if it has engaged in "related, unlawful conduct," and claim that: "Breach of contract is such conduct." (See Exhibit "9").

30. In this eminent domain case the breach of contract counterclaim has not yet been permitted.

31. Recorp asserts it is appropriate to attempt to mediate all pending and potential disputes in the mediation connected to this proceeding. However, the only pending dispute in this proceeding is the value of Alice King Way. See NMSA §42-2-6 (C) (1978).

32. Recorp asserts that the provision of the Development Agreement requiring that County staff "use his or her best efforts" (Exhibit E to Exhibit "3", paragraph 17.2) to bring Rio West development issues to the County Commission if an impasse has been reached must now be construed to require the County Commission to mediate issues at this time which are not before the District Court and are not relevant or related to the condemnation.

33. For Respondent to agree with Recorp, he must engage in impermissible stacking of inference on inference, contrary to the rule of *Lovato v. Plateau, Inc.*, 79 N.M. 428, 444 P.2d 613 (Ct. App. 1968) and *Hausler v. Bass*, 106 N.M. 382, 743 P.2d 1031 (Ct. App. 1987). The inferences whose stacking is not permitted are (1) that an issue respecting something other than the value of Alice King Way exists; (2) that impasse respecting it has been reached between Recorp and the County, and (3) that bringing the issue to court-ordered mediation is the same as bringing it to the Board for resolution. The portion of the paragraph cited by Recorp requires an impasse in the Rio West development be brought to the Board or the Planning and Zoning Commission in a regularly scheduled public meeting, not at mediation. See Development Agreement, p. 17.2 (Exhibit "E" to County's Exhibit "3"). Contracts must be read and construed as a whole and not as a series of isolated statements. *Gardner-Zemke Company v. State*, 109 N.M. 729, 790 P.2d 1010 (1990).

34. The amount of just compensation for the taking of "Alice King Way" is the sole remaining issue before the District Court under the provisions of NMSA §42-2-6(C) (1978).

35. Irrespective of the issues before the Court, the County has not attempted to limit the mediation issues to the compensation for Alice King Way.

36. Respondent lacks the power to order the Board to convene a special session, recess into closed session and compel all five members of the Board to attend the mediation. *State v. Steele* and *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque, supra.* The Board gave settlement authority to the County Manager. (Exhibit "8").

37. Each year, pursuant to NMSA § 10-15-1 (1978), the Board adopts an Open Meetings Act Resolution. (Exhibit "10"). The 2010 Open Meetings Act Resolution states in paragraph 4:

> "Special meetings may be called by the Chairman or a majority of the members upon three (3) days notice. The Notice shall include an agenda for the meeting or information or [sic, should be "on"] how members of the public may obtain a copy of the agenda. The agenda shall be available to the public at least twenty-four (24) hours before any special meeting." (See Exhibit "10" attached hereto.)

38. Only the Board can determine when it shall meet and only the Board has the power to determine if a special session is necessary or desirable.

39. The exercise of power by a county in New Mexico was determined by

the Territorial Legislature in 1876 which stated: "The powers of a county as a body politic and corporate shall be exercised by a board of county commissioners." NMSA §4-38-1 (1897). Counties were granted the same powers as municipalities except for powers that would be inconsistent with the two forms of local government in NMSA §4-37-1 (1978). Included in the grant of powers are those powers

> ". . . necessary and proper to provide for the safety, preserve the health, promote the prosperity and improve the moral, order, comfort and convenience of any county or its inhabitances." NMSA §4-27-1, §4-37-1 (1978).

40. The board of county commissioners may make and publish any ordinance to discharge these powers not inconsistent with statutory or constitutional limitations placed on counties. Id.

41. In 1876, the Territorial Legislature passed what is now NMSA §4-38-8 (1976), which states:

> "The board of county commissioners shall meet, after notice as required by law for meetings of public bodies, at the county seat of each county at quarterly meetings in January, April, July and October in each year and at such other times within the prescribed county which in the opinion of the board the public interest may require. . . . All meetings shall be held in a public building . . . ." (Emphasis added).

42. The law does not otherwise directly address the power of a county to hold public meetings. When to meet, and what subject matters are to be discussed is a matter solely in the discretion of the Board.

43. A County must hold meetings to conduct business. The Court should take Judicial Notice pursuant to NMRA 11-201(B)(1) as a fact generally known within the community that the County does hold regular meetings. The regular meeting schedule of the Board is shown on Exhibit "9".

44. The judicial branch does not have the power to order the Board to meet. In *State ex rel., Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 119 N.M. 150, 889 P.2d 185 (1994), this Court examined the power of the judiciary over the decisions of local governments, and held discretionary legislative powers and duties of local governments include determination of time, manner or locations of performance of governmental duties. Specifically listed as a discretionary power is the provision of necessary or desirable public works projects. The condemnation that is the genesis of the instant case is such a public works project, specifically the condemnation of well sites and a roadway.

45. Counties were granted the explicit power to condemn water rights in 1959 by NMSA §72-4-2 (1978) and the power to acquire land to access water has never been questioned. See, e.g. *City of Sunland Park v. Paseo del Norte Limited Partnership*, 128 N.M. 163, 1999-NMCA-124 (Ct. App. 1999). In the instant case, there was no challenge to the County's power to condemn the deep well sites or Alice King Way. Respondent found notice inadequate and negotiations insufficient

for the condemnation of the well sites, although not for the roadway. The decision to use the power of eminent domain is a discretionary act. The requirement to pay just compensation is non-discretionary legal requirement that flows from a discretionary decision. While mediation of a discretionary act may be appropriate, the executive or legislative body's determination regarding its representative at the mediation must be honored by the judiciary.

46. The determination of the municipality respecting its representation in mediation is presumptively valid. *Los Ranchos*, *supra*. The burden of proving invalidity is upon Respondent. The Court held in *Los Ranchos*, that the judicial branch will not interfere with the exercise of discretionary powers. The Board authorized the County Manager to represent the County at the mediation with full settlement authority on behalf of the County. That decision is beyond the power of the district court to review or reverse and is not a concern of either Respondent or Recorp, when the requirements of LR 13-803(G) (2008) are met.

47. More specifically, this Court's holding in *Los Ranchos*, *infra*, is:

> "As long as [the municipality] acts within its sphere of discretion we will not inquire into the wisdom of the act even if it "is an economic burden upon the taxpayers, as so often is urged in contests of this nature" {quotation in original}. A different policy would place courts in the untenable role of administration rather than adjudication." *State of New Mexico ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 119 N.M. 150, 158, 889 P.2d 185, 193 (1994).

48. The County has agreed to fully participate in meaningful mediation in good faith as required by NMRA LR 13-803(G) (2008). However, it is solely within the discretion of the Board to schedule its own meetings and determine the agenda for the meetings as well as its mediation tactics and positions. There remains no role for the Judiciary to interfere with this legislative discretion.

III. THE MOTION FOR INJUNCTIVE RELIEF IS BEYOND THE JURISDICTION OF THE DISTRICT COURT IN THIS EMINENT DOMAIN ACTION AND VIOLATES THE SEPARATION OF POWERS DOCTRINE AND NEW MEXICO LAW

49. Recorp seeks leave to file or amend an unfiled counterclaim in the condemnation action.

50. The counterclaim is compulsory or mandatory under NMRA 1-013. Attached hereto and incorporated by reference herein as Exhibit "11" is Recorp's Reply to the County's Response to Recorp's Motion to Amend their counterclaim to add a claim for injunctive relief. The penultimate sentence of Recorp's argument states: "Clearly, Recorp's counterclaim and proposed amendment could be categorized as compulsory." (Exhibit "11", page 4).

51. The counterclaim is barred because as a compulsory counterclaim because it is untimely under NMRA 1-013 (2010).

52. In addition, only counterclaims for inverse condemnation are permitted

in eminent domain cases. The proposed amendment to the unfiled counterclaim would include a cause of action for injunctive relief. (See Exhibits "5" and "6").

53. Recorp claims the result of the Development Agreement is a "joint venture" between it and Sandoval County which created a fiduciary relationship. Recorp argues the relationship entitles it to an injunction against Sandoval County as its "joint venture" or partner from "in any form or fashion competing with the operations of the [claimed] joint venture . . . which involves the development of water rights, the development and treatment of water and the sale of water located in Sandoval County."

54. Recorp contends it should have injunctive relief in the eminent domain case. Recorp has already prevailed in the portion of the eminent domain action that is the basis for their injunction request. Respondent dismissed the portion of the eminent domain action in which the County sought the condemnation of the well sites. (See Exhibit "3").

55. Recorp asserts that any action by the County "would be in direct competition with [and] damaging to the joint venture." Sandoval County is informed and believes and therefore alleges Recorp is asserting whatever action it seeks to have enjoined would impair its water rights, and the Respondent should consider its counterclaim to prevent such impairment.

56. In order for there to be impairment, there must be water rights;

57. Recorp has no water rights.

58. Recorp has drilled no wells of which Sandoval County is aware;

59. Recorp has applied no water to beneficial use as far as Sandoval County is aware;

60. Recorp made no application to the State Engineer for any permit to appropriate water;

61. Recorp has made no claim that its water rights would be impaired by Sandoval County.

62. The Courts may determine what protections and remedies are appropriate only when water rights are perfected or instituted by whatever legal means are available to do so. The determination of impairment depends upon the other users of the water source and the degree to which the water has already been appropriated. Here no water rights have been instituted or perfected by Recorp and therefore it has nothing to be protected by an injunction. See, *Turner v. Bassett*, 137 N.M. 381, 2005-NMSC-009. "The proposed severance [of the water from the real property] is evaluated by the State Engineer to determine whether the changed use of water may result in adverse impacts to other appropriators or may be detrimental to water conservation and the public welfare. Protests and objections

are also submitted during this initial point in the process." (emphasis added) 137 N.M. 381, 386.

63. Both the County and Recorp filed Notices of Intent with the State Engineer to drill wells into an aquifer lying more than 2,500 feet below the surface and containing saline water. The State Engineer did not then control the appropriation of deep water from a saline aquifer. The Notices were filed at a time when such deep water aquifers were beyond the administrative jurisdiction of the State Engineer under NMSA §72-12-25 (2009) (prior to amendment by the 2009 Legislature). (See Exhibit "3" attached hereto.)

64. At that time, the State Engineer had no statutory authority over such water, and even now has exercised none of the power given to him by the 2009 Legislature over the acquisition or development of water rights in the water in question.

65. The purpose of the Notices of Intent to drill exploratory wells was to alert the State Engineer so that he could supervise the plans and construction of the wells.

66. The State Engineer required the submission of plans and specifications in order to assure that water from the deep saline aquifer did not contaminate the shallow fresh water aquifers above and to assure that fresh water was not lost to the

saline aquifer below.

67. The County proceeded in accordance with the approval of its plans and specifications by the State Engineer to drill two exploratory test wells at a cost of about $6.5 million.

68. The County received a permit from the New Mexico Environment Department ("NMED") to bring the brackish water to the surface and to test a treatment method for the water. The County's Preliminary Engineering Report test results indicate the water can be made potable and palatable, but the County has proceeded no further with the project.

69. The County cannot use the water referred to above until a permit is granted by NMED. (NMAC §20.6.2.3104). At this time, the County expects the process to take about three (3) more years before the County can begin desalinating the water.

70. The State Engineer gave the County and Recorp approval only of the plans and specifications for the exploratory wells.

71. No water rights were created by the State Engineer (*see*, NMSA § 72-12-1 et seq. for the exclusive means by which the State Engineer can create underground water rights) or recognized by the Engineer (which, in any event, is beyond his power under *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73

(1963).

72. Recorp asserts, in various fashions, that their Notice of Intent gave them substantive, appropriative water rights to all the water that lies beneath their 11,683 acres as well as the entire aquifer itself. (*See* Exhibit "12", Carinos' Objection to the Preliminary Order of Entry filed on October 29, 2009, page 5, paragraph 19,

> "This agreement . . . illustrates . . . [the County's] awareness that Respondents own the real property, own the wells, and own the rights to drill for and use the water in the aquifer below."

73. This is a new and novel proposition under New Mexico's law of prior appropriation in which the "law of capture" plays no role. *Yeo v. Tweedy*, 34 N.M. 611, 286 P. 970 (1929).

> [a] person owning a parcel of land situated over an underground aquifer does not necessarily own the right to use that water. Ground water, like surface water, must be appropriated and applied to beneficial use before a vested water right will result. *Hydro Resources Corp. v. Gray*, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749.

74. Respondent agreed with Recorp/Carinos that the County's attempt to condemn the sites on which the wells were drilled by the County (with Recorp's permission) was an attempt to take water or water rights, despite the County's Disclaimer (See Exhibit "4").

75. Recorp claims that the Notices of Intent gave them ownership of the

entire aquifer. (Exhibits "3", "5", "6", "11" and "12").

76. The result of the April 12, 2010 hearing was that the County was permitted to condemn Alice King Way and was denied condemnation of the two well sites. No other issues were decided, although a mortgagee of one of the Recorp affiliates withdrew its Motion to Intervene. (Exhibit "13").[1]

77. In the proposed counterclaim to the condemnation action, Recorp requests Respondent enjoin the County from doing anything at anytime in anyway related to the aquifer, desalination, "development, processing and sale of deep water" anywhere in any area of Sandoval County.

78. Recorp believes it is in a "joint venture" with the County (See, Exhibits "5", "6" and "11"). (Emphasis added).

79. The contract of the County with Recorp can be neither a joint venture nor a partnership as a matter of law.

80. Counterclaims are limited in an eminent domain action, which is a statutory cause of action. The Eminent Domain Code states:

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[1]1 The Motion to Intervene was filed by Southwest Lending. Recorp recorded a $35 million non-recourse loan secured only by water rights on September 30, 2009. That was the date the Board of County Commissioners for Sandoval County authorized the condemnation at issue in this case. The title search was completed prior to the recordation of the Southwest Lending mortgage. Therefore, Southwest Lending was not named in the condemnation. The County did not oppose a limited intervention by a Recorp creditor. The County argued the creditor had an intervention right to claim the proceeds under the holding of *City of Sunland Park v. Santa Teresa Services Company*, 134 N.M. 243, 2003-NMCA-106 (Ct. App. 2003).

"The Rules of Civil Procedure shall apply to the special alternative procedure in eminent domain except where special provisions are found in the special alternative procedure which conflict with the Rules of Civil Procedure and then the Rules of Civil Procedure shall not apply." NMSA §42-2-18 (1978).

81. If the Legislature intended the Rules of Civil Procedure to apply uniformly to condemnation proceedings, NMSA §42-2-18 (1978), would be rendered meaningless. *See, also*, NMSA 42A-1-15 (1978):

"Unless specifically provided to the contrary in the Eminent Code . . . or unless inconsistent with its provisions, the Rules of Civil Procedure for the District Courts govern matters pursuant to that act."

82. The Eminent Domain Code and the case law there under have "provided to the contrary" and the Rules of Civil Procedure are inconsistent with some of the provisions of the condemnation statutes.[2]

83. NMSA § 42-2-1 is the declaration of Legislative intent.[3]

84. An action for injunction is not a permitted counterclaim in a condemnation proceeding. If the taking is not for a public purpose, an injunction is unnecessary because the condemnation fails as a matter of law. If the taking is for a

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[2]The Laws of 1981, ch. 125, § 62 repealed 42-1-1 to 42-1-39 NMSA 1978 and replaced the Code with §§ 42A-1-1 through 42A-1-33 NMSA 1978.

[3]The Legislature finds the Eminent Domain procedure in place was leading to delays in both public works projects and the award of just compensation. NMSA § 42-2-2 (1978) makes it clear the Code applies to all political subdivisions of New Mexico. Both Chapters 42 and 42A of the Statutes provide a specific procedure for the condemnee and condemnor to follow and set forth what must be contained in the petition and methods that court may use to arrive at the amount of compensation for the taking that is "just compensation".

public purpose, the taking succeeds and there is no activity to enjoin. NMSA §42-2-6(C)(1978) provides that the only remaining issue is just compensation. Therefore, there is no activity that can be enjoined in a condemnation. If the condemnation harms property that is not the subject of the pending eminent domain action, the proper claim in an original action or counterclaim in a pending action is inverse condemnation.

85. The Respondent has no jurisdiction in the present case either to adjudicate the water rights of Recorp (or anyone else), or to perform essentially the same function, to enjoin the use of the public water. *State ex rel Reynolds v. Sharp*, 66 N.M. 192, 194, 344 P.2d 943, 944 (1959); N.M.S.A. 72-4-13, et seq.; *City of Albuquerque v. Reynolds*, 71 N.M. 428 at 433, 379 P.2d 73 (S. Ct. 1962).

86. The mere possibility that injury, such as impairment of water rights, may result from a public works project is not a basis for injunction. The courts will not interfere where the claimed injury is doubtful, speculative or contingent. *City of Albuquerque v. State of New Mexico ex rel. Village of Los Ranchos de Albuquerque*, 111 N.M. 608, 808 P.2d 58 (Ct. App. 1991).

87. Even if the County was taking water, Recorp's options would be limited to a claim of inverse condemnation based on impairment of its water rights, damage to its aquifer (if it owned one), or to the taking of its water.

88. The County is vested with statutory authority to plan and construct a County water project if it so chooses and an injunction cannot be used to stop a public works project. *City of Albuquerque v. State ex rel. Village of Los Ranchos, supra.*

89. If the County's action with respect to the deep well project, which is not yet in existence, is claimed to be a breach of contract, Recorp must file a separate action. It cannot proceed with such a counterclaim in this eminent domain case, particularly since the County was denied access to the well sites and hence to the water which might be accessed by it, (and, as a meaningless aside, some of which may be under the Recorp land).

90. The Real Parties argue that the holding of this Court in *Ortega, Snead, Dixon & Hanna v. Gennitti*, 93 N.M. 135, 597 P.2d 745 (1979) is dispositive on the issue of whether any and all manners and types of counterclaims may be filed in an eminent domain action. The County disagrees. The question before the Court in the *Ortega, Snead* case only involved counterclaims in quiet title actions. The statutes governing quiet title actions, NMSA §§42-6-1 et seq. (1978), were passed by the 1897 Territorial Legislature and have apparently remained relatively unchanged since at least 1937. The Quiet Title Article does not have a statement of legislative intent similar to NMSA §42-2-1 (1978). The Article does not address

the Rules of Civil Procedure as the Eminent Domain Code does in NMSA§42A-1-15 (1978). The Quiet Title statutes do not have any section comparable to NMSA §42-2-6(C) which specifically instructs the district court that only compensation remains as an issue after the Preliminary Order of Entry is either made permanent or dissolved. Quiet Title cases cannot be equated to eminent domain cases. Any citizens "having or claiming an interest" in the "title to real property" can file a Quiet Title action. NMSA §42-6-1(1978). Only government or quasi-government entities can file an eminent domain action, with the exception of limited condemnation rights granted to entities such as utilities and railroads.

91. The development agreement does not create either a partnership or a joint venture. Included in the elements of a joint venture are a right to share in the profits and a duty to share in any losses. *Fullerton v. Kaune*, 72 N.M. 201, 382 P.2d 529 (1963); *Copper v. Curry*, 92 N.M. 417, 589 P.2d 201 (Ct. App. 1978). Governments do not make profits. (Exhibit "47" Deposition of County Manager Juan R. Vigil). Further, a duty to share in any losses would make the County the equivalent of an insurer.

92. Recorp and Sandoval County cannot be partners, either. A joint venture is simply a partnership for a single transaction. *Hansler v. Bass*, 106 N.M. 382, 743

P.2d 1031 (Ct. App. 1987).

93. For Recorp to prevail not only must they overcome the law of partnerships and joint ventures, as well as the limitations on injunctions against local governments such as Sandoval County, they must also prevail on two other issues over which the Respondent has no jurisdiction. First, that the court has the power to adjudicate water rights, i.e. recognize and define them. Second, that Respondent has the power to create water rights, which is a power reserved to the State Engineer. NMSA §72-2-1 (1982).

IV. RELIEF REQUESTED AND NEED FOR STAY ON THE ISSUE OF MEDIATION

94. Real Parties in Interest have requested a setting of September 9, 2010, for the Court to hear the motion to allow the counterclaim for injunction. At that hearing, if set by the Respondent, matters in excess of the Court's jurisdiction will be considered.

95. The ultimate relief requested by the County is a Peremptory Writ of Prohibition or Superintending Control that prohibits Respondent from requiring attendance at mediation by the entire County Commission.

V. RELIEF REQUESTED AND NEED FOR STAY ON THE ISSUE OF INJUNCTIVE RELIEF

96. Although the Recorp Respondents seek to enjoin the County from

doing anything concerning water anywhere in the County, the County cannot proceed forward on the desalination project until NMED acts. NMED must approve the County's plan to dispose of the by-products that will be isolated in the desalination project. At this time, the County cannot proceed on the desalination project.

97. While the County has no known immediate need for well sites at other County facilities, such as the County's fire stations, it is not possible to predict when there might be an immediate or emergency need for the County to provide water, drill wells, condemn water rights or take or sell water. The relief requested by the County is a Peremptory Writ of Prohibition or Superintending Control that prohibits the district court from any further action in the Eminent Domain case except establishing just compensation for Alice King Way.

WHEREFORE, Sandoval County respectfully requests that the Court issue its alternate writ of prohibition or superintending control, and upon the hearing thereof, to make such writ permanent, and that it have such other and further relief to which it is entitled. Petitioner further requests this Court to issue a Stay of Proceedings in the above-referenced matter in order to conduct briefing and argument.

Respectfully submitted:

David Mathews, County Attorney
Sandoval County Courthouse
Post Office Box 40
Bernalillo, New Mexico 87004-0040
(505) 867-7500
(505) 771-7194 facsimile

Peter B. Shoenfeld by DM
Peter B. Shoenfeld
Post Office Box 2421
Santa Fe, New Mexico 87504
(505) 982-3567
(505) 982-5520 facsimile

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, I caused to be hand-delivered a copy of the foregoing pleading to:

The Honorable George P. Eichwald
Thirteenth Judicial District Court
1500 Idalia Road, Building A
Bernalillo, New Mexico 87004
(505) 867-2861

Deborah K. Farrar, CCR, RPR
Official Court Reporter

Thirteenth Judicial District Court
1500 Idalia Road, Building A
Bernalillo, New Mexico 87004

I caused to be mailed and emailed a copy of the foregoing pleading to:

Ronald J. VanAmberg, Esq.
VanAmberg, Rogers, Yepa, Abeita
& Gomez, LLP
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
rvanamberg@nmlawgroup.com

Carolyn M. Nichols, Esq.
Rothstein, Donatelli, Hughes, Dahlstrom
Schoenberg & Bienvenu, LLP
500 4th Street, N.W., Suite 400
Albuquerque, New Mexico 87102
camnichols@rothsteinlaw.com
Real Parties in Interest

David Mathews, County Attorney
Sandoval County
Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of August, I caused to be hand-delivered a copy of the foregoing pleading to:

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Deborah K. Farrar, CCR, RPR
Official Court Reporter
Thirteenth Judicial District Court
1500 Idalia Road, Building A
Bernalillo, New Mexico 87004

Gary King, Attorney General
Of the State of New Mexico
408 Galisteo Street
Villagra Building
Santa Fe, New Mexico 87501
Phone: (505) 827-6000
Fax: (505) 827-5826

I caused to be mailed and emailed a copy of the foregoing pleading to:

Ronald J. VanAmberg, Esq.
VanAmberg, Rogers, Yepa, Abeita
& Gomez, LLP
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
rvanamberg@nmlawgroup.com

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Schoenberg & Bienvenu, LLP
500 4th Street, N.W., Suite 400
Albuquerque, New Mexico 87102
camnichols@rothsteinlaw.com

Real Parties in Interest

David Mathews, County Attorney
Sandoval County
Petitioner

VERIFICATION

STATE OF NEW MEXICO)
ss.:
COUNTY OF SANDOVAL)

JUAN R. VIGIL, COUNTY MANAGER OF SANDOVAL COUNTY, being first duly sworn upon oath, deposes and states that he is the designated representative of the Petitioner in the above entitled cause; that he has read the above and foregoing Petitioner and knows the contents thereof; and that the matters contained therein are true and correct to the best of his knowledge, information and belief.

JUAN R. VIGIL

SUBSCRIBED AND SWORN TO BEFORE me this 19 day of August, 2010.

Notary Public

My Commission Expires: August 19, 2012

[seal]

STATE OF NEW MEXICO
COUNTY OF **SANDOVAL**
THIRTEENTH JUDICIAL DISTRICT COURT

Case No. D1329 CV 2009 2408

SANDOVAL COUNTY, NEW MEXICO, a Statutorily created County,

Petitioner,

-vs.-

TESORO PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; BUTERA PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; CARINOS PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEW MEXICO LIMITED PARTNERSHIP' RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP; and ALL UNKNOWN OWNERS OR CLAIMANTS OF IF THE PROPERTY INVOLVED,

Respondents.

Judge Ellenwan

PETITION/COMPLAINT FOR CONDEMNATION

Petitioner states that:

I.

Petitioner is Sandoval County, a statutorily created County pursuant to NMSA §4-23-1 (1905) and the proper authority under the Constitution and statutes of the State of New Mexico to institute and prosecute this action in eminent domain.

II.

It is necessary for the Petitioner to acquire by condemnation the property, property rights, easements and licenses herein sought for the purpose of constructing, reconstructing or

improving public roads, streets or highways for public purposes and for the purpose of accomplishing the removal of any and all encroachments upon the right of way and for all other purposes in connection with access to Sandoval County's well sites, desalination facilities and the Northwest Loop via a ranch road known as Alice King Way. As further explanation, upon information and belief, the Northwest Loop must connect to an existing roadway. That "existing roadway" is 60th Street in Rio Rancho. The connection between the Northwest Loop and 60th Street is currently an unimproved ranch road known as Alice King Way, which will become a County road. The other area landowners (the King family and Amrep) have given the County access. Some or all of the Respondents in the instant matter told the County, in writing on October 2, 2009, that access is denied. Respondents' agent orally told the County in a meeting on or about September 29, 2009, that access was denied to the property at issue.

III

This action is brought pursuant to and under the terms of NMSA 1978, §§ 42-2-1 to 42-2-24 (1959 as amended).

IV

Petitioner seeks to acquire the property or property rights described in Exhibits "A", "B" and "C" attached hereto and incorporated herein by reference, in fee simple, or such lesser estate as is shown under each separate numerical parcel designation and to require the removal of all improvements and encroachments, if any, on the portion of land sought to be condemned.

V

Petitioner also seeks to acquire a license to enter Respondents' remaining land, if any, for the purpose of removing improvements and encroachments, if any, on the portion of land sought to

be condemned, or to protect the portion of the improvements which remain on Respondents' land.

VI

Petitioner has been unable to agree with one or more of the Respondents having an interest in the property as to just compensation to be paid for the property sought to be acquired. The total amount offered by Petitioner as just compensation for said property is Two Hundred Thirty Seven Thousand Eight Hundred Eighty Five and 50/100 ($237,885.50) Dollars.

VII

The names and addresses of all Respondents who own, have an interest in, or occupy the property or who own the property rights sought to be acquired, as well as any facts of legal disability, deceased owners, unknown owners, and property and property rights held in trust, insofar as they are known to the Petitioner after a search of the county records are:

TESORO PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY
BUTERA PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY
CARINOS PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY
RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP
RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP
RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEW MEXICO LIMITED PARTNERSHIP' RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP
7835 E. Redfield Road #100
Scottsdale, Arizona 85260

PROPERTY TAX DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, STATE OF NEW MEXICO
Manuel Lujan Sr. Building
1200 St. Francis Drive
Santa Fe, NM 87501

and ALL UNKNOWN OWNERS OR CLAIMANTS OF IF THE PROPERTY INVOLVED,

The names or addresses of some of the Respondents may not be known and may remain unknown after due inquiry has been made by Petitioner and certain Respondents may not reside within the State or cannot be found therein after Petitioner has made due inquiry and search for them, and it may therefore necessary for Petitioner to obtain constructive service upon them by publication.

IX

Petitioner is credibly informed and believes, and upon such information and belief alleges that parties designated herein as "ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED" may claim some title or interest in the property involved in this action. Petitioner has made due search to ascertain the identity of such persons, but such identity is unknown and cannot be ascertained by Petitioner.

WHEREFORE, Petitioner respectfully requests:

1. An order and judgment of this Court granting to Petitioner the fee simple title to the property sought to be acquired and granting to the Petitioner such lesser interest in the property or property rights sought to be acquired and which are described in Exhibits "A", "B" and "C" attached hereto and incorporated herein by reference

2. That Respondents be restrained from hindering or interfering with the occupation and control of the premises by the Petitioner; and that the Petitioner be granted the right to enter upon the Respondents' remaining land, if any, for the purposes of removing encroachments, or to protect the improvements remaining on the Respondents' land.

3. That the Court determine the respective interests of the Respondents in the property taken and the amount of just compensation and the damages, if any, which the

Respondents may jointly or severally sustain as a consequence of the taking for, and establishment of, this public street, road or highway.

4. For such other and further relief as the Court deems proper.

Respectfully submitted:

David Mathews, County Attorney
Sandoval County Courthouse
Post Office Box 40
Bernalillo, New Mexico 87004-0040
(505) 867-7500
(505) 771-7194 facsimile

Peter B. Shoenfeld by DM
Peter B. Shoenfeld
Post Office Box 2421
Santa Fe, New Mexico 87504
(505) 982-3566
(505) 982-5520 facsimile

Alice King Way Right-of-Way

A PORTION OF LAND LYING IN THE SOUTHEAST ONE-QUARTER OF SECTION 3, THE NORTHEAST ONE-QUARTER OF SECTION 10, AND THE NORTHWEST ONE-QUARTER OF SECTION 11, TOWNSHIP 12 NORTH, RANGE 1 WEST, SANDOVAL COUNTY, NEW MEXICO, BEING DESCRIBED AS FOLLOWS:

COMMENCING AT THE EAST ¼ CORNER OF SAID SECTION 3 (A FOUND ALUMINUM CAP STAMPED "LS 7248), WHENCE THE SOUTHEAST CORNER OF SAID SECTION 3 (A FOUND ALUMINUM CAP STAMPED "LS 7248" DATED "1990"), BEARS S 00° 51' 24" W (BASIS OF BEARING), A DISTANCE OF 2633.32 FEET;

THENCE S 16°13'39" W, A DISTANCE OF 2689.65 FEET TO THE EASTERLY RIGHT-OF-WAY LINE OF THE NORTHWEST LOOP ROAD (NM STATE HIGHWAY COMMISSION MAP SP-7543) AND THE **POINT OF BEGINNING;**

THENCE N 90°00'00" E LEAVING THE EASTERLY RIGHT-OF-WAY LINE OF SAID NORTHWEST LOOP ROAD AND TANGENT TO THE FOLLOWING DESCRIBED CURVE, A DISTANCE OF 149.44 FEET;

THENCE 511.17 FEET ALONG THE ARC OF A TANGENT CURVE TO THE RIGHT HAVING A RADIUS OF 700.00 FEET, A CENTRAL ANGLE OF 41° 50' 22", AND A CHORD WHICH BEARS S 69° 04' 49" E, A DISTANCE OF 499.88 FEET;

THENCE 438.13 FEET ALONG THE ARC OF A REVERSE CURVE TO THE LEFT HAVING A RADIUS OF 600.00 FEET, A CENTRAL ANGLE OF 41° 50' 18", AND A CHORD WHICH BEARS S 69° 04' 51" E, A DISTANCE OF 428.46 FEET;

THENCE N 90° 00' 00" E TANGENT TO THE PREVIOUSLY AND FOLLOWING DESCRIBED CURVES, A DISTANCE OF 553.52 FEET;

THENCE 887.62 FEET ALONG THE ARC OF A TANGENT CURVE TO THE LEFT HAVING A RADIUS OF 1450.00 FEET, A CENTRAL ANGLE OF 35° 04' 25", AND A CHORD WHICH BEARS N 72° 27' 47" E, A DISTANCE OF 873.83 FEET TO THE NORTH LINE OF THE NORTHWEST ONE-QUARTER OF SAID SECTION 11;

THENCE S 89° 24' 09" E NON-TANGENT TO THE PREVIOUSLY AND FOLLOWING DESCRIBED CURVES AND ALONG THE NORTH LINE OF THE NORTHWEST ONE-QUARTER OF SAID SECTION 11, A DISTANCE OF 161.90 FEET;

THENCE 1080.52 FEET LEAVING THE NORTH LINE OF THE NORTHWEST ONE-QUARTER OF SAID SECTION 11 AND ALONG THE ARC OF A NON-TANGENT CURVE TO THE RIGHT HAVING A RADIUS OF 1550.00 FEET, A CENTRAL ANGLE OF 39° 56' 29", AND A CHORD WHICH BEARS S 70° 01' 46" W, A DISTANCE OF 1058.77 FEET;

THENCE S 90° 00' 00" W TANGENT TO THE PREVIOUSLY AND FOLLOWING DESCRIBED CURVES, A DISTANCE OF 553.52 FEET;

THENCE 511.15 FEET ALONG THE ARC OF A TANGENT CURVE TO THE RIGHT HAVING A RADIUS OF 700.00 FEET, A CENTRAL ANGLE OF 41° 50' 18", AND A CHORD WHICH BEARS N 69° 04' 51" W, A DISTANCE OF 499.87 FEET;

THENCE 438.14 FEET ALONG THE ARC OF A REVERSE CURVE TO THE LEFT HAVING A RADIUS OF 600.00 FEET, A CENTRAL ANGLE OF 41° 50' 23", AND A CHORD WHICH BEARS N 69° 04' 49" W, A DISTANCE OF 428.47 FEET;

THENCE N 90° 00' 00" W, A DISTANCE OF 150.70 FEET TO THE EASTERLY RIGHT-OF-WAY LINE OF SAID NORTHWEST LOOP ROAD;

THENCE N 00° 43' 23" E ALONG THE EASTERLY RIGHT-OF-WAY LINE OF SAID NORTHWEST LOOP ROAD, A DISTANCE OF 100.00 FEET TO THE **POINT OF BEGINNING**;

CONTAINING 6.0563 ACRES (263,811 SQ. FEET), MORE OR LESS.

Well Site # 5

A PORTION OF LAND LYING IN SECTION 11, TOWNSHIP 12 NORTH, RANGE 1 WEST, SANDOVAL COUNTY, NEW MEXICO, BEING DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHWEST CORNER OF SAID SECTION 11 (A FOUND ALUMINUM CAP STAMPED "LS 7248), WHENCE THE SOUTHWEST CORNER OF SAID SECTION 11 (A FOUND ALUMINUM CAP STAMPED "LS 7248" DATED "1990"), BEARS S 00° 29' 56" W (BASIS OF BEARING), A DISTANCE OF 5267.67 FEET;

THENCE S 43° 57' 14" E, A DISTANCE OF 2365.94 FEET TO THE **POINT OF BEGINNING;**

THENCE S 88° 38' 43" E, A DISTANCE OF 223.96 FEET;

THENCE S 02° 04' 58" E, A DISTANCE OF 100.88 FEET;

THENCE S 10° 37' 28" W, A DISTANCE OF 214.95 FEET;

THENCE N 87° 42' 09" W, A DISTANCE OF 186.26 FEET;

THENCE N 00° 20' 13" W, A DISTANCE OF 309.91 FEET TO THE **POINT OF BEGINNING;**

CONTAINING 1.5208 ACRES (66,247 SQ. FEET), MORE OR LESS.

EXHIBIT "B"

Well Site # 6

A PORTION OF LAND LYING IN SECTION 10, TOWNSHIP 12 NORTH, RANGE 1 WEST, SANDOVAL COUNTY, NEW MEXICO, BEING DESCRIBED AS FOLLOWS:

COMMENCING AT THE NORTHEAST CORNER OF SAID SECTION 10 (A FOUND ALUMINUM CAP STAMPED "LS 7248), WHENCE THE SOUTHEAST CORNER OF SAID SECTION 10 (A FOUND ALUMINUM CAP STAMPED "LS 7248" DATED "1990"), BEARS S 00° 29' 56" W (BASIS OF BEARING), A DISTANCE OF 5267.67 FEET;

THENCE S 29° 59' 09" W, A DISTANCE OF 2072.02 FEET TO THE WESTERLY RIGHT-OF-WAY LINE OF THE NORTHWEST LOOP ROAD (NM STATE HIGHWAY COMMISSION MAP SP-7543) AND THE **POINT OF BEGINNING;**

THENCE S 00° 43' 23" W ALONG THE WESTERLY RIGHT-OF-WAY LINE OF SAID NORTHWEST LOOP ROAD, A DISTANCE OF 1586.12 FEET;

THENCE S 90° 00' 00" W LEAVING THE WESTERLY RIGHT-OF-WAY LINE OF SAID NORTHWEST LOOP ROAD, A DISTANCE OF 1708.08 FEET;

THENCE N 37° 59' 45" E, A DISTANCE OF 2012.54 FEET;

THENCE N 90° 00' 00" E, A DISTANCE OF 489.16 FEET TO THE WESTERLY RIGHT-OF-WAY LINE OF SAID NORTHWEST LOOP ROAD AND THE **POINT OF BEGINNING;**

CONTAINING 40.0000 ACRES (1,742,400 SQ. FEET), MORE OR LESS.

PH: 505-823-1000

EXHIBIT 'C'

STATE OF NEW MEXICO
COUNTY OF **SANDOVAL**
THIRTEENTH JUDICIAL DISTRICT COURT

Case No.: D1329 CV 2009 240

SANDOVAL COUNTY, NEW MEXICO, a Statutorily created County,

Petitioner,

-vs.-

TESORO PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; BUTERA PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; CARINOS PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEW MEXICO LIMITED PARTNERSHIP' RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP; and ALL UNKNOWN OWNERS OR CLAIMANTS OF IF THE PROPERTY INVOLVED,

Respondents.

FILED IN MY OFFICE
DISTRICT COURT CLERK
2009 OCT -8 PM 3:21
THERESA VALENCIA
BY _____ DEPUTY
SANDOVAL COUNTY

JURY DEMAND

COMES NOW the Petitioner, Sandoval County, New Mexico, by and through its attorneys in this cause of action, and pursuant to Rule 1-038 NMRA 1998, hereby demands a trial by a jury of twelve (12) persons of all of the issues in this case.

Respectfully submitted:

David Mathews, County Attorney
Sandoval County Courthouse
Post Office Box 40
Bernalillo, New Mexico 87004-0040
(505) 867-7500
(505) 771-7194 facsimile

Peter B. Schoenfeld by DM

Peter B. Shoenfeld
Post Office Box 2421
Santa Fe, New Mexico 87504
(505) 982-3566
(505) 982-5520 facsimile

I hereby certify that a true and correct copy of the foregoing pleading was attached to the Petition/Complaint for service on Respondents.

D Mathews

David Mathews

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

SANDOVAL COUNTY, NEW MEXICO,
a statutorily created County,

Petitioner,

v. **D-1329-CV-2009-2408**

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES, LLC, a New Mexico limited liability company; CARINOS PROPERTIES, LLC, a New Mexico limited liability company; RECORP NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents.

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT CARINOS' AND REMAINING RESPONDENTS' MOTIONS TO DISMISS PETITION/COMPLAINT FOR CONDEMNATION

THIS MATTER having come before the Court on the Motions to Dismiss the Petition/Complaint for Condemnation filed by Respondent Carinos and by the remaining Respondents;

THE PARTIES being represented by counsel of record at the hearing on this matter;

THE COURT, BEING FULLY ADVISED, FINDS:

1. That this action should be governed by the contract which the Court finds was entered into by the parties;

2. That notice of the condemnation action was not provided by Petitioner in accordance with the requirements of NMSA § 42A-1-5;

3. That no meaningful negotiations as required by NMSA § 42A-1-4 were entered into with respect to the value of the property at Well Sites # 5 and #6 (as described by Exhibits B and C to the Petition/Complaint for Condemnation);

4. Based on its equitable powers, the Court is not dismissing the Petition/Complaint for Condemnation with respect to the Alice King Right-of-Way (as described by Exhibit A to the Petition/Complaint for Condemnation), so long as the land is to be used only for the stated purpose of a roadway, and is not to be used for any other purpose (including but not limited to the drilling of any well sites), except for possible utility easements along the roadway; and

5. The County of Sandoval does not intend to seek interlocutory appeal of this Order;

WHEREFORE, the Motions to Dismiss are GRANTED with respect to Well Site # 5 and Well Site #6 (as described by Exhibits B and C to the Petition/Complaint for Condemnation) and DENIED with respect to the Alice King Right-of-Way (as described by Exhibit A to the Petition/Complaint for Condemnation).

THE HONORABLE GEORGE P. EICHWALD
District Court Judge

Submitted by:

Carolyn M. "Cammie" Nichols
Peter Schoenburg
Counsel for Respondent Carinos

Reviewed and Joined Telephonically, 05/03/2010
Ronald Van Amberg
Counsel for Respondents

Approved as to Form by:

Approved Per Electronic Mail, 06/02/2010
David Mathews
County Attorney for Sandoval County

THIRTEENTH JUDICIAL DISTRICT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

SANDOVAL COUNTY, NEW MEXICO, a Statutorily created County,

Petitioner,

vs. D-1329-CV-09-2408

TESORO PROPERTIES, LLC., a New Mexico Limited Liability Company, et al.

Respondents.

SOUTHWEST LENDING, LLC, a New Mexico Limited Liability Company,

Plaintiff-in-Intervention,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANDOVAL, NEW MEXICO,

Defendant-in-Intervention,

SOUTHWEST LENDING, LLC, a New Mexico Limited Company,

Third-Party Plaintiff,

v.

RECORP PARTNERS, INC., a foreign corporation, and RECORP, a foreign corporation,

Third-Party Defendants.

TRANSCRIPT OF PROCEEDINGS

On the 12th day of April, 2010, at 1:30 p.m, this matter came on for Motions Hearing before THE HONORABLE GEORGE P. EICHWALD, Judge of the Thirteenth Judicial District Court, State of New Mexico, Division II.

The Petitioner was represented by Counsel of Record DAVID MATHEWS, Sandoval County Attorney and by Counsel of Record PETER SHOENFELD, Sandoval County Attorney, P.O. Box 40, Bernalillo, New Mexico 87004-0040.

The Respondents, Carinos, were represented by Counsel of Record CAROLYN M. NICHOLS, Attorney at Law, 500 4th Street, NW, Suite 400, Albuquerque, New Mexico 87102.

DEBORAH K. FARRAR, CCR, RPR

The Respondents, Recorp, were represented by Counsel

CCDSandoval County v Tesoro Properties April 12 2010 Hearing of Record RONALD J. VAN AMBERG, Attorney at Law, P.O. Box 1447, Santa Fe, New Mexico 87504-1447.

(Note: Appearances continued.)

The Proposed Intervenor, Southwest Lending, was represented by Counsel of Record, RANDY BARTELL, Attorney at Law, P.O. Box 2307, Santa Fe, New Mexico 87504-2307.

Also Present: County Manager Juan Vigil; County Commissioner Donald Leonard; County Attorney Stephanie Lopez; David Maniatis; Michael Springfield.

At which time the following proceedings were had:

INDEX TO TRANSCRIPT OF PROCEEDINGS

DEBORAH K. FARRAR, CCR, RPR

THIRTEENTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF SANDOVAL

I, DEBORAH K. FARRAR, Court Reporter in the State of

New Mexico, hereby certify that I transcribed, to the best of my ability, the Audio CD from Cause Number D-1329-CV-09-2408; that the pages numbered 3 through 77 are a true and correct transcript of the Audio CD to the best of my ability and was reduced to typewritten transcript through Computer-Aided Transcription; that on the date I transcribed these proceedings, I was a New Mexico Certified Court Reporter.

Dated at Bernalillo, New Mexico, this 16th day of April, 2010.

NOTE: THIS TRANSCRIPT WAS TRANSCRIBED TO THE BEST OF MY ABILITY. THE CD WAS INAUDIBLE IN SEVERAL PLACED THROUGHOUT THE TRANSCRIPT.

_E-Tran Signature_____

DEBORAH K. FARRAR, CCR, RPR
New Mexico CCR No. 17
Expires: December 31, 2010

CORRECTION PAGE

TITLE: Sandoval County v. Tesoro Properties, et al., CV-1329-CV-09-2409. April 12, 2010 Hearing.

NOTE: THIS TRANSCRIPT WAS TRANSCRIBED TO THE BEST OF MY ABILITY. THE AUDIO CD WAS INAUDIBLE IN SEVERAL PLACES THROUGHOUT THE TRANSCRIPT.

PAGE	LINE	DESIRED CHANGE AND REASON

CCDSandoval County v Tesoro Properties April 12 2010 Hearing

SIGNATURE OF ATTORNEY/DATE:

DEBORAH K. FARRAR, CCR, RPR

(Note: In Open Court, April 12, 2010, Motions Hearing, approximately 1:35 p.m.)

THE COURT: This is Sandoval County versus Tesoro Properties, et al., Cause Number CV-09-2408. We're here on a number of motions.

Let me have everyone's appearance for the record for today's hearing.

MR. MATHEWS: I'm David Mathews, Sandoval County Attorney, accompanied by Peter Shoenfeld, Sandoval County Attorney; County Manager Juan Vigil; County Commissioner Donald Leonard; Stephanie Lopez, County Attorney.

MS. NICHOLS: Your Honor, Cammie Nichols on behalf of Respondent Carinos, along with Peter Schoenburg, on behalf of Respondent Carinos. Also present is Mr. David Maniatis.

MR. VAN AMBERG: Good afternoon, Your Honor. Ronald Van Amberg on behalf of the remaining Recorp Respondents.

MR. BARTELL: Your Honor, I'm Randy Bartell, I'm with Montgomery & Andrews. I am here with Michael Springfield on behalf of the Proposed Intervenor, Southwest Lending.

THE COURT: Okay. I'm going to handle these in a particular order. And yours is next to the last, Mr.

Bartell, so just be patient.

I believe it was Ms. Nichols who sent to me a proposed order in which to handle these motions, and I'm going to follow those today.

Before we get started, however, I have reviewed this file. I have gone over the file, and I have seen attached affidavits from various people from the County, and they are stating something to the effect that they are not seeking anything but the surface of this property.

On the other hand, I reviewed Mr. Van Amberg's Counterclaim, and in the Counterclaim there are assertions by Mr. Van Amberg that there are a whole lot of other things that are going on other than the County just wanting the surface of these 43 acres.

I guess my question to the County is: What exactly is

the County seeking in this condemnation? Is it just the surface? Is it the surface that includes the wells, by that I mean, the casing and the hole that goes down to the well, all the way down to the acquifer? Is it the surface, the well, and the 43 acre-feet of water that are below it? Or is it the 43 acres, the well, and all the water in the acquifer?

And to that point is, my other concern is, in reading the statutes involved in this situation, if I were to grant that to the County, just these 43 acres, then do the

defendants have to get a permit for a different place on their development that it would be quite difficult for them to achieve for them to drill subsequent wells?

So that's what's going on as I'm looking at all this.

Mr. Mathews?

MR. MATHEWS: May it please the Court, Your Honor. Let me address a couple preliminary matters. Also, there was a Motion to Compel Discovery set today. Although his clients' discovery was late, the County has received it, so we will abandon that motion.

THE COURT: Okay. That was a motion that was filed back on February the 4th?

MR. MATHEWS: Yes. And we received the discovery. I don't think you had it set for today, but on November 6th, 2009, the County filed a Motion to Strike the Respondents' Objection to the Preliminary Order of Entry because of failure to follow the rules of civil procedure.

I went ahead and answered that. I answered it, I guess, in an odd way, by saying that the third unnumbered

paragraph of the fourth sentence is admitted or denied. But, anyway, that motion we filed on November 6th, 2009. We have -- I have answered that, and we will abandon it.

And I'm accompanied by Peter Shoenfeld who will argue, when necessary, water law violations. But in direct answer to your question, what the County is seeking today -- I

think it's 47 acres, and I think you may have said 43 acres. It's 47 acres. It's Alice King Way, which is a roadway that's not related in any way to the well sites.

And I guess, let me just tell you, the Alice King Way would connect the Northwest move to 60th Street. It's a requirement of Federal Funding that the roads be connected, so that's Alice King Way, and has nothing to do with the well sites.

So the two well sites, we are seeking the land and the wells, we are not seeking any water. The County has no water rights there. The County hopes to develop a desalinization plant on the 40-acre parcel that we are taking. The one-plus acre parcel we are taking, we hope, in approximately a year, we'll have approval from NMED to re-inject some of these biproducts of the saline water back into the acquifer.

So that's the small well site that we are taking. We are not claiming any of the water. Whether or not the Respondents have water is not our issue. We are taking only the land and the wells that are on it.

And the second part of your question was whether the Respondents can go someplace else to drill a well. And I'm

told that the answer is yes. If you would like to have Mr. Shoenfeld address that, he might be able to give you more details.

THE COURT: Mr. --

MR. MATHEWS: Yes, Your Honor?

THE COURT: What is the purpose of the County if they just move on the wells for purposes of testing?

MR. MATHEWS: No, we've done the testing, Your Honor.

THE COURT: Well, what's the purpose then of the County wanting these two wells if they're not claiming any water, just for the sake of having a well?

MR. MATHEWS: No. The 40-acre parcel with one well will be the site of the desalinization plant and -- when we get water rights from the Office of the State Engineer in another proceeding, they'll be some water coming out of that well into the desalinization plant.

But the second well site, that's the smaller parcel, we're not going to be pulling water from it at all, we will be re-injecting dissolved solids back into the acquifer from the second site. This is a couple, three years down the road, probably optimistically.

We think the NMED permitting process will take a year. We've got money from the Water Trust Board to design the desalinization plant, but we haven't got that money to construct it yet. That is another grant that we're working on.

THE COURT: Is the County going to limit the amount of water that they're going to pump to the 47 acre-feet, or whatever that parcel is? I guess that's the big question.

MR. MATHEWS: No. We have -- we're obligated under an agreement, it's a 30-year agreement with the Respondents, to furnish low water to 47 acre-feet. I'm not sure where you're getting 47 acre-feet -- because of the 47 acres we're taking?

THE COURT: Right.

MR. MATHEWS: Oh, okay. We're taking 47 acres.

THE COURT: Right.

MR. MATHEWS: No. We're going to take -- we don't know how much water we're going to be taking. Respondents have the development that has been approved out there called Rio West. We have an agreement with Respondents to help them supply water.

We will be taking as much water as is necessary for the demand, but that would be, like I say, two or three years in the future. We'll have to perfect our water rights with the Office of the State Engineer.

THE COURT: Finally, one final question, okay? If there is an agreement; therefore, why this condemnation action?

MR. MATHEWS: Because we were ordered to

leave the property immediately by the attorney for the Respondents. And, of course, we're not -- we have to separate Alice King Way because that's a roadway.

The condemnation action is for us to fulfill the agreement with the Respondents, to build the desalinization plant and to supply water to western Sandoval County.

THE COURT: All right. Okay.

MR. MATHEWS: And I also want to say -- may I say something else?

THE COURT: Sure.

MR. MATHEWS: Because I have a Motion in Limine today that I'd like to present to you. This is not a Trial on the Merits --

THE COURT: Right.

MR. MATHEWS: -- this is a motion hearing. The case is not about water. We are not taking water. The Disclaimer means what it says, in this action, we are not claiming water rights. We have a 30-year agreement with Respondents that we intend to honor. And this hearing is not about a breach of contract with the Respondents, that's a 30-year agreement.

We have received a list of exhibits from Ms. Nichols, and she wants to present to you the agreement and the Respondents' water rights. They have nothing to do with

today's hearing. Whatever water rights Respondents have, they have. We're not arguing about that. This is not about just compensation either. That comes later under the statute. This is just for the taking.

So we would ask the Court to move through this hearing

and listen to the condemnation issues. And the matters, of course, you've got breach of contract, cause of action to be heard in the intervention. We understand that. But there's no reason to be hearing evidence about who has water rights. We're not saying we have water rights. We're taking the land and the wells.

THE COURT: Any other preliminary statements before we get started?

MR. VAN AMBERG: No, Your Honor. I think we should move into the motions.

THE COURT: Okay, let's --

MR. SHOENFELD: May I interject, your Honor?

THE COURT: Mr. Shoenfeld?

MR. SHOENFELD: You mentioned this 47 acres and acre-feet, and I just need to bring home to you the proposition that there is no relationship of the amount of surface acreage being taken. We have either water that lies beneath or water that doesn't lie beneath it. There could be thousands of acre-feet beneath these 47 acre-feet -- that's 47 acres -- there could be none. We don't know. But

they're not related under our water law.

And so we take the view that -- well, it's one of the four issues that I think is possible to come before you, what is the connection of water rights and water with surface ownership? It will be our position, of course, in the event this issue arises, that there is no such relationship under New Mexico basic water law.

THE COURT: Okay. Ms. Nichols, let's start

MS. NICHOLS: Thank you, Your Honor. Your Honor, the problem that you've seen in this case is that the condemnation action and the right to appropriate the water through the wells at issue, they're inseparable in this case. And the history of how we got here will explain that, so let me --

Can you see that from there, Your Honor?

THE COURT: Yes.

MS. NICHOLS: We're asking the Court, in this motion filed by Carinos, and also in the second motion filed by the other Respondents, to dismiss the entire condemnation action before you because it was inappropriately brought.

The first reason it was inappropriately brought is that it was not done in accord with the statutory requirements. So the first thing that the County had an obligation to do, regardless of whether they had an agreement with the

Respondents in this case, was to negotiate, to make reasonable and diligent efforts to acquire the property needed by negotiation.

What's at issue here is the title to the land on which the wells sit and where the County wants to build the desalinization plant and where the County wishes to seek public funding to build that plant.

They had a contract, a written contract, with Respondents. And Mr. Maniatis is a representative of all the Respondents in this matter. They had a written contract and they failed to negotiate with Mr. Maniatis for what they needed to get the funding that they wanted to build the

plant. They needed to have title to the acreage at issue in this case to get the funding and public funds. That's what they are truly seeking.

They don't offer anything to the Respondents in exchange, however, for getting the title, they just demand title. First, they demand that he provide enough easements to the acreage at question, which he does. And then, finally, they just ask for title, but they don't agree in writing to make any change to protect the Respondents' rights in the contract that they have with the County.

And as they say, they are not seeking to condemn a contract, because to condemn the contract would cost them millions of dollars, and they don't want to pay that value.

So they're arguing to the Court that they are not condemning a contract, when, in fact, if they take the wells and they build a plant and they get out of their joint venture, and they do so because they have gotten title to the condemnation, then they have, in fact, breached the joint venture and left Mr. Maniatis outside the protection of the written contract that they entered into with him.

There was a hearing on October 1st of 2009, a closed County Commission Hearing, and during that hearing, they approve the filing of the condemnation action, the commissioners. This is discussed by Don Leonard during his deposition.

I'm going to show you a calendar first.

MR. MATHEWS: Your Honor, we object to the use of Commissioner Leonard's deposition. It isn't

finished. We haven't had a chance to cross-examine him. The remainder of his deposition is scheduled for tomorrow. You can't use an unfinished deposition.

MS. NICHOLS: Your Honor, counsel was provided with notice that we intended to use portions of the deposition and didn't object prior to this proceeding. Mr. Maniatis is here --

MR. MATHEWS: Your Honor, I was notified Friday, Your Honor.

MS. NICHOLS: -- and I assume he may take the

stand if they would rather proceed in that manner.

THE COURT: Mr. Mathews? Do you wish him to take the stand or --

MR. MATHEWS: This is quicker. Let's do it this way.

THE COURT: Pardon me?

MR. MATHEWS: This will be a quicker method.

THE COURT: Okay.

MS. NICHOLS: Your Honor, on October 1st, as you can see on here, Commissioner Leonard calls Mr. Maniatis, calls the Respondents, and that's the first time that the Respondents are provided with any notice of a contemplated condemnation action. There's no notice prior to that point in writing. There's not even any verbal notice.

And what Mr. Leonard says on that day to Mr. Maniatis,

"ANSWER: He and I discussed --" Mr. Maniatis and Mr. Leonard -- "I asked him to please reconsider giving us access to finish the contract that we had with a contractor

to come up with the information that we needed to -- that was beneficial to all of us: Sandoval County, Aperion, the project, everything.

And that I was concerned and that I didn't know what the Commission would be deciding. And he asked, I believe if I recall, 'What do you mean?' And I said, 'Well, it

could even mean condemnation.'"

Which is exactly what they were going there to do. Failing to negotiate good faith with their business partner, they were, instead, simply going to condemn title to the 47 acres of land at issue to accomplish what they wanted to do, which was fund the desalinization plant without (inaudible) public money, and to run it as a County (inaudible.) That's the first notice that the Respondents have.

A mere seven days later, on October 8th, Sandoval County files this action before Your Honor. Now, (inaudible) the statutory procedures, they had to file that action only after providing -- first, only after negotiating in good faith and then after providing Mr. Maniatis and the Respondents with 25 days, they had to give written notice of the condemnation action, their intent to file a condemnation action in the district court.

And then the Respondents would have had an opportunity to seek an appraisal, to make arguments about what was actually at stake here besides the title to the 47 acres of land at issue. But none of that happened. Instead, there's a phone call, and within 7 days, the condemnation proceedings are filed.

So that is in violation of the statutory requirements under section -- - Chapter 42(A). There's no negotiations in good faith, there's no offer of value, and there's no

25-day window after written notice for the Respondents to seek their own appraisal.

Based on that alone, Your Honor, this condemnation action may be dismissed for failure to follow those statutory procedures.

They would have had to provide written notice to the Respondents by September 13th in order for this Petition to have been filed in accordance with the statute, and that was not done, by the admission of Mr. Leonard. The first time condemnation proceedings were mentioned to the Respondents was on the phone, on October 1st.

There's another reason to ask you to dismiss the proceeding. Your Honor, the parties, as I've said before, had a valid written contract. Your Honor, they had a Memorandum of Understanding, which was an exhibit to the Development Agreement, which was in writing and which governed the future development of the water at issue in this case in the acquifer that's accessed by the wells that we're all discussing.

That agreement, Your Honor, allowed for a split of ownership between the County and Mr. Maniatis of a water entity, and this is in Exhibit 13, and by Mr. Maniatis -- I mean, Your Honor, the Respondents in this matter.

The ownership of said entity, the water entity, shall be 66 percent owned by the County and 34 percent owned by

Recorp. Furthermore, Recorp will be guaranteed the first 18,000 acre-feet of water per year, as long as that water is physically available.

Now, this is a joint venture with an anticipated future relationship, Your Honor. It's Exhibit 14 -- 13 and 14 to the depositions that we've taken in this case, the Memorandum of Understanding, and the Development Agreement dealing with the planned development on the 11,000-plus acres of land owned by the Respondents.

The County not only entered into that written agreement, but they then validated that agreement with an ordinance. The agreement was entered into on July 17th of 2007, and then there was an ordinance passed on December 21st of 2007. And this ordinance, which is Exhibit 22 to the deposition, specifically recognizes the Memorandum of Understanding and the Development Agreement to develop the water resource in the acquifer which the wells access in this case.

Furthermore, the County anticipated that there could be some issues with funding, and so the County included in the ordinance that the County desired -- the County own and operate the brackish water wells, it own, operate, and finance the desalinization plant and related infrastructure.

Realizing that that might require some tweaking or renegotiation of the terms in the joint venture, the

ordinance allows them to enter into a royalty agreement with

Recorp, or other business entities, in case that's necessary to obtain the public funding for the project. So that was recognized way back in December of 2007.

That's where there was a failure to negotiate in good faith. Even at the time that this condemnation action was filed -- and this is another exhibit to the depositions, Your Honor -- a sign remaining outside of the Well 6 at issue here -- and if you will note, at the bottom of the sign, sitting right outside the well site says, "Public, private, partnership, Sandoval County and Aperion Companies."

They had an obligation to negotiate with their department, certainly, outside of the statutory obligation. They had a statutory obligation to negotiate with anybody before filing a condemnation action. They did not do so. They did not provide written notice, nor offer 25 days for a counter-appraisal by Respondents.

Your Honor, this case really is about the access to water in the acquifer and about who has a right to access that water and develop that resource.

In a White Paper, which was also an exhibit to the depositions in this case, the County submitted to the legislature their own estimate of the value of the potential resource in the acquifer. But before we talk about how much

the value of the resource was, let's talk about who secured the right to access the water.

By the County's own admission -- I know they're telling you here today that this is not about water rights; however, by their own admissions, Exhibit 23 to the deposition --

which is a copy of the letter to the State Engineer from the parties in this case -- on page 5 of that letter, the County, by its own admission, the document signed by Michael Springfield on behalf of the County, states that the water right claim, pursuant to this notice, is over and above the 16,000 acre-feet per-year water right, which was the subject of an earlier notice filed by Respondents in this matter.

So the County themselves have ascribed that the parties do, in fact, enjoy a water right. It is essentially the right to access, to appropriate the water, to put it to some beneficial use, the water in the acquifer that we're talking about.

And that's, by the County's own admission, a water right. And it's a water right that was first secured by Respondents back in December of 2007, and before December of 2007 when the joint venture was entered into with the County and the ordinance was passed.

June 12th of 2006, Your Honor -- and this is Exhibit 5 of the deposition -- on June 12th of 2006, there was delivered to the State Engineer, by Respondent, a Notice of

Intent to Appropriate through the well sites at issue in this case. By Respondents in this matter, Your Honor, there is no -- the County is not one of filers in this Notice of Intent to Appropriate, filed in June of 2006.

There is another Notice of Intent to Appropriate filed on February 27th of 2007, with the State Engineer, Exhibit 11 to the depositions. Again, Your Honor, this is one of the wells at issue, and they are filed by Recorp, and that

is a property that is in Rio Rancho, and (inaudible).

Then in that same filing, secured by Mr. Draper, is what we've called a grandfather letter, Exhibit 12 to the depositions. This is sent to them because there's been a change in state law about groundwater below a certain depth. This letter is to confirm and clarify that if there is a change in the law, that will not retroactively affect the Notices of Intent to Appropriate nonpotable groundwater at greater depth than 2500 feet, which were filed by Respondents in this matter.

The County then joined in after there was a joint venture, and that brings us back to Exhibit 23, where the County now, back in January 9th of 2008, one month after entering into the agreement with the Respondents that the water will be appropriated by joint venture, the County sends other letters of intent.

And this time is the first time that the County of

Sandoval expresses an intent to appropriate in conjunction with the Respondents.

And that's the first time that the County appears, in terms of seeking the right and securing the right to appropriate the water from the aquifers through the wells at issue and to build a plant that's been discussed on the land at issue in a joint venture with the Respondents.

And then when the County filed its bond, Your Honor -- we also objected to the bond in this case -- the bond completely ignores value on several different levels, Your Honor.

And first -- this is the White Paper I mentioned

earlier, submitted by accounting in connection with the proposed legislation -- this would be the White Paper, "The County Impacts from the Proposed HB 762, February 2009," which is Exhibit 32 to the depositions.

And the County gives an estimate of the importance of this resource with current values of potable water approaching 30,000 an acre-foot. This represents -- of 30,000 per acre foot -- this represents a potential value greater than $1.3 billion dollars, including the value of capital improvements.

They're discussing the water at issue, the development of the water at issue in this case, Your Honor, the development of water in the acquifer, and they're placing a

value on that resource of potentially greater than 1.3 billion dollars.

Then they filed a condemnation action and they failed to include any consideration of the actual impact of seeking to take those wells and seeking to take access to that resource.

Instead, they have an appraisal done, which they don't share with Mr. Maniatis and with Respondents prior to filing the condemnation action, but they have an analysis done. And even just looking at the land, not even considering at this moment the water that lies beneath the land, they have an obligation to evaluate it for its highest and best use.

And the highest and best use in this case, of even the 47 acres at issue, because of the roadways and the right to access and the access to the property and the potential

water resource and everything else, is a potential for development there, the highest and best use is to hold for future development. That's by their own appraisal, and was provided by them in discovery, which is Exhibit 46 to the depositions.

And yet, they don't offer anything reflecting development when they offer their bond in this case. Instead, they post a bond based on the lowest possible use, which is grazing, the value of the land is grazing property.

The subject that's the land at issue, with graded

access and power lines on the property, is superior to all the sales consistent with the conclusion that grazing land is not the highest and best use of the subject property.

But they offer -- the final analysis, their bond is based on grazing land values. And that is where they obtained their bond amount that they posted in this matter, Your Honor.

So the response to the condemnation action was a Motion to Dismiss for failing to follow the statutory requirements of written notice and the 25 days written notice with appraisal, 25 days to respond, seek an alternative appraisal. That was not provided.

Furthermore, they did not negotiate prior to filing the condemnation action, which was filed in this case, about the issues beneath the property. And then when they posted the bond, they completely ignored the right of access to the water, which they had joined into with Respondents in this matter in the Notices of Intent.

The State Engineer, they call those water rights,

rights of access, they had joined into those with Respondents who originally secured them. And they completely ignore that when they seek to take title of this land and to the wells that access the acquifer and to build the desalinization plant no longer in partnership with the Respondents in this case, Your Honor.

That's why we ask to dismiss the condemnation proceeding entirely because it was not brought appropriately. It is not the right vehicle for what they're even attempting to do. And what needs to happen is negotiation between the parties, resolution of the issues as contemplated by the County, by the Board -- and it's adopted by the County -- these issues can be resolved and the joint venture can be honored; however, that wasn't done in this case.

Instead, a condemnation action was filed in seven days of giving oral notice that the land and the wells would be taken. And then a ludicrously low bond now is posted, completely ignoring the actual value of the resources there.

And so it would be appropriate, in the interests of justice, and in accord with state law on this issue and the statute, to dismiss the condemnation action in its entirety.

THE COURT: Mr. Van Amberg, do you want to --

MR. VAN AMBERG: I would think it would be more efficient if I added by two cents.

MR. SHOENFELD: Your Honor, could we inquire, please, I understood Ms. Nichols to say she was speaking for Carinos and the others at the beginning of this presentation

to you.

THE COURT: And I think what Mr. Van Amberg is saying he had filed a similar motion.

MR. SHOENFELD: I understand. I'm just trying to be clear as to who is speaking for whom on the Respondents' side of the courtroom.

THE COURT: Ms. Nichols, you are speaking on behalf of your clients?

MS. NICHOLS: Yes, Your Honor. Respondent Carinos is my client. They all share common interests.

THE COURT: Okay.

MR. VAN AMBERG: If it please the Court, Ron Van Amberg for the other Respondents.

The Court began these proceedings by asking the County what it wanted in these proceedings, and I'll deal with that in a little more detail because, certainly, it's confusing, they don't want to condemn water, but yet they want to use water.

Essentially, what they want, I think, when it all shakes out, is they want a multi-billion dollar opportunity for $238,000. And then, disturbingly, what we hear is that after they take the wells, then they're going to run the water through their desalinization plant and dump contaminates back into the acquifer, which is under our property.

So we not only end up losing, them getting a value much greater than what they're willing to pay for, they end up then damaging whatever residual rights we may have.

Now, I'll try not to be too repetitive, but Recorp owns 11,000 acres of property, and it's in the vicinity of Rio Rancho. It's in a high-growth area, tremendous potential for development in the sale of water.

In 2006, as Ms. Nichols stated, Recorp seized upon a rare opportunity. They realized that, under the statutes, if you were to develop water below 2500 feet below the surface, and it was nonpotable, and it didn't feel -- didn't interfere with any of the other regulated aquifers, you essentially were limited to the amount that you declared with the State Engineer's Office.

This opportunity was taken advantage of by Recorp and they made the appropriate declaration to the State Engineer, who accepted those declarations and essentially established this unique type of right. They published, there was no response, and so there's no protest that's involved.

This water is now outside the jurisdiction of the State Engineer's Office, and it's literally just there for the taking. That is the extent of the value of this commodity.

Well permits were issued in the name of Recorp, and, again, the State Engineer accepted these declarations. Recorp hired consultants, spent multi-thousands of dollars doing geohydro tests and studies, realizing where the best place was to drill, and were getting ready to drill them when the County came in and proposed, ultimately, this

Memorandum of Understanding.

The parties would go into partnership. And it was a good deal for everybody. The first 18,000 acre-feet would go to the Recorp Respondents and their residential and the commercial and recreational development of their 11,000 acres, and Recorp would own a 34 percent share in the profits, and Recorp would be credited to this operation with the appraised value of its water rights.

And what's significant is that in this Memorandum of Understanding, the County clearly recognizes the true value of the rights -- and I'm using the word "rights," they're not paper rights, they're not Mendenhall rights, they are a unique statutory right. And that was developed by Recorp. So they entered into the Memorandum of Understanding.

Significantly, in 2009, the legislature came in and closed this loophole, so now these -- now the legislature has effectively eliminated the competition, locked in, grandfathered in the Recorp rights and created an enormous value and potential associated with the Recorp property. That was the point (inaudible) use. The water -- the -- they're locked in by their declarations. All they have to do is drill it, process it, sell it, and comply with, you know, environmental and other regulations. But, anyway --

THE COURT: Mr. Van Amberg, let me ask you a question before I lose this thought. Assuming that the

County -- well, let me go back. When Recorp went to the State Engineer and secured these rights, the points of diversion of the wells, were they a limited number of wells that were allowed by the State Engineer?

MR. VAN AMBERG: I believe there are 36 -- 36

-- I believe there were 36 well sites established. There were essentially two areas that were identified through the hydrology and the tests as being (inaudible.) That's where those wells --

THE COURT: Two? And where are those two?

MR. VAN AMBERG: Those are where the two wells are.

THE COURT: The ones that are subject to this cause of action?

MR. VAN AMBERG: Right.

THE COURT: So assuming that the County was to prevail, okay, you can no longer go back and ask the State Engineer for permits for additional wells, correct? Because --

MR. VAN AMBERG: When you are locked in by --

THE COURT: That's what I'm saying.

MR. VAN AMBERG: Yes. We're locked in by the declarations. The County -- and I'll address this -- the County says it doesn't want any water rights, but apparently it's going to take the water. And so every drop of water

that the County takes is a drop of water that we don't get.

THE COURT: You may continue.

MR. VAN AMBERG: Okay. The County then began testing and drilling and drilled the two wells, and the tests were about as good as you could expect. There's a huge plunder of water under there. It's the perfect water because it's nonpotable, but yet it's treatable. And even the residue has a certain value.

And the point of diversion and the point of use is strategically located in the Rio Rancho area. It's an enormous potential. And so the County comes in on about eight days notice, decides that it's going to, after all these results came in, it's now time to condemn the property for $238,000 and get Recorp out of the way. And that's what they do.

And the only process that they really followed was paying the filing fee. Their own value puts this operation at 1.3 billion dollars. And the question is, how do they justify it? And it's -- the argument that I hear, that maybe Your Honor understands what they're saying, but I certainly don't, they say they're not condemning water, they're not condemning water rights, they're not condemning rights of water, they're only concerning -- going to condemn the surface; they're not going to condemn the well, but they're just going to condemn the hole. But when Your Honor

asks them, well, what are you going to do? They're going to put up a desalinization plant. Well, what are you -- what's the point of a desalinization plant if they don't have water? Well, we'll take some of the water and then we'll run it through the plant, dump the impurities back into the acquifer.

Well, isn't that taking water? And I guess the answer is, well, we're not going to do it for three years, so you don't have to worry about it. And if you just let us have the surface rights, then we don't have to bother the Court any longer.

And I'll start referring to the board over there, Your

Honor, but they've done this wrong procedurally. They've done this wrong legally. And policy-wise, it doesn't make any sense.

This Court asked, what's the point of condemnation, and the response was that they were told -- the County was told that they no longer had permission to enter, I guess, to continue their testing. Well, then the condemnation should be limited to that.

And then in response as to whether or not they need additional testing, the response is, they've done all the testing. So the question still lingers, what are we doing here?

And I'd like to go through the procedures. The first,

42.5(A)4, they're supposed to describe each property separately. There are seven -- seven different properties. There's no description of the separate parcels. Then they are supposed to consecutively number each parcel. I mean, this is so that we know what the impact is on each of the parcels.

42.5(A)1, the amount offered for each tract affected. They haven't done that. They haven't even identified the tracts. 42.2-5(A)12, attach a map plat or plan showing property to be condemned. None. Even subsequently supplied the plat does not comply.

And this is so you can identify and quantify what the damage is from the taking. Does the road go through the middle of the property? Does the road clip part of the property? Does it interfere with building sites? They

haven't done their homework in explaining exactly where the properties are and what the effect of these improvements are going to be, and that's essential.

42.(A)1-4, to make reasonable and diligent efforts to acquire by negotiations. And Ms. Nichols talked about that, and I would like to expand on it a bit.

These are the -- this is the position that the County has taken in a variety of its pleadings. And the Court can understand when we get to the other positions that's taken, that there is no negotiation here. It's impossible to

negotiate because they refuse to articulate exactly what they're trying to do.

In their -- County's Motion for Summary Judgment, it says, "None of the property that the County seeks condemned has any appurtenant water rights and no condemnation of water rights would result from this action."

In that same motion, the County then says, "The County is only taking fee simple title to the property." In the same motion, "The County is not taking nor intending to take the water or water rights or the permitted license vested or inchoate."

(Inaudible) state again, "Even if Recorp owns any interest in any inchoate water rights, the County does not seek (inaudible.)"

In the same motion, the County states, "The County claims they do not seek any water -- any rights of Recorp to any water or water rights of any agent.

They then concur, the County is taking no property owned. They state also in that motion, the County is

neither claiming nor taking any rights to Recorp.

They admit in their Summary Judgment motion that the right to use water is considered a property right. And then a very telling representation, the taking of the well site does not give the County the water underlying sites. And even if it did, the County has disclaimed that right. This

is entirely consistent with representing that.

Then they say, the County has filed a Disclaimer regarding the water, water rights, to provide that, quote, Sandoval County is not seeking to take any water or water rights whether it's protected or pending from any parties to this action (inaudible.) And that's in the Disclaimer.

In response to Recorp's motion for Summary Judgment, the County states, "The County not only admits but indeed urges (inaudible) and it does not take any water or water rights from any person or entity in this cause of action."

The County then states, "The County's Disclaimer was intended to put at rest the Recorp Respondents' false argument that the County was attempting to take their so-called water rights in this action.

And finally they state, the County admits and has disclaimed any intent to take (inaudible) water or water rights from Respondents.

Then when pressed, as the Court did, indeed, they are seeking water.

And in the County's response to claims -- or Recorp's Motion for Summary Judgment, they say their access to water is a vastly different subject matter, which the County does

not disclaim.

Apparently all this idea of water, water rights, water underneath the wells, that does not fit within the

definition of access to water. So they're saying, we're not after any water, we don't need to condemn any water, we don't get paid for any water, but we sure as heck are going to get access to water.

Then they say, obviously there is a claim to condemn the property necessary to allow physical access to water, i.e., well sites. That is the very purpose of the condemnation of well sites, exact.

Then they say, the County has never asserted it will not seek water rights at the appropriate time and simply they are not doing so in this proceeding.

So I guess what they're saying is, they can't really get over their -- their task of trying to explain how they can get the water, but say they're not getting water and don't have to pay for the water, so they say, we're not going to get the water at this time -- (inaudible.)

Then the County says -- the fact that the County is not seeking water in this action, has no relevance to future needs both for water and the means to get the water, i.e., wells, tanks, and desalinization plants. The County can take the means to get the water now and take the water as may be necessary (inaudible) time, but I think now it's becoming clear what they're saying. Since they're not going to take the water tomorrow, doesn't mean they have the right to take it.

The entire purpose of this action is, (inaudible) respect to the well sites, is to condemn the real estate required to access the water. They state, the County is taking the means to access the water.

The County is seeking to condemn the whole -- the County wants to condemn the well sites to let the construction of the desalinization plant to operate and divert saline water for more than 2500 feet below the land surface. That's the water that we obtained from the State Engineer's Office, through the declarations as a matter right, and we have the right to access.

Well Site 5 will also be used to divert water. The water (inaudible) developed from the well sites will be treated in the County Waterworks and sold to the public. Desalinization (the value to produce and ** water, County intends to purify the water under (inaudible) well sites.

This is a water project they are condemning and they want to (inaudible) grazing land (inaudible.)

So I submit, Your Honor, that their negotiations are essentially nonexistent because they refuse to even acknowledge what they're taking.

And here's what they're taking, grandfather, State Engineer's (inaudible) Declaration for -- its says 42, but it should be 28,000 acre-feet a year, available for the taking, just put it to beneficial use. No State Engineer's

jurisdiction, no protests, no priority (inaudible) Recorp

property is the place of diversion, Recorp property is the place of use and (inaudible.)

It's the perfect acquifer to be (inaudible) nonpotable, but treatable, two to three dollars per (inaudible) residue (inaudible) doesn't interfere with the acquifer above it, it's ready to market in Rio Rancho. It's -- a willing buyer and Recorp Development itself.

Your Honor, they also refuse to acknowledge the additional damage that it caused, which has essentially destroyed the Memorandum of Understanding because it's taking the assets that were supposed to be conveyed over to the joint entity.

Recorp was to get the first 18,000 acre-feet a year. Recorp was to get 34 percent of the profit. There is no compensation tendered for the damage to the remainder of the properties, had to put roads and -- and then with all this, the County is offering $233,885.50. It admits to -- the Albuquerque Journal article, if we do the math and (inaudible) of figures that they have presented, that translates out to about $42 million a year. And the impact fees of a billion two hundred million.

The White Paper that Ms. Nichols referenced, they put their value at 1.3 billion. The County has spent more than $6 million on tests (inaudible.) I've talked to one granting

agency, and a $3 million grant apparently is applying for. Another hundred thousand dollars. And the opportunity that's described here, they want to pay $233,885.50.

And we submit, Your Honor, that that is not negotiations. They are obligated to negotiate diligently in

good faith. Ms. Nichols went over 42(A)1-5. That's our right to request an appraisal after notice of intent to condemn.

There was no notice of intent to condemn. There was no 25-day period. There was about a 7-day window between the authorization for the condemnation and the condemnation itself.

42(A)1-7 says, "Failure to make reasonable and diligent efforts to negotiate and failure to comply with the procedures of 42(A)1-5 results in a dismissal."

42-2-5 -- (inaudible) all with interest in the property as defendants. They didn't join in the project. They admitted in their own pleadings that they know about Mr. Bartell's client. And Mr. Bartell is here trying to intervene. They should have -- that client should have been joined.

They also identified a number of other (inaudible) on the property, which I guess they subsequently discovered, and those individuals have not been joined.

So in summary, Your Honor, they have failed at every

step along the way. They refused to identify exactly what they're taking. And they are only offering to pay for something that they aren't taking, which is grazing land. That's the clearest reason why this case ought to be dismissed, over and above all of the other statutory requirements that they have failed and apparently refused to meet.

Your Honor, we believe that it is not only a legal

requirement but also in the public interest that this County -- or that this Court dismiss this condemnation action and send the County back to where it belongs, and that is to try and sort out its contractual obligations and relationships of Recorp.

Again, they stated the only reason they filed the condemnation action was because they were not given permission to do the testing. That's what this case is about, and that's what ought to take place, Your Honor, and not this, what we contend to be a subterfuge, trying to take a billion dollar industry for about $238,000.

THE COURT: Mr. Mathews?

MR. MATHEWS: May I approach, Your Honor?

THE COURT: You may.

MR. MATHEWS: I have a notebook, Your Honor, that may help you with the oral arguments.

Your Honor, many of the things that you were just told

are absolutely incorrect. You are not being told the truth.

If you look at the appraisal, which is in a notebook that I gave you, page 27 of the appraisal says that the highest and best use is to hold for development.

The first sentence on page 27 says that appraisers must appraise at the highest and best use. The last sentence on page 27 of the appraisal says the highest and best use is to appraise -- is to hold for development.

The appraisers then use that standard and they arrived at a value of $5,000 per acre. The reason that the County is offering the amount of money that it's offering is exactly what the appraisal came in at, $5,000 per acre to

hold for development.

The Respondents believe that we should appraise the water, which according to the affidavit of Mr. Springfield, which has not been attacked or contradicted, is a liability, not an asset.

Mr. Van Amberg just stood up here and told you that the County intended to put pollutants into the acquifer. I mean, you heard my opening statement. We're going to use the well to re-inject into the acquifer after NMED approval.

We are obviously not going to put pollutants into the acquifer.

Again, I believe the way that he -- my words were twisted in my opening statement.

Also, if you look at the notebook that I gave you, Your Honor, first of all, there's three parcels, they were numbered consecutively, they did have complete legal descriptions, they gave the square-footage of each parcel, they gave the acreage of each parcel.

The amount offered for these tracts is the acreage times 5,000. And I will admit that the County did not put on each tract if you want to buy 40, you multiply by 5,000, and you have $200,000. We did not do that. We just -- because of the price for every acre is the same. And it's not grazing value. And nowhere in the appraisal does it say that it's grazing value, it says it's to hold for development. And that's the highest and best use now, because this water, in the condition it's in, is a liability, it's not an asset.

Reasonable diligence, efforts to (inaudible) in negotiations. Well, first of all, Your Honor, they are going to allege that we failed to negotiate and in the depositions, though, (inaudible) elicited testimony from the County Manager and from Chairman Leonard about substantial and substantive negotiations. And they've all been -- oh, I'm sorry.

THE COURT: Let me take a five-minute break.

MR. MATHEWS: No problem.

THE COURT: Okay. Let's take a five-minute

break.

(Note: Brief recess, 2:45 p.m.)

(Note: In Open Court, 2:53 p.m.)

THE COURT: You may continue.

MR. MATHEWS: I think I was telling the Court that whatever we re-injected into the acquifer had to be approved by the New Mexico Environment Department. It's a process that we believe will take a year.

THE COURT: Mr. Mathews, on that, whatever you re-inject back in the acquifer, you're going to take -- whatever you take out, you are going to re-inject it back into the acquifer; whereas, to me, the concentration of whatever is in the acquifer is going to increase.

MR. MATHEWS: And, Your Honor, I understand what you're saying, but we are not re-injecting everything we take out. There will be -- for instance, the salt that we take out, it will be re-injected back in the acquifer.

So don't assume that because we inject something back into the acquifer, it's everything that we take in, because

some of those biproducts will not be put back in.
We can't do anything that would pollute the acquifer.
THE COURT: Okay.
MR. MATHEWS: Let's see, the map, plat, or plan showing the property to be condemned.
We did not include the map, and that's solely my error,

the way I filed the condemnation proceeding.
We did elicit parcels, we gave the legal descriptions, we told the amount, had the appraisal, but I did not remember to attach the maps. We cured that very quickly.
In the notebook that I handed you, there's a section that says, Maps sent by County Attorney electronically in December of 2009.
And Ms. Lopez, the Assistant County Attorney, sent the maps to the Respondents. And it shows Alice King Way, and it shows the well sites. This is Alice King Way.
And I don't want to forget about Alice King Way, because there's so much attention being paid to the wells. Alice King Way connects 60th Street to the Northwest Loop. And in the affidavit of Phil Rios, that's attached to our Motion for Summary Judgment, the requirement of federal funding is that the Northwest Loop be connected to an existing roadway.
So these are the maps we sent. And this does show Alice King Way. And it's important not to forget that. And here are the desalinization well sites. It's also on the map.
And we should have had it attached to the condemnation,

but we did not. That is a harmless error, Your Honor. It was quickly corrected.

And the courts have looked at harmless errors in New

Mexico in condemnation proceedings. The courts have looked at prejudicial errors and harmless errors for a number of years, and there's about 18 cases. And prejudicial errors in condemnation proceedings affect value.

Harmless errors do not affect value. An omission in a pleading on a condemnation case is a harmless error and does not affect value. And, obviously, we're talking about value of the water. And Mr. Shoenfeld is going to talk to you in more detail about the water.

But the purpose of a map is to show the Respondents where the property is that we're taking. We did that. We did not include it in the condemnation petition because I forgot it, but it was shown to them.

The appraisal, as I've noted, is absolutely pretty developable land. It is not for grazing right. There's nothing in that appraisal that says it's for grazing right. And page 27 makes it clear that it is not.

On the negotiations, the deposition of the County Manager, Mrs. Vigil, and the Chairman of the Board of County Commissioners, Chairman Leonard, talked about substantial and substantive negotiations with Mr. Maniatis.

And all these issues have been addressed in previous pleadings, and I was happy to hear that the Court had an opportunity to read through this because they're so voluminous.

But there are instances when we do not have to negotiate. In the pleadings to the Court, I have cited a number of cases that say that you do not have to negotiate when the effort would be futile. The law does not make people engage in a futility.

Further, Your Honor, we're talking about a 1.75 billion-dollar difference in negotiations. And we're not going to be able to settle that difference in 25 days. But, also, we're excused from negotiation when there is an immediate need.

And we received the letter from Mr. Van Amberg, which is also in the Court's notebook, and it is tabbed with the heading Sandoval County [Fails] to Negotiate Condemnation Procedures. The letter is dated October 2, 2009, and it was faxed to the County at 5:38 p.m. on a Friday night.

Mr. Van Amberg says it is likely the taking -- likely the highest and best use standard will result in a ten figure award. We had an appraisal for a much lower amount of 5,000 an acre.

Mr. Van Amberg said that the activities of the County must halt and cease immediately. So we had an emergency. We had equipment at the well sites.

On October 6th -- and we actually received the letter on October 5th -- and on October 6th, we offered $237,885.50 for the 47 acres. That is the appraised value. Attached to

that letter is the legal description of each site and the

sites are pulled out and they are separated. On October 7th, Mr. Van Amberg rejected the County's offer. And on October 8th, we filed for condemnation.

The other reason that you do not have to move forward for negotiations, is when a condemnee fails to provide any appraisals required -- this is Section 42A-197 -- purchase offers are waived or excused when the condemnee fails to provide any appraisals. So we have not yet received any appraisals from the condemnee.

We are willing to have the Court to put in a condemnation order that the County gets no water rights from this. Mr. Shoenfeld is going to address the water law issues in a bit more detail after I'm finished, but it is correct that we are not seeking their water rights, whatever they happen to be.

We name the name of all interested parties as Defendants. Your Honor, that really goes to the intervention of Mr. Bartell. Mr. Bartell was at the injunction hearing, and you may remember, he spoke and decided that -- he said that he hadn't decided whether he would enter an appearance.

We kept Mr. Bartell informed. I will argue to you later the Sunland Park case that says that Mr. Bartell is not a party of interest in the condemnation. He's not an

owner. We named all the owners that we knew about. There's a long list of owners. They all are related somehow to Mr. Maniatis. He is their agent and president and CEO, whatever, but all of these properties are related to Mr. Maniatis, and we named all the owners of interest, so we did

not miss any parties.

And it is not mandatory that we name mortgage lenders. And that is very clear in the Sunland Park case. And I can give you a lot more details on that, but it sort of fits better with the intervention.

So let me have Mr. Shoenfeld speak to you about water rights, and then if you want anymore information on the mortgage holders, I will come back on it.

THE COURT: Okay.

MR. SHOENFELD: May it please the Court. What we have here -- let me take a step back -- in New Mexico we have water rights that may be vested; that is, perfected before the groundwater, the Surface Water Code was adopted, March 19th, 1907.

Those that were perfected in an undeclared area, groundwater rights resulted from drilling a well in an undeclared area. Anybody had the right to do that in the state in an undeclared area.

In 1933, our legislature provided a code where the State Engineer determines that there is an underground water

basin, reasonably ascertain the boundary, then if you want to drill a well in that basin, you've got to get a permit from the State Engineer, from Rio Grande Underground Water Basin, get such a permit, (Inaudible) that's one we're sitting on top of here. And by now, almost the entire state is covered with underground water basins.

In order to get an appropriation of water in such a basin, you make application to the State Engineer. And the

State Engineer goes through his process, he either grants you a permit and you drill a well, or he doesn't. If he grants you the permit, you still don't have a water right. You've got to drill the well and you've got to put the water from that well to beneficial use.

In 1968, Mr. Mendenhall, down in Southern New Mexico, in the Roswell-Artesian Basin, started drilling a well. It was outside the boundaries of any basin. Before he finished though, the State Engineer had declared a basin, so that our courts were faced with a dilemma. He started it, had a perfectly legitimate right to complete it, he said.

The State Engineer said, no, he didn't. Because we had a basin, he had to have a permit. The courts resolved that issue by saying, somebody who starts a well at a point where there's no State Engineer administrative jurisdiction, has the right to complete it even though the State Engineer later declares a basin. And that's the cornerstone of the

problems in this case.

We have here an underground water basin that isn't described by circles going this way, but we have one beneath the surface down here. Has the State Engineer acquired jurisdiction over that underground water basin? He has not.

He has the right to, according to a 2009 legislature enactment. Water beneath 2500 feet below the land surface, with more than a thousand parts per million total dissolved solids, can be included in an underground basin by the State Engineer. As a matter of law, he hasn't done that here.

So what does that mean? That means that anybody, even now, after the 2009 legislature, could have drilled a well

right now, period.

The Respondents say that they have permits from the State Engineer. You haven't seen a single permit from the State Engineer. You won't see a single permit from the State Engineer because the State Engineer has issued no permits. The State Engineer has no jurisdiction to issue permits.

The State Engineer has only one interest here, and that is, when somebody proposes to drill through, first, the top 2500 feet of the surface -- which in a lot of cases contains fresh water -- and you go to the area beneath 2500 feet beneath the low-land surface, the State's Engineer wants to know about it.

Why does he want to know about it? He wants to know about it so that he can look at your -- the design of your well and see that you're not going to be taking water from the Briney [phonetic] acquifer, below 2500 feet, and unintentionally or intentionally putting it into the shallow acquifer.

He also wants to be sure you don't happen to be taking fresh water and putting it into the (inaudible.) He requires -- he asks for Notices of Intention and Publication of Notice. That's all. There is no permit process. There is no permit. There is no water right developed until you drill the hole in the ground, you take the water out, and you apply it to beneficial use.

Now, to go back to Mendenhall, the guy who puts the hole in the ground, the farmer in that case, the well -- the

guy who drilled the well gets the water right. A Notice of Intention does not give you a water right either now or at anytime in the future.

The Respondents in this case, they can file Notices of Intention until the cows come home, and you know what they get by virtue of that? That plus -- three or four dollars over at Starbucks gets you some coffee. That's all that they get. They are worthless. The only one who has drilled a hole in the ground here, in accordance with the Mendenhall case, is the County of Sandoval. They paid some six million

bucks for it.

And Respondents didn't contribute anything. They have no interest in those holes in the ground. They have no interest in whatever should ultimately come out of those holes in the ground or what goes back into them -- into the ground.

Mr. Van Amberg makes clear in his presentation to you that what they're complaining about is the fact that we're condemning the location where the hole in the ground leads from the surface to down to 3,000 feet below.

They're saying, we have just taken something very valuable from them. What is the value? Well, for what purpose could it conceivably be valuable? Is it the only place on the face of the earth or is it the only place in the 11,000 acres at which a well could be drilled? Absolutely not. They can drill a well anywhere they like.

They claim to have discovered this acquifer? That's nonsense. That's absolute nonsense. Their State Engineer papers have shown the existence of this acquifer as early as

1961, and -- long before it was a Rio Rancho much less a County water system, before Mr. Maniatis had any interest in it.

So what I'm gathering from the presentation of the Respondents is, they're saying we took -- are taking their right of access to the water. We are not taking their right

of access to the water. They've got it. We're not taking their water, mostly because they don't have any, but even if they did, we're not taking it.

And there was one particularly important reference in one of the presentations, I believe it was by Mr. Van Amberg, in which he referred to the acquifer under our property. The acquifer under our property, the acquifer under this courthouse, the acquifer under anybody's property has no relation to the ownership of the surface of the land or to the crust of the earth through which holes are drilled. It is simply unrelated.

That's the point of all the entire New Mexico groundwater, the entire New Mexico surface and groundwater, is just because you have land means nothing. And we have cited the cases in our pleadings and motions before you. One of them was Yeadle v. Tweedy, it may be the earliest case on the subject in Mexico, in which the Supreme Court of New Mexico said that because you own the surface, doesn't mean anything about what you have in respect to the water that lies underneath it or flows through it on the surface or the underground.

THE COURT: Mr. Shoenfeld, I guess what

you're telling the Court is, the Memorandum of Understanding, the agreement between the County and these folks, isn't worth the paper it's written on, that's what

I'm getting from you.

MR. SHOENFELD: No. I'm saying, it may be, but not in the condemnation action because we're not taking any of the rights created by that -- by that Memorandum of Agreement or the MOU or the Development Agreement. We're not.

If they find there's a breach of contract, they can file a claim for breach of contract, but that's legal. If this is the condemnation for a piece of the surface of the earth, comprises the roadway and the well sites, that's all it is.

If they claim we've breached the contract, they know where the courthouse is, obviously.

THE COURT: Let me ask you another question. Assuming I was to grant this condemnation and we have a hearing whereby this Court is going to determine the value of this condemnation, and assuming I determine it's 1.3 billion dollars, is the County going to come up with 1.3 billion dollars? I guess that's a question for Mr. Mathews.

MR. SHOENFELD: Well, I'm certain -- to the extent that I can answer it, I'll say, yeah, they'll write a check tomorrow, but, no, I don't know. I can't answer that question.

The interesting part about -- again, I can't recall whether it was Mr. Van Amberg's or Ms. Nichols' presentation

to you, was that they base their claim of 1.3 billion dollars on the going price three years ago of potable water in the Middle Rio Grande. Potable water in the Middle Rio Grande three years ago, indeed, was bringing $30,000 an acre-foot.

What is the value of saline water, nonpotable water? We say it has a negative value, and that's an issue to be tried if they're -- if they -- if we come to some sort of conclusion that says we are taking water, but we're not.

Mr. Van Amberg's statement to the Court is, what we have taken after all is not the water, not the water rights, not the inchoate water rights under Mendenhall, not water, wet water, it is access to water. That's what this comes down to: Did the County or does the County wish to take access to water.

He wants to take the holes that it drilled in the ground, that's true. Is that the only access to this acquifer? Absolutely not. This acquifer, if it exists, in anything like what all the parties assume it exists, in whatever form, would allow access to it from any of the 11,000-plus remaining acres of the Recorp Defendants and Ms. Nichols' client.

The effect of the grand- -- the so-called grandfather letter, you need to read that, because he doesn't say anything about what rights anybody has. The State Engineer

doesn't do that, and even if he did say what rights you get

by self-help and speculation, as is the case here, he just doesn't commit to that. He can't do that, that's a judicial function under a case called City of Albuquerque v. Wells. It is not an administrative function.

The State Engineer can permit water rights, but he hasn't permitted any here. He could take a position in court as a party that the water rights exist or the water rights don't exist. He hasn't done that here. There is no such thing.

Mr. Van Amberg's statement that well permits were issued is simply untrue. No well permits were ever issued here. None. There were exploratory permits. They say on their face -- well, on the back side of it but -- that no water rights, no beneficial use, no taking of water is allowed pursuant to this drilling permit.

A drilling permit and a water rights permit are vastly, vastly different things. I would -- I suppose you can go back to the New Mexico Constitution, Article 16, Section 3, that's where all of this starts. It says, it's a one-liner, "Beneficial use shall be the basis, the measure, and the limit of all water rights in this state." Period.

That's all it says, and yet it is the thing that makes this case -- that -- forgive me (inaudible) in which billions of dollars are being talked about when, in fact,

$5,000 times the number of acres is all that has been taken.

We haven't interfered with their access. They can drill anywhere they want under Section 72-12-24, I believe it is -- or 25, excuse me. They can drill anywhere they want because the State Engineer has not extended his

jurisdiction to include this basin.

So, they've got the right of access to their -- to whatever water they claim. If they have any, they can go get it. If they don't have any, they can probably still go get it, they just can't do it by means of the property that the County has taken.

And I would point out that the County's taking is, among other things, pursuant to Section 72-1-5 NMSA, which is a really unusual statute. It's unique in the United States. It's been recognized by the United States Supreme Court as valid. And you'll see in the annotations to that statute, you will see reference to WS Ranch v. Kaiser Steel, in the United States Supreme Court and the Opinion of our New Mexico Supreme Court holding, that in this country, this dry, arid country, anybody can take land for the purpose of building aqueducts, pipelines, tanks, wells, conveyances for water, and other -- other devices -- I not quoting, but that's the essence of it.

And we can do that. If you have a place that you needed to get water to, you could do that, not as a judge,

but as a property owner. It's a very unusual statute, it's section 72-1-5, it's pretty important.

One moment, Your Honor. I will turn it back over to Mr. Mathews.

MR. MATHEWS: Your Honor, let me just finish very briefly. The County is not disavowing the Memorandum of Understanding and the Development Agreement, and that's not two agreements, that is one agreement, paragraph 23.4 of

the Development Agreement, which is in your packet, incorporates the Memorandum of Understanding into it, as you always do in independent contracts that are a couple months apart as this one is.

The Development Agreement is something the County intends to honor. We have obligations under that agreement. Paragraph 2.1.1 of the Development Agreement provides that the primary source of potable water will be derived by the treatment of nonpotable resources. That's what we're trying to do with the desalinization.

The developer acknowledges that the County shall retain the rights to a portion of the 18,000 acre-feet of water, based on the proportion of the County's participation in the cost of drilling any exploratory wells, and hydrogeologic studies conducted for the State Engineer review and approval.

The developer shall petition the County to form a

Public Improvement District. The County shall have a proportional equity share in the plant, the desalinization plant, dependent on the actual cost of the plant.

There isn't anything in the Development Agreement or the Memorandum of Understanding that we have disavowed. The developer has not petitioned us for public improvement history. I don't think that's unreasonable. They're not building homes out there now. But when the time is right, this is a 30-year agreement. It covers schools, fire departments, landscape easements, community centers.

We intend to stand behind that agreement. What I had to prove to you today was that there was a public purpose

for the County's taking. No one is to ever forget Alice King Way, but there is a public purpose for the road, there is a public purpose for taking the two well sites.

We are obligated, under the Development Agreement, to construct a desalinization facility. Under Section 42-2-6 -- and we did go under Article 42, Chapter 2, we did use the quit take because Mr. Van Amberg ordered us off his property instantly.

Under that article, once you decide there's a public purpose -- and I've cited in my Motion for Summary Judgment -- laws from all over the United States, Louisiana, Mississippi, Hawaii -- water is a public purpose. Once I prove there's a public purpose, 42-2-6 says, "All subsequent

proceedings shall effect only compensation."

So we are asking you today, Your Honor, to find that water is a public purpose and that Alice King Way is a road that is needed and that the County has a right to condemn it. We have asked for a hearing on compensation -- well, we asked for a jury trial on compensation, but I know that we will get sent to mediation and we will deal with the compensation issues.

But it's time for the Respondents to come forward with an opinion of value, and they haven't. They have said ten figures. They haven't told us what they think it's worth, and they haven't given us a value of the land.

Thank you, Your Honor.

THE COURT: Mr. Mathews, I still have this question: If the County intends to honor this agreement,

why the condemnation?

MR. MATHEWS: Because we were ordered off the well sites on the morning of April 5th. We had equipment out there. We have an obligation under the Memorandum of Understanding to develop an agreement.

This is the position we were put into, Your Honor. If we didn't have any of those well sites, we couldn't honor our obligation under that agreement. So Respondents forced us into a breach of contract. And we had to leave the land immediately. We can't build Alice King Way. We can't

finish the Northwest Loop. We can't connect with the 60th Street. We had 24 hours to get all our equipment off the well site or we're trespassing.

We don't have a whole lot of options there. And if we don't go forward with desalinization, then we're breaching the agreement, the Memorandum of Understanding, and the Development Agreement, and then they can sue us for breach of contract, which, apparently, they already intend to do anyway.

So we were put in this position by the actions of the Respondents.

THE COURT: Ms. Nichols?

MS. NICHOLS: Thank you, Your Honor, may I approach?

THE COURT: You may.

MS. NICHOLS: Here is a packet of copies of everything by Respondents, as there have been lots of other exhibits put into the record, so just hand you one more thing here.

Your Honor, your question hit the nail on the head. The condemnation action was not a part of the agreement. This whole thing was supposed to be done as a joint venture with their partner, the Respondents, and suddenly the rug was pulled out from under the Respondents by the County by the condemnation action.

And they decided, the Commission decided on October 1st, to approve the condemnation action, the same day that Respondents got the phone call from Commissioner Leonard that they might condemn the title to the land.

The letter from Mr. Van Amberg saying, get off the property then, was on October 2nd, after they had been notified that the County intended to condemn the property at issue. The condemnation action was not a response to anybody telling the County to get off the land.

The condemnation action was actually brought because the County had told -- had secured funding and had told the state that the County owned the property at issue.

The County needed to own the project, and the County did not own the property and did not own the project. Rather than fix that problem by negotiating with their partner, the Respondents, a solution to that issue in good faith, we entitled -- we have to work out something so that this is no longer a public/private venture but somehow a public venture, and here's what we're going to do with your share -- rather than doing that, they simply moved to condemn title to the land and pretend that this was solely their project.

Now, they're asking the Court, essentially, to undo that error that they made way back when they secured funding rather than force them to sit down at the table with

Respondents and resolve it in good faith and confront the fact that they engaged in those activities prior to the condemnation action.

Let me just run through it a little bit, and I'll explain. So the wells in the first place, Wells 5 and 6 that we keep talking about on the land at issue, were done pursuant to the agreement with the Respondents in the Memorandum of Understanding and the Development Agreement.

There were easements granted to the County to go on those sites, engage in testing, and engage in drill- -- engage at least in drilling, pursuant to that Memorandum of Understanding. Access on the road was granted pursuant to the Memorandum of Understanding and Development Agreement. Having a trailer there, they could do -- pursuant to their easement.

In other words, everything was done as this joint venture with their partner until they decided to test the water and start building a plant (inaudible), and then suddenly they decide to condemn the land and cut their partner out of the process.

And the partner had been a part of the process from the very beginning. Those wells wouldn't be there if Respondents hadn't secured the Notices of Intent to drill those wells there. And none of this would be happening if they hadn't engaged in that activity with Respondents to

begin with.

Now they want to cut the Respondents out of the entire appropriation of water and access to the water before they start putting it to beneficial use, as you heard Mr. Shoenfeld explain, which is when you really start to acquire water rights in the State of New Mexico.

The Respondents secured the right to drill. They have admitted the Respondents have permits to drill exploratory wells. They joined in with the Respondents to exercise that right to drill.

Now that they're in a position to take the water out of the acquifer and begin to put it to beneficial use, they want to cut the Respondents out of that scenario.

We wouldn't be here if there wasn't something valuable, more valuable than 230,000-some dollars about that land. We wouldn't be here if Well Sites 5 and 6 weren't actually incredibly important and incredibly valuable. They are, in fact, the best places for the drilling to occur.

In a study we obtained recently from the County, as part of discovery -- we also have, at the back of the packet if this is too hard to read -- but specifically, Well Sites 5 and 6 are being looked at here. They relate to the acquifer. There's 6 and there is 5. There's this north acquifer. It's in dispute. No one is sure exactly how much water is in there.

The joint venture allows Respondents the first 18,000

acre-feet, but who's to say there is 18,000 acre-feet, and who's to say there is anymore than that. So once that's being taken, then the Respondents' access and right to put that water for beneficial use is basically gone.

Then there's Well Site 5, which is what the County is now proposing to use to dump back into the acquifer, and that -- those are the two wells.

And if you drilled in the ideal spot, given the geography, given the -- I'm forgetting the term -- (inaudible) a rift, you know, the place where earthquakes can happen -- fault line, thank you very much -- and so two wells were drilled there with the idea that those would be the best sites. And they are drilled there after the State Engineer approves, they're grandfathered in, the permit secured by Respondents to drill in those specific sites were chosen very much on surface. And the wells themselves were incredibly expensive to drill.

And the other thing, Your Honor, is the extent of the acquifer is not quite known, but also from the County, this is an estimate of possibly the acquifer's aerial extent, as seen from above. And Well Sites 5 and 6 are identified on this as well and located, and they are ideal and already-drilled wells from which not only test water can be taken, but a desalinization plant can be built.

And those wells can be used to then pump the water and turn it from a nonpotable resource into a very beneficial, very valuable resource for development on the West Side.

That's the critical issue. That's why we're here. If there was nothing special about Well Sites 5 and 6, then the

County would never have filed a condemnation proceedings to begin with.

Certainly, if it was a liability, the water in the aquifers was somehow a liability, we wouldn't be here. Why would the County want to condemn a liability, an access to a liability. That's simply a ludicrous idea. The County is, instead, trying to back door access to the water of this -- at issue here and put it to beneficial use without doing so with their partner, the Respondents.

The highest and best use for the land at issue in this case is the building of the desalinization plant. The County is seeking hundreds of millions of dollars -- or at least a hundred million dollars to continue to build a plant.

There is definitely some debate there. Desalinization is a very rapidly-growing field. It's possible to do it at a significantly less cost, but that's an entirely other area of exploration that's supposed to happen between the partners at issue in this case.

But the County, if they are able to condemn the wells

and then start pulling water, could easily and simply go through the first 18,000 acre-feet, or whatever is in there, and that's it, without ever engaging in the process that they're supposed to engage in with their partners. So when they say they're not disavowing the agreement, this condemnation action flies right in the face of that agreement with those partners.

And going back to the statutory violations at issue

here that the County is saying are harmless, Your Honor, the due process clause and the takings clause try to strike a the due process clause and the taking clause try to strike a balance between property rights and rights of governmental entities to condemn those property rights.

And the statute is drafted very carefully to protect the due process rights of the person whose property is being condemned under the taking clause. And to say simply, oh, we don't have to comply with 25 days written notice and providing you with a real appraisal, that's just harmless if we don't do that, completely flies in the face of the statute that was designed to protect and to balance those rights. Ignoring the requirements, negotiating good faith, same thing.

And the statute was drafted in order to make the process of condemnation constitutional. And to say that ignoring those statutory exceptions requiring written notice

and 25 days to provide a written counter-appraisal prior to filing a condemnation action is simply error.

Your Honor, what's really happening here is that the County obtained public money to drill and -- I'm sorry -- to build a desalinization plant. They thought they were acquiring money -- and I want to show you an email from Ms. Dianne Ross, which is Exhibit 49 to the depositions, to Ms. DuBois with New Mexico Environment Department.

They were supposed to acquire money to -- she mentions that they are supposed to acquire real property prior to obtaining the funding to do what they wanted to do, to build a plant. And in October 22nd, 2009, after this condemnation

action was filed, Ms. DuBois writes about three small things -- back on October 6th, 2009, she sent me an email stating potential legal action regarding the development of the wells that were previously drilled with the County's own funding.

And she also said, from my understanding, her discussions with you, the State Grant Fund would be utilized for surveying, appraisal, and for the pilot project for the treatment of the water from the wells. (Inaudible.)

Would you please clarify if the County owns the land where all this work is being conducted. If the County owns the land, the attached site certificate should have been completed by a County Attorney. This is after the County

filed a condemnation action seeking to own the land at issue. Ms. DuBois is saying, you owned the land at issue (inaudible.)

In response, a Site Certificate is filed. This is to certify that the County of Sandoval has now acquired all property, sites (inaudible) specific use permits necessary for construction, operation, and maintenance of the project described as Sandoval County deep aquifer water desalinization (inaudible.)

And a Site Certificate is filed on October 22nd of 2009, claiming ownership of the land at issue in this condemnation proceeding. (Inaudible.) Naturally, the purpose of this condemnation proceeding has to do with (inaudible) ownership of that particular site.

So I think what's happening here is that, yes, it's a

valuable resource, and yes, developing it is going to be costly. And yes, they were working with their partner for some period of time and then decided to stop working with their partner, condemn the land and take title and to proceed with the venture on their own.

So it is all about what lies below the land at issue. It's all about securing access to the development of that water for the beneficial use. And the condemnation action was brought hastily because they realized that they needed to take title of that land and, in fact, they needed to take

it yesterday, and they probably should have done it months, and months, and months, and months ago through negotiations with their partner.

Rather than do that, they simply filed a condemnation action for failure to correct their error through the action filed in this court. They ignore the right to notice required by the statute. They ignore the right to negotiate -- or the requirements as far as negotiate with the condemnor prior to the filing. And that's why we're asking you to dismiss this condemnation action.

It was not brought as an appropriate condemnation action for appropriate reasons and the statutory requirements which are constructed to strike a balance between government's right to take property. And the private owners' property rights were not followed.

THE COURT: Anything else, Mr. Van Amberg?

MR. VAN AMBERG: Yes, Your Honor, I'll try to be brief. If it please the Court. You know, the statement has been made that the only reason that this condemnation

action was brought was because there was -- the County's attempts to continue their access to the property and perform their testing was frustrated by orders from the Recorp group.

Where this really began was back in July of -- or, actually, June 29th of 2009. I am referring to an Exhibit

16, which is in response to the Motion for Summary Judgment by the County. And there the County Attorney Juan Vigil, after the testing has been completed and they realized what they --

THE COURT: County Manager or County Attorney?

MR. VAN AMBERG: Pardon?

THE COURT: County Manger, you mean?

MR. VAN AMBERG: County Manager, I'm sorry. I misspoke. The County Manger. He writes to Mr. Maniatis, and he now suddenly announces -- and recall that the Memorandum of Understanding provided for 18 -- the first 18,000 acre-feet of water for the 11,000 acres that Recorp had for development. With the water, it was an extraordinary project. Without water, however, it turns into a place for prairie dogs.

And on that date, Mr. Vigil writes and states that the County just contributed all the money, the monetary costs of the resource development to date. The above-reference 2.1.1 addresses the rights to the 18,000 acre-feet of water. Quote, the County shall retain the right to a portion of the 18,000 acre-feet of water based on the proportion of County

participation and the cost of drilling in the exploratory wells, end quote.

Based on the County's contributions thus far, that

portion would translate as the County retaining the rights to the entire 18,000 acre-feet. That's where this began.

The interpretation of the contract rate was clearly not accurate because, under the Memorandum of Understanding, the value of the water rights were to be appraised, which they had been, at millions of dollars, and that was used to balance out any payments made by the County.

But, clearly, what was happening now -- and the alarm went off -- is the County began its move to take over the project. And that's where this began.

There have been questions about, can we drill somewhere else? Well -- and as the Court has heard, well we -- rarely where these wells are located are the optimal spots on the property. But that's not the issue.

The issue is what is the value that is being taken at this point, not whether there's any residual value of the balance of the property. That's a wholly different measure of damages. The question is, what is the value of the taking. The County itself has valued it at 1.3 billion dollars.

The appraisal -- and maybe we didn't misread it, that they appraised resident -- the value of residential rates instead of grazing rates, but still, it's a matter of a few thousand bucks an acre. And that is not the value. I think the Court should see, at this point, of what is being taken.

What is being taken is a water business. Was this a condemnation of well sites and the use of water an afterthought? No. The whole Memorandum of Understanding, the whole history of the transaction between the parties leads us to the only conclusion that this whole case is about water, and the Alice King Way is essentially the afterthought.

Shoenfeld states that there is no value to this, it's only a liability. Exhibit Number 5 to the Response to the Motion for Summary Judgment is a letter to the State Engineer's Office.

And it says, Dear Mr. Draper, who is the water attorney for both -- for the entity that was supposed to have been set up under the MOU -- this letter is to confirm and clarify my letter to you of February 21, 2007, that in the event that SB 1169 is passed -- and that was the bill that foreclosed the loophole, and I'll read that in a minute -- and signed into law. It will not retroactively affect the Notices of Intention to appropriate non-potable groundwater at greater depths than 2500 feet for the appropriation of up to 24,000 acre-feet of water, should it be available, under the above-mentioned notices, which you have filed in my office or may file to the effective date of the act on behalf of the following entities. And it lists the Recorp entities.

The State Engineer understood the value of these

declarations and rights -- the precise rights that they confer upon someone who did that. And he understood the concern that the subsequent enactment of legislation might be read by some to foreclose those rights even once declared, but he assured Recorp that that was not to be the case.

Under 17-12-25, prior to 2009, the statute provided no past or future order of the State Engineer declaring underground water basins, having reasonable ascertainable boundaries, shall include water in an aquifer, the top of which aquifer is at a depth of 2500 feet or more below the ground surface at any location in which a well is drilled in which aquifer contains non-potable water.

The subsequent legislation in 2009 provided, an undeclared underground water basin, having reasonably ascertainable boundaries that consist of an aquifer, the top of which aquifer is at a depth of 2,500 feet or more below the ground surface at any location in which a well is drilled in which aquifer contains only non-potable water, is subject to State Engineer Administration, in accordance with Section 72-12-25 through 72-12-28 NMSA 1978.

Everybody understood the value of those declarations and understood the value of the grant grandfathered in after the 2009 legislation.

The Memorandum of Understanding fully understood and contemplated that these water "rights" were going to be appraised and had a considerable value. They had a significant value to the extent that the County was willing to spend $6 million dollars in tests and exploratory wells,

was able to obtain a grant of $3 million from granting authorities in the state, has applied for grants in the approximate amount of $100 million. They, themselves, have valued this water right at 1.3 billion.

It just makes absolutely no sense -- absolutely no sense, Your Honor, to contend that this a valueless right, that it's deserving of no consideration and no compensation. It's an enormous value.

And as Ms. Nichols says, if it doesn't have any value, then what are we doing here. If it doesn't have any value and it's a liability, then there is no public purpose behind them condemning any of these well sites.

It's also significant that the argument is also that obtaining water is -- involves the purpose. If it's a liability and they're not going to be obtaining water, then the argument that obtaining water for a public purpose is worthy of condemnation.

And that doesn't make any sense either and further confirms that what we're talking about here is water and the value -- the valuable industry that potentially exists.

I think that's all that I have, Your Honor.

MR. MATHEWS: Your Honor, may I?

THE COURT: Be brief.

MR. MATHEWS: Your Honor, Ms. Nichols put up the correspondence from me to Ms. DuBois. And at the time that I sent that to her, I spoke with her first. I told her all we have is the Preliminary Order of Entry. That is what she wanted to see. That's what I sent her. That's the

correspondence that she asked me to send her.

Well, the County would be happy to let the Respondents have these wells for $6 million, $6-plus million, if they want to give us the money. We do believe that there's a future for this project in Sandoval County.

The water is a liability in its present form. It's not a liability after it's cleaned, after it's cleaned and desalinated. We have an obligation to clean it. We have an obligation to work with the Respondents.

We were working with the Respondents until they refused to let us onto the property, and at that point, we had to condemn. But Mr. Maniatis didn't purchase the aquifer. He didn't discover the aquifer. He doesn't have rights to the aquifer. And today all we're asking the Court to do is to give us the property.

We don't have the water rights. We will get them in the appropriate fashion. If Mr. Maniatis gets them first,

we'll be able to drill also. But we have to prove to you that this is a public purpose. And my Motion for Summary Judgment has case after case, statute after statute, showing that water use throughout the United States is a public purpose.

THE COURT: Mr. Mathews, how much of this property involves Alice King Way?

MR. MATHEWS: I can -- seven acres, a little over seven acres is Alice King Way. It's -- it is separate in the Petition and it's the first one.

THE COURT: It's a separate piece of property from the well sites.

MR. MATHEWS: It is separate in the Petition and it's the first one. And the second and the third say Well Site 5, Well Site 6.

THE COURT: Okay. Counsel, here's my decision on this motion: I'm granting in part and denying in part, the Motion to Dismiss. I'm going to deny the motion with respect to the property that deals with Alice King Way. I'm going to grant the Motion to Dismiss this condemnation proceeding with respect to the other two parcels, the well sites.

I'm going to find that -- first of all, that this should be governed by the Memorandum of Understanding. That was a contract that was entered into by the parties. If

either of the parties feels that, at this time, that it was a bad contract, you have to live with your contract, but more importantly than that, I see this as a due process question or problem in that I'm going to find that Notice was not proper.

I'm going to also find that no negotiations were really entered into with respect to the value of this property -- or this -- in this property; therefore, I'm going to dismiss the condemnation with respect to those two parcels. I am not going to dismiss it with respect to the property regarding the Alice King Way.

Ms. Nichols, I need for you to prepare the appropriate order, circulate it to counsel as soon as possible. I don't know if counsel for the County wishes to appeal this matter, but I think if they do, it simply needs to be done fairly

soon.

MS. NICHOLS: Yes, sir.

THE COURT: Mr. Bartell, based on my ruling, do you still wish to intervene or not?

MR. BARTELL: Your Honor, I think your ruling moots our need to intervene, so --

THE COURT: Also, counsel, based on my ruling, I don't know that we need to go into the other issues at this time.

MR. MATHEWS: Well, Your Honor, it's -- it

presents a problem to the County because this is a final order as to the well sites, but not a final order to the case because of Alice King Way, so may we have an interlocutory appeal on the well sites?

THE COURT: Yes. With respect to the well sites, you may. And, Mr. Mathews, put in the magic language that this is an issue for purposes -- or the language that you need for interlocutory appeal with respect to those two parcels, and I'll grant leave to take interlocutory appeal.

MR. MATHEWS: Thank you, Your Honor.

THE COURT: And the other portion will continue on even though my ruling does not stay the issue with respect Alice King Road. Continue on that one.

MR. MATHEWS: Yes.

THE COURT: Okay? If there's nothing further, we'll be in recess.

(Note: Court in recess, 4:00 p.m.)

DEBORAH K. FARRAR, CCR, RPR

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

CASE NO. D1329CV20092408

SANDOVAL COUNTY, NEW MEXICO, a statutorily created County,

Petitioner,

v.

TESORO PROPERTIES, LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; BUTERA PROPERTIES, LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; CARINOS PROPERTIES LLC, A; RECORP NEW MEXICO ASSOCIATES LIMITEDPARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEWMEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents.

OBJECTION TO PRELIMINARY ORDER OF ENTRY AND COUNTY'S PROPOSED DEPOSIT

COME NOW the Respondents, except Carinos Properties LLC, and pursuant to NMSA 1978 § 42-2-6 hereby object to the entry of the Preliminary Order of Entry and the County's proposed deposit, and as grounds therefore state:

1. The Application for a Preliminary Order of Entry is based upon a false Affidavit which claims that the County is the owner of certain water wells upon Respondents' properties.

2. The Petition/Complaint is vague and does not fully describe the property and rights being taken by the County as required by NMSA 1978 Section 42-2-5.

3. The County falsely claims ownership of a well desalinization facility on the Respondent's property.

4. The County is only offering $237,885.60, which grossly undervalues the damages caused by the County's taking of land, contract rights, rights to waters and water wells, and planned development opportunities. This compensation offer by the County is made in such bad faith that all condemnation proceedings should be dismissed and Respondents compensated for costs and attorney fees.

BACKGROUND

The Respondents are affiliated entities which own parcels of land which total 11,673 acres located west of the City of Rio Rancho and which received approval by Sandoval County for a Master Plan Development District on October 5, 2006. Recorp is the representative entity for the Respondents and secured the rights and entitlements described herein on their behalf. Carino is the owner of Well 6 and the well site described in the Petition. Butara is the owner of Well 5 and the associated well site. Given the lack of a plat or plans, Respondents do not know which land is affected by the proposed road.

Pursuant to the development of this project, the Respondents applied to the New Mexico Office of the State Engineer ("OSE") for a permit to drill exploratory wells. The Respondents also made certain declarations as shown in Exhibit A., which is a "Notice of Intention to Appropriate Non-Potable Ground Water at Greater Depths than 2,500 Feet Pursuant to NMSA 1978 § 72-12-26". Wells 5 and 6 were to be drilled on the

Butera and Carinos properties respectively and the water developed was to serve the Respondents' joint project. The intent was to develop the non-potable water by treating it through a desalinization process. Since the aquifer below 2,500 feet was not at that time under the jurisdiction of the OSE, treated water limited only by declarations could be used to service the Respondents' project.

As the Respondents were preparing to drill the well sites, the Respondents' representative, David Maniatis, was contacted by representatives of the County who were interested in participating in the development of the water on the Petitioner's property.

Accordingly, in early 2007, Recorp, for the benefit of the Respondents, entered into a "Memorandum of Understanding Between Sandoval County, New Mexico and Recorp" (the "MOA") (Exhibit B). The MOA, drafted by the Sandoval County Attorney, was signed by County Chairman Don Leonard and by Recorp. The MOA provides:

a. That the document constituted "an agreement between the County of Sandoval. . . and Recorp."

b. That Recorp owned 11,673.3 acres in the Puerco Basin west of the City of Rio Rancho.

c. That this property had Master Planned Development approval.

d. That Recorp obtain a drilling permit from the OSE with conditions which applied to "appropriation and beneficial use."

e. That upon confirming the quantity and quality of water, Recorp could use up to 18,000 acre feet of water per year which would be applied to beneficial use at the time of the build-out of its project.

f. That the purpose of the MOA was to outline "the next steps in securing and supplying the non-potable water to the Rio West project."

The parties then agreed to "jointly set up a water entity that shall control the eighteen thousand (18,000) acre feet of non-potable water." Recorp agreed to "transfer all State Engineer's permits to the water entity." (¶ III (1)). Accordingly, the parties recognized that through Recorp's efforts, it had the capacity to develop 18,000 acre feet of water from its property and wells. The County would own 66% and Recorp would own 34% of the water entity. (¶ III (2)). Under the MOA, Recorp would be "guaranteed" the 18,000 acre feet of water for use in its subdivisions. After the 18,000 acre feet of water was developed, additional water could be developed and sold by the water entity with profits split in accordance with the parties' interests. (¶ III (4)).

The intent was also to create a Public Improvement District ("PID") to help fund the project. The County was also to make application "to state and federal agencies for matching funds to assist in the costs associated with producing potable water." (*Id.*).

The County intended to expend some six million dollars toward drilling. The parties clearly attributed a substantial value to the OSE permits obtained by Recorp and the associated declarations. Further, as provided in ¶ III (7) "Recorp shall have the value of the permit/intellectual property and the water rights for 18,000 acre feet of non-potable water appraised by a third party appraiser . . . within 60 days of signature of this agreement." Recorp would then be credited toward their 34% ownership interests in the water entity based upon the appraised value of these water rights, another recognition of the value of these rights.

On April 20, 2007, the parties amended the MOA by providing that the obligation of the County to reimburse Recorp for expenses was "not a general obligation of the County." Instead, reimbursement would only come from "special funds and accounts designated therefor by the County." (Exhibit C) The County Manager subsequently informed Mr. Maniatis that even if the Public Improvement District could not be created, bond proceeds were available for the required improvement. (Exhibit D)

Accordingly, under this MOA, the parties acknowledged that the Respondents owned the real property involved and all benefits of OSE approvals relating to the drilling for and use of non-potable water.

On May 1, 2007, Recorp and the County entered into a Development Agreement (Exhibit E). Under this Agreement, the County agreed: "The primary source of potable water will be derived by the treatment of non-potable resources in the area. The Developer acknowledges that the County shall retain rights to a portion of 18,000 acre feet of water, based on the proportion of County participation in the cost of drilling any exploratory well ..." (Para.2.1.1) As will be seen later, this is a shorthand reference to the more detailed provisions of the MOA. Thus the County knew that the water it is now apparently claiming is the water that it agreed would be the water for the Respondents' project. Taking the water also takes the project development rights and all other benefits under the Development Agreement. The Development Agreement also contains an attorney fee provision (Para.22.2). Condemning the Development Agreement condemns the attorney fee provision, which is a specific taking. Finally the Development Agreement specifically acknowledges and reconfirms the MOA (23.3) and its provisions.

The parties then proceeded under the MOA, with the County requesting access to the Respondents' property to perform "due diligence" and determine the quantity and quality of the water. A temporary easement was then granted to allow the County to perform its due diligence. The County then drilled for and tested the water to determine project feasibility. Months later, the County sought an extension of the now expired temporary easement. Mr. Maniatis explained that the water entity needed to be created and the formalities of the MOA followed. The County insisted that it be allowed to continue with its due diligence and refused to leave the property.

The County, apparently now satisfied with the water tests, then changed course. Baiting and switching, it informed Mr. Maniatis that the MOA was invalid and that there was no agreement between the Respondents and the County. The County was again informed that it should leave the Respondents' property given that the County purportedly believed that it had no contractual relation with the Respondents. The County responded that since the MOA was invalid and the County spent money on drilling wells and testing water, the County now owned the wells and the Respondent's valuable rights to water. Now, according to the County, the County would be making beneficial use of these valuable rights, would not be compensating the Respondents, and would be destroying the Respondents' rights under the MOA and Development Agreement to receive 18,000 acre feet of water for the development of its projects. The County then filed a condemnation action offering the Respondents two hundred thirty seven thousand dollars claiming, disingenuously, that it is condemning only real property

which has no water rights and which apparently has no value over and above grazing land.

The County has taken the following positions: First, it claims that there is no value to the permits and rights received from the OSE, which apparently means that there is no right to drill for non-potable water and treat it for public consumption. Nevertheless, the County has spent several million dollars drilling wells and treating the water and claims in these proceedings that there is a vital need for the County to obtain access to the Respondents' wells. If there are no rights to water from these wells, then the County needs to leave, as there is no public need that can be addressed by these wells. If there are rights to water through these wells, then the County needs to pay. Second, the County claimed that the MOA is invalid while performing under the MOA and reconfirming its validity in the Development Agreement. If the MOA is of no force, then the County has no basis for making any claims to the Respondents' properties, wells or rights to water. If the MOA is valid, then the County is condemning the MOA and Development Agreement contract rights and the County must compensate the Respondents for these lost rights and benefits.

SPECIFIC OBJECTIONS

1. The Application for the Preliminary Order of Entry contains an Affidavit of Juan Vigil which affirms under oath that Sandoval County needs a Preliminary Order of Entry to allow "access to Sandoval County water wells" which would "minimize the economic effects lack of water . . . would have upon the people of Sandoval County" and to "efficiently program the desalinization" project. The Affidavit is false, as the County

does not own water wells on the Respondents' property. The Court, under § 42-2-6 *supra,* "shall issue or refuse to issue the preliminary order according to the equity of the case "and the relative damages the parties might suffer. The County is committing nothing short of fraud by gaining access to Respondents' property under an apparent pretext that it was operating under a joint venture with the Respondents. It now claims that it drilled wells solely for its own benefit and some how usurped Respondents' valuable rights to water. Under § 42-2-5, the County's Petition in Condemnation must accurately describe the property that it is condemning and the estate to be taken. The County failed to comply with this requirement and has apparently and intentionally drafted its Petition in vague terms in an attempt to mask the County's true intent. The reality is that the County discovered that the Respondents obtained valuable rights from the OSE to farm treatable non-potable water. The County then drafted the MOA which it represented to the Respondents to be valid. The MOA was then reconfirmed in the Development Agreement. In operating under the MOA, the County was allowed upon the Respondents' property to drill and test for water. If the County was satisfied, the commonly owned water entity would be formed and the water rights transferred to this entity. The first 18,000 acre feet of water were available for Respondents' project, with the rest available for other uses. The County then disavowed its fiduciary obligations and claimed to own the Respondents' wells and rights to water without any compensation to the Respondents. Under the equities in this case, there should be no access to the property by the County allowed. At the very least, since there is no intent to compensate Respondents for their water, the County should not be allowed access to any water.

2. Amount of Deposit. The deposit being offered by the County is $237,885.50. This amount represents only some compensation for taking real property for the alleged road the County intends to construct and well sites, valuing the property at its lowest and worst use. Instead, full compensation should be deposited for the following takings:

a. The rights to the well and water.

b. Valuable planned development rights of the Respondents' lands.

c. Respondents' rights under the MOA and Development Agreement.

d. The true value of the real property at its highest and best use.

3. Any development and processing of Respondents' water will cause additional damage to the Respondents and additional sums should be deposited by the County.

Respondents make the following requests:

a. That the Application for Preliminary Order of Entry be denied, that the County be enjoined from entering upon the properties of the Respondents and the Respondents be awarded their costs and fees.

b. That in the event the Order of Entry is granted, the amount of the deposit be an amount determined by this Court pursuant to an evidentiary hearing.

c. That in any event, if an Order of Entry is granted; that the County be enjoined from any access to wells or water.

Respondents will be conducting discovery on an expedited basis and would request that a hearing on this matter be set in approximately sixty (60) days.

VanAmberg, Rogers, Yepa, Abeita
& Gomez, LLP
347 East Palace Avenue
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979
(505) 983-7508 (fax)

By _____
Ronald J. VanAmberg

CERTIFICATE OF SERVICE

It is hereby certified that on the 26th day of October, 2009 a true and correct copy of the foregoing was deposited in the United States Mail at Santa Fe, New Mexico, first-class, postage prepaid, addressed to:

David Mathews, County Attorney
Sandoval County Courthouse
Post Office Box 40
Bernalillo, NM 87004-0040

Peter B. Shoenfeld
Post Office Box 2421
Santa Fe, NM 87504

_____
Ronald J. VanAmberg

VERIFICATION

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

DAVID MANIATIS, being first duly sworn, on oath, deposes and states: That he is one of the Respondents in the above-entitled cause; that he has read the foregoing Objection to Preliminary Order of Entry; and that the same are true to the best of his knowledge and belief, except as to matters asserted on information and belief and, as to those matters, he believes them to be true.

DAVID MANIATIS

SUBSCRIBED AND SWORN TO and acknowledged before me this 21 day of October, 2009.

Notary Public

My Commission Expires:
10/13/2013

File Number:

NEW MEXICO OFFICE OF THE STATE ENGINEER

NOTICE OF INTENTION TO APPROPRIATE NONPOTABLE GROUNDWATER AT GREATER DEPTHS THAN 2500 FEET PURSUANT TO NMSA 1978 § 72-12-26

1. FILERS OF NOTICE

A. Name: Recorp New Mexico Associates, LP — Work Phone: 480-991-2288
Contact: Gary Lane — Home Phone:
Address: 7835 East Redfield Rd. Suite 100
City: Scottsdale State: AZ Zip: 85260

B. Name: Butera Properties, LLC — Work Phone: 480-991-2288
Contact: Gary Lane — Home Phone:
Address: 7835 East Redfield Rd. Suite 100
City: Scottsdale State: AZ Zip: 85260

C. Name: Carinos Properties, LLC — Work Phone: 480-991-2288
Contact: Gary Lane — Home Phone:
Address: 7835 East Redfield Rd. Suite 100
City: Scottsdale State: AZ Zip: 85260

D. Name: Recorp New Mexico Associates II, LP — Work Phone: 480-991-2288
Contact: Gary Lane — Home Phone:
Address: 7835 East Redfield Rd. Suite 100
City: Scottsdale State: AZ Zip: 85260

E. Name: Recorp New Mexico Associates III, LP — Work Phone 480-991-2288
Contact: Gary Lane — Home Phone:
Address: 7835 East Redfield Rd. Suite 100
City: Scottsdale State: AZ Zip: 85260

F. Name: Tesoro Properties, LLC — Work Phone 480-991-2288
Contact: Gary Lane — Home Phone:
Address: 7835 East Redfield Rd. Suite 100
City: Scottsdale State: AZ Zip: 85260

2. LOCATION OF WELLS: Within a 1,000 foot radius of the following points:

2006 JUN 16 PM 3:26
STATE ENGINEER OFFICE
ALBUQUERQUE, NEW MEXICO

CG-88934 PODS 1-3 & 25-35

EXHIBIT
A
tabbies

Rio West Master Planned District in Sandoval County, New Mexico, described as follows:

Section and Subdivision	Township	Range
Section 8 (Part), Section 7 (Part), Section 17 (Part), Section 18 (all), Section 20 (Part), Section 19 (all), Section 29 (Part), Section 30 (all), Section 31 (Part) and Section 32 (Part)	12N	1E
Section 3 (all), Section 4 (Part), Section 2 (all), Section 9 (Part), Section 12 (Part), Section 11 (all), Section 10 (all), Section 14 (all), Section 13 (all), Section 15 (all), Section 16 (Part), Section 21 (Part) Section 22 (all), Section 24 (all), Section 23 (all), Section 28 (part), Section 33 (part), Section 36 (all)	12N	1W

Who is the owner of the land? Filers of Notice listed in ¶ 1 above.

7. ADDITIONAL STATES OR EXPLANATIONS:

The water pumped will be treated and then applied to the uses specified.

ACKNOWLEDGEMENT

I, David Miniatis, affirm that the foregoing statements are true to the best of my knowledge and belief.

Signature

RA-88934 Pods 1-3 + 25-35

Well No. 1: X = 293,310 feet, Y = 1,564,400 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Tesoro Properties, LLC

Well No. 2: X = 297,330 feet, Y = 1,564,380 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Tesoro Properties, LLC

Well No. 3: X = 302,610 feet, Y = 1,564,330 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Butera Properties, LLC

Well No. 4: X = 293,320 feet, Y = 1,569,150 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Carinos Properties, LLC

Well No. 5: X = 297,320 feet, Y = 1,569,120 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Carinos Properties, LLC

Well No. 6: X = 302,500 feet, Y = 1,559,050 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Butera Properties, LLC

Well No. 7: X = 306,740 feet, Y = 1,559,960 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Butera Properties, LLC

Well No. 8: X = 293,270 feet, Y = 1,553,940 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Recorp New Mexico Associates II, LP

Well No. 9: X = 297,200 feet, Y = 1,553,910 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.

Trn Number :

File Number : _____

RG-88934 POOS 1-3 & 25-35

On land owned by: Recorp New Mexico Associates II, LP

Well No. 10: X = 301,360 feet, Y = 1,555,450 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Recorp New Mexico Associates II, LP

Well No. 11: X = 293,240 feet, Y = 1,548,620 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Recorp New Mexico Associates, LP

Well No. 12: X = 296,490 feet, Y = 1,548,890 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Recorp New Mexico Associates, LP

Well No. 13: X = 293,240 feet, Y = 1,543,350 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Recorp New Mexico Associates III, LP

Well No. 14: X = 292,710 feet, Y = 1,539,100 feet, N.M. Coordinate System, Central Zone
(NAD27) in Sandoval County.
On land owned by: Recorp New Mexico Associates III, LP.

3. WELL INFORMATION

Approximate depth of all wells: 3000 - 6000 feet.
Name of well driller and driller license number: Not yet contracted.

4. QUANTITY

Diversion Amount: 16,000 acre-feet per annum

5. PURPOSE OF USE

Domestic: X Livestock: ___ Irrigation: X Municipal X Industrial X
Commercial X Other (specify): subdivision and related uses
Specific use: Community water supply for Rio West Master Planned District

6. PLACE OF USE:

File Number : _____ Trn Number :

RG-88934 Pods 1-3 + 25-35

EXHIBIT B

MEMORANDUM OF UNDERSTANDING BETWEEN SANDOVAL COUNTY, NEW MEXICO AND RECORP

I. PARTIES

This document constitutes an agreement between the County of Sandoval (the "County"), a political subdivision of New Mexico, and Recorp, ("Recorp"), an Arizona Corporation.

II. PURPOSE

Recorp is the owner(s) of certain real property in the Puerco Basin, consisting of approximately 11,673.3 acres, as described in Exhibit "A."

The real property is generally located west of the City of Rio Rancho as depicted in Exhibit "B" and received approval by the County for a Master Planned Development District on October 5, 2006. This is otherwise known as the "Project."

Furthermore, Recorp has approached the New Mexico Office of State Engineer ("OSE") for an "application for permit to drill an exploratory well." This permit (RG-88934) has been approved with 6 Points of Diversion (POD's 1-6). Conditions of approval attached to this permit by the OSE apply to appropriation and beneficial use.

Upon completion of the exploratory wells analyses will be performed to determine the suitability of the water source to allow production of 18,0000 (EIGHTEEN THOUSAND) acre feet of water per year that Recorp expects to pump and apply to beneficial use at the time of build-out (expected to be around 2031).

It is the intention of this agreement to identify and memorialize the parties' understanding as to the next steps in securing and supplying the nonpotable water to the Rio West project.

III. AGREEMENT

1. The County and Recorp shall jointly set up a water entity that shall control the 18,000 (EIGHTEEN THOUSAND) acre feet a year of nonpotable water. Recorp agrees to transfer all State Engineer permits to the water entity.

2. The ownership of said entity shall be 66% owned by the County and 34% owned by Recorp;

3. Recorp shall be guaranteed the 18,000 (EIGHTEEN THOUSAND) acre feet of water per year as long as it is physically available. Both the County and Recorp are proceeding under the assumption that the non-potable water resource is renewable. In

the event that the resource is found to be non-renewable, the water entity shall develop a plan for transition to renewable resources. The plan shall be developed no later than 20 years after the formation of the water entity, and the transition to the renewable source shall be complete no later than 100 years after the formation of the water entity.

4. Profits generated from sale of water shall be split per the ownership interest of the parties (all sales of water are limited to entities exclusively in Sandoval County), as mentioned herein. * See Chart of Agent for Add'l Data

5. The County has started the process to create a Public Improvement District ("PID") to help with the funding of the Project; Recorp expects to sign the approval of the PID following recognition and approval by the County Commission. The PID shall be the primary entity for funding the development of potable water resources. The County shall make application to State and Federal agencies for matching funds to assist in the costs associated with producing potable water. The County shall be credited with its administrative costs associated with securing said funds and funds obtained from State and Federal sources.

6. It is the intention of the County to fund the PID with $6,000,000 (SIX MILLION DOLLARS), for the right to drill for the non-potable water below 2500 feet, upon approval and written acceptance of said PID by both the County Commission and Recorp. Said funds may be used to pay for costs associated with initial administrative, legal, engineering, and exploratory well and feasibility study costs, and the costs associated with Phase I construction of the desalination plant.

7. Recorp shall have the value of the permits/intellectual property and the water rights for 18,000 acre feet of non-potable water appraised by a third party appraiser (selection of which shall be agreed to by Recorp and the County) within 60 days of signature of this agreement;

8. Recorp shall be credited towards their 34% ownership interest in said jointly owned entity and, should there be a deficit between the appraised value and the 34%, Recorp shall make up the short-fall with cash; conversely, if there is a value more than the 34%, then the difference shall be made up by the County with cash, not to exceed the County's total $6,000,000 (SIX MILLION DOLLARS) contribution within this phase;
Note: Intera's hydrology contract costs come from this $6Mil, and are already "obligated".

9. The County shall also have the right of first refusal on any portion of the 18,000 (EIGHTEEN THOUSAND) acre feet per year not directly used by Rio West, and the fact that, upon signature, the County will pursue funding on a State and Federal level for the water program until the program is complete;

10. All bills authorized by, and from, both the County and Recorp are to be paid within 45 days of invoice;

11. Recorp will fund its proportionate share as demanded from the County from time to time;

12. Recorp shall have the right to all the effluent water (concentrate) produced by the desalinization plant. This effluent water can be disposed of by Recorp at Recorp's sole discretion (so long as approved methods, i.e. EPA, NMED, etc., are met) and as long as it is used for the Rio West Project;

13. Recorp shall fund the driller mobilization cost once this Memorandum of Understanding is accepted and approved by the County Commission. Once the PID is formed Recorp expects reimbursement within 3 weeks after formation per County agreement. If the PID is not formed, the County will reimburse Recorp for said driller mobilization fee within 30 days from Recorp's payment.

This Memorandum of Understanding is effective as of the last date it is executed by the second party and shall continue in effect until such time as both parties mutually agree to terminate it.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the _____ day of _____ 2007.

RECORP:

By: _____
David Maniatis

SANDOVAL COUNTY COMMISSION

By: _____
Don Leonard, Chairman

APPROVED AS TO FORM:

_____
David Mathews, County Attorney

ATTEST:

_____
Sally Padilla, County Clerk

SANDOVAL COUNTY ADMINISTRATIVE OFFICES

April 20, 2007

David Maniatis
RECORP
7835 E. Redfield Road, Ste. 100
Scottsdale, AZ 85260

RE: LETTER OF AGREEMENT REGARDING MEMORANDUM OF UNDERSTANDING BETWEEN SANDOVAL COUNTY AND RECORP

Dear Mr. Maniatis:

Pursuant to conversation with Sandoval County Bond Counsel, we have been requested to further detail information regarding funding and, in particular, paragraph 13 of the MOU between the County and Recorp which was approved at the April 19th, 2007 Commission meeting.

At end of Paragraph 13, remove period and continue final sentence, as follows:

"...but only from such special funds of the County as are designated for such reimbursement. The obligation of the County to make reimbursements to Recorp under this Paragraph 13, is not a general obligation of the County, but is a special limited obligation of the County and Recorp may not look to any other funds or accounts of the County other than those special funds and accounts designated therefore by the County for such reimbursement."

In order to finalize this agreement, please sign below and return this Letter of Agreement, along with the enclosed MOU.

Sincerely,

Don Leonard, Chairman, for Sandoval County — Date: 4/20/07

By: _____ — Date: 4/25/07
David Maniatis for Recorp

Approved as to form: _____
David Mathews, County Attorney

EXHIBIT
tabbies
C

APR 2 5 2007

SANDOVAL COUNTY ADMINISTRATIVE OFFICES

BOARD OF COUNTY COMMISSIONERS

DON LEONARD
District 2, Chairman

JOSHUA MADALENA
District 5, Vice Chairman

ORLANDO J. LUCERO
District 1

DAVID BENCY
District 3

JACK THOMAS
District 4

DEBBIE HAYS
County Manager

April 23rd, 2007

FAXED & MAILED: 4-23-07

David P. Maniatis
RECORP
7835 E. Redfield Road Ste. 100
Scottsdale, AZ 85260

RE: Funding the Recorp Reimbursement

Dear David:

A *"Letter of Agreement Regarding Memorandum of Understanding Between Sandoval County and Recorp"* was sent to you by overnight mail this past Saturday; however, I want to assure you that the County has the funds budgeted within the Intel Bond proceeds should the Public Improvement District fail to be set up within the appropriate timeframe.

The letter dated April 20th failed to mention this and I want you to know that these funds are "designated for such reimbursement."

If you have any questions please feel free to call me at the office, 505-867-7538, or on my cell, 934-8770.

Sincerely,

Debbie Hays
County Manager

EXHIBIT
D

SANDOVAL COUNTY
200729035
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1 of 26
07/17/2007 02:23:28 PM

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the "Agreement") is made as of the 1st day of May, 2007 by and between the SANDOVAL COUNTY, NEW MEXICO (the "COUNTY"), a political subdivision of New Mexico, RECORP PARTNERS INC. DEVELOPMENT COMPANY, L.L.C., an Arizona limited liability company ("RECORP"), is referred to herein as "DEVELOPER".

RECITALS:

A. "RECORP PARTNERS INC." otherwise known as the DEVELOPER is the owner(s) of certain real property known as, consisting of approximately 11,673.3 acres, as described in Exhibits "A" (the "Property").

B. The real property located generally west of the City of Rio Rancho in RECORP PARTNERS, INC., as depicted on Exhibit "B" (the M.P.D.D.), is included within the Master Planned Development District adopted on October 5, 2006, pursuant to Section 19 of the County Zoning Ordinance (the "Zoning Ordinance"), County Ordinance No.04-12-02.4, and the document entitled "Rio West Master Plan RECORP PARTNERS INC.", dated April 2006, prepared by Consensus Planning, Inc. (collectively referred to herein a the "M.P.D.D.").

C. It is the desire and intention of the DEVELOPER to develop the Property in the COUNTY, pursuant to this Agreement and in accordance with the M.P.D.D., DEVELOPER'S conceptual plan for RECORP PARTNERS INC. (the "Conceptual Plan"), attached as Exhibit "C" that certain Preliminary Plat of RECORP PARTNERS INC., dated April 2006, prepared by Consensus Planning, Inc. All references herein to the "Agreement" shall include the Master Plan, and all other exhibits attached hereto.

C. The COUNTY and DEVELOPER desire to enter into this Agreement in order to, among other things: (I) facilitate development of the Property by providing for and establishing public infrastructure improvements; (II) confirm the type of land uses approved by the COUNTY for the Property and the location, density and intensity of such land uses; and (III) confirm other matters relating to the development of the Property and the location, density and intensity of such land uses; and (IV) confirm other matters relating to the development of the Property as described in the M.P.D.D. and this Agreement in accordance with the Sandoval County Ordinances. Appropriate officials of the COUNTY have studied and reviewed this Agreement and related submittals by DEVELOPER and find that: (V) the M.P.D.D. and this Agreement are in substantial conformance with the County Ordinances and can be coordinated with existing and planned development of surrounding areas; (VI) development of the Property in accordance with this Agreement and the M.P.D.D. will result in the planning, design, engineering, construction, acquisition and/or installation of public and other infrastructure improvements which will support development of the Property, which the COUNTY has examined and determined will be of a sufficient size and capacity to adequately provide for the health and safety needs of the of the future residents of the Property and, where applicable, the larger land area which includes the Property, including that the streets and thoroughfares contemplated by the M.P.D.D. and this Agreement are suitable and adequate to serve the proposed uses and the anticipated traffic that will be generated, and (VII) that the M.P.D.D. and this Agreement are consistent with planned area development districts as contemplated by Section 6 of the Zoning Ordinance, are appropriate in all respects and should be adopted. The COUNTY expressly acknowledges and agrees that,

EXHIBIT
F

to the best of its knowledge, there are no features of the M.P.D.D., including, without limitation, the intensity of development and range of land uses described therein, that cannot be accommodated within the scope of the General Plan. The COUNTY further acknowledges and agrees that delivery of potable and nonpotable water to the Property is critical to its successful development.

E. The COUNTY and DEVELOPER understand and acknowledge that this Agreement is a "development agreement" within the meaning of, and entered into pursuant to the terms of, Sandoval County Zoning & Subdivision Ordinances, and that the terms of this Agreement are binding upon the COUNTY and DEVELOPER and their successors and assigns and that such terms run with the land.

F. The COUNTY and DEVELOPER acknowledge that the development of the Property pursuant to this Agreement will result in significant planning and economic benefits to the COUNTY and its residents by (I) initiating the kind of detailed planning, development and growth with respect to the Property that is consistent with the applicable County ordinances and the M.P.D.D.; (II) increasing the amount of available housing in the COUNTY; (III) providing additional tax and other revenues to the COUNTY based on improvements to be constructed on the Property; (IV) creating quality housing and employment through the development of the Property consistent with the M.P.D.D.; and (V) providing for the planning, design, engineering, construction, acquisition and/or installation of private and public infrastructure in order to support anticipated development of the Property and the larger land area which includes the Property.

In reliance upon and for the reasons set forth above and in consideration of the covenants set forth herein, the parties hereto agree as follows:

1. Development in Accordance With M.P.D.D. and Development Agreement.

1.1. Approvals. The COUNTY has approved the M.P.D.D. The M.P.D.D., the Overall Preliminary Plat and this Agreement set forth the land uses, densities and intensities of such land uses, and development standards for the Property. The M.P.D.D. was incorporated into and became part of the COUNTY's Zoning Map for all purposes when the COUNTY approved the M.P.D.D. on October 5, 2006.

1.2. Development. The development of the Property shall be in accordance with the M.P.D.D., and this Agreement, as may be amended from time to time pursuant to Paragraph 19 below. Without limitation to the foregoing, the COUNTY agrees that the Overall Master Plan shall be deemed approved for a period of five (5) years from the date hereof and shall require no further COUNTY approvals prior to the expiration of such 5-year period (the "Master Plan Renewal Date"). In addition, the COUNTY's approval of the Master Plan shall. to the extent possible, be deemed to vest all rights necessary to develop the Property in accordance therewith, such approval and vested rights to extend in accordance with County Attorney Letter dated August 10, 2007 without the need for further approvals by the COUNTY (and the event DEVELOPER requests an extension of the Overall Master Plan Renewal Date, the COUNTY shall exercise its review and approval rights in a reasonable manner and, except for modifications required in order to satisfy subsequent public health or safety concerns, shall not unreasonably withhold such approval). Nothing herein shall be construed to relieve the Developers from compliance with Sandoval County's Zoning and Subdivision Ordinances.

1.3. Reliance. The COUNTY's approval of the M.P.D.D., and the COUNTY's acceptance of this Agreement, constitute affirmative representations by the COUNTY, on which DEVELOPER are entitled to rely, that the COUNTY has reviewed and approved the studies, plans and other submittals provided by or on behalf of DEVELOPER in support of the M.P.D.D., and has considered other information known and available to the COUNTY related to the public health, safety and welfare of the future residents of the Property and projected needs for public services and infrastructure and that DEVELOPER:

1.3.1. shall be entitled to develop the Property in accordance with the land uses, densities, intensities, and development standards and regulations in effect as of the date of the COUNTY's approval of the M.P.D.D., as more particularly set forth in the Zoning Ordinance, the M.P.D.D. and this Agreement, including that development of the Property shall comply with the Master Plan;

1.3.2. shall be entitled to have granted and issued the approvals and permits reasonably necessary to allow DEVELOPER to develop the Property in accordance with the Zoning Ordinance, the M.P.D.D., and this Agreement through the development review and approval process as set forth in the COUNTY's ordinances and regulations, provided that DEVELOPER pay all applicable permit and application fees;

1.3.3. shall not be subject to any action by the COUNTY that would result in restricting the availability of building permits or other applicable permits or approvals necessary to allow construction of the type of improvements and uses that are, as of the date of this Agreement, permitted under the M.P.D.D. and/or that limit the maximum intensity of development and range of uses consistent with the M.P.D.D. and this Agreement. Any such moratorium, restriction or limitation on the availability of building permits or other applicable permits or approvals shall be of no effect against the Property, the owner(s), or any person or entity having any interest in the Property, except as necessary to protect public health and safety in circumstance where less restrictive measures are not available or effective; and

1.3.4. Developer understands and agrees that all public safety concerns have not yet been resolved. These issues include, but are not limited to, arrangements for adequate fire protection.

1.4. Breach.

1.4.1. COUNTY Breach. Except as otherwise provided in this Agreement, the COUNTY's failure to approve plans and specifications, to issue permits and/or to grant approval of such other matters as are reasonably necessary to permit DEVELOPER to develop the Property in accordance with the Zoning Ordinance, the M.P.D.D., the Overall Preliminary Plat, and this Agreement, or as the same may be modified from time to time upon request of DEVELOPER and approval of the COUNTY, or any action by the COUNTY that would otherwise restrict, impair, delay or preclude DEVELOPER from developing the Property in accordance with the land use, densities and intensities, and development standards specified in the Zoning Ordinance, the M.P.D.D., and this Agreement, subject only to the development regulations contained therein or such rules, regulations or official policies of the COUNTY as provided in

Paragraph 12 below, shall be a breach of this Agreement; provided, however, that nothing herein shall preclude the COUNTY from the reasonable exercise of its enacted review processes and the reasonable exercise of its obligation to protect the public health and safety. Developer acknowledges that "contract zoning" is prohibited by New Mexico law and nothing herein shall be construed to permit the developer from strict compliance with the Sandoval County zoning and subdivision ordinances as amended from time to time.

1.4.2. DEVELOPER Breach. Except as otherwise provided in this Agreement, DEVELOPER'S failure to comply with the terms and conditions of the M.P.D.D., this Agreement, and the applicable County ordinances, as the same may be modified from time to time upon request of DEVELOPER and approval by the COUNTY, shall be a breach of this Agreement; provided, however, that this Agreement is intended to set forth conditions to the development of the Property and nothing herein requires, or shall be construed to require, development of the Property and related public improvements to occur within a specified time frame, it being understood and agreed that market conditions and other factors will affect the time frame within which development of the Property commences and/or proceeds.

1.5. No Delay. Subject to the qualifications set forth hereinafter, the COUNTY shall use its best efforts to ensure that its plan review and approval process do not result in unusual delay in the use and/or development of the Property. DEVELOPER acknowledge that the COUNTY has both a "standard" review process (whereby plans and specifications are reviewed "in-house") and an "expedited" review process (whereby the COUNTY retains outside consultants to assist in, and facilitate, the expedited review of plans and specifications). The plan review and approval process for the "Infrastructure Improvements" (as defined in Paragraph 2 below) shall be conducted on an expedited basis, subject to fees and charges levied in accordance with applicable COUNTY Ordinances.

2. Infrastructure Improvements. The parties acknowledge that a primary purpose of this Agreement is to provide for the planning, design, engineering, construction, acquisition and/or installation of public infrastructure improvements, as more particularly described in those certain RECORP PARTNERS INC. Infrastructure Improvement Plans prepared by the Developer and this Agreement (the "Infrastructure Improvements"). The COUNTY acknowledges and agrees that the Infrastructure Improvements confer a benefit on the Property and the larger land area including the Property and, based on the COUNTY's detailed review and approvals, comprise all public infrastructure improvements and/or will result in the provision of all necessary public services that will be required by the COUNTY in connection with the development of the Property in accordance with the Zoning Ordinance, the M.P.D.D., and this Agreement. Without limitation of the foregoing, the COUNTY acknowledges and agrees that the Improvement Plans, as and when approved, shall have satisfied all requirements to prepare and deliver to the COUNTY a "master street plan for an major and collector streets abutting or within the site", the Zoning and Subdivision Ordinance. However, developer recognizes that provisions for adequate fire protection for this development have not yet been determined.

The Infrastructure Improvements include the following:

2.1 Water and Sanitary Sewer Facilities. The COUNTY acknowledges and agrees that there is no existing COUNTY sewer and/or water facilities within the Property. The Developer shall

provide adequate capacity to serve the development of the Property in accordance with the Zoning Ordinance, the M.P.D.D., the Master Plan and this Agreement. The DEVELOPER shall have the right to establish a retail water company or to contract for said services.

2.1.1. Potable Water. The primary source of potable water will be derived by the treatment of non-potable resources in the area. The Developer acknowledges that the County shall retain the rights to a portion of 18,000 acre feet of water, based on the proportion of County participation in the cost of drilling any exploratory wells, and hydrogeologic studies conducted for State Engineer review and approval. The DEVELOPER shall petition the COUNTY to form a Public Improvement District (referred to herein as the P.I.D.) to construct a desalination plant. The COUNTY shall have a proportional equity position in the plant dependent on the actual cost of the plant, and shall have a proportional vote in determining the rate structure for consumption purposes.

2.1.2 Sewer: The DEVELOPER shall have the right to develop on site wastewater treatment facilitie(s). The DEVELOPER shall have the water rights to any and all effluent/tertiary treated water produced by the water plant. The DEVELOPER shall have the right to utilize the effluent water as it deems appropriate as regulated by Local, State, and Federal laws. DEVELOPER will make its best efforts to use effluent water for its proposed golf course site.

2.2. Streets: Streets, roadways, and parking facilities to be used for motorized vehicular travel, ingress, egress and parking and pedestrian, bicycle or other facilities to be used for non-motor vehicular travel, ingress, egress and parking to, through, within and from the Property as described in the Improvement Plans, including street lighting with underground electric service distribution and all striping, street sign posts, street name signs, stop signs and all other directional/warning/advisory signage as required, except for speed limit signs. Speed limit signs shall be provided and installed by the COUNTY.

2.2.1 Offsite Streets. The primary access to the property will be westerly along Southern Boulevard, northerly along 60th Street, and Northern Boulevard. The DEVELOPER shall be responsible for the construction of the road. The ultimate road section shall be 68 feet in width (a 4-lane divided facility) from the alignment of Paseo Del Volcan westerly to the Developer's property. Phasing of the roadway construction will be allowed in accordance with the level of services outlined in the Master Plan. The first phase shall be the construction of a two lane roadway. The roadway shall be constructed in accordance with County roadway standards. Phase 2 shall complete the roadway to a four lane (4) divided facility. The COUNTY shall be responsible for the cost of all traffic control, except for striping. The COUNTY shall be responsible for the construction of a two lane road along 20th Street from Southern Boulevard to the southern County line. The COUNTY shall be responsible for all frontage roads required to limit access to the road to half mile intervals.

2.3. Landscaping. Landscaping including earthworks, structures, plants, trees, shrubs, flowers, ground cover (vegetation and/or other cover) and related water delivery systems, as described in the Improvement Plans shall be installed and maintained by the DEVELOPER or assignee.

2.4. Dry Utilities. All dry utilities shall be placed underground including the installation of trenches, conduits and "dry utilities", together with the relocation of certain existing electric distribution overhead transmission lines and the installation underground of certain existing electric distribution overhead transmission lines, up to and including 12 KV of power, that

are adjacent to arterial or collector streets abutting or within the Property.

2.5. Drainage Improvements. Drainage and flood control systems and facilities for collection, diversions, detention, retention, disbursal, use and discharge, consistent with the Master Grading and Drainage Improvement Plans prepared by the DEVELOPER and approved by the COUNTY ("the "Master Grading and Drainage Plans") and applicable FEMA regulations shall be submitted with Preliminary Plat submission, including certain drainage and flood control systems to be constructed and installed in the Property, adjacent to and via conduits through the existing Rio Puerco (depicted on the Improvement Plans) in order to address the COUNTY's regional drainage and flood control concerns.

2.5.1. To the extent not concluded prior to the date of this Agreement, the COUNTY shall cooperate with DEVELOPER, and exercise all reasonable efforts to facilitate approval of the Master Grading and Drainage Plans.

2.5.2. Following approval of the Master Grading and Drainage Plans for the Property by the County, DEVELOPER shall prepare final Master Grading and Drainage Plans for the Property consistent with the approved Master Grading and Drainage Plans previously approved by the COUNTY (and other required governmental authorities) and provide the same to the COUNTY for inclusion by the COUNTY in any future drainage and flood control plans adopted by the COUNTY for any land area that encompasses the Property. The COUNTY acknowledges and agrees that, upon final approval by the COUNTY of the Master Grading and Drainage Plans, all requirements of the Zoning Ordinance and other applicable laws, rules and regulations for submission and approval of the Master Grading and Drainage Plans for the M.P.D.D. shall have been fully satisfied.

2.5.3. The COUNTY agrees and covenants that it shall not approve any plat for property that is submitted after the effective date of this Agreement, if, to the best of the COUNTY's knowledge such approval shall result in an increase in the amount of flows across the DEVELOPER'S Property above the level and amount of historical flows.

2.6. Parks and Recreational Facilities. Parks, recreational facilities and open-space areas are for the use of the residents only for assembly and recreation, as described within the M.P.D.D. (the "Parks and Open Space Plans"), provided that it is contemplated that all or portions of the land area occupied by such parks, recreational facilities and open-space areas shall also be available for collection, diversion, detention, retention, and disbursal of surface water as necessary to fully satisfy the requirements of any governmental or other body with jurisdiction over drainage and flood control aspects of the M.P.D.D. Concurrently with the recordation of the Master Plat for RECORP PARTNERS INC. there shall either be reflected on a Master Plat or DEVELOPER(S) (as applicable) shall execute, have acknowledged and deliver, for recordation in the Official Records of the County, one or more Drainage Easement[s] in favor of the COUNTY or other appropriate governmental body. DEVELOPER acknowledge that COUNTY's acceptance of the Drainage Easement(s) shall not, and is not intended to, constitute the COUNTY's agreement to accept dedication of all or any portion of the property which is the subject of the Drainage Easement(s) and that DEVELOPER and, when formed, the "Association" (as hereinafter defined) shall retain responsibility for the maintenance of all landscaping and recreation improvements located thereon in perpetuity. The "Association" shall not be allowed to convey any open space or recreational facility to the County for maintenance.

2.7. Phasing. Installation and construction of the Infrastructure Improvements shall be phased in accordance with the Master Plan attached hereto to coincide with the development of parcels within RECORP PARTNERS INC. Without limitation of the foregoing, installation of the landscaping along arterial streets and collector streets within the Property with the exception of the landscaping associated with "entry features" to be installed at certain intersections, shall similarly be phased to coincide with the development of adjacent parcels.

2.8. Dedication. From time to time, upon completion of the installation and construction of portions of the Infrastructure Improvements described in this Paragraph 2, the COUNTY shall accept the conveyance, for dedication, (except for open spaces or recreational facilities) of the land area in or on which such improvements are constructed and installed, together with an assignment of the contractor(s)' warranty (ies) (which, for all improvements other than landscaping, shall be for a period no less than one year from completion of installation and COUNTY acceptance of such improvements). The COUNTY shall concurrently execute, acknowledge and deliver to the appropriate party(s) for recordation in the Official Records of the County, a permanent maintenance easement in respect of the landscaping portion of the Infrastructure Improvements either on the Master Plat for the Property in favor of the "RECORP PARTNERS INC. Homeowners Association", a to-be-formed New Mexico not-for-profit corporation (the "Association"). The Association shall thereafter be responsible for the continuing maintenance, repair and replacement of the plants, trees, shrubs, flowers, ground cover and watering systems installed within the landscaped areas located within the land area occupied by the Infrastructure Improvements; provided, however, that it shall be a condition to the Association's continuing maintenance, repair and replacement obligations that the COUNTY shall not thereafter modify or reconfigure the plan for, or composition or configuration of, such landscaping improvements in a manner that would materially increase the cost of maintenance, repair and replacement without the prior written consent of the Association.

3. On-Site Facilities. DEVELOPER shall construct on-site facilities including the following:

3.1 On-Site Water Distribution Facilities. DEVELOPER shall be responsible for constructing on-site water facilities needed to serve DEVELOPER' proposed development of the Property in accordance with the Zoning Ordinance, the Subdivision Ordinance, the M.P.D.D., the Master Final Plats and this Agreement, along with any amendments thereto.

3.2 On-Site Sanitary Sewer Facilities. DEVELOPER shall be responsible for constructing on-site sewer facilities and associated sewer collection systems, to include ROW easements, etc. needed to serve DEVELOPER' proposed development of the Property in accordance with the Zoning Ordinance, the Subdivision Ordinance, the M.P.D.D., the Master Plat and this Agreement, along with any amendments and appendices thereto.

3.3 COUNTY Access. DEVELOPER agrees that, in conjunction with the recordation of the Master Plat, DEVELOPER shall grant to the COUNTY and/or other appropriate parties access and/or maintenance easement(s) and, if and to the extent necessary, provide perpetual access for the operation, maintenance and repair of public and other utilities and facilities included within such platted portion of the Property.

3.4 Roadway Improvements. DEVELOPER shall be responsible for constructing any required on-site roadways consistent with the subdivision improvement plans approved

by the COUNTY.

4. Water Resources. It is the intent of the parties that the COUNTY and DEVELOPER shall work together as provided in this Agreement so that the Property will be supplied with water (and obtain certificates of 100 years of assured water supply) by the most cost-efficient means possible. Accordingly, it is agreed as follows:

4.1 Commitment to Provide. The DEVELOPER agrees to serve water ~~to~~ throughout the Property in quantity and quality sufficient to satisfy all of the present and future domestic, municipal and commercial demands for potable water at the Property, subject to those restrictions and limitations of applicable laws, rules and regulations.

4.2 Potable Water. The COUNTY agrees and covenants that it shall not approve any plat that is submitted after the effective date of this Agreement, if, to the best of COUNTY's knowledge, such approval shall impair the DEVELOPER's ability to provide adequate potable water to the Property, or shall impair the DEVELOPER's ability to obtain or retain a designation of assured water supply.

4.3 Certificate of Assured Supply. The DEVELOPER represents and warrants to the COUNTY that the COUNTY /DEVELOPER will file an application with the New Mexico State Engineer's Office for a designation of assured water supply and shall diligently prosecute such application to completion. The COUNTY agrees to take such reasonable steps as may be required to assist in obtaining and retaining a designation of assured water supply from the New Mexico State Engineer's Office until complete development of the Property in accordance with the Zoning Ordinance, the Subdivision Ordinance, the M.P.D.D. and this Agreement.

5. Right-or-Way Maintenance. The DEVELOPER (or Association) shall maintain, at its sole expense, all road improvements in all dedicated road rights-of-way located within or adjacent to the boundaries of the Property. All landscaping located in the right-of-way shall be initially maintained by DEVELOPER until it becomes feasible to form a homeowner's association for the Property (the "Association"), which shall then be responsible to perpetually maintain the right-of-way landscaping.

6. Open Space Areas.

6.1 The COUNTY and DEVELOPER acknowledge to satisfy all requirements and conditions set forth by the approval of the Rio West Master Plan, and any other requirements applicable by the Sandoval County Comprehensive Zoning Ordinance or the Sandoval County Subdivision Ordinance. DEVELOPER shall provide those open space areas as designated in the Master Grading and Drainage Plan for drainage retention/detention basins and channels, which the COUNTY acknowledges and agrees are in accordance with the COUNTY engineer's standards and guidelines.

6.2 There shall be additional open space within the Property to accommodate the proposed golf course, which shall be privately operated and maintained.

6.3 An open space area shall be dedicated (as appropriate) by specific purpose and by designated land tract on the Property's final plat document(s).

6.4 All open space areas shall be initially maintained by DEVELOPER until the Association is formed. The Association shall then be responsible from that time on for the perpetual maintenance of the open space area.

7. Public Facilities - School Site. The COUNTY acknowledges that DEVELOPER will incorporate a significant quantity of public facilities in the M.P.D.D. and the Overall Preliminary Plat, including a proposed school site and other public facilities to be maintained by the Association, sufficient to satisfy all requirements of Section ___ of the Zoning Ordinance, the Subdivision Ordinance, and the P.AD.D. and any applicable laws, rules and regulations. In consideration of, and in reliance upon, the agreements of the COUNTY contained herein, RECORP has agreed to convey that portion of the Property which has been designated for use as the "School Site", to the appropriate School District (the "District") for purposes of constructing and operating an elementary school facility thereon as and when requested by the District to do so, at no cost to the District; provided, however, that the deed of conveyance shall reserve a right of reversion (the "Deed Reversion"). In the event the Deed Reversion Event is triggered, resulting in reversion of fee title to the School Site to RECORP, RECORP shall thereafter be entitled to proceed with development of the School Site consistent with the underlying zoning, as described in the M.P.D.D. DEVELOPER have the right but not the obligation to contribute an alternative school site for development and, in such event, the COUNTY agrees to make the corresponding changes to the school site locations.

8. Airport Facility: Upon County request, DEVELOPER will donate fee simple property, within 30 days, that is necessary to accommodate a landing strip and FBO operation that meets FAA requirements. Any profits ascertained from the Operation of the airport shall be split equally between the DEVELOPER and the COUNTY.

9. Public Facilities – EMS/Fire Provision. The DEVELOPER agrees to petition the COUNTY for the establishment of a fire district in accordance with N.M.S.A. Section 59A-53-5 (2006) to provide for adequate fire and EMS services.

10. Easements. DEVELOPER shall dedicate all necessary and required easements including but not limited to: public utility easements, drainage easements, sewer/water easements, landscape easements, and vehicular non-access easements. All easements shall be dedicated as required and shall be clearly identified and described by specific purpose on the Property's final plat document(s).

11. Fees. DEVELOPER shall pay for any and all COUNTY, State and Federal licenses, permits and application fees associated with the development of the Property, as required by ordinance or law.

12. Regulation of Development.

12.1 Except as specifically provided in Paragraph 13 hereof, the ordinances; rules, regulations, development fees and official policies applicable to and governing the development of the Property shall be those ordinances, rules, regulations, development fees and official policies that are existing and in force upon the approval of each final plat within the Master Plan.

12.2 In addition to the vesting rights described in County Attorney's letter dated August 10, 2007 the COUNTY acknowledges and agrees that, when the M.P.D.D. zoning for the Property was approved, and in consideration of the obligations undertaken by DEVELOPER under this Agreement, the M.P.D.D. and existing development regulations became vested rights and may not be changed, limited or impaired without the consent of DEVELOPER.

13. COUNTY Representations and Warranties. The COUNTY acknowledges that DEVELOPER acquired the Property and is entering into this Agreement, and has, and will continue to, expend substantial time and money with regard to development of the Property, in reliance upon the representations, warranties and covenants of the COUNTY as described elsewhere in this Agreement and herein below. The COUNTY represents and warrants to DEVELOPER that all of the COUNTY's representations and warranties set forth in this Agreement are, to the best of its knowledge, true in all material respects as of the date of this Agreement, including the following:

13.1 Organization. The COUNTY is a duly organized, a valid existing governmental subdivision in the State of New Mexico. The transactions contemplated by this Agreement and the execution and delivery of all documents required herein, and the COUNTY's performance hereunder, have been duly authorized by all requisite actions of the COUNTY and/or other parties. The execution and delivery of this Agreement and any other document required herein and the consummation of the transaction contemplated hereby and thereby shall not result in any violation of, or default under, any term or provision of any applicable agreement, instrument, law, rule, regulation or official policy to which the COUNTY is a party or by which the COUNTY is bound.

13.2 No Litigation. There is no litigation, investigation or proceeding pending or, to the knowledge of the COUNTY, contemplated or threatened against the COUNTY, which would impair or adversely affect the COUNTY's ability to perform its obligations under this Agreement or under any instrument or document related hereto.

13.3 Restatement of Warranties. At any time, or from time to time, upon the request of DEVELOPER, the COUNTY shall reaffirm and restate any or all of its representations, warranties and covenants as set forth in this Agreement and any other agreements and instruments executed in connection herewith.

14. RECORP Representations and Warranties. RECORP acknowledges that the COUNTY has and will continue to expend substantial time with regard to development of the Property, in reliance upon the representations, warranties and covenants of RECORP as described elsewhere in this Agreement and herein below. RECORP represents and warrants to the COUNTY that all of RECORP's representations and warranties set forth in this Agreement are, to the best of RECORP's individual and actual knowledge, true in all material respects as of the date of this Agreement, including the following:

14.1 Organization. RECORP is a duly organized, validly existing limited liability company in the State of New Mexico. The transactions contemplated by this Agreement and the execution and delivery of all documents required herein, and RECORP's performance hereunder, have been duly authorized by all requisite actions of RECORP and/or any other necessary parties. The execution and delivery of this Agreement and any other document required herein and the consummation of the transaction contemplated hereby and thereby shall not result in any violation of, or default under, any term or provision of any applicable agreement, instrument, law, rule, regulation or official policy to which RECORP is a party or by which RECORP is bound.

14.2 No Litigation. There is no litigation, investigation or proceeding pending or, to the knowledge of RECORP contemplated or threatened against RECORP, which would impair or adversely affect RECORP's ability to perform its obligations under this Agreement or under any instrument or document related hereto.

14.3 Restatement of Warranties. At any time, or from time to time, upon the request of the COUNTY, RECORP shall reaffirm and restate any or all of its representations, warranties and covenants as set forth in this Agreement and any other agreements and instruments executed in connection herewith.

15. Moratorium. No moratorium, ordinance, resolution or other land use rule or regulation limiting or conditioning the rate, timing or sequencing of the development of the Property or any portion thereof shall apply to or govern the use, development or improvement of the Property during the term hereof, whether affecting parcel or subdivision maps (whether tentative, vesting tentative, or final), building permits, occupancy permits or other entitlements to use, except as otherwise provided for in this Agreement, and except for any ordinance, resolution or regulation enacted by the COUNTY after the date of this Agreement as may be necessary to:

15.1 comply with any future State or Federal law or mandatory regulation, provided that in the event any such future State or Federal law or mandatory regulation prevents or restricts the COUNTY from complying with this Agreement, the COUNTY is obligated in a timely fashion to make reasonable efforts to remove the moratorium or other restrictions on the Property and simultaneously to mitigate their effects, or

15.2 alleviate or otherwise deal with a future unforeseen or unforeseeable threat to the health or safety of the general public, in a non-arbitrary and non-capricious fashion. In the event of any such subsequent action, the DEVELOPER shall continue to be entitled to apply for and receive approvals for the implementation of the final plats and development plans, consistent with the Zoning Ordinance, the M.P.D.D., the Master Plat and this Agreement.

16. Amendments to M.P.D.D. and this Agreement. DEVELOPER and the COUNTY agree to cooperate and pursue any future amendments to the M.P.D.D., the Overall Preliminary Plat, the Master Plat and this Agreement that are reasonably necessary to accomplish the goals expressed in this Agreement and the M.P.D.D., in light of any changes in market conditions or as may be reasonably necessary for DEVELOPER and the COUNTY to comply with those special circumstances specified in Paragraphs 5, 11 and 17. Any such amendments to the M.P.D.D. or this Agreement shall be in writing and must be approved and signed DEVELOPER and the COUNTY Any amendment to this Agreement shall be approved and recorded pursuant to Paragraph 24.1 0 below.

17. Cooperation and Expedited COUNTY Decisions Alternative Dispute Resolution.

17.1 Appointment of Representatives. To further the commitment of the parties to cooperate in the implementation of the final plat and this Agreement, the COUNTY and DEVELOPER each shall designate and appoint a representative (the "Representatives") to act as a liaison between the COUNTY and its various departments and DEVELOPER. The Representatives shall be available at all reasonable times to discuss and review the performance of the parties to this Agreement and the development of the Property pursuant to the M.P.D.D., the Overall Preliminary Plat, the Master Plat, this Agreement and/or the final plats. The Representatives may recommend amendments to the M.P.D.D., the Master Plat, or this Agreement or the final plats which may be agreed upon by the parties pursuant to Paragraph 19 above. The COUNTY representative is the County

Development Director and the DEVELOPER'S representative is the Project Manager.

17.2 COUNTY Decisions. The implementation of this Agreement shall be in accordance with the COUNTY's development review process. The COUNTY and DEVELOPER agree that DEVELOPER must be able to proceed in a timely manner with the development of the Property and that, accordingly, a timely COUNTY review process is necessary. Accordingly, the parties agree that if at any time DEVELOPER believe that an impasse has been reached with the COUNTY staff concerning any issue affecting the Property, DEVELOPER shall have the right to immediately appeal to the COUNTY Representative for an expedited decision pursuant to this Paragraph. If the issue on which an impasse has been reached is an issue where a final decision can be reached by COUNTY staff, the COUNTY Representative shall give DEVELOPER a final decision within thirty (30) days after the request for an expedited decision is made. If the issue on which an impasse has been reached is one where a final decision requires action by the COUNTY Commission, the COUNTY Representative shall use his or her best efforts to schedule a COUNTY Commission hearing on the issue as soon as possible but not later than two (2) weeks after the request for an expedited decision is made; provided however, that if the issue is appropriate for review by the COUNTY's Planning and Zoning Commission, the matter shall be submitted to the Planning and Zoning Commission first, and then to the COUNTY Commission. Both parties agree to continue to use reasonable good faith efforts to resolve any impasse pending any such expedited decision.

18. Default. Failure or unreasonable delay by either party to perform any term or provision of this Agreement for a period of thirty (30) days (the "Cure Period") after written notice thereof from the other party shall constitute a default under this Agreement. Said notice shall specify the nature of the alleged default and the manner in which said default may be satisfactorily cured, if possible.

19. Notices and Filings.

19.1 Manner of Serving. All notices, filings, consents, approvals and other communications provided for herein or given in connection herewith shall be validly given, filed, made, delivered or served if in writing and delivered personally or sent by registered or certified United States Mail, postage prepaid, if to:

The COUNTY:
Sandoval County
711 Camino Del Pueblo
P.O. Box 40
Bernalillo, NM 87004
Attn.: Michael R. Springfield Community Development Director

with a copy to:
COUNTY ATTORNEY
711 Camino Del Pueblo
P.O. Box 40
Bernalillo, NM 87004
Attn: David Mathews, Esq.

DEVELOPER:
RECORP PARTNERS INC. Development L.L.C.
7835 E. Redfield Road, Ste. 100 Scottsdale, AZ 85260
Attn: Gary Lane, Senior Project Manager
with a copy to:
Mr. David P. Maniatis
RECORP PARTNERS INC. Development L.L.C.
7835 E. Redfield Road, Ste. 100 Scottsdale, AZ 85260

19.2 Mailing Effective. If not received sooner, notices, filings, consents, approvals and communication given by mail shall be deemed delivered seventy-two (72) hours following deposit in the U.S. mail, postage prepaid and addressed as set forth above.

20. Term. The term of this Agreement shall be thirty (30) years, from the date of execution of this Agreement by both parties. Upon mutual agreement of the parties, as evidenced by a written amendment recorded in the Official Records of Sandoval County, New Mexico prior to the expiration of the initial term, the term may be extended for one additional period not to exceed twenty (20) years.

21. Status Statements. Any Party (the "Requesting Party") may, at any time, and from time to time, deliver written notice to any other Party requesting such other Party (the "Providing Party") to provide in writing that, to the knowledge of the Providing Party, (a) this Agreement is in full force and effect and a binding obligation of the Parties, (b) this Agreement has not been amended or modified either orally or in writing, and if so amended, identifying the amendments, and (c) the Requesting Party is not in default in the performance of its obligations under this Agreement, or if in default, to describe therein the nature and amount of any such defaults (a "Status Statement"). A Party receiving a request hereunder shall execute and return such Status Statement within 10 days following the receipt thereof. All Parties acknowledge that a Status Statement hereunder may be relied upon by transferees and mortgagees.

22. General.

22.1 Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by the COUNTY or DEVELOPER of the breach of any covenant of this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant or condition of this Agreement.

22.2 Attorneys' Fees. In the event either party finds it necessary to bring any action at law or other proceeding against the other party to enforce any of the terms, covenants or conditions hereof) or by reason of any breach or default hereunder, the party prevailing in such action or other proceeding shall be paid all reasonable costs and reasonable attorney's fees by the other party, and in the event any judgment is secured by said prevailing party, all such costs and attorneys' fees shall be included therein) such fees to be set by the court and not by jury.

22.3 Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to single instruments so that the signature of all parties may be physically attached to a single document.

22.4 Headings. The descriptive headings of the Paragraphs of this Agreement are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.

22.5 Exhibits. Any exhibit attached hereto shall be deemed to have been incorporated herein by this reference with the same force and effect as if fully set forth in the body hereof.

22.6 Further Acts. Each of the parties hereto shall execute and deliver all such documents and perform all such acts as are reasonably necessary, from time to time, to carry out the matters contemplated by this Agreement. Without limiting the generality of the foregoing, the COUNTY shall cooperate in good faith and process promptly any requests and applications for plan and specification, plat or permit approvals or revisions, and other necessary approvals relating to the development of the Property by DEVELOPER and its successors.

23.Future Effect.

23.1 Time Is Of The Essence and Successors. Time is of the essence of this Agreement. All of the provisions hereof shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto, except as provided in Paragraph 25.7.2 below with respect to any Public Lot. Notwithstanding the foregoing, DEVELOPER (or any of them) shall have the right, upon five (5) business days prior written notice to the COUNTY, to assign all or part of their rights hereunder to any one or more persons or entities. DEVELOPER' rights and obligations hereunder may only be assigned by a written instrument, recorded in the Official Records of Sandoval County, New Mexico, expressly assigning such rights and obligations. In the event of a complete assignment by DEVELOPER (or any of them) of all rights and obligations of DEVELOPER (or any of them) hereunder, DEVELOPER' (or such party's) liability hereunder shall terminate effective upon the assumption by another DEVELOPER' (or such party's) assignee.

23.2 Termination Upon Sale to Public. It is the intention of the parties that although recorded, this Agreement shall not create conditions or exceptions to title or covenants running with the Property. Any title insurer can rely on this Paragraph when issuing any commitment to insure or when issuing a title insurance policy. In order to alleviate any concern as to the effect of this Agreement on the status of title to any of the Property, this Agreement shall terminate without the execution or recordation of any further document or instrument as to any lot that has been finally subdivided and individually (not in "bulk") leased (for a period of longer than one year) or sold to the purchaser or user thereof (a "Public Lot") and thereupon such Public Lot shall be released from and no longer be subject to or burdened by the provisions of this Agreement.

23.3 Assignment. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other similar arrangement between DEVELOPER and the COUNTY except as outlined in 21.1., Memorandum of Understanding-Sandoval County 200718194. No term or provision of this Agreement is intended to, or shall be for the benefit of any person, firm, organization or corporation not a party hereto to which DEVELOPER may assign their rights and obligations under this Agreement, with notice to the County and no such other person, firm, organization or corporation shall have any right or cause of action hereunder.

23.4 Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof. All prior and contemporaneous agreements, representations and understandings of the parties, oral or written, are hereby superseded and merged herein.

23.5 Amendment. No changes or additions may be made to this Agreement, except by a written amendment executed by the parties hereto. Within ten (10) days after any amendment to this Agreement, such amendment shall be recorded, at DEVELOPER' expense, in the Official Records of Sandoval County, New Mexico.

23.6 Names and Plans. RECORP shall be the sole owner of all names and titles in connection with the Property, and all plans, drawings, specifications, ideas, programs, designs and work products of every nature at anytime developed, formulated or prepared by or at the instance of RECORP in connection with the Property.

23.7 Good Standing; Authority. Each party hereby represents and warrants to the other parties follows: (i) it is duly formed and validly existing under the laws of New Mexico; and is in good standing under applicable state laws; and (ii) each individual executing this Agreement on behalf of the respective parties is authorized and empowered to bind such party.

23.8 Governing Law. This Agreement is entered into in New Mexico and shall be construed and interpreted under the laws of the State of New Mexico.

23.9 Recordation. No later than ten (10) days after this Agreement or any amendment to this Agreement has been executed by the COUNTY and DEVELOPER, it shall be recorded in its entirety, at DEVELOPER' expense, in the Official Records of Sandoval County, New Mexico.

23.10 Default and Remedies. If any party to this Agreement is in default under any provision of this Agreement, the non-defaulting party shall be entitled, without prejudice to any other right or remedy that it may have under this Agreement, at law or in equity, to specific performance by the defaulting party of this Agreement (and each party hereby waives the defense that the other party has an adequate remedy at law), or, in the alternative, to terminate this Agreement and to exercise any or all other remedies available to it at law or in equity.

23.11 Severability. If any one or more sections, clauses, sentences or parts of this Agreement shall be adjudged unconstitutional or invalid by a court of competent jurisdiction, such judgment shall not affect, impair or invalidate the remaining provisions hereof, but shall be confined to the specific sections, clauses, sentences and parts so determined.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the 17th day of July, 2007.

DEVELOPER:

RECORP PARTNERS INC. DEVELOPMENT COMPANY.

LLC, an Arizona limited liability company

By: _____

Its: President

Date: 7/13/07

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COUNTY:

SANDOVAL COUNTY, NEW MEXICO
A Statutorily Created County

By: _____

Its: Commission Chairman

Date: 6-21-07

APPROVED AS TO FORM:

_____
Attorney for Sandoval County

Date: 5 June 2007

ATTEST:

Sally Padilla ex officio
Sandoval County Clerk

Date: June 21, 2007

Exhibit A

Appendix A
Rio West Master Plan Legal Description

Rio West is comprised of unplatted land located in Sandoval County. The legal description for Rio West is as follows:

Range 1 East

Section 7
Section 8
Section 17 (portion)
Section 18
Section 19
Section 20 (portion)
Section 29 (portion)
Section 30
Section 33 portion

Range 1 West

Section 3
Section 4 (portion)
Section 9 (portion)
Section 10
Section 11
Section 12
Section 13
Section 14
Section 15
Section 21 (portion)
Section 22
Section 23
Section 24
Section 28 (portion)
Section 33 (portion)

Exhibit B

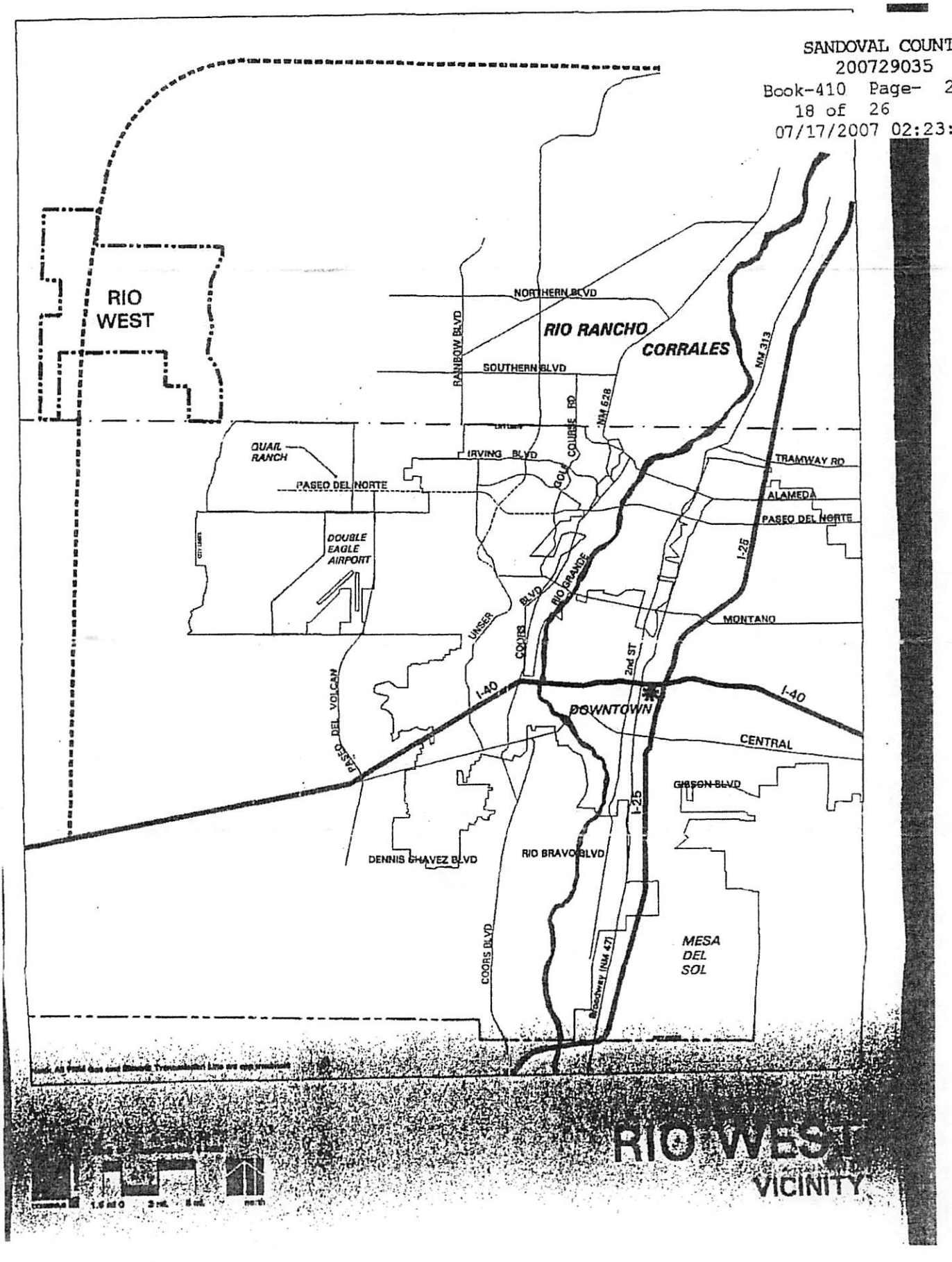

Exhibit C

SANDOVAL COUNTY
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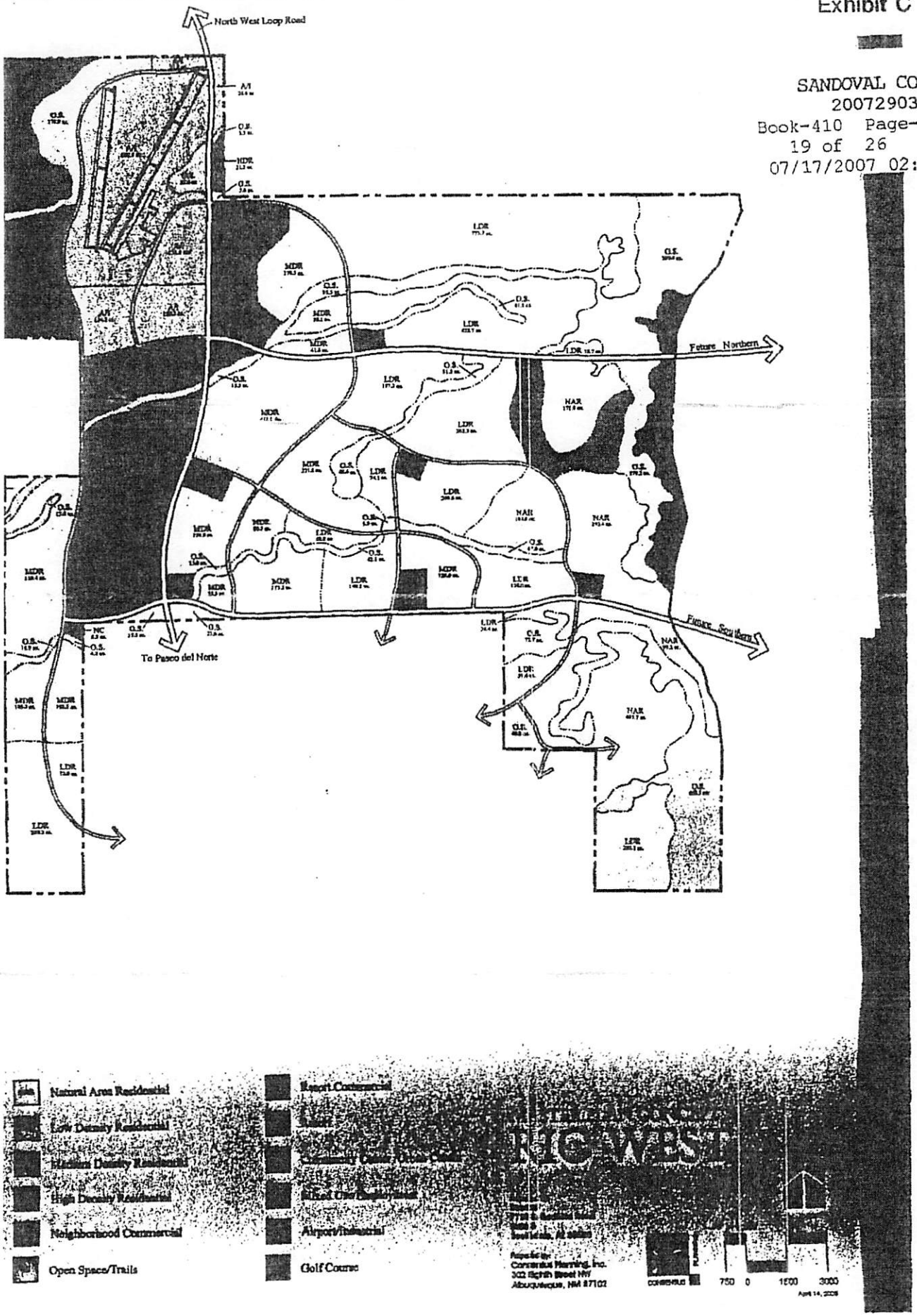

SANDOVAL COUNTY ADMINISTRATIVE OFFICES

BOARD OF COUNTY COMMISSIONERS

August 10, 2006

Gary Lane, Sr. Project Manager
Aperion Communities
7835 East Redfield Road, #100
Scottsdale, Arizona 85260

Re: Rio West Master Plan

Dear Mr. Lane:

Michael Springfield, Director of County Development, has advised me that you would like some assurance from Sandoval County that you have vested rights to move forward with your Rio West Master Plan. The purpose of this letter is to explain the Vested Rights Doctrine as interpreted by the New Mexico Courts.

The New Mexico Courts have only two (2) cases that examine the Doctrine of Vested Rights in this State. However, the Doctrine of Vested Rights has been interpreted to give you, or any developer, vested rights after two (2) events occur. You must submit a plan to a local government that is approved. You have met that prong of the Vested Rights Doctrine.

The second prong to vested rights in New Mexico is reliance upon the approval. This has been interpreted to mean that you have expended time and financial resources in reliance upon your approval by the applicable local government. I cannot tell you at this time the extent of your vested rights, but you do have the right to go forward with the development of Rio West. It would be my assumption, although I am lacking in factual information, that you have expended a considerable sum of money in developing the Master Plan. However, you must now rely upon the approval of the Master Plan and continue forward with the necessary development or exploration for development. In other words, you must take acts that are in reliance upon approval of the Master Plan that show financial expenditures. It is my opinion you will have vested rights to proceed with the Rio West Master Plan after, for example, you had taken acts such as drilling exploratory wells.

What remains uncertain in New Mexico is how much reliance upon the Master Plan is considered detrimental reliance in the financial sense. This issue has never been fully explored in New Mexico. However, the lack of law in New Mexico does allow the local government the power to determine you have met the Doctrine of Vested Rights. What I can advise you at this time is after you take steps to move forward with this development based upon Sandoval County's approval, you will achieve the status of vested rights. I believe the drilling of test wells

and exploration of methods of obtaining water and planning for infrastructure will complete the process of complete vesting of your rights to proceed with the Rio West Project.

For example, I do not believe the case law from other states is helpful in examining the Vested Rights Doctrine of New Mexico. I read a California case that found the expenditure of $500,000.00 on a shopping center to be insufficient to achieve vested rights. It is my belief the New Mexico Courts would find vesting at a lower financial level than California. It is also important for you to understand that you have vested rights to proceed with the Master Plan, but you do not have vested rights to proceed with any particular subdivision within Rio West. As you become ready for subsequent County approval of individual developments within the Rio West area, you will obtain additional vested rights for those developments. For example, if you submit a preliminary plat for a subdivision in the Rio West area and the preliminary plat is approved, you have vested rights to proceed with that subdivision. This does not mean that you have vested rights to proceed with every subdivision in Rio West. This opinion is based upon the assumption that you will develop this community in phases. Obviously, a plat that includes the whole Rio West area would give you vested rights to proceed with everything approved by the County in such a plat.

In summary, I regret that this letter is not more definitive as to the extent of your vested rights, but I do not have the facts available to assess how much money you have spent in reliance of the County's approval. However, your Master Plan has been approved and you have the right to proceed with the next steps you deem to be required to continue this development. When you get to the stage of actually planning subdivisions, you will be required to submit preliminary plats to the County for approval and approval of each preliminary plat submitted increases the extent of your vested rights.

I apologize if you find this letter at all confusing, but it is important to note that only two (2) New Mexico cases have ever discussed the Doctrine of Vested Rights. I invite you to call me at any time if you have any questions concerning New Mexico law regarding land use or development, but you may rely upon this letter to proceed with the next steps necessary to move forward with Rio West.

Very truly yours,

David Mathews, County Attorney

DM:hl
cc: Michael Springfield, Director
County Development

SANDOVAL COUNTY ADMINISTRATIVE OFFICES

BOARD OF COUNTY COMMISSIONERS

DON LEONARD
District 2, Chairman
JOSHUA MADALENA
District 5, Vice Chairman
ORLANDO J. LUCERO
District 1
DAVID BENCY
District 3
JACK THOMAS
District 4

DEBBIE HAYS
County Manager

April 20, 2007

SANDOVAL COUNTY
200718194
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1 of 4
05/01/2007 10:39:36 AM

David Maniatis
RECORP
7835 E. Redfield Road, Ste. 100
Scottsdale, AZ 85260

RE: LETTER OF AGREEMENT REGARDING MEMORANDUM OF UNDERSTANDING BETWEEN SANDOVAL COUNTY AND RECORP

Dear Mr. Maniatis:

Pursuant to conversation with Sandoval County Bond Counsel, we have been requested to further detail information regarding funding and, in particular, paragraph 13 of the MOU between the County and Recorp which was approved at the April 19th, 2007 Commission meeting.

At end of Paragraph 13, remove period and continue final sentence, as follows:

"...but only from such special funds of the County as are designated for such reimbursement. The obligation of the County to make reimbursements to Recorp under this Paragraph 13, is not a general obligation of the County, but is a special limited obligation of the County and Recorp may not look to any other funds or accounts of the County other than those special funds and accounts designated therefore by the County for such reimbursement."

In order to finalize this agreement, please sign below and return this Letter of Agreement, along with the enclosed MOU.

Sincerely,

Don Leonard, Chairman, for Sandoval County — Date: 4/20/07

By: _____ — Date: 4/25/07
David Maniatis for Recorp

Approved as to form: _____
David Mathews, County Attorney

SANDOVAL COUNTY
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MEMORANDUM OF UNDERSTANDING BETWEEN SANDOVAL COUNTY, NEW MEXICO AND RECORP

I. PARTIES

This document constitutes an agreement between the County of Sandoval (the "County"), a political subdivision of New Mexico, and Recorp, ("Recorp"), an Arizona Corporation.

II. PURPOSE

Recorp is the owner(s) of certain real property in the Puerco Basin, consisting of approximately 11,673.3 acres, as described in Exhibit "A."

The real property is generally located west of the City of Rio Rancho as depicted in Exhibit "B" and received approval by the County for a Master Planned Development District on October 5, 2006. This is otherwise known as the "Project."

Furthermore, Recorp has approached the New Mexico Office of State Engineer ("OSE") for an "application for permit to drill an exploratory well." This permit (RG-88934) has been approved with 6 Points of Diversion (POD's 1-6). Conditions of approval attached to this permit by the OSE apply to appropriation and beneficial use.

Upon completion of the exploratory wells analyses will be performed to determine the suitability of the water source to allow production of 18,0000 (EIGHTEEN THOUSAND) acre feet of water per year that Recorp expects to pump and apply to beneficial use at the time of build-out (expected to be around 2031).

It is the intention of this agreement to identify and memorialize the parties' understanding as to the next steps in securing and supplying the nonpotable water to the Rio West project.

III. AGREEMENT

1. The County and Recorp shall jointly set up a water entity that shall control the 18,000 (EIGHTEEN THOUSAND) acre feet a year of nonpotable water. Recorp agrees to transfer all State Engineer permits to the water entity.

2. The ownership of said entity shall be 66% owned by the County and 34% owned by Recorp;

3. Recorp shall be guaranteed the 18,000 (EIGHTEEN THOUSAND) acre feet of water per year as long as it is physically available. Both the County and Recorp are proceeding under the assumption that the non-potable water resource is renewable. In

the event that the resource is found to be non-renewable, the water entity shall develop a plan for transition to renewable resources. The plan shall be developed no later than 20 years after the formation of the water entity, and the transition to the renewable source shall be complete no later than 100 years after the formation of the water entity.

4. Profits generated from sale of water shall be split per the ownership interest of the parties (all sales of water are limited to entities exclusively in Sandoval County), as mentioned herein. * See Ltr of Agmt for Add'l Details

5. The County has started the process to create a Public Improvement District ("PID") to help with the funding of the Project; Recorp expects to sign the approval of the PID following recognition and approval by the County Commission. The PID shall be the primary entity for funding the development of potable water resources. The County shall make application to State and Federal agencies for matching funds to assist in the costs associated with producing potable water. The County shall be credited with its administrative costs associated with securing said funds and funds obtained from State and Federal sources.

6. It is the intention of the County to fund the PID with $6,000,000 (SIX MILLION DOLLARS), for the right to drill for the non-potable water below 2500 feet, upon approval and written acceptance of said PID by both the County Commission and Recorp. Said funds may be used to pay for costs associated with initial administrative, legal, engineering, and exploratory well and feasibility study costs, and the costs associated with Phase I construction of the desalination plant.

7. Recorp shall have the value of the permits/intellectual property and the water rights for 18,000 acre feet of non-potable water appraised by a third party appraiser (selection of which shall be agreed to by Recorp and the County) within 60 days of signature of this agreement;

8. Recorp shall be credited towards their 34% ownership interest in said jointly owned entity and, should there be a deficit between the appraised value and the 34%, Recorp shall make up the short-fall with cash; conversely, if there is a value more than the 34%, then the difference shall be made up by the County with cash, not to exceed the County's total $6,000,000 (SIX MILLION DOLLARS) contribution within this phase;
Note: Intera's hydrology contract costs come from this $6Mil, and are already "obligated".

9. The County shall also have the right of first refusal on any portion of the 18,000 (EIGHTEEN THOUSAND) acre feet per year not directly used by Rio West, and the fact that, upon signature, the County will pursue funding on a State and Federal level for the water program until the program is complete;

10. All bills authorized by, and from, both the County and Recorp are to be paid within 45 days of invoice;

11. Recorp will fund its proportionate share as demanded from the County from time to time;

12. Recorp shall have the right to all the effluent water (concentrate) produced by the desalinization plant. This effluent water can be disposed of by Recorp at Recorp's sole discretion (so long as approved methods, i.e. EPA, NMED, etc., are met) and as long as it is used for the Rio West Project;

13. Recorp shall fund the driller mobilization cost once this Memorandum of Understanding is accepted and approved by the County Commission. Once the PID is formed Recorp expects reimbursement within 3 weeks after formation per County agreement. If the PID is not formed, the County will reimburse Recorp for said driller mobilization fee within 30 days from Recorp's payment.

This Memorandum of Understanding is effective as of the last date it is executed by the second party and shall continue in effect until such time as both parties mutually agree to terminate it.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the 19 day of April 2007.

RECORP:

By: _____
David Maniatis

SANDOVAL COUNTY COMMISSION

By: _____
Don Leonard, Chairman

APPROVED AS TO FORM:

_____
David Mathews, County Attorney

ATTEST:

_____
Sally Padilla, County Clerk

SANDOVAL COUNTY
200718194
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SANDOVAL COUNTY
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SANDOVAL COUNTY
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26 of 26
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TYPICAL PAVEMENT SECTIONS SHOWN ON THIS EXHIBIT MAY BE REDUCED WITH SUPPORTING GEOTECHN

HUITT-ZOLLARS

RIO WEST

SOUTHERN BLVD, 60TH ST AND NORTHERN BLV

JUNE 2007

Filed Via Facsimile 01/21/2010

STATE OF NEW MEXICO
COUNTY OF **SANDOVAL**
THIRTEENTH JUDICIAL DISTRICT COURT

Case No.: D-1329-CV-200902408

SANDOVAL COUNTY, NEW MEXICO, a Statutorily created County,

Petitioner,

-vs.-

TESORO PROPERTIES LLC, et al.,

Respondents.

DISCLAIMER REGARDING WATER AND WATER RIGHTS

Sandoval County, by and through its attorneys, David Mathews and Peter Shoenfeld, herewith states:

By this proceeding in Eminent Domain, Sandoval County is not seeking to take any water or any water rights, whether perfected or pending, from any parties to this action, whether named or unnamed.

Submitted by:

David Mathews, County Attorney
Sandoval County Courthouse
Post Office Box 40
Bernalillo, New Mexico 87004-0040
(505) 867-7500
(505) 771-7194 facsimile

Peter B. Shoenfeld by DM
Peter B. Shoenfeld
Post Office Box 2421
Santa Fe, New Mexico 87504
(505) 982-3566
(505) 982-5520 facsimile

EXHIBIT 4

A copy of the foregoing was faxed to Ronald VanAmberg, Esq. at 505-983-7508 and Carolyn M. Nichols, Esq. at 505-242-7845, attorneys for Respondents on this 21st day of January, 2010.

Heide A. Lorne

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

D-1329-CV-20092408

FILED BY FAX:
DATE FILED: 3/16/10
TIME FILED: 12:44
BY: R. Van Amberg
ORIGINAL MAILED ON
ORIGINAL NOT MAILED

SANDOVAL COUNTY, NEW MEXICO,
a Statutorily created County,

Petitioner,

vs.

TESORO PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; BUTERA PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; CARINOS PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP; and ALL UNKNOWN OWNERS OR CLAIMANTS OF IF THE PROPERTY INVOLVED,

Respondents.

RESPONSE TO MOTION TO DISMISS COUNTERCLAIM FOR LACK OF JURISDICTION AND, IN THE ALTERNATIVE, REQUEST FOR LEAVE TO FILE COUNTERCLAIM

The Petitioner ("The County") has filed a motion to dismiss Recorp's counterclaim, arguing that this Court lacks jurisdiction to entertain counterclaims in actions founded upon special statutory proceedings, such as condemnations. The County relies upon *Jackson v. Hartley,* 90 N.M. 428, 564 P.2nd, 992 (S.Ct 1977) for this proposition.

The *Jackson* case and its line of authority have been specifically overruled since 1979. *See, Ortega Snead Dixon and Hanna v. Gennitti,* 93 N.M. 135, 597, P.2nd, 745 (S. Ct. 1979). In *Gennitti* the defendants asserted that since quiet title actions were special statutory proceedings, counterclaims and cross-claims could not be filed. In support of their argument, the defendants cited "*Clark v. Primus,* 62 N.M., 259, 308 P.2nd, 584 (1957) and *Jackson v. Hartley,* 90 N.M. 428, 564 P.2nd, 992, (S. Ct. 1977) (*Id at* N.M. 140), and relied upon Rule 1 of the 1978 Rules of Civil Procedure, the rule, in substance, cited in our case by the County. The Gennitti Court stated that the critical inquiry is "whether the statutory rules for proceedings to quiet title are inconsistent with the applicable rules with respect to assertions of counterclaims or cross-claims in civil actions." *Id at* 93 N.M. 140. The Court stated: "The overriding emphasis is on consolidation and the expeditious resolution (where that is fair) of all the claims between the parties in one proceeding". *Id at* 93 N.M. 140

The Court stated that counterclaims and cross-claims were proper under Rule 13 (Rule 13, NMRA in our case) and concluded: "We expressly overrule the principle established in *Clark* and the cases which have relied on it. We hold that in determining whether a counterclaim or cross-claim may be brought in a quiet title action, or whether a counterclaim or cross-claim to quiet title may brought in any other action, the proper analysis is that provided in Rules 1, 13, 20(b) and 42. (*Id.* at 93 N.M. 140-141)." In our case, Recorp's counterclaim is based upon the clear breach by the County of the Memorandum of Understanding between the parties ("MOU"). The County is claiming specifically that it is not condemning any contract rights in this action, but only surface

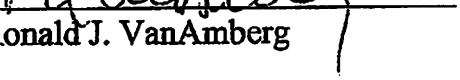
land rights. If the County is not condemning contract rights, then it is in breach of the MOU and needs to pay appropriate compensatory damages. Rule 1-013, NMRA. provides that a compulsory counterclaim is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ." Clearly, Recorp's counterclaim could be categorized as compulsory. Certainly, it is at least permissible.

Concerning the time limits on filing the counterclaim, Recorp's response to the condemnation petition has been to file a motion to dismiss. A motion to dismiss under Rule 12(B)(6) is not a *responsive* pleading. See *Moffatt v. Branch,* 2002-NMCA-067 ¶ 21, 132 N.M. 412. This distinction is important because until the motion to dismiss is resolved, the time to file an answer, which is a responsive pleading, does not arise. Rule 12 (B) provides that a counterclaim is to be "asserted in the responsive pleading thereto if one is required...." A responding party, such as Recorp, has the option to file a motion to dismiss instead of a responsive pleading. (*Moffat v. Branch, supra)* Accordingly, since Rule 12 allows for counterclaims to be filed at the latest with the responsive pleading and the time for a responsive pleading has not yet arrived, the Recorp counterclaim is filed timely.

If this Court, however, determines that leave of this Court to file the counterclaim is necessary, then Recorp makes that request. Given that the parties have filed multiple pleadings, including cross motions for summary judgment, and the Court is now educated about the circumstances surrounding this case, judicial economy would not be served by having Recorp file a separate action against the County, with consolidation being the obvious result.

The motion to dismiss should be denied.

VanAmberg, Rogers, Yepa, Abeita
& Gomez, LLP
347 East Palace Avenue
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979
(505) 983-7508 (fax)

By 
Ronald J. VanAmberg

CERTIFICATE OF SERVICE

It is hereby certified that on the 16 day of March, 2010 a true and correct copy of the foregoing was deposited in the United States Mail at Santa Fe, New Mexico, first-class, postage prepaid, addressed to:

David Mathews, County Attorney
Sandoval County Courthouse
Post Office Box 40
Bernalillo, NM 87004-0040

Peter B. Shoenfeld
Post Office Box 2421
Santa Fe, NM 87504

Peter Schoenberg
Carolyn M. Nichols
Rothstein, Donatelli, Hughes,
Dahlstrom, Schoenburg, & Bienvenu LLP
500 4th ST NW, Suite 400
Albuquerque NM, 87102

Ronald J. VanAmberg

* * * COMMUNICATION RESULT REPORT (MAR. 16. 2010 12:45PM) * * *

FAX HEADER 1: VANAMBERG ROGERS LA
FAX HEADER 2:

TRANSMITTED/STORED : MAR. 16. 2010 12:44PM

FILE MODE	OPTION	ADDRESS	RESULT	PAG
2089 MEMORY TX		8675161	OK	6/6

REASON FOR ERROR
E-1) HANG UP OR LINE FAIL
E-2) BUSY
E-3) NO ANSWER
E-4) NO FACSIMILE CONNECTION

VANAMBERG, ROGERS, YEPA, ABEITA & GOMEZ, LLP

RONALD J. VANAMBERG (NM)
CARL BRYANT ROGERS (NM, MS)**
DAVID R. YEPA (NM)
CAROLYN J. ABEITA (NM)**
DAVID GOMEZ (NM, NAVAJO NATION)**

**NEW MEXICO BOARD OF LEGAL SPECIALIZATION CERTIFIED SPECIALIST IN THE AREA OF FEDERAL INDIAN LAW

ATTORNEYS AT LAW
P.O. BOX 1447
SANTA FE, NM 87504-1447
(505) 988-8979
FAX (505) 983-7508

347 EAST PALACE AVENUE
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ALBUQUERQUE OFFICE
1201 LOMAS BOULEVARD, N.W
SUITE C
ALBUQUERQUE, NEW MEXICO 87
(505) 242-7352
FAX (505) 242-2283

TELECOPY COVER SHEET

Date: March 16, 2010

PLEASE DELIVER TO: Clerk, Civil Division

FAX NO.: (505)867-5161

FROM: Ronald J. VanAmberg, Esq.

CLIENT: Sandoval County v. Tesoro Properties et

NO. OF PAGES: 6 (including cover sheet)

SPECIAL MESSAGE:

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

D-1329-CV-20092408

SANDOVAL COUNTY, NEW MEXICO,
a Statutorily created County, Petitioner,

vs.

TESORO PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; BUTERA PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; CARINOS PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP; and ALL UNKNOWN OWNERS OR CLAIMANTS OF IF THE PROPERTY INVOLVED,

Respondents.

Attached is a Response to Motion to Dismiss Counterclaim for Lack of Jurisdiction and, in the Alternative, Request for Leave to File Counterclaim for fax filing in the above-referenced matter. Please feel free to call Ronald J. VanAmberg, Esq. (505/988-8979) if you have any questions. Thank you.

If you do not receive all pages, please call (505) 988-8979.

Our facsimile machine is a SHARP FO5500. Our facsimile telephone number is (505) 983-7508.

VANAMBERG, ROGERS, YEPA, ABEITA & GOMEZ, LLP

ATTORNEYS AT LAW

RONALD J. VANAMBERG (NM)
CARL BRYANT ROGERS (NM, MS)**
DAVID R. YEPA (NM)
CAROLYN J. ABEITA (NM)**
DAVID GOMEZ (NM, NAVAJO NATION)**

**NEW MEXICO BOARD OF LEGAL SPECIALIZATION CERTIFIED SPECIALIST IN THE AREA OF FEDERAL INDIAN LAW

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(505) 242-7352
FAX (505) 242-2283

TELECOPY COVER SHEET

Date: March 16, 2010

PLEASE DELIVER TO: Clerk, Civil Division

FAX NO.: (505)867-5161

FROM: Ronald J. VanAmberg, Esq.

CLIENT: Sandoval County v. Tesoro Properties et

NO. OF PAGES: 6 (including cover sheet)

SPECIAL MESSAGE:

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

D-1329-CV-20092408

SANDOVAL COUNTY, NEW MEXICO,
a Statutorily created County, **Petitioner,**

vs.

TESORO PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; BUTERA PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; CARINOS PROPERTIES LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP; and ALL UNKNOWN OWNERS OR CLAIMANTS OF IF THE PROPERTY INVOLVED,

Respondents.

Attached is a Response to Motion to Dismiss Counterclaim for Lack of Jurisdiction and, in the Alternative, Request for Leave to File Counterclaim for fax filing in the above-referenced matter. Please feel free to call Ronald J. VanAmberg, Esq. (505/988-8979) if you have any questions. Thank you.

If you do not receive all pages, please call (505) 988-8979.

Our facsimile machine is a SHARP FO5500. Our facsimile telephone number is (505) 983-7508.

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

CASE NO. D-1329-CV-2009-2408

SANDOVAL COUNTY, NEW MEXICO, a statutorily created County,

Petitioner,

v.

TESORO PROPERTIES, LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; BUTERA PROPERTIES, LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; CARINOS PROPERTIES LLC, A; RECORP NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents.

RESPONDENTS' (EXCEPT CARINOS) MOTION FOR PRELIMINARY INJUNCTION AND MOTION TO AMEND COUNTERCLAIM

COME NOW the Respondents ("Recorp') (except Carinos) and move that this Court issue a preliminary injunction and allow an amendment to Recorp's Counterclaim which would, through the course of these proceedings and thereafter, enjoin the County of Sandoval from in any form or fashion competing with the operations of the joint venture between Sandoval County and Recorp which involves the development of water rights, the development and treatment of water and the sale of water located in Sandoval County.

EXHIBIT 6

As this Court is aware, Recorp took advantage of a small window of opportunity to declare and lock in rights to water located below Recorp property at depths exceeding 2,500 feet. This opportunity had and has a proven potential to develop, treat and sell water in massive quantities. The County of Sandoval, recognizing this potential, then proposed a joint venture between the County and Recorp for the development of this water. Recorp would receive enough of the water to service its 11,000 acre development. Excess water developed by the joint venture could then be used to assist Rio Rancho with its water problems. Profits would then be divided between the parties on a percentage basis. Accordingly, the parties entered into a Memorandum of Understanding ("MOU") which provided the following:

1. It recognized that Recorp developed valuable rights with the SEO to develop water rights (¶ II).

2. The parties needed to determine the quantity and quality of the water (¶ II).

3. The parties were to set up a jointly owned entity which would control the 18,000 acre feet of water (66% County, 34% Recorp) (¶ III (1) and (2)).

4. Recorp was to get the first 18,000 acre fee of treated potable water per year for its development. (¶ III (3)).

5. A "PID" was being formed by the County to help fund the project. (¶ III (5)).

6. The County would contribute up to Six Million Dollars ($6,000,000) for exploratory wells and related purposes (¶ III (6)).

7. Recorp would contribute the value of its "permits/intellectual property and water rights" for 18,000 acre feet non-potable water as appraised. (¶ III (7)).

8. If that appraised value exceeded 34% of capital contribution requirements, then Recorp was to be reimbursed up to a capped limit. If this appraised value did not satisfy the capital contribution requirements then Recorp would make up the difference. (¶ III (8)).

9. While ¶ III (9) required Recorp to fund its "proportionate share as demanded by the County", no demand has been made for any contributions. In fact Recorp's contributions far exceed its obligation under the MOU Agreement.

As this Court has been informed in previous motions and pleadings filed in this matter, in July of 2009, the County Manager suggested that the County now owns the project which included the Recorp wells, well sites and rights to water. The County followed this announcement with a condemnation action which attempted to condemn property for a road and Recorp's wells, well sites and rights to access and develop water. The condemnation action has been dismissed.

Recorp could not reconcile the actions of the County with its obligations under the MOU and had concluded that the County was disavowing its obligations under the MOU. The County, however, has repeatedly represented to this Court that in fact it has not repudiated the MOU, but the MOU is a live and vibrant document which the County intends to follow and execute.

1. "The County has not disavowed those agreements with Respondents and affirmatively states that the County was at all times ready and willing to honor the

Agreement if Respondents also performed their obligations in the Development and Memorandum of Understanding" (County's Response to Respondent' (Except Carinos) Motion to Dismiss Petition/Complaint for Condemnation p.4 ¶ 13).

2. "The County also denies that it has disavowed any Agreement with the Respondents and affirmatively states that the County was at all times ready and willing to abide with the terms set forth in the Agreement if Respondents also performed their obligations in the Memorandum of Understanding (MOU) and the Development Agreement." (County's Response to Carinos' Properties, LLC's Objection to Preliminary Order to Entry ET. SET.) p. 2 ¶.

3. "There is no issue before the Court in this case or presented in this Motion concerning the Agreement, almost all the obligations of the parties set forth in the Agreement are premature and cannot be honored by either party at this time." County's Memorandum in Support of Motion for Partial Summary Judgment p.3 ¶ 10.

4. "It is clear from the Agreement between the parties this desalinization project is designed to meet future water needs of both the Respondents and other residents of Sandoval County in the Rio Puerco area." (*Id.*, p.10, ¶ 39).

5. "At this time, the County is satisfied with the Agreement and intends to honor all its legal commitments. Many of aspects, obligations or events set forth in the Agreement will occur in the future and the County has always assumed the Agreement sets forth the basic frame work for the development of Rio West." Affidavit Michael Springfield, Director, Sandoval County Development, in support of County's Motion for Partial Summary Judgment p.2, ¶ 9.

6. "The County is obligated under the Development Agreement and the MOU incorporated therein . . . to assist Respondents' effort to create potable water from the deep aquifer under this area of the County." County Response to Respondents', except Carinos, Motion for Partial Summary Judgment p. 17, ¶ 50.

7. "The Development Agreement is the operative agreement between the parties and the County admits the MOU is part of the Development Agreement. The Development Agreement imposes obligations, duties and responsibilities on both Recorp and the County." Sandoval County's Response to Motion to Intervene by Southwest Lending, LLC p.2, ¶ 4.

8. "The County denies the second sentence of ¶ 11 and specifically states that it intends to abide by the terms and conditions of the Agreement between the parties." (*Id.*, p.3 ¶ 8).

The County has continuously made judicial admissions and representations to this Court that there is a binding joint venture agreement between the parties. Put simply, the purpose of the joint venture is to develop the rights to water secured by Recorp on Recorp property utilizing aquifers below depths of 2,500 feet. The water is to be desalinized, transported and sold to a huge awaiting market.

Following the oral decision of this Court to dismiss the condemnation petition, Mr. Maniatis contends that Commissioner Leonard informed Mr. Maniatis that effectively the County would do what was necessary to destroy the project for Mr. Maniatis. Mediation was set up with William Madison and then unilaterally cancelled by the County. Then

Mr. Maniatis attempted to contact Juan Vigil to discuss moving the project along. Mr. Maniatis was informed that the partners (Recorp and the County) could only communicate through their respective counsel. Even though the County has admitted that the MOU was in force and effect and creates rights and obligations in the parties, County actions or lack thereof demonstrate intent to stall this project and instead explore the possibility of setting up operations with others in direct competition with the County/Recorp joint venture.

N.M.S.A 1978 § 54-1A-404 provides that as part of a partner's duty of loyalty to the partnership the partner is to "refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership". § 54-1A-404 (D), provides that a partner should "discharge the duties in the partnership and the other partners under the Uniform Partnership Act (UPA) or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.". § 54-1A-401 (G) provides that "a partner may use or possesses partnership property only on behalf of the partnership." *Clark v. Simms,* 2009-N.MC.A.-118, 147 N.M. 252, recognizes a "strict good faith standard" as arising from the special fiduciary duty of one partner to another. In the *Clark* case, the question was whether the partnership level of fiduciary duty applied to a closely held corporation. The Court ruled that it did and in so doing explained that duty: "This approach analogizes the structure of a close corporation to a partnership, in which the law recognizes a special duty arising from a fiduciary duty of good faith and loyalty. Following *Donahue*, this Court stated, 'The duty between shareholders of a close corporation is similar to that owed by

directors, officers and shareholders to the corporation itself; that is, loyalty, good faith, inherent fairness and the obligation not to profit at the expense of the corporation.'" The Court then noted the contrast between a "strict good faith standard" governing shareholders in a close corporation "with the some what less stringent standard of fiduciary duty to its directors and stockholders of all corporations must adhere". *Id* at ¶10.

In *Meehan v. Shaughnessy,* 535 N.E. 2d 12 55 (Mass. 1989), the Court fleshed out the "fundamental fairness" test which is born from the good faith and fair dealing obligation of one partner to the other. "This 'fundamental fairness' test places the burden on the fiduciary who acquires a corporate (or partnership) opportunity, or who engages in self dealing, 'to prove that his or her actions were intrinsically fair, and did not result in harm to the corporation or partnership."' *Id* at 1277.

There is no question but that any County action which would have as its goal the development, processing and sale of deep water in the Sandoval County would be in direct competition with the Recorp/County joint venture and would be damaging to the joint venture. Any proposed effort in this regard by the County would be a clear violation of the County's fiduciary obligations to the joint venture and to Recorp and should be preliminarily and permanently enjoined.

Opposing counsel has been contacted and will not concur in this motion.

"Electronically Filed"
By /s/ Ronald J. VanAmberg
VanAmberg, Rogers, Yepa, Abeita
& Gomez, LLP
347 East Palace Avenue
Post Office Box 1447

Santa Fe, New Mexico 87504-1447
(505) 988-8979
(505) 983-7508 (fax)

CERTIFICATE OF SERVICE

It is hereby certify that on the 8th day of June, 2010, I filed the foregoing electronically through the wiznet system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

David Mathews, County Attorney
Sandoval County Courthouse
Post Office Box 40
Bernalillo, NM 87004-0040

Peter B. Shoenfeld
Post Office Box 2421
Santa Fe, NM 87504

Carolyn M. Nichols
Peter Schoenburg
Rothstein, Donatelli, Hughes,
Dahlstrom, Schoenburg, & Bienvenu LLP
500 4th St. NW, Suite 400
Albuquerque NM, 87102

"Electronically Filed"
/s/ Ronald J. VanAmberg

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

SANDOVAL COUNTY, NEW MEXICO,
a statutorily created County,

Petitioner,

v. **D-1329-CV-2009-2408**

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES, LLC, a New Mexico limited liability company; CARINOS PROPERTIES, LLC, a New Mexico limited liability company; RECORP NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents.

OPPOSED MOTION SEEKING COURT-ORDERED MEDIATION

COME NOW Respondents, by and through the undersigned counsel, and move this Court for an order referring this case to mediation. Respondents are not seeking a referral for any type of binding arbitration, but seek instead a court-ordered opportunity to present their issues of dispute to a mediator for possible resolution, and are seeking this Court's referral to such mediation. As grounds therefore, Respondents state:

BACKGROUND FACTS

1. The parties agreed to mediation of their disputes, in hopes of resolving the conflict and reaching a working agreement which would facilitate the partnership between Petitioner and Respondents
2. The parties agreed to mediate before Luis G. Stelzner, and a mediation was scheduled for Wednesday, April 21, 2010.
3. This mediation was canceled due to a medical emergency involving counsel for Petitioner.
4. The parties agreed to re-schedule.
5. Unfortunately, Mr. Stelzner had no availability until late June or early July, and the parties wished to re-schedule sooner.
6. They conferred and agreed upon William C. Madison as an alternate mediator.
7. The parties then scheduled a mediation for May 26, 2010, before William C. Madison.
8. Approximately one and one-half weeks prior to the mediation, counsel for Petitioner canceled the mediation, based on the inability of the parties to agree upon an order from the April 12, 2010 hearing and due to a lack of a counter-appraisal for the value of the Alice King Way land.
9. Respondents suggested that all of the parties disagreements could be the subject of mediation.
10. Ultimately, Mr. Madison was suddenly notified that he had to be in court in Las Cruces on May 26, 2010. The mediation was canceled and never re-scheduled.

11. After the filing of motions for presentment, along with responses and replies, Petitioner and Respondents were able to agree on an order reflecting the Court's ruling, with the modification that the Petitioner would not seek an interlocutory appeal.

12. That order has now been entered.

13. The parties can engage in mediation in an effort to resolve all the remaining issues pending in the condemnation action and related to the contract between the parties.

14. It is imperative that steps be taken in a timely manner to review new technologies and to make progress towards developing the water resource for the public good, with the Petitioner and Respondents moving forward as partners.

15. There is good reason to attempt to mediate the dispute in this case, as resolution outside of litigation may be possible if all parties act towards that goal in good faith.

16. In order to ensure that mediation is re-scheduled and will occur, the parties are seeking this Court's order.

17. As the parties have previously agreed to submit their disputes to either Mr. Stelzner or Mr. Madison as a mediator, Respondents request that the mediation be ordered to take place with Mr. Stelzner, the first mediator agreed-upon by the parties.

LEGAL ARGUMENT AND REQUESTS FOR RELIEF

18. Under LR 13-803 of the Thirteenth Judicial District Court, the Court may, pursuant to NMRA Rule 1-016, refer cases to mediation.

19. Any party may at any time file a motion requesting referral to Alternative Dispute Resolution, under LR 13-803(C). This is an express embodiment of NMRA Rule 1-016(A)(5), which allows the Court to schedule conferences to facilitate settlement.

20. Per the local rules, the parties may choose a mediator by stipulation, and they have agreed upon two alternative mediators up to this point. Respondents request that the Court order the mediation be scheduled before Mr. Stelzner, the first mediator agreed upon by both Petitioner and Respondents.

21. Respondents request that the parties be ordered to share the cost of such mediation, at the usual rates charged by Mr. Stelzner. as this was also agreed upon previously by Petitioner and Respondents.

22. Also per the local rules, the mediator shall set the time and place of the mediation, and Respondents request that the Court's order give Mr. Stelzner this authority.

23. Finally, per the local rules, each counsel of record and all persons with final settlement authority shall attend the mediation; and all persons shall participate in good faith at mediation conferences. *See* LR 13-803(E)(F)(G) and (H).

24. Given the course of events of this case, Respondents specifically request that the Court order the County Manager along with a quorum (at least three of the five) County Commissioners attend the mediation with counsel for the Petitioner, pursuant to LR 13-803(G).

25. Petitioner may simply publish the mediation for the public, engage in an opening session, and move to closed session when mediation in the pending litigation begins.

26. It is necessary for a quorum of the commission to attend in order to have all persons with final settlement authority present. Without this, the mediation may not succeed.

27. Respondents and Petitioner have agreed upon all aspects of the mediation except for this critical point, hence the need for Respondents to file this as an opposed motion. Petitioner will not agree to attend the mediation with a quorum of the commissioners, therefore

Respondents seek a Court order referring the case to mediation, and requiring such a quorum to attend.

28. Given the state of Mr. Mathews health, and the fact that two previous mediation sessions have been canceled, one due to Mr. Mathews health issues, Respondents request that both Mr. Mathews and Ms. Lopez be required to plan to attend along with the County Commissioner and the quorum of the County Commission, with the understanding that if only one of the two county attorneys is available, the mediation will still proceed as scheduled.

29. Respondents request this Court order a mediation, to be scheduled as soon as possible before Mr. Stelzner by Mr. Stelzner, per the Court's rules and in the interests of justice and the public welfare.

30. Attached to this motion as Exhibit A is Respondents' proposed order, submitted with the understanding that this motion is opposed and that Petitioner has a right to respond, in order to provide the Court with a complete picture of the relief requested by Respondents.

31. The parties wish to preserve their ability to file motions and orders, as may be necessary, to protect their rights or interests in this litigation, even after the referral to mediation. The referral to mediation shall not divest the Court of jurisdiction to consider and rule upon pending matters in the case at hand, should the need arise.

WHEREFORE Respondents seek the Court's order under NMRA Rule 1-016 and LR 13-803 referring this matter to mediation before Mr. Stelzner, along with such other and further relief requested and as the Court may deem necessary and appropriate.

Respectfully submitted:

/s/ Cammie Nichols, Electronically Filed
Rothstein, Donatelli, Hughes, Dahlstrom,
Schoenburg & Bienvenu, LLP
Peter Schoenburg
Carolyn M. "Cammie" Nichols
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(505) 243-1443
Attorneys for Respondent Carinos

Joined per agreement by R. VanAmberg
Van Amberg Rogers Yepa Abeita
& Gomez, LLP
Ron Van Amberg
P.O. Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979
Attorney for Other Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 7thday of June, 2010, I served a true and correct copy of the foregoing pleading electronically on the following counsel:

David L. Mathews
Stephanie Lopez
Attorneys for Sandoval County
P.O. Box 1779
Bernalillo, NM 87004
505-867-7536
505-867-5161 (F)

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/s/ Cammie Nichols, Electronically Filed
ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM, SCHOENBURG & BIENVENU, LLC

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

SANDOVAL COUNTY, NEW MEXICO,
a statutorily created County,

Petitioner,

v. **D-1329-CV-2009-2408**

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES, LLC, a New Mexico limited liability company; CARINOS PROPERTIES, LLC, a New Mexico limited liability company; RECORP NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents.

ORDER GRANTING RESPONDENTS' MOTION FOR REFERRAL TO MEDIATION

THIS MATTER having come before the Court on the Respondents' Opposed Motion for Referral to Mediation;

THE PARTIES being represented by counsel of record;

THE COURT, BEING FULLY ADVISED, FINDS:

1. Under LR 13-803 of the Thirteenth Judicial District Court, the Court may, pursuant to Rule 1-016 NMRA, refer cases to mediation.

EXHIBIT
A

2. Any party may at any time file a motion requesting referral to Alternative Dispute Resolution, under LR 13-803(C).

3. Respondents have requested the settlement conference be ordered to take place before a neutral third party, namely Mr. Luis G. Stelzner. Mr. Stelzner's office is now at the following location: 302 8th St. NW, Suite 200, Albuquerque, NM 87102.

4. Per the local rules, the parties may choose a mediator by stipulation, and the parties have previously agreed upon Mr. Stelzner as a mediator.

THE COURT, BEING FULLY ADVISED, ORDERS:

5. Mr. Stelzner is appointed as the mediator in this matter.

6. He will be paid his usual fee, the cost to be shared equally, 50% to be paid by Respondents, and 50% to be paid by the County of Sandoval.

7. Mr. Stelzner shall set the time and place of the mediation session or sessions, if multiple sessions are necessary.

8. Each counsel of record and all persons with final settlement authority shall attend the mediation.

9. For Petitioner, counsel in attendance shall include, specifically, Mr. David Mathews and Ms. Stephanie Lopez for the County of Sandoval, either one of whom may attend alone if the other is not available.

10. For Petitioner, persons with final settlement authority shall include, specifically, the County Commissioner, and a full quorum of commissioners representing the Sandoval County Board of Commissioners.

11. For Respondents, counsel in attendance shall include, specifically, Mr. Ronald VanAmberg, Mr. Peter Schoenburg, and Ms. Carolyn M. "Cammie" Nichols. Either Ms. Nichols or Mr. Schoenburg may attend with Mr. VanAmberg if one or the other is unavailable.

12. For Respondents, persons with final settlement authority shall include, specifically, Mr. David Maniatis.

13. All persons shall participate in good faith.

14. The Court shall retain jurisdiction, and any party may file any motion necessary to protect its rights or interests, and the Court may rule on pending matters, as necessary, after the entry of this order.

WHEREFORE, the Opposed Motion for Referral to Mediation is GRANTED.

THE HONORABLE GEORGE P. EICHWALD
District Court Judge

Submitted by:

Carolyn M. "Cammie" Nichols
Peter Schoenburg
Counsel for Respondent Carinos

Approved and Joined, 06/07/2010
Ronald Van Amberg
Counsel for Respondents

Approved as to Form by:

David Mathews
Stephanie Lopez
Peter Shoenfeld
Counsel for Sandoval County

STATE OF NEW MEXICO
COUNTY OF **SANDOVAL**
THIRTEENTH JUDICIAL DISTRICT COURT

Case No.: D-1329-CV-200902408

SANDOVAL COUNTY, NEW MEXICO, a
Statutorily created County,

Petitioner,

-vs.-

TESORO PROPERTIES LLC, et al.,

Respondents.

AFFIDAVIT OF COUNTY MANAGER JUAN R. VIGIL

STATE OF NEW MEXICO)
: ss
COUNTY OF SANDOVAL)

Juan R. Vigil, being first duly sworn, states:

1. My name is Juan R. Vigil.

2. I am County Manager of Sandoval County, New Mexico, and have served in that capacity since January 1, 2009.

3. I am familiar with the legal and factual issues of the instant case and I make the statement herein of my own personal knowledge.

4. The Board of County Commissioners of Sandoval County has been fully informed about this lawsuit and has been fully informed concerning the mediation requested by the Respondents.

5. The Board of County Commissioners considered Respondents' request that the entire Board of County Commissioners convene a special session for mediation and then move into closed session for the mediation. Upon full consideration, the Board declined to do so.

6. The Board has granted authority to me, as County Manager, to attend any scheduled mediation.

7. I have read NMRA LR 13-803(G)(2008) and have the authority required by the Rule.

FURTHER AFFIANT SAYETH NOT:

Juan R. Vigil

Sworn to before me this 1st day of July, 2010.

My Comission Expires: 8/12/2012

Notary Public

[SEAL]

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

SANDOVAL COUNTY, NEW MEXICO,
a statutorily created County,

Petitioner,

v. **D-1329-CV-2009-2408**

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES, LLC, a New Mexico limited liability company; CARINOS PROPERTIES, LLC, a New Mexico limited liability company; RECORP NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents.

RESPONDENTS' JOINT REPLY TO PETITIONER'S RESPONSE TO RESPONDENTS' MOTION FOR MEDIATION

COMES NOW Respondent Carinos, joined by all other Respondents, and replies to Petitioner's response to its motion to compel mediation as follows:

Facts and Legal Argument

Petitioner's response, essentially, opines that Respondents are somehow requesting this Court overstep its bounds and usurp legislative authority. That is not the case. Respondents seek the exercise of judicial authority to enforce the Court's rules governing mediation and dispute resolution.

Sandoval County is not exempt from these rules, and to the extent that the County relies upon its Board of County Commissioners to enter into agreements with private parties, then the Board is also not exempt for the Court's rules. The authority possessed by the Board may not be delegated to the County Manager. Therefore any mediation efforts which do not involve the Board of Commissioners are inherently flawed, as there will be no certainty that agreements reached will indeed be adopted by the entire Board. The necessity for Board approval is inescapable.

In order for this Court's order referring the case to mediation to be effective, the Board of County Commissioners must be directly involved. Respondents are not seeking a judicial fiat, but rather a lawful order compelling the Board of Commissioners to engage in meaningful, effective mediation. Courts have the power to review discretionary acts by municipalities and counties. "As long as the decisions remain within lawful bounds, the courts will not interfere." *State ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 119 N.M. 150, 157, 889 P.2d 185, 192 (N.M. 1994). This Court has already found that the County of Sandoval's exercise of its power of eminent domain was, in part, unlawful, as it failed to follow statutory requirements when filing the original petition in this matter. *See Court's Order Granting in Part and Denying in Part Respondent Carinos' and Remaining Respondents' Motions to Dismiss Petition/Complaint for Condemnation, entered 06/03/2010.* In so ruling, the Court reiterated that the parties needed to work together within the parameters of their contractual relationship. The parties have sought, unsuccessfully so far, to mediate the dispute, and now Respondents seek a Court order compelling mediation in an effort to set a stage where successful negotiations may occur.

Petitioner is correct that, in order for this to happen, "all persons who have full and final settlement authority [must attend] the entire mediation conference." NMRA LR 13-803(G) (2008).

The Board of County Commissioners may not delegate its legislative authority to the County Manager. The County Manager may not become the *de facto* or *de jure* legislative branch of Sandoval County. Whatever agreements are reached at mediation, they will have to be approved by a quorum of the Board of Commissioners. Surely Petitioner does not argue that if the Board disagrees with the proposed resolution brought to them by the County Manager, they will be powerless to act. To leave the Board uninvolved in the nuts and bolts of the mediation process will create an insurmountable stumbling block to a final resolution of the disputes. The entire work accomplished during the mediation could be scrapped in a matter of minutes, sending the parties back to square one without any reasonable expectation of resolving the issue. This is not merely a decision about whether to pay a damages claim. This is a decision about public works, public utilities, land and water use, and other matters which cannot be resolved by the County Manager alone.

Petitioner argues that Respondent's suggestion that the Board could convene a special session as a means of proceeding with this action, is "especially egregious." *See Petitioner's Response to Respondents' Motion for Mediation,* ¶ *7.* Far from it. Respondents are attempting to facilitate a means by which truly effective work can be accomplished on a matter of critical public interest – the availability of water for the residents and businesses of Sandoval County. A Court may oversee the discretionary activities of a legislative body if the body has engaged in related, unlawful conduct. Breach of contract is such conduct. Respondents have been brought before this Court through the condemnation proceedings begun by Sandoval County, and it is appropriate to work to resolve all

pending disputes between the parties in these proceedings, if possible.[1] The agreement between the parties contains a provision which reads as follows:

> If the issue on which an impasse has been reached is one where a final decision requires action by the COUNTY Commission, the COUNTY Representative shall use his or her best efforts to schedule a COUNTY Commission hearing on the issue as soon as possible but not later than two (2) weeks after the request for an expedited decision is made...

See copy of p. 13 of the Development Agreement (bates C000285), highlighted portions, attached hereto as Respondents' Exhibit A.

Resolving the disputes facing the parties in this matter will clearly require action by the County Commission. Sandoval County included in its agreement with Respondents a provision requiring the Board of County Commissioners to meet in an expedited fashion, if necessary to resolve disputes. Clearly it is not impossible to schedule such a meeting, nor is it unheard of, and it most certainly will not be a hindrance to mediation. If the County wishes the Board to participate in mediation where matters involving pending litigation are to be discussed, then a closed session is appropriate. Respondents are suggesting no more nor less than the most effective way to actually resolve the disputes between the parties, disputes which are hindering important projects which could be of great benefit to the public.

---

[1] For the same reasons which support the bringing of counterclaims in a quiet title action, the Court's order enforcing LR 13-803 as a means of resolving all the disputes is the appropriate manner in which to proceed. *See Respondents' Reply to Petitioner's Response to Respondents' Motion for Preliminary Injunction*, at p. 3.

WHEREFORE, Respondents reiterate their request that this Court order mediation and compel the attendance of the Board of County Commissioners for Sandoval County.

Respectfully submitted:

Rothstein, Donatelli, Hughes, Dahlstrom,
Schoenburg & Bienvenu, LLP
Peter Schoenburg
Carolyn M. "Cammie" Nichols
500 4th Street NW, Suite 400
Albuquerque, New Mexico 87102
(505) 243-1443
Attorneys for Respondent Carinos

Joined by Ronald VanAmberg
Van Amberg Rogers Yepa Abeita & Gomez, LLP
Ron Van Amberg
P.O. Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979
Attorney for Other Respondents

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of July, 2010, I served a true and correct copy of the foregoing pleading by electronic mail on the following counsel:

David L. Mathews
Stephanie Lopez
Attorneys for Sandoval County
P.O. Box 1779
Bernalillo, NM 87004
505-867-7536
505-867-5161 (F)

Peter B. Shoenfeld
P.O. Box 2421
Santa Fe, NM 87504
505-982-3566
505-982-5520 (F)

ROTHSTEIN, DONATELLI, et al., LLC

Development Director and the DEVELOPER'S representative is the Project Manager.

17.2 COUNTY Decisions. The implementation of this Agreement shall be in accordance with the COUNTY's development review process. The COUNTY and DEVELOPER agree that DEVELOPER must be able to proceed in a timely manner with the development of the Property and that, accordingly, a timely COUNTY review process is necessary. Accordingly, the parties agree that if at any time DEVELOPER believe that an impasse has been reached with the COUNTY staff concerning any issue affecting the Property, DEVELOPER shall have the right to immediately appeal to the COUNTY Representative for an expedited decision pursuant to this Paragraph. If the issue on which an impasse has been reached is an issue where a final decision can be reached by COUNTY staff, the COUNTY Representative shall give DEVELOPER a final decision within thirty (30) days after the request for an expedited decision is made. If the issue on which an impasse has been reached is one where a final decision requires action by the COUNTY Commission, the COUNTY Representative shall use his or her best efforts to schedule a COUNTY Commission hearing on the issue as soon as possible but not later than two (2) weeks after the request for an expedited decision is made; provided however, that if the issue is appropriate for review by the COUNTY's Planning and Zoning Commission, the matter shall be submitted to the Planning and Zoning Commission first, and then to the COUNTY Commission. Both parties agree to continue to use reasonable good faith efforts to resolve any impasse pending any such expedited decision.

18. Default. Failure or unreasonable delay by either party to perform any term or provision of this Agreement for a period of thirty (30) days (the "Cure Period") after written notice thereof from the other party shall constitute a default under this Agreement. Said notice shall specify the nature of the alleged default and the manner in which said default may be satisfactorily cured, if possible.

19. Notices and Filings.

19.1 Manner of Serving. All notices, filings, consents, approvals and other communications provided for herein or given in connection herewith shall be validly given, filed, made, delivered or served if in writing and delivered personally or sent by registered or certified United States Mail, postage prepaid, if to:

The COUNTY:
Sandoval County
711 Camino Del Pueblo
P.O. Box 40
Bernalillo, NM 87004
Attn.: Michael R. Springfield Community Development Director

with a copy to:
COUNTY ATTORNEY
711 Camino Del Pueblo
P.O. Box 40
Bernalillo, NM 87004
Attn: David Mathews, Esq.

EXHIBIT A

2010001512 01/22/2010 10:10:20 AM B: 413 P: 1512
RESOLUTION Pg. 1 of 3
Sally G. Padilla, Sandoval County Clerk

Sandoval County, New Mexico
OPEN MEETINGS ACT RESOLUTION NO. 1-21-10.4A

WHEREAS, *the Board of County Commissioners , Sandoval County met in regular session on January 21, 2010, at 6:00 p.m. as required by law; and*

WHEREAS, *upon adoption of this Resolution, Resolution 1-15-09.4A and any amendment thereto are hereby rescinded in their entirety.*

WHEREAS, *Section 10-15-1 (B) of the Open Meetings Act (NMSA 1978, §10-15-1 to -§10-15-4 states that, except as may otherwise be provided in the Constitution or the provisions of the Open Meetings Act, all meetings of a quorum of members of any board, council, commission, administrative adjudicatory body or other policy-making body of any state or local public agency held for the purpose of formulating public policy, discussing public business or for the purpose of taking any action within the authority of or the delegated authority of such body, are declared to be public meetings open to the public at all times; and*

WHEREAS, *any meetings subject to the Open Meetings Act at which the discussion or adoption of any proposed resolution, rule, regulation or formal action occurs shall be held only after reasonable notice to the public; and*

WHEREAS, *§10-15-1 (D) of the Open Meetings Act requires the Board of County Commissioners, Sandoval County to determine annually what constitutes reasonable notice of its public meetings.*

NOW, THEREFORE, BE IT HEREBY RESOLVED *by the Board of County Commissioners, Sandoval County (hereinafter referred to as the "Board"):*

1. *All meetings shall be held at 711 Camino del Pueblo, Bernalillo, New Mexico at 6:00 p.m. or as indicated in the meeting notice.*

2. *Unless otherwise specified, regular meetings of the Board shall be held each month on the first and third Thursday of the month, the agenda will be available at least twenty-four (24) hours prior to the meeting from the Office of the County Manager located at 711 Camino del Pueblo, Bernalillo, New Mexico. Notice of any other regular meetings will be given ten (10) days in advance of the meeting date. The notice shall indicate how a copy o the agenda may be obtained.*

3. *A member of the Board may participate in a meeting by means of a telephone conference when it is otherwise difficult or impossible for the member to attend the meeting in person. Any member participating by conference telephone shall be identified when speaking. The Board shall insure that all members of the Board and of the public are able to hear any member of the Board who speaks during the meeting.*

4. *Special meetings may be called by the Chairman or a majority of the members upon three (3) days notice. The notice shall include an agenda for the meeting or information or how members of the public may obtain a copy of the agenda. The agenda shall be available to the public at least twenty-four (24) hours before any special meeting.*

5. Emergency meetings will be called only under unforeseen circumstances that demand immediate action to protect the health, safety and property of citizens or to protect the public body from substantial financial loss. The Board will avoid emergency meetings whenever possible. Emergency meetings may be called by the Chairman or a majority of the members upon twenty-four (24) hours notice, unless threat of personal injury or property damage requires less notice. The notice for all emergency meetings shall include an agenda for the meeting or information or how the public may obtain a copy of the agenda.

6. For the purpose of regular meetings described in Paragraph 2 of this Resolution, notice requirements are met if notice of the date, time, place and agenda is placed in newspapers of general circulation in the state and posted on the first floor official Courthouse bulletin board located in the Sandoval County Courthouse, 711 Camino del Pueblo, Bernalillo, New Mexico. Copies of the written notice shall also be mailed to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation that have made a written request for notice of public meetings.

7. For the purposes of special meetings and emergency meetings described in paragraph 3 and 4 of this resolution, notice requirements are met if notice of the date, time, place and agenda is provided by telephone to newspapers of general circulation in the state and posted on the first floor official Courthouse bulletin board located in the Sandoval County Courthouse, 711 Camino del Pueblo, Bernalillo, New Mexico.. Telephone notice also shall be given to those broadcast stations licensed by the Federal Communications Commission and newspapers of general circulation that have made a written request for notice of public meetings.

8. In addition to the information specified above, all notices shall include the following language:

If you are an individual with a disability who is in need of a reader, amplifier, qualified sign language interpreter, or any other form of auxiliary aid or service to attend or participate in the hearing or meeting, please contact the County Manager's office at 867-7538 at least one (1) week prior to the meeting, or as soon as possible. Public documents, including the Agenda and minutes, can be provided in various accessible formats. Please contact the County Clerk's office at 867-7572 if a summary or other type of accessible format is needed.

9. The Board may close a meeting to the public only if the subject matter of such discussion or action is excepted from the open meeting requirement under §10-15-1 (H) of the Open Meetings Act.

(a) If any meeting is closed during an open meeting, such closure shall be approved by a majority vote of a quorum of the Board taken during the open meeting. The authority for the closed meeting and the subjects to be discussed shall be stated with reasonable specificity in the motion to close and the vote of each individual member on the motion to close shall be recorded in the minutes. Only those subjects specified in the motion may be discussed in the closed meeting.

(b) If a closed meeting is conducted when the Board is not in an open meeting, the closed meeting shall not be held until public notice, appropriate under the circumstances, stating the specific provision of law authorizing the closed meeting and the subjects to be discussed with reasonable specificity, is given to

the members and to the general public.

(c) Following completion of any closed meeting, the minutes of the open meeting that was closed, or the minutes of the next open meeting if the closed meeting was separately scheduled, shall state whether the matters discussed in the closed meeting were limited only to those specified in the motion or notice for closure.

(d) Except as provided in §10-15-1 (H) of the Open Meetings Act, any action taken as a result of discussions in a closed meeting shall be made by vote of the Board in an open public meeting.

PASSED *by the Board of County Commissioners, Sandoval County this 21st day of January 2010.*

ATTEST:

Sally Padilla, County Clerk

BOARD OF COUNTY COMMISSIONERS
SANDOVAL COUNTY

Orlando J. Lucero Chairman

Darryl F. Madalena Vice Chairman

David Benez Member

Glenn Walters Member

Don E. Leonard Member

APPROVED AS TO FORM:

David Mathews, County Attorney

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

CASE NO. D-1329-CV-2009-2408

SANDOVAL COUNTY, NEW MEXICO, a statutorily created County,

Petitioner,

v.

TESORO PROPERTIES, LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; BUTERA PROPERTIES, LLC, A NEW MEXICO LIMITED LIABILITY COMPANY; CARINOS PROPERTIES LLC, A; RECORP NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, A NEW MEXICO LIMITED PARTNERSHIP; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, A NEW MEXICO LIMITED PARTNERSHIP; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents.

REPLY BY ALL RESPONDENTS TO RESPONSE BY SANDOVAL COUNTY TO RESPONDENTS' MOTION FOR PRELIMIMARY INJUNCTION

The Respondents filed a Motion for Preliminary injunction and a Motion to Amend Counterclaim seeking a preliminary and permanent injunction which would enjoin the County from in any way competing with or working against the objective of the joint venture between Recorp and the County. The motion sets forth a number of facts describing the nature and extent of the joint venture between the parties and sets out the clear objective and plan of the joint venture. The motion further sets out a number of judicial admissions by the County confirming the full extent of the joint venture and its

objectives. However the motion also points out that certain County officials have made statements and taken actions which directly conflict with the judicial representations of the County and indeed appear to be working directly against the interests of the joint venture.

None of these contentions made in Recorp's motion are contradicted by the County in its response. Accordingly, Recorp's motion should be granted as a matter of law.

The only substantive response from the County is that this matter was initiated as an eminent domain proceeding and no counterclaims are permissible. The County recites N.M.S.A. 1978 § 42-2-6 (C) which provides that in eminent domain proceedings after a governmental entry has been made, "all subsequent proceedings shall only affect the amount of compensation allowable". That is true as to the eminent domain portion of any proceedings. It is not true as to counterclaims or other causes of action joined in such proceedings. Accordingly, the only issue that needs to be resolved before granting Recorp's motion is whether counterclaims can be asserted in these proceedings. As shown in the record, Recorp has filed a counterclaim, and the counterclaim has not been dismissed.

The County previously filed a motion to dismiss Recorp's counterclaim, arguing that this Court lacks jurisdiction to entertain counterclaims in actions founded upon special statutory proceedings, such as condemnations. The County relied upon *Jackson v. Hartley*, 90 N.M. 428, 564 P.2nd, 992 (S.Ct 1977) for this proposition. In Respondents'

response, it was pointed out that the County was relying upon authority overruled more than thirty (30) years ago.

The *Jackson* case and its line of authority were specifically overruled since 1979. *See, Ortega Snead Dixon and Hanna v. Gennitti*, 93 N.M. 135, 597, P.2nd, 745 (S. Ct. 1979). In *Gennitti* the defendants asserted that since quiet title actions were special statutory proceedings, counterclaims and cross-claims could not be filed. In support of their argument, the defendants in *Gennitti* cited "*Clark v. Primus*, 62 N.M., 259, 308 P.2nd, 584 (1957) and *Jackson v. Hartley*, 90 N.M. 428, 564 P.2nd, 992, (S. Ct. 1977) (*Id at* N.M. 140), and relied upon Rule 1 of the 1978 Rules of Civil Procedure. The *Gennitti* Court stated that the critical inquiry is "whether the statutory rules for proceedings to quiet title are inconsistent with the applicable rules with respect to assertions of counterclaims or cross-claims in civil actions." *Id at* 93 N.M. 140. The Court stated: "The overriding emphasis is on consolidation and the expeditious resolution (where that is fair) of all the claims between the parties in one proceeding". *Id at* 93 N.M. 140

The Court stated that counterclaims and cross-claims were proper under Rule 13 (Rule 13, NMRA in our case) and concluded: "We expressly overrule the principle established in *Clark* and the cases which have relied on it. We hold that in determining whether a counterclaim or cross-claim may be brought in a quiet title action, or whether a counterclaim or cross-claim to quiet title may brought in any other action, the proper analysis is that provided in Rules 1, 13, 20(b) and 42. (*Id.* at 93 N.M. 140-141)." In our case, Recorp's counterclaim is based upon the clear breach by the County of the Memorandum of Understanding between the parties ("MOU"). The County is claiming

specifically that it is not condemning any contract rights in this action, but only surface land rights. If the County is not condemning contract rights, then it is in breach of the MOU and needs to pay appropriate compensatory damages. Or this Court could exercise its equitable powers and enjoin the County from such action. Rule 1-013, NMRA provides that a compulsory counterclaim is one that "arises out of the transaction or occurrence that is the subject matter of the opposing party's claim . . ." Clearly, Recorp's counterclaim and proposed amendment could be categorized as compulsory. Certainly, it is at least permissible.

Respondents' motion should be granted.

"Electronically Filed"

By: /s/ Ronald J. VanAmberg
VanAmberg, Rogers, Yepa, Abeita
& Gomez, LLP
347 East Palace Avenue
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979
(505) 983-7508 (fax)

By: /s/ Carolyn M. Nichols
Rothstein, Donatelli, Hughes,
Dahlstrom, Schoenburg, & Bienvenu, LLP
500 4th St. NW, Suite 400
Albuquerque NM, 87102
(505) 243-1443
(505) 242-7845 fax

CERTIFICATE OF SERVICE

It is hereby certify that on the 28th day of July, 2010, I filed the foregoing electronically through the wiznet system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

David Mathews, County Attorney
Sandoval County Courthouse
Post Office Box 40
Bernalillo, NM 87004-0040

Peter B. Shoenfeld
Post Office Box 2421
Santa Fe, NM 87504

"Electronically Filed"
/s/ Ronald J. VanAmberg

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

2009 OCT 29 AM 10:20

BY

SANDOVAL COUNTY, NEW MEXICO,
a statutorily created County,

Petitioner,

v. D-1329-CV-2009-2409

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES, LLC, a New Mexico limited liability company; CARINOS PROPERTIES, LLC, a New Mexico limited liability company; RECORP NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III, a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents.

RESPONDENT CARINOS PROPERTIES, LLC'S OBJECTION TO PRELIMINARY ORDER OF ENTRY, OBJECTION TO PROPOSED DEPOSIT, AND MOTION TO DISMISS PETITION FOR CONDEMNATION

COMES NOW Respondent Carinos Properties, LLC (hereinafter "Carinos"), by and through the undersigned counsel, objecting to the entry of the Preliminary Order of Entry, objecting to the proposed deposit by Petitioner, and moving to dismiss the petition for condemnation as follows:

NATURE OF ACTION

Petitioner, Sandoval County, desires to take control over, and ultimately assume ownership of, a large aquifer which lies under the property of Respondent Carinos and the other identified

Respondents. Water is key to the survival and expansion of urban communities in the American Southwest. All who live here understand it is a precious resource, and it becomes increasingly scarce. Petitioner Sandoval County realizes the value of the large aquifer discovered, by Respondents, under the land it now seeks to condemn. It is no accident that the well sites which provide access to that water lie on Respondents' property. Respondents, including Respondent Carinos, conducted the initial exploration and testing which first identified the incredibly valuable resource lying deep under the surface. The aquifer is so rich it bubbles up from the depths as an Artesian flow, warmed by the restless activities of the earth far below. Respondents realized that this water was the key to creating a healthy, sustainable, and environmentally sound community on the land above. Respondents were also more than willing to share this resource with Petitioner Sandoval County, the City of Rio Rancho, and the surrounding communities. Indeed, Respondent Carinos and others entered into a Memorandum of Understanding with Petitioner Sandoval County, an agreement Petitioner Sandoval County now disavows, instead seeking to grab all of the land and water in question for itself. This abuse of power must not be sanctioned.

STATEMENT OF FACTS

1. On October 5, 2006, the 11,673.3 acres of land at issue in this case, owned by Respondents including Respondent Carinos, was approved by Sandoval County as the site of a Master Plan Development District.
2. Development of this land depended upon the availability of water.
3. In the fall of 2006, Respondents discovered the possible existence of an aquifer which would support the planned development.

4. Respondents began the application process for the drilling of deep wells, requiring the use of specialized drilling rigs (as it was impossible to know what might be encountered at the depths they planned to drill).

5. Respondent Carinos and the other Respondents applied to the Office of the State Engineer for a permit to drill exploratory wells, and made related declarations in a "Notice of Intention to Appropriate Non-Potable Ground Water at Greater Depths than 2,500 Feet Pursuant to NMSA 1978 § 72-12-26," *attached as Exhibit A to Respondents' Objection to Preliminary Order of Entry and County's Proposed Deposit.*

6. The exploratory wells were approved for drilling in 2006.

7. The well known as "Well 6" was to be drilled on the parcel of land owned by Respondent Carinos. Respondent Butera owns the parcel of land containing "Well 5."

8. Literally on the eve of drilling, as a rig was on its way from Texas to the project in question, Respondents were negotiating with Petitioner.

9. Petitioner sought, purportedly, to assist Respondents in the procurement and development of the water resource in order to participate in and encourage industrial and other growth, and to secure any water in excess of Respondents' needs for the Petitioner.

10. As development of the water resource was incredibly costly, and as Respondents were willing to share water in excess of the water the planned community would need, Respondents were amenable to entering into an agreement with Petitioner.

11. The Memorandum of Understanding, *attached as Exhibit B to Respondents' Objection to Preliminary Order of Entry and County's Proposed Deposit*, was born of those negotiations.

12. The Memorandum of Understanding addressed the needs of Petitioner and Respondents.

13. Specifically, the Memorandum recognized and provided for the following:

A. Petitioner Sandoval County and Respondent Recorp had an agreement;

B. Respondents, including Recorp, owned 11,673.3 acres of land in the Puerco Basin west of Rio Rancho;

C. That the property had been approved for a Master Planned Development;

D. That Respondents were to obtain a drilling permit for "appropriation and beneficial use" of water under the land;

E. That Respondent Recorp could use up to 18,000 acre feet of water each year, to be applied to beneficial use in connection with the planned development;

F. That the agreement was designed to outline the procedures to be followed by the Petitioner and Respondents in securing and supplying water for the development project.

14. Petitioner and Respondents agreed to establish a single water entity, jointly, to control the 18,000 acre feet of non-potable water, and Respondent Recorp would transfer permits for development to that water entity.

15. Petitioner and Respondents agreed that Respondent Recorp would own 34% of the water entity while the Petitioner would own 66%.

16. They further agreed that Respondent Recorp would be ***guaranteed*** the 18,000 acre feet of water per year for its planned development, and that after the guaranteed 18,000 acre feet of water was developed every year, additional water could then be developed and be sold by the joint water entity, with the profits split by the percentage of ownership agreed upon.

17. In order to fund this project, Petitioner and Respondents agreed to create a Public Improvement District, and Petitioner was to apply for matching funds from federal and state agencies.

18. The entire value of Respondent Recorp's rights to the 18,000 acre feet of water was to be appraised and to be applied as a credit towards Respondent Recorp's 34% ownership interest in the water entity.

19. This agreement between Petitioner and Respondents illustrates clearly Petitioner's awareness that Respondents own the real property, own the wells, and own the rights to drill for and use the water in the aquifer below.

20. Petitioner, however, now seeks to gut the Respondents, by claiming the land is worth practically nothing, ignoring the value of the viable community made possible by the aquifer, and further ignoring the value of access to and use of the aquifer itself.

21. Prior to filing its Petition for Condemnation, Petitioner requested a temporary easement from Respondents, which was granted, to allow the Petitioner to drill for and test the water in the aquifer.

22. Some months later, Petitioner sought to 'extend' the temporary easement.

23. Respondent asserted that it was time to proceed to the creation of the joint water entity and to follow the procedures detailed in the Memorandum of Understanding.

24. Petitioner refused, remained on the property (now as a trespasser) and proceeded to disavow the Memorandum of Understanding and to file its Petition for Condemnation.

25. The affidavit filed by Petitioner in support of the Application for Preliminary Order of Entry is materially false as it describes Petitioner as the owner of the wells and water rights, which is false.

26. Further, as it ignores the existence of the Memorandum of Understanding, the affidavit describes needs which do not, in fact, exist.

27. Petitioner and Respondents had an agreement which specifically allowed for the development of the water resource in question for the benefit of the community.

28. Petitioner Sandoval County, upon information and belief, has engaged in fraudulent procurement of public funds in order to develop the water resource outside the parameters of its agreement with Respondents.

29. Petitioner is not acting for a public purpose.

30. The amount of the deposit proposed by the Petitioner in this case is $237,885.50. That amount purportedly represents compensation for taking only real property for the undefined roadway the Petitioner asserts it needs to construct, along with physical well sites, and that value utterly ignores the true potential use of the property as a site for development, along with ignoring all rights of Respondents to the wells and to the development and use of the water in the aquifer.

CONTINUED STATEMENT OF FACTS AND LEGAL ARGUMENT

31. Petitioner has failed to comply with the requirements of NMSA 1978 § 42-2-5, as well as the requirements of NMSA 1978 §§ 42A-1-4, and 42A-1-5. Petitioner has failed to comply with those statutory requirements by:

A. Failing to describe the property of each defendant separately, with consecutive numbers for identification as required by NMSA 1978 § 42-2-5(A)(4);

B. Failing to state the amount offered as just compensation for each tract affected as required by NMSA 1978 § 42-2-5(A)(11);

C. Failing to include or to attach a map, plat, or plan of the improvement to be constructed and showing the property to be condemned as required by NMSA 1978 § 42-2-5(A)(12);

D. Failing to make reasonable and diligent efforts to acquire the property by negotiation, as the Petitioner has only offered a sum for land alone ignoring the true value of the land, the value of the wells and aquifer, and the existence of the Memorandum of Understanding, as illustrated by *Exhibit A attached to the Respondents' Motion to Dismiss Petition/Complaint for Condemnation*, as required by NMSA 1978 § 42A-1-4;

E. Failing to enter into good faith negotiations and further failing to provide a written notice of intent to file a condemnation action (therefore obviously failing to wait twenty-five days after providing notice to allow Respondent time to obtain an appraisal) as required by NMSA 1978 § 42A-1-5l; and

F. Failing to name as defendants all parties who own or occupy the property or have any interest therein as may be ascertained by a search of the County records, as the records in this case identify a substantial mortgage on a parcel of Respondents' property but Petitioner has failed to name the holder of the mortgage as a defendant, as required by NMSA 1978 § 42-2-5(B).

LEGAL ARGUMENT

Respondent Carinos objects to the preliminary order of entry, and objects to the proposed deposit. Furthermore, Respondent Carinos seeks dismissal of the petition for condemnation, along with attorneys fees and costs. The petition and other pleadings filed by Petitioners are not filed in good faith, and contain egregious misrepresentations of the facts. Contrary to being filed with an eye towards public interest, this condemnation proceeding has been filed as a means to usurp a written agreement with Respondents, an agreement which was developed with an eye towards the interests of the public. By attempting to pull the rug out from under Respondents, Petitioner sets in motion an action which betrays the public trust in government. Petitioner has a fiduciary obligation to uphold that public trust, and to uphold its agreements. Petitioner is abusing process, and such abuse of process should not be sanctioned. Such abuse of process must be rebuked and the harm caused redressed.

The failure of Petitioner to undertake reasonable and diligent efforts to negotiate with Respondents with respect to the property at issue, or to comply with the procedures of NMSA 1978 § 42A-1-5, provides grounds in and of itself for denial of any permanent right of entry and for dismissal of the entire condemnation action. NMSA 1978 § 42A-1-7. None of the statutory exceptions to the requirements to negotiate in good faith or to comply with the procedures at issue apply. There has been no waiver of compliance. This is not a case where one or more of the condemnees are unknown. There is no compelling need on the part of Petitioner to avoid delay caused by negotiation or compliance with process. The Respondents have been afforded no opportunity to seek appropriate appraisals and cannot, therefore, have failed to make the results of

such appraisals available in a timely manner. No exceptions exist which allow Petitioner to avoid its statutory obligations to Respondents.

The amount of a deposit suggested by Petitioner is so astronomically low it is evidence of Petitioner's bad faith and underhanded dealings in this matter. It is black letter law that the value of property to be condemned must be determined by its highest and best uses, not based upon what it is being used for at the time or its lowest possible use. *City of Clovis v. Ware*, 96 N.M. 479, 480, 632 P.2d 356, 357 (1981). Petitioner by its own admission wants the land to get to the water resource, but in the same breath ignores the water resource when valuing the land. Furthermore, Petitioner ignores the fact that it has, itself, approved the land for development. Finally, Petitioner fails to mention that it has entered into a written agreement with Respondent which recognizes the high value of the land in conjunction with development and use of the water in the aquifer below. Respondent is entitled to full and fair compensation for the true value of the real property, at its highest and best use.

In addition to seeking dismissal of the entire condemnation action and refusal of any permanent right of entry, Respondent seeks damages including an award of litigation expenses and attorneys' fees. This case was brought in bad faith. Petitioner has no need for the condemnation action in this matter, therefore Petitioner has no right to take this property. Attorneys' fees are an appropriate part of an award of litigation expenses under these circumstances. NMSA 1978 § 42A-1-25; *Landavazo v. Sanchez*, 111 N.M. 137, 139-41, 802 P.2d 1283, 1285-86 (1990). Petitioner must be sanctioned for engaging in the abuse of process evinced by its filings in this matter.

WHEREFORE, Respondent Carinos seeks:

1. Denial of the Application for Preliminary Order of Entry and that Petitioner be enjoined from entry onto properties of Respondents;

2. That if the Application is Granted, the value of the property be fairly determined at an evidentiary hearing;

3. That if the Application is Granted, the Petitioner be enjoined from any access to wells or to water;

3. Dismissal of the Petition/Complaint for Condemnation;

4. An award of damages, as determined appropriate by the Court, including attorneys' fees and costs; and

5. A hearing set in approximately sixty (60) days, as Respondent Carinos will be joining with the other Respondents in conducting expedited discovery.

ROTHSTEIN, DONATELLI, HUGHES,
DAHLSTROM & SCHOENBURG, & BIENVENU, LLP

Carolyn M. "Cammie" Nichols
500 4th Street NW, Suite 400
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(505) 243-1443

Peter Schoenburg
500 4th Street NW, Suite 400
Albuquerque, New Mexico 87102
(505) 243-1443

CERTIFICATE OF SERVICE

I hereby certify that on the 29th of October, 2009, I served a true and correct copy of the foregoing pleading on the following counsel via U.S. Mail:

David L. Mathews
Sandoval County Courthouse
P.O. Box 1779
Bernalillo, NM 87004
505-867-7500
505-771-7194 (F)

Peter B. Shoenfeld
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Santa Fe, NM 87504
505-982-3566
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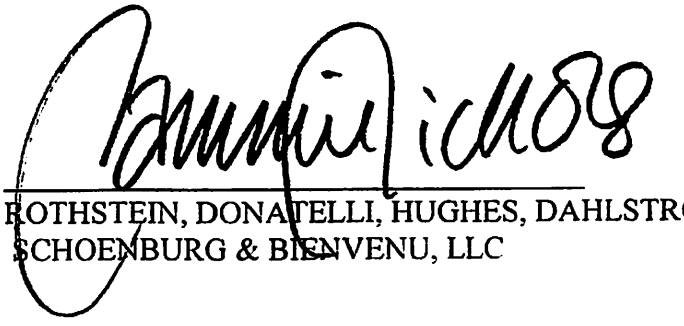

ROTHSTEIN, DONATELLI, HUGHES, DAHLSTROM, SCHOENBURG & BIENVENU, LLC

rec'd 23 March 2010
via U.S.P.S.

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

SANDOVAL COUNTY, NEW MEXICO, a Statutorily created County,

Petitioner,

v.

No. D-1329-CV-2009-02408

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES LLC, a New Mexico limited liability company; CARINOS PROPERTIES LLC, a New Mexico limited liability company; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP; a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III; a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents

SOUTHWEST LENDING, LLC, a New Mexico limited company,

Plaintiff–in-Intervention,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANDOVAL, NEW MEXICO,

Defendant-in-Intervention,

SOUTHWEST LENDING, LLC, a New Mexico limited company,

Third-Party Plaintiff,

v.

RECORP PARTNERS, INC., a foreign corporation, and RECORP, a foreign corporation,

Third-Party Defendants.

MOTION TO INTERVENE
AND
POINTS AND AUTHORITIES IN SUPPORT THEREOF

Southwest Lending LLC ("SWL") moves to intervene and file a complaint for declaratory judgment in the form attached hereto as Exhibit 1 pursuant to Rules 1-019 and 1-024 NMRA. In support of its motion, SWL states as follows:

1. SWL is a New Mexico limited partnership with its principal place of business in Bernalillo County, New Mexico.

2. SWL has extended loans in excess of $5 million to Recorp Partners, Inc. ("Recorp Partners") and associated entities, including many of the named defendants, which are secured by properties located in Sandoval County. The properties that SWL has its security interests in are slated for inclusion in a large-scale development known as "Rio West."

3. The viability of the Rio West development is dependent on whether the developer, Recorp, which is believed to be closely related to Recorp Partners, can secure and supply water. As part of securing and supplying water to the planned development, Recorp, together with Sandoval County, have drilled exploratory wells on the property which Sandoval County is condemning and those wells have demonstrated that there is a water source.

4. On April 19, 2007, Recorp and Sandoval County entered into a Memorandum of Understanding regarding the potable water which may eventually be produced in commercial quantities on the condemned land. According to this Memorandum, Recorp is guaranteed access to 18,000 acre feet of water per year as long as it is available.

5. Sandoval County has since indicated that it believes the Memorandum of Understanding is unenforceable and that Recorp has breached the agreement between the parties.

6. On October 8, 2009, Sandoval County filed a Petition/Complaint for Condemnation seeking to condemn the land on which the exploratory wells are located.

ARGUMENT

7. The mortgages held by SWL cover lands which surround the property being condemned by Sandoval County. When the mortgages were executed, it was anticipated by SWL and the mortgagors that any potable water which might eventually be produced by the wells on the condemned property would be available for use in the Rio West development.

8. By virtue of its mortgages on properties slated for inclusion in the Rio West development, SWL is a third-party beneficiary of the Memorandum of Understanding between Sandoval County and Recorp. As a third-party beneficiary, SWL may ask this Court to determine any question of construction or validity arising under the Memorandum and obtain a declaration of rights, status or other legal relations thereunder. NMSA 1978, § 44-6-4 (1975); *see also Callahan v. N.M. Fed'n of Teachers—TVI*, 2006-NMSC-010, ¶ 20, 139 N.M. 201, 131 P.3d 51 ("A third-party may have an enforceable right against an actual party to a contract if the third-party is a beneficiary of the contract.").

9. Under Rule 1-024(A)(2) NMRA, anyone who makes a timely application shall be permitted to intervene,

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

10. Furthermore, Rule 1-019 NMRA permits the joinder of persons needed for a full and just adjudication. As noted in the proposed complaint-in-intervention attached as Exhibit 1,

SWL seeks to both intervene and name additional parties so that all parties with an interest in the Memorandum of Understanding will be before the Court.

11. While disclaiming any intention to take any "perfected or pending" water or water rights, Sandoval County's condemnation action nonetheless places the County in a position to eventually claim water rights under the Doctrine of Prior Appropriation. *See Walker v. United States*, 2007-NMSC-038, §§ 21-22, 142 N.M. 45, 162 P.3d 882. Sandoval County has further signaled an intent not to abide by the terms and conditions of the Memorandum of Understanding. Such actions threaten the value of SWL's existing security interests, which will be rendered worthless should Recorp fail to secure and supply water for the Rio West development. SWL therefore has an interest in this action that will impaired if SWL is not allowed to intervene herein. Moreover, none of the current parties to this action will adequately represent SWL's interest in protecting the value of its security interests.

12. SWL's instant motion is timely given that discovery is ongoing, trial is not yet scheduled, and granting this Motion will not unduly delay or prejudice the rights of the original parties.

13. Counsel for all parties have been contacted. The attorneys for the respondents and proposed third-party defendants concur in this motion. The County's attorneys do not concur.

Therefore, SWL respectfully requests that this Court enter an order allowing SWL to file a complaint-in-intervention in the form of the proposed complaint attached as Exhibit 1.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.C.

By _____
Randy S. Bartell
Attorneys for Intervenor/Third Party Plaintiff
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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2010, a true and correct copy of the foregoing was mailed by United States mail, postage prepaid, to the following:

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Carolyn M. Nichols
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500 4th St. NW, #400
Albuquerque, NM 87102-2174

_____
Randy S. Bartell

STATE OF NEW MEXICO
COUNTY OF SANDOVAL
THIRTEENTH JUDICIAL DISTRICT COURT

SANDOVAL COUNTY, NEW MEXICO, a
Statutorily created County,

Petitioner,

v.

No. D-1329-CV-2009-02408

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES LLC, a New Mexico limited liability company; CARINOS PROPERTIES LLC, a New Mexico limited liability company; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP; a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III; a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents;

SOUTHWEST LENDING, LLC, a New Mexico limited company,

Plaintiff–in-Intervention,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANDOVAL, NEW MEXICO,

Defendant-in-Intervention,

SOUTHWEST LENDING, LLC, a New Mexico limited company,

Third-Party Plaintiff,

v.

RECORP PARTNERS, INC., a foreign corporation, and RECORP, a foreign corporation,

EXHIBIT 1

Third-Party Defendants.

COMPLAINT IN INTERVENTION AND THIRD-PARTY COMPLAINT FOR DECLARATORY JUDGMENT

For its complaint-in-intervention and third-party complaint, plaintiff-in-intervention and third-party plaintiff Southwest Lending LLC ("SWL") states as follows:

PARTIES

1. SWL is a New Mexico limited company with its principal place of business in Bernalillo County, New Mexico.

2. Plaintiff and defendant-in-intervention Board of County Commissioners for the County of Sandoval ("County") is a county duly constituted pursuant to NMSA 1978, § 4-23-1 (1905) located in the State of New Mexico.

3. Third party defendant Recorp Partners, Inc. ("Recorp Partners") is a Delaware corporation that is authorized to do business in New Mexico.

4. Third party defendant Recorp is, upon information and belief, an Arizona corporation that is authorized to do business in New Mexico.

JURISDICTION & VENUE

5. This Court has jurisdiction of the subject matter and parties and venue is proper.

GENERAL ALLEGATIONS

6. On March 1, 2006, defendant Butera Properties, LLC, granted SWL a mortgage covering 1,645 acres of land in Sandoval County to secure a loan for $2,000,000.

7. Upon information and belief, Recorp Partners is the manager of Butera Properties, LLC.

8. Recorp Partners' President, David P. Maniatis, signed the mortgage agreement between Butera Properties, LLC and SWL.

9. On April 13, 2006, defendant Recorp New Mexico Associates I Limited Partnership granted SWL a mortgage covering 640 acres of land in Sandoval County to secure a loan of $200,000.

10. Upon information and belief, Recorp Partners is the general partner of Recorp New Mexico I Associates Limited Partnership.

11. Recorp Partners' President, David P. Maniatis, signed the mortgage agreement between Recorp New Mexico I Associates Limited Partnership and SWL.

12. On April 19, 2008, SWL advanced an additional $17,500 to Recorp New Mexico Associates I Limited Partnership in connection with the April 13, 2006 mortgage.

13. On May 27, 2008, SWL advanced an additional $140,000 to Recorp New Mexico Associates I Limited Partnership in connection with the April 13, 2006 mortgage.

14. On April 13, 2006, defendant Recorp New Mexico Associates II Limited Partnership granted SWL a mortgage covering 1,069.75 acres of land in Sandoval County to secure a loan of $300,000.

15. Upon information and belief, Recorp Partners is the general partner of Recorp New Mexico Associates II Limited Partnership.

16. Recorp Partners' President, David P. Maniatis, signed the mortgage agreement between Recorp New Mexico Associates II Limited Partnership and SWL.

17. On April 19, 2008, SWL advanced an additional $26,250 to Recorp New Mexico Associates II Limited Partnership in connection with the April 13, 2006 mortgage.

18. On May 27, 2009, SWL advanced an additional $275,000 to Recorp New Mexico Associates Limited Partnership II in connection with the April 13, 2006 mortgage.

19. On October 16, 2001, defendant Recorp-New Mexico Associates Limited Partnership III, granted SWL a mortgage covering two parcels of land in Sandoval County to secure a loan of $250,000.

20. Upon information and belief, Recorp Partners, Inc. is the general partner of Recorp-New Mexico Associates Limited Partnership III.

21. Recorp Partners, Inc.'s President, David P. Maniatis, signed the mortgage agreement between Recorp-New Mexico Associates Limited Partnership III and SWL.

22. On September 16, 2002, SWL advanced an additional $200,000 to Recorp New Mexico Associates Limited Partnership III in connection with the October 16, 2001 mortgage.

23. On April 14, 2004, SWL advanced an additional $150,000 to Recorp New Mexico Associates Limited Partnership III in connection with the October 16, 2001 mortgage.

24. On May 5, 2005, SWL advanced an additional $100,000 to Recorp New Mexico Associates Limited Partnership III in connection with the October 16, 2001 mortgage.

25. On April 13, 2006, SWL advanced an additional $100,000 to Recorp New Mexico Associates Limited Partnership III in connection with the October 16, 2001 mortgage.

26. On April 19, 2008, SWL advanced an additional $65,650 to Recorp New Mexico Associates Limited Partnership III in connection with the October 16, 2001 mortgage.

27. On May 27, 2008, SWL advanced an additional $185,000 to Recorp New Mexico Associates Limited Partnership III in connection with the October 16, 2001 mortgage.

28. On July 22, 2009, SWL advanced an additional $275,404.90 to Recorp New Mexico Associates Limited Partnership III in connection with the October 16, 2001 mortgage.

29. On March 1, 2006, defendant Tesoro Properties granted SWL a mortgage covering 989 acres of land in Sandoval County to secure a loan of $1,000,000.

30. Upon information and belief, Recorp Partners is the manager of Tesoro Properties, LLC.

31. Recorp Partners' President, David P. Maniatis, signed the mortgage agreement between Tesoro Properties, LLC and SWL.

32. On October 19 2006, SWL advanced an additional $500,000 to Tesoro Properties, LLC in connection with the October 16, 2001 mortgage.

33. SWL entered into the above-described mortgage agreements in anticipation of the mortgaged properties being used to create a large-scale planned development commonly known as "Rio West."

34. In connection with plans for Rio West third-party defendant Recorp and the County entered into a Memorandum of Understanding on April 19, 2007 ("MOU"), a copy of which is attached as Exhibit 1 to *Respondents' (Except Carinos) Counterclaim*, filed herein on February 9, 2010 and is incorporated herein by reference.

35. The MOU outlines the parties' understanding as to securing and supplying water to the Rio West development.

36. As part of securing and supplying water to the Rio West development, Recorp and the County have drilled exploratory wells which indicate that there is a water source.

37. Pursuant to the MOU, Recorp is to be guaranteed access to 18,000 acre feet of water per year from that source as long as it is available.

38. On information and belief, Recorp Partners submitted and obtained approval of a Master Planned Development District by the County on or about October 5, 2006 which covers the parcels identified above on which SWL holds mortgages.

39. A company believed to be related to Recorp Partners named Recorp Partners Inc. Development Company LLC and the County entered into a Development Agreement on July 7, 2007 which controls the development of the Master Planned Development District previously approved by the County.

40. The County has since indicated that it believes the MOU is unenforceable and that Recorp has breached the agreement between the parties.

41. On October 8, 2009, the County filed a Petition/Complaint for Condemnation seeking to condemn the land on which the exploratory wells are located.

COUNT I – DECLARATORY JUDGMENT

42. By virtue of its mortgages on properties slated for large-scale development, SWL is an intended third-party beneficiary of the MOU.

43. As a third-party beneficiary, SWL may ask this Court to determine any question of construction or validity arising under the MOU and obtain a declaration of rights, status or other legal relations thereunder.

44. While disclaiming any intention to take any "perfected or pending" water or water rights, the County's condemnation action nonetheless potentially puts the County in a position to claim future water rights which may be perfected in the water to which access has been established from the lands which are the subject of the County's condemnation action pursuant to the Doctrine of Prior Appropriation.

45. The County has further signaled an intent not to abide by the terms and conditions of the MOU.

46. Such actions threaten the value of SWL's existing security interests.

47. An actual controversy exists between SWL, the County, Recorp Partners and Recorp concerning the validity and application of the MOU.

48. This Court has the power to declare rights, status and other legal relations as relating to the MOU.

49. This Court should exercise its jurisdiction to declare the respective rights and obligations of the parties under the MOU.

50. This Court should declare that the MOU is valid, enforceable and secures SWL's interests as described above.

PRAYER FOR RELIEF

WHEREFORE, SWL requests that this Court enter its order:

1. Declaring that the MOU is valid and enforceable;

2. Awarding SWL its costs; and

3. Granting such additional relief as the Court deems just and proper.

Respectfully submitted,

MONTGOMERY & ANDREWS, P.A.

By_____
Randy S. Bartell
Attorneys for Plaintiff-in-Intervention
and Third-Party Plaintiff
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THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

SANDOVAL COUNTY, NEW MEXICO, a
Statutorily created County,

Petitioner,

v. No. D-1329-CV-2009-02408

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES LLC, a New Mexico limited liability company; CARINOS PROPERTIES LLC, a New Mexico limited liability company; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP; a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III; a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents,

SOUTHWEST LENDING, LLC, a New Mexico limited company,

Plaintiff-in-Intervention,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANDOVAL, NEW MEXICO,

Defendant-in-Intervention,

SOUTHWEST LENDING, LLC, a New Mexico limited company,

Third-Party Plaintiff,

v.

RECORP PARTNERS, INC., a foreign corporation, and RECORP, a foreign corporation,

Third-Party Defendants.

REQUEST FOR HEARING

1. Assigned judge: The Honorable George P. Eichwald

2. Type of case: Condemnation action

3. X Jury Non-Jury ____

4. Dates of hearings presently set: April 12, 2010

5. Matter to be heard: Motion to Intervene and Points and Authorities in Support Thereof

6. Estimated time required: Thirty (30) minutes

7. Names, addresses and telephone numbers of all counsel or parties pro se entitled to notice:

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(505) 988-8979

I hereby certify that I have caused a copy of the foregoing to be mailed to each of the opposing parties listed above on March 22, 2010.

SUBMITTED BY:

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THIRTEENTH JUDICIAL DISTRICT COURT
COUNTY OF SANDOVAL
STATE OF NEW MEXICO

SANDOVAL COUNTY, NEW MEXICO, a
Statutorily created County,

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No. D-1329-CV-2009-02408

TESORO PROPERTIES, LLC, a New Mexico limited liability company; BUTERA PROPERTIES LLC, a New Mexico limited liability company; CARINOS PROPERTIES LLC, a New Mexico limited liability company; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP; a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP I, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP II, a New Mexico limited partnership; RECORP-NEW MEXICO ASSOCIATES LIMITED PARTNERSHIP III; a New Mexico limited partnership; and ALL UNKNOWN OWNERS OR CLAIMANTS OF THE PROPERTY INVOLVED,

Respondents,

SOUTHWEST LENDING, LLC, a New Mexico limited company,

Plaintiff-in-Intervention,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR THE COUNTY OF SANDOVAL, NEW MEXICO,

Defendant-in-Intervention,

SOUTHWEST LENDING, LLC, a New Mexico limited company,

Third-Party Plaintiff,

v.

RECORP PARTNERS, INC., a foreign corporation, and RECORP, a foreign corporation,

Third-Party Defendants.

NOTICE OF HEARING

PLEASE TAKE NOTICE that the above-entitled cause is scheduled for hearing before the Honorable Geroge P. Eichwald, District Judge, for the date, time and place set forth below:

DATE: _____

TIME: _____

PLACE: Thirteenth Judicial District Courthouse

MATTER TO BE HEARD: Motion to Intervene and Points and Authorities in Support Thereof

TIME ALLOCATED: _____

_____
Trial Court Secretary

Parties entitled to notice:

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mean by that?
A. The Board of County Commissioners in terms of the record that I've looked at in terms of the project have been -- have indicated that one of the primary issues for investing taxpayer money on this project is to create jobs on the west side of Sandoval County. That that is their primary interest.
The secondary interest is to of course with jobs you need housing, then to provide that. But if one of the things that we could accomplish with this project is to attract a large employer, then serving that large employer's water needs would -- would be primary overall in terms of meeting the intent of the Board of County Commissioners.
Q. At the time Rio West had a master plan, the Rio West master plan for residential development, right?
A. Yes.
Q. Was that also part of the commission's vision for that area?
A. As I said, yes. The, you know, with attracting industry you also need housing so yes, it's part of it.
Q. And then the rest of the information attributed to you is in the next two paragraphs, I guess. Is there anything about those paragraphs that

inaccurately represents your opinion at the time?
A. The two paragraphs that you're referring to are, I'll read them. "Industrial and commercial development would help lessen commuter traffic from Sandoval County communities into Albuquerque Vigil said. He's also excited about the possibility for agricultural jobs that a renewable energy source being considered would provide to the pueblos and other rural parts of Sandoval County." Paragraph. "Vigil expects Universal and its subcontractor" -- too fast? Sorry. "CDM to submit a report on their test findings in about two weeks. Based on the report, county officials hope to build a desalinization plant within three years. The initial plan is to produce 5 million gallons of water daily expanding up to 30 million -- 30 million gallons daily." Yes.
Q. And so you had at that point -- you were expecting to get a report in about two weeks. Had you gotten any kind of initial report at that point in terms of the water resource?
A. I had talked with the consultant orally but no official written report was received until I think the first part of December of last year.
Q. And how important to the planned development that you're discussing here is the water?

MR. MATHEWS: I didn't hear the first part of that, Ms. Nichols. How what?
Q. (BY MS. NICHOLS) How important to the planned development that's being discussed here is the water itself?
MR. MATHEWS: How important is the water to the development?
MS. NICHOLS: Uh-huh.
MR. MATHEWS: Okay.
A. The County Commission several years ago prior to my becoming County Manager established that any development had to prove up a hundred year water supply. So it is an important issue I think in terms of the development that the water be made available because it would then afford the developer a source of water to meet that obligation.
Q. (BY MS. NICHOLS) So without that water essentially the development being discussed would be impossible.
A. I can't answer that. I'm not a hydrologist, I do not know what the water conditions are in that area. There may be some other opportunities for water but I think it is an important element.
Q. Have you since obtained the report from CDM which was discussed in the November article?

A. Yes, we have.
Q. And in your own words, what did that report say about the water resource at issue?
A. Again, this is not a -- what I understand the report to say rather than what, you know, I may misquote the report. My understanding is that the report has informed staff and the board will take into consideration the report.
But that there is -- there are methods for treating the water to make it potable in a cost beneficial way. That the water has a high level of total dissolved solids with a lot of other byproducts that are part of the project that may have positive attributes to the project in terms of resources to sell minerals but also have cost impact.
But ultimately I think the bottom line is that the staff -- that the engineers' reports, consultant's report is favorable to proceeding to the next phase of design and development of the desalinization project.
Q. Meaning it looks like that would be a profitable project.
A. Meaning that it is feasible. And profitable is dependant on a number of factors. By the way, let me clarify. The County is not in the profit-making

business. We are not -- the -- these -- the plant itself as proposed would be established as an enterprise zone -- as an enterprise program. Excuse me.

Therefore, that program would stand on its own based on the revenues for operation and maintenance sustaining the project. So but there is no profit per se in the public sector.

Q. If the revenues to sustain the project are greater than the expenses of sustaining the project, what then happens with those additional revenues?

A. In -- in an enterprise project and the way the state regulates some of those is that in order to stay as a -- remain as an enterprise project it has to have a reserve of funds available to sustain the operation, it needs to meet the three-month rule that it has to have sufficient revenues to carry over for a three-month operating costs.

It also has to have its maintenance and operation budget so that replacement of equipment, expansion, all those would be taken from within whatever reserves are within the project.

The -- also the other factor and as you know from just being a citizen in our community that rates are dependent on what the cost of operation are. So if you can reduce the rate or maintain a rate that is

competitive with other public sector or private sector areas then, you know, you adjust your rates to meet the economic conditions at the time and what your operations are.

Operating and maintenance costs will be for the project. So the -- any revenues over and above expenses would be allocated for project expansion, debt service, whatever is part of that budget.

Q. Did you invite anybody from Recorp to the media conference or visit to the site?

A. Well --

Q. Why not?

A. I didn't say no.

Q. I'm sorry.

A. I said I don't recall. I mean, I didn't do the inviting. I think that was done primarily through public works department. But Recorp has access to be on the site at any time that they want to be.

Q. And they were still involved jointly with developing the water resource with you at the time, right?

A. Again, you're using the word "jointly." They are informed and know what action the County is taking with regard to the development of the project.

Q. When you thought about the project did you

think about the project as being a project that was going to be shared by Recorp with the County?

A. Using the word "shared." I'm unclear as to what you mean by shared.

Q. Did you see them as part owners or part participants in the project itself?

A. Again, that goes to my earlier explanation that we have an agreement with responsibilities from both parties. And I think that explains where the County's position is, that they -- that we have entered into that agreement and feel that that agreement is what conducts the behavior of both parties.

MR. MATHEWS: Ms. Nichols, are you using the word "project" in the broad sense of the desalinization project as -- as a whole and not in a more limited sense regarding wells? Are you looking at the whole project in total?

MS. NICHOLS: Yes. In that context.

MR. MATHEWS: Okay.

MS. NICHOLS: Which I think is what Mr. Vigil was responding to.

Q. (BY MS. NICHOLS) What did CDM stand for, just for the record?

A. I don't remember.

Q. And when -- who was that report provided to,

the CDM testing report?

A. The primary consultant if you're referring to the report that was in the newspaper article was -- is, the primary consultant is Universal Asset Management. CDM is one of their subcontractors, I guess. But the contract for the pilot project testing is with Universal Asset Management.

Q. And you have seen that report, right?

A. I have seen -- I have seen the three-inch binder, I have not read the three-inch binder. I have reviewed the executive summary but I have not looked at the details.

Q. Has that report been provided to Recorp?

A. The report has not been provided to Recorp. It has been -- it has not been provided to the Board of County Commissioners. It is currently in review, editing, questions being asked by staff for clarification.

So the report is I guess in its final, final draft but has not been taken to the Board of County Commissioners for their review and acceptance. And until that point it is not being shared with anyone else.

MR. MATHEWS: The County does understand its continuing duty under the rules of discovery to disclose documents.