File Number: _____

NEW MEXICO OFFICE OF THE STATE ENGINEER
APPLICATION AND SIXTH AMENDED APPLICATION FOR PERMIT TO APPROPRIATE THE PUBLIC SURFACE WATERS OF THE STATE OF NEW MEXICO

1. APPLICANT

Name: Lion's Gate Water, a Canadian Business Trust, its successors and assigns — Work Phone: 505-843-7643
Contact: Dr. William M. Turner, Trustee — Home Phone: 505-843-7305
Address: 610 Gold Avenue, Southwest – Suite 111
City: Albuquerque — State: NM Zip: 87102

2. QUANTITY TO BE APPROPRIATED

Diversion Amount: :All of the diversion necessary to protect from reservoir evaporation 100 percent of the consumptive evaporative loss from Cochiti, Elephant Butte and Caballo Reservoirs (a re-regulating reservoir) which will include the underlying reservoir storage and inflow that gives rise to the lake evaporation surface area less the amount of water that must be by-passed to meet downstream in-stream flow uses and delivery requirements to downstream ground-water storage facilities or the total flow of the Rio Grande less instream flow requirements depletions caused by existing water rights owners.

Consumptive Use: Best available estimates for unappropriated (non-beneficially used) consumptive evaporative losses are:

Cochiti Reservoir: Up to 18,000 acre feet per annum based on maximum reservoir-full conditions during period 1985 through 1987.

Elephant Butte: Up to a maximum of 292,000 acre-feet per annum or all of the consumptive use evaporated from the surface of Elephant Butte Reservoir

Caballo: 62,982 acre feet per annum based on surface area of 10,859 acres and a net evaporation of 5.8 ft/yr[1] Subsequent information indicates net evaporation may be up to 9 ft/yr for an evaporation of 97,731 acre feet per annum.

Total consumptive use applied for: 372,982 acre feet per annum more or less.

Storage Amount: In addition to perennial and torrential flow of the Rio Grande, the volume of water in Elephant Butte Reservoir now occupied by 600,000 plus acre feet is applied for based on Elephant Butte storage volume occupied by sediment since construction of the reservoir.

3. PERIOD OF ANNUAL USE January 1 **TO** December 31**.**

4. POINT(S) OF DIVERSION (A, B, C, or D required, E or F if known)

A. ____1/4 ____1/4 ____1/4 Section:____ Township:____ Range:____ N.M.P.M. Bernalillo County.

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

[1] Testimony on behalf of the Jicarilla Apache v. the United States *et al*. Tribe in District Court by Dr. William M. Turner based on his report entitled: Evaluation of the Albuquerque Plan to Store its San Juan-Chama Water in Elephant Butte Reservoir.

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C. One or more points of diversion subject to the specific approval of the State Engineer and the Rio Grande Compact Commission as applicable in the exercise of his and their continuing supervision and administration of the waters of New Mexico within the main channel of the Rio Grande by means of bladder dams or by Ranney wells or other wells within 12 miles of a geographic line commonly defined in layman's terms by the centerline of the Rio Grande from Fort Quitman, Texas to the upper headwaters of the Rio Grande in southern Colorado and its tributaries and if within the reach of the Middle Rio Grande between Otowi Gage south of Espanola, New Mexico at Latitude 35d 52m 29s, Longitude 106d 08m 30s (NAD27) at the intersection of NM Route 4/502 and the Rio Grande on the White Rock 7.5 Minute U.S. Geological Survey Topographic Map sheet and the gage on the Rio Grande at San Marcial, New Mexico at Latitude 33d 40m 50s, Longitude 106d 59m 30s (NAD27) on the San Marcial 7.5 Minute U.S. Geological Survey Topographic Map and the Elephant Butte Dam Site approximately situated at Latitude 33d 09m 19s, Longitude 107d 11m 12s which reach is more or less defined as follows from the first identified point to the last identified geographic point described and in layman's terms as required by N.M. Stat. Ann. § 14-11-10.1

	Latitude	Longitude	Location
1.	35d 52m 29s N	106d 08m 30s W	Otowi Gaging Station below Espanola
2.	35d 50m 09s N	106d 09m 45s W	Buckman at Santa Fe
3.	35d 37m 03s N	106d 19m 01s W	Cochiti Dam
4.	35d 19m 21s N	106d 33m 26s W	NM Route 44 Bridge over Rio Grande at Corrales
5.	35d 11m 50s N	106d 38m 28s W	Alameda Bridge over Rio Grande at Albuquerque
6.	34d 01m 38s N	106d 40m 21s W	Rio Bravo Bridge over Rio Grande at Albuquerque
7.	34d 48m 16s N	106d 43m 03s W	NM Route 49 Bridge over Rio Grande at Los Lunas
8.	34d 39m 09s N	106d 44m 13s W	NM Route 6 Bridge over Rio Grande at Belen
9.	34d 25m 04s N	106d 47m 56s W	US 60 Bridge over Rio Grande at Bernardo
10.	34d 15m 13s N	106d 53m 45s W	San Acacia Gaging Station
11.	33d 55m 07s N	106d 51m 21s W	US Route 380 Bridge over Rio Grande at San Antonio
12.	33d 40m 50s N	106d 59m 30s W	San Marcial Gaging Station
13.	33d 09m 19s N	107d 11m 12s W	Elephant Butte Dam

and which point(s) of diversion may coincide with the above designated points but may differ and which will be based on land availability and hydrologic and engineering studies and for which specific permits under the general permit sought in this Application will be sought or points for points of diversion whose locations are as yet undeterminable bearing in mind the desire of the legislature for active conjunctive water management and bearing in mind the hydraulic continuity that exists between the ground-water and surface-water systems in the Rio Grande rift valley. The diversion points may be situated within Taos, Rio Arriba, Santa Fe, Sandoval, Bernalillo, Valencia, Socorro, Sierra, and Dona Anna Counties, New Mexico unless otherwise restricted by law. Or, the water applied for may be used to offset effects of increasing depletion within the Rio Grande caused by ground-water diversions of lessees, contractees, or purchasers of the water from Applicant upon specific applications for such purposes in which case, diversions may not occur but the water applied for here or any portion thereof contracted for may be allowed to run in the river to offset depletions caused by ground-water diversion or physical diversion by contractees/lessees which effects will be determined by the State Engineer.

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

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

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

G. Other: The points of diversion will be determined by land availability and engineering studies where surface water may be diverted at specific points for direct use or the surface waters may be appropriated by the diversion of ground water from the ground-water-flow system of the Rio Grande Valley alluvial aquifer that is hydraulically connected to the surface-water-flow system of the Rio Grande which hydraulic connection has been well studied and modeled by both the U.S. Geological Survey and the Office of the New Mexico State Engineer as the Administrative Groundwater Model for the Middle Rio Grande Basin[2] or other studies and models as may be adopted by the State Engineer such that the amount of depletion or accretion caused over time by any wells at their future points of location can be easily determined. Any required deliveries of water to the Rio Grande or any existing diversion works will be made by augmenting the natural flow of the river with water pumped back into the Rio Grande upstream of the diversion works or water pumped from ground-water storage directly to the point of diversion. This application is consistent with the Water 2025 Plan announced by the Bush Administration.

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

I. On land owned by (required): Some land owners include but are not limited to: Westland Corporation, a New Mexico Corporation, successor to the Atrisco Land Grant; land s within the boundaries of the former Tome, Atrisco, Sevilleta, Armendaris, Belen, Nicholas Duran de Chavez Land Grants, lands owned by the State of New Mexico and the U.S. Government, land within the boundaries of the areas served by the Santa Fe, Rio Rancho, Bernalillo, Albuquerque, Los Lunas, Belen, and Socorro municipal water systems as well as land served by the California Water Company east of Belen, New Mexico; land owned by Jack Huning west of and in the vicinity of Los Lunas; lands West of the Rio Grande owned by RECORP, Inc, lands presently served by New Mexico Utilities, Inc., and National Utilities, Inc., lands within the Rio Grande Conservancy District (MRGCD), lands of the New Mexico Pueblos within the Rio Grande surface water catchment area, and other land belonging to owners both public and private that are to numerous to identify, the ownership of which is a matter of public record with the assessors offices of Taos, Rio Arriba, Santa Fe, Sandoval, Bernalillo, Valencia, Socorro, Sierra Counties, New Mexico as well as the live channel of the Rio Grande and the riparian bosque all within the geographic boundaries of the Rio Grande Surface Water Basin as defined and published by the New Mexico State Engineer which are a matter of public record at 19.27.49 N.M.A.C.(recomp. Dec. 31, 2001) and are or should be displayed on the Internet website of the State Engineer at (http://www.seo.state.nm.us/water-info/misc-maps/SurfaceBasins.html)

J. Source of surface water supply:
a. Name of ditch, acequia, or spring: _____

[2] State Engineer Technical Division Hydrology Report TDH-99-3

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b. Stream or water course: Rio Grande and its tributaries within geographic limits of the Rio Grande surface water catchment basin within the State of New Mexico upstream of the San Marcial gaging station.
c. Tributary of: _____

5. PURPOSE OF USE
Domestic: X Livestock: X Irrigation: X Municipal: X Industrial: X Commercial: X Other: Storage and Environmental and Endangered Species and Fish and Wildlife: X
Specific use: All of the above

6. PLACE OF USE
Within geographic boundaries of the surface water catchment of the Rio Grande Drainage basin that contributes water to the reaches of the Rio Grande between Fort Quitman, Texas and the headwaters of the Rio Grande and which region is comprehended by the Rio Grande Compact and especially between the Otowi gaging station downstream on the Rio Grande near the intersection of the N.M. Route 4/502 and the Rio Grande more exactly situated at Latitude 35d 52m 29s, Longitude 106d 08m 30s North American Datum 1927and San Marcial, New Mexico situated at Latitude 33d 40m 50s, Longitude 106d 59m 30s North American Datum 1927 the legal description of the boundaries of which are, for the purpose of this Application, the corresponding boundaries of Rio Grande Underground Water Basin as published by the New Mexico State Engineer between the Otowi Gage south of Espanola, New Mexico and San Marcial, New Mexico which boundaries are a matter of public record within the published State Engineer Rules and Regulations Governing the Drilling of Wells and Appropriation and Use of Ground Water in New Mexico, 1995 Edition, Article 7-29, and as published within Title 19, Chapter 27, Part 49 of the New Mexico Administrative Code (19.27.49 N.M.A.C., recomp. Dec. 31, 2001) (http://www.nmcpr.state.nm.us/nmac/cgi-bin/hse/homepagesearchengine.exe?url=http://www.nmcpr.state.nm.us/nmac/parts/title19/19.027.0049.htm;geturl;terms=19.27.49) and as depicted graphically in Figure 6.1 of the Annual Report of the State Engineer for 2001-2002 and which is available on the Internet at (http://www.seo.state.nm.us/publications/01-02-annual-report/toc.html) and if permitted by law, from Fort Quitman, Texas to upstream of the Otowi gaging station within the Rio Grande surface-water catchment area in Rio Arriba and Taos Counties and if permitted by law within the State of Colorado upstream of the Lobato Gage within the Rio Grande Basin and if permitted by law, within the Lower Rio Grande Basin as defined by the Rio Grande Compact. Water may be used in-stream to offset depletions caused by surface-water diversions or depletions caused by increasing effects of ground-water withdrawal on the Rio Grande.

Water will only be contracted by Applicant to entities making beneficial uses that utilize the best available water use and water management practices for the uses intended. Agricultural best management practices may include nocturnal drip feed irrigation, non-spray application, greenhouses, hydroponic facilities, and tree envelopes. Municipal contractees/lessees must have water-conservation plans in place that at least meet the water conservation standards in Water Conservation and Quantification of Water Demands in Subdivisions.[3] and such other water

[3] State Engineer Technical Report 48, 1996, by Brian Wilson. Last Modified August 22, 2001.

conservation plans as are being developed now under Anne Watkins of the State Engineer's Office.

Municipalities should implement water re-use plans. Golf courses, if absolutely necessary, must use treated wastewater. From the point of view of water for a environmental restoration and a sustainable environment including restoration of the bottom structure of the river bed, Lessees / Contractees will be required to contract and pay for "Environmental Water" as a condition of any contracts for lease of water applied for hereunder. "Environmental Water" is that water, in addition to natural surface-water flow and other beneficial uses that deplete the flow of the Rio Grande, that is necessary for the restoration of the Rio Grande environment and sustenance of endangered species and the riverine environment, to be determined by federal and state government agencies in cooperation and collaboration with other public and private stakeholders in a manner that protects private property rights and based on the best available scientific information, as a proportion of the total water supply available. It should hopefully be equivalent to the minimum flows that were specified in the June 29, 2001 Biological Opinion of the Rio Grande[4] which may amount to 10,000 to 12,000 acre feet per year.[5] Carry over storage from year to year may be used to offset the effect of drought on the riverine environment.

In the alternative, the unappropriated water subject of this Application may be used within the entire surface- water catchment of the Rio Grande from its headwaters in Colorado to Fort Quitman, Texas and within the entire transboundary region of Texas, Republic of Mexico and New Mexico as an economic trade good and an article of international and interstate commerce[6] and as the doctrines of equitable apportionment and prior appropriation may apply and as the need arises and as the water is contracted for beneficial uses and as the Rio Grande Compact as may be supplemented and amended allows and as sound basin-wide principles of active water management apply for the most efficient and efficacious administration and beneficial use of the water require.

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

Who is the owner of the land? Land is owned by persons of public and private law too numerous to specifically identify and list whose names and property descriptions are to be found in the public records of the assessors offices of Dona Anna, Sierra, Socorro, Valencia, Bernalillo, Sandoval, and Santa Fe Counties, and Rio Arriba and Taos Counties and other counties as

[4] U.S. Fish and Wildlife Service, 2001

[5] Letti Belin, 47th New Mexico Water Conference, Ruidoso, New Mexico, 2002

[6] Sporhase *et al*. v. Nebraska *ex rel*. Douglas, 458 U.S. 941, 102 S. Ct. 3456, 73 L. Ed. 2d 1254, 50 U.S.L.W. 5115

beneficial need arises and as may be approved by application to the Office of the New Mexico and / or Colorado State Engineers, if necessary, or as may be applied for the multiple uses stated herein within the service area set forth herein, an actual possessory interest in the land or place of use not being a requirement for approval and as is common practice for beneficial users in areas served by existing private and publicly owned water systems such as the Entranosa Water Cooperative, the City of Albuquerque, the Horton Family Interests, Moongate Water Company and a constellation of others such being the rule rather than the exception and government installations, for example.

7. DIVERSION DAM (if applicable)
The diversion dam is constructed of _____; Crest length _____ feet; Crest width _____ feet; Height above stream bed _____ feet; Depth below stream bed _____ feet; Side slopes of _____ horizontal to 1 (one) vertical on upstream face And _____ horizontal to 1 (one) vertical on downstream face; And contains about _____ cubic yards of material.

8. HYDRAULIC PROPERTIES OF MAIN CANAL OR PIPELINE (if applicable)
Name of ditch _____ ; Bottom width _____ feet;
Depth of water at full operating capacity _____ feet; Side slopes _____ horizontal to 1 (one) vertical; Diameter (pipe line or circular flume) _____ feet; Type of pipe line _____;
Slope _____ feet per 1000 feet; Capacity _____ cubic feet per second; Length of canal or pipeline _____ feet.

9. HYDRAULIC PROPERTIES - STORAGE DAM (if applicable)
Maximum storage capacity _____acre feet; Maximum height above foundation _____ feet; length of crest _____ feet; Maximum width at base _____ feet; Crest width _____ feet; Slope of upstream face _____ horizontal to 1 (one) vertical; Slope of downstream face _____ horizontal to 1 (one) vertical; Elevation of crest of dam _____ feet;
Elevation of spillway crest _____ feet; Elevation of flow line of outlet conduit _____ feet;
Freeboard (above high water line at maximum spill) _____ feet; Width of spillway _____ feet;
Discharge capacity of spillway _____ cubic feet per second; Location of spillway: _____;
Cross-sectional area at maximum flow: _____ square feet;

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Size and character of outlet conduit _____
_____;

Type of dam, construction material, etc. All storage of water will be in multiple ground-water storage and retrieval facilities except for the temporary storage of water in lakes and man-made reservoirs for the purpose of sediment removal and clarification or the storage of water in upper basin reservoirs where evaporation is significantly less such that the operation of the total system will minimize water loss.

Elevation or (feet) Area of Water Storage Capacity Remarks depth above outlet Surface, (Acres) (Acre Feet) _____

10. ADDITIONAL STATEMENTS OR EXPLANATIONS:
Lion's Gate Water is in the business of the commercialization and commoditization of water as a trade good effectuated by acquiring unappropriated water and water rights by operation of law for the right to divert, impound, capture, store, conserve, produce, market, sell, lease, and deliver the unappropriated water applied for beneficial uses either itself or through public private partnerships including but not limited to municipal, industrial, agricultural, domestic, fish and wildlife, construction, power, mining, recreational, and environmental uses and for the protection of endangered species and riparian habitat.

This Application comprehends and supercedes all prior Applications and amendments and is made in good faith for *bona fide* commercial and environmental and in-stream flow purposes pursuant to the Constitution of the State of New Mexico N.M. Const. Art. XVI which reads: "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right. N.M. Stat. Ann. §72-1-1 states: "All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use." N.M. Stat. Ann. § 72-12-1 provides: "The water of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries, are declared to be public waters and belong to the public and to be subject to appropriation for beneficial use." In Rio Grande Silvery Minnow, *et al.* v. John W. Keyes *et al*. (Decision 10th Cir., June 12, 2003) at 44, the court cited with approbation Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981) wherein the court said: "[I]t generally can be said that state law governs the distribution of water from federal projects unless Congress expresses a different approach." *Id.* at 1133. In New Mexico, an arid state, "[w]ater conservation and preservation [are] of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress but for survival." *Id.* (citation omitted.). Thus, absent a specific congressional authorization, "storage of [project] water is to be only for beneficial consumptive use." *Id.* at 1139. Evaporation of 93% of the stored [SJCP] water, then, was not a beneficial use sanctioned by the SJCP Act. While storage of water behind Elephant Butte Dam was authorized by Congress the rational expressed by the both the Jicarilla and the Rio Grande Silvery Minnow Courts also stands for the proposition that unconscionable evaporative loss from Elephant Butte Reservoir cannot be a beneficial use because to satisfy irrigation requirements from San Marcial to Fort Quitman, Texas, the water is subject to

evaporation twice: first from the reservoir where it resides prior to irrigation use and second when the remaining water is applied to irrigated fields. Consequently, water needed for all beneficial uses to ensure "progress and survival" within not only the Middle and Upper Rio Grande but also the Lower Rio Grande at least to Fort Quitman, Texas including environmental uses, has been squandered by Congress, the U.S. Bureau of Reclamation, and the State of New Mexico acting through the Territorial Engineer and the State Engineer.

This Application seeks a permit to divert, capture, salvage, and commercialize for beneficial uses the water lost by evaporation from Elephant Butte Reservoir as determined by a report entitled Middle Rio Grande Water Supply Study prepared by S.S. Papadopoulos & Associates (August 4, 2000) for the New Mexico Interstate Stream Commission which indicates a maximum of about 250,000 acre feet per annum, when the reservoir is full, and an average of about 145,000 acre feet annum and Water Use by Categories in New Mexico Counties and River Basins, and Irrigated Acreage in 1995[7] indicates 292,561 acre-feet of evaporation in Sierra County, most of which is from Elephant Butte Reservoir (Brian Wilson, personal communication, July 7, 2003). Papers presented at several State Water Conferences indicate Elephant Butte Evaporation is 180,000 acre feet per year. [8,9] Total New Mexico evaporation is placed at 521,500 acre feet per year of which half (~260,750 af/yr) comes from Elephant Butte Reservoir which is more than the total 198,400 acre feet per year for all of New Mexico.[10]

The water budget for the Rio Grande is also well documented from the current version of the Upper Rio Grande Water Operations Model (URGWOM) prepared under a Cooperative Agreement among the U.S. Army Corps of Engineers, U.S. Geological Survey, U.S. Bureau of Reclamation, U.S. Fish and Wildlife Service, U.S. Bureau of Indian Affairs, and the International Boundary and Water Commission, in which effort, the New Mexico State Engineer has an advisory role, and from the Middle Rio Grande Interactive Dynamic Systems Model developed by Sandia National Laboratories (Tidwell, *et al*., 2002)

The storage of water as it is the proximate cause of evaporative water losses from Elephant Butte Reservoir is not a beneficial use (*See* State of New Mexico through the Office of the State Engineer v. Elephant Butte Irrigation District, *et al*. Cause CV 96-888 ¶ 13) nor is the loss of water evaporated from the surfaces of Cochiti and Caballo Reservoirs. The evaporated water has never been placed to beneficial use in New Mexico, Texas, Colorado, and the Federal Republic of Mexico or anywhere else. This evaporative loss is an egregious and unconscionable waste of our water, a precious natural resource, which must be available for beneficial and environmental uses to ensure progress, the quality of life, and as a sustenance to mankind. The loss of this water has contributed to the long standing myth that, in the words of the State Engineer, "All the waters of the Rio Grande River have been [fully] appropriated." State v. Meyers *et al*., 64 N.M. 186, 190 ¶ 13 (1958) The evaporative loss is not a beneficial use and hence the Rio Grande is far from appropriated or even overappropriated depending on one's choice of terms.

The estimated water shortage of 65,000 acre feet for the Middle Rio Grande alone[11], can be satisfied with one half to one fifth of the evaporated water leaving abundant supplies for environmental uses including environmental restoration of the Rio Grande and other future beneficial uses. Frank Ward has estimated

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[7] New Mexico State Engineer Office, Technical Report 49) (http://www.ose.state.nm.us/publications/wrri/wateruse/county95/sierra.html)
[8] Norm Gaum, The Rio Grande Compact: It's the Law, Proceedings of the 44th Annual New Mexico Water Conference, 1999.
[9] Frank Ward, Proceedings of the 47th Annual New Mexico Water Conference, 2002
[10] Bob Grant and Sue Wilson-Befort, Proceedings of the 47th Annual New Mexico Water Conference, 2002
[11] Sherry Tippett, Proceedings of the 47th Annual New Mexico Water Conference, Ruidoso, New Mexico, 2002.

the marginal value of the water lost to evaporation from Elephant Butte at $60 per acre foot.[12] Under conditions of maximum evaporation, this is a loss to New Mexico's economy from all evaporative losses applied for herein for agricultural uses primarily is at least $22.4 million annually.

The Acts of Congress, beginning with the Reclamation Act of June 17, 1902[13] and decisions of the Secretary of Interior or his agents and representatives thereafter, have led to evaporative loss and unsustainable environmental damage and have endangered pelagic and benthic species of flora and fauna of the river ecosystem and its riparian habitat and extinction and extirpation of species. The extinction, extirpation and endangerment of species would not have occurred but for the construction of Cochiti, Elephant Butte, and Caballo Dams and which losses are contrary to the Endangered Species Act. The impoundment of the Rio Grande of these dams is the proximate cause of the environmental and species damage. The silvery minnow, for example, requires a lengthy habitat and minimal pools of stagnant water for survival. Otherwise predation is extremely high. The evaporative loss of water from Elephant Butte Reservoir is an egregious waste and benefits only water users in the Lower Rio Grande downstream of Elephant Butte Dam to Fort Quitman, Texas, that, but for the evaporative loss of water from the Elephant Butte Reservoir, downstream users would be unable to store their surface water for use, which loss can be prevented by placing the much of the perennial and torrential flow of the Rio Grande, not necessary for the preservation of the environment and the endangered species into upstream reservoirs at a higher elevation where evaporative loss is much less or into ground-water-storage and retrieval facilities authorized by N.M. Stat. Ann § 72-5A-1 *et seq.* that will provide better basin-wide conjunctive management of the waters for environmental, municipal, industrial and irrigation uses and which application is clearly in the public interest and in the interest of a sustainable environment and preservation of endangered benthic and pelagic riverine flora and fauna and the riparian bosque habitat.

The impoundment of the Rio Grande by Elephant Butte Dam was enabled by approval of the Territorial Engineer of the Application[14] No. 8 perhaps filed on or about January 28, 1906 for the

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[12] Frank Ward, Figure 13, *Id.* (http://wrri.nmsu.edu/techrept/tr317/downl.html

[13] Statutes at Large 388

[14] HISTORICAL NOTE: It would seem the applicant (B. M. Hall) didn't know what day it was when he filed the application. Further, he did not indicate the capacity in which he was authorized to file the application. He did not indicate his agency affiliation on the Application or that he was even a regular employee of the federal government. In fact, Mr. Hall was a "consulting engineer" and not an U.S. Government employee. As a "consultant" it is unlikely he had any authority to file applications for or on behalf of the U.S. Government for anything. Nor did he provide evidence that he had any authority to act for the U.S. Government. The Application was incomplete and grossly deficient on its face. Mr. Hall did not fill out Item 5 of the Application and he likely did not fill it out intentionally because he certainly knew of the civil works already constructed and in the process of construction by the Rio Grande Dam and Irrigation Company, Inc., a New Mexico corporation, then in good standing, as early as 1896 because as early as 1904 he reports, in official correspondence, that he was "hard at work on estimates for storage, mud accumulation and irrigation water from the International reservoir and the Elephant Butte reservoir." The Application bears no verification that it was actually received into the possession of the Territorial Engineer or when it was received. There is no certification as to the verity and substantial completeness of the information in the Application.

storage only of 2,000,000 acre feet of water and by the permit of 1908 for all unappropriated water of the Rio Grande, which permit represented an egregious future taking of all then unappropriated water from upstream users by the federal government and which permit must be equitably limited by the amount of water actually beneficially used within the Lower Rio Grande portion of the Rio Grande at the time of the application. Elephant Butte Reservoir as finally constructed had a storage volume of about 2,600,000 acre feet.

This Application is also for water contained within the Elephant Butte Reservoir now and in the future occupied by sediment which sediment has reduced the original storage volume from about 2,600,000 acre feet to about 1,998,358 acre feet of winter storage capacity today. Any water or rights to water for water contained within this 600,000 acre feet have been abandoned and forfeit by the BOR because they stood by for 98 years and watched as sediment has filled the reservoir (to the extent that they had rights to this storage volume and rights to water in it.) The BOR has known since 1904 that this would be a problem from the work of B.M. Hall, a consultant to the Bureau of Reclamation of the U.S. Geological Survey, a department of the U.S. Department of Interior, who worked on this problem. The fact that the reservoir is filling with sediment operates as a release of the water pursuant to N.M. Stat. Ann. §72-5-33(A)(2) which then is available for storage and appropriation which storage and appropriation is also the subject of this Application.

This Application will not violate the original permit for storage save that the Applicant or the BOR or other entities with whom Applicant may contract must store the water underground to conserve and preserve the water subject to this application from unconscionable waste. This

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The Application was hand-written, as though dashed off in a moment as an afterthought, as to quickly correct a past oversight as with a wave of the hand all of the earlier extensive civil works were non-existent. We know from other records, that Mr. Hall had access to a typewriter at that time. A government officer would normally respect the dignity of a document, particularly as important as an Application and in particular, "this" Application, by using a typewriter. We can show that Mr. Hall had a typewriter in his office in El Paso at 322-323 Trust Building in 1904. Why was it submitted from Carlsbad rather than his office in El Paso? We do not know if the Reclamation Service of the U.S. Geological Survey of the Department of Interior, for whom he was a "consultant", had any offices in Carlsbad. Consequently, the 1906 Application was incomplete, seriously defective, and likely submitted outside of Mr. Hall's authority and should probably have been rejected by the Territorial Engineer as invalid and seriously deficient, no affidavit of a prior filing or authority having been found to support a *nunc pro tunc* filing. In fact, it is more likely that the Application was filed much later and an earlier date was entered on the Application and that there was, in fact, no earlier Application. In fact, the Application is so suspicious, suspect, and strange as to raise the thought of a fraudulent filing that must have been made with the collusion of the Territorial Engineer to confer a prior right so as to defeat the works that had already been initiated by other persons, the existence of which can be proven from historical documents but which are omitted under Item 5, as though they did not exist and the existence of which must certainly have been known to the Territorial Engineer because they had been on-going for at least 10 years in 1906. He who has accepted the Application has gone only skin deep into its meaning. If it was wrongly filed, those who conspired to file it and those who have lived by it and those who have perpetuated it have taken advantage of their own wrong to the detriment of future generations of New Mexicans and any rights obtained thereunder by the BOR should be abjudged.

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Application will not violate the 1908 permit as all of that water has already been placed to beneficial use by users who established rights prior to January 28, 1906 and those with water rights established through beneficial use after January 28, 1906.

This Application challenges the inequitable taking of water by the federal government which inequity has been wrought on the Middle Rio Grande even including the Upper Rio Grande into Colorado by designing, planning for, and allowing the flagrant and inequitable evaporation, the right to which has never been perfected and has been lost and which action has been a detriment to the sustainability of the environment of the Rio Grande and adverse to the benefit of mankind.

Where "Conservation is the foresighted utilization, preservation and/or renewal of forests, waters, lands and minerals, for the greatest good of the greatest number for the longest time." (Gifford Pinchot) the BOR may be labeled as the archenemy of conservation by its egregious waste of our most precious and finite water resources.

As far as Applicant knows, the federal government has never filed any Extensions of Time in which to place water to beneficial use and is on no different footing before New Mexico State Law than any other person of public or private law under New Mexico statutes and is in violation of N.M. Stats. Ann. §§ 72-5-14 and 72-5-28 and any water for which BOR applied that has not been placed to beneficial use is void by operation of law as well as the common law judicial doctrine of abandonment as applied by the New Mexico State Engineer.

Furthermore, New Mexico statutes and regulations clearly protect the public monopoly over water to the exclusion of private enterprise (*See* N.M. Stat. Ann. §§ 75-5A-1 through 72-5A-17 (1999 supp), 72-12-8(F), 72-1-9, Laws of 2003, Chapters 132, 135, 369, 19.25.8.9 NMAC – N, 01-31-2001, Lower Pecos Water Banking Regulations Rule 11(A)(1)).

Therefore, in the alternative, any intent to place this evaporation loss to beneficial use has been abandoned for non-use and the failure to carry through its intent (if any) and the federal government cannot come along now after 98 years and say that it has continuing rights to the water lost by evaporation. They are forfeit under state law for any number of reasons.

Those unappropriated waters are now unappropriated and available for appropriation pursuant to N.M. Stat. Ann. § 72-1-1 *et seq*. and are available for diversion, withdrawal, capture, storage, conservation, marketing, sales and leases as beneficial commercial trade good uses on the Rio Grande for which this Application is filed. Any position to the contrary taken by either the Federal Government or the State of New Mexico will constitute violation of state law and the perpetuation of a public monopoly to the detriment of commercial enterprises and contrary to principles of equity and customary international law and the commercial purposes of this Application.

This Application will not violate the requirements of the Rio Grande Compact of March 18, 1938 (N.M. Stat. Ann. § 72-15-23) nor the Elephant Butte Irrigation Project except those requirements that relate to Elephant Butte Dam and Reservoir which are, in the face of modern technology, illegal and not in the public interest and violate the public trust doctrine under which government has a duty to protect resources for and on behalf of the public.

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The administrative move of the delivery of water from San Marcial to the gaging station downstream of Elephant Butte Dam in 1948 imposed an unconscionable increase in evaporative water loss from simple channel losses to San Marcial to the additional losses from the Elephant Butte Reservoir that were never contemplated at the time of the change or if contemplated were given no consideration or were recognized and planned for. Deliveries to Elephant Butte today are measured as the total of storage and evaporation loss. Such a shift in measurement point with attendant outrageous evaporative losses cannot be sustained and the delivery point must be shifted back to San Marcial such that the Applicant can utilize the water subject to this Application within the Middle and Upper Rio Grande for municipal, industrial, domestic, commercial, and environmental purposes.

This Application will not disturb and existing prior rights or claims to antecedent storage under the Rio Grande Project. Nor will it disturb any existing water rights of any successors in interest to the Rio Grande Dam and Irrigation Company or any other beneficial users with a priority date preceding and January 28, 1906 or any of the water rights of any acequias in the area that were in operation prior to any commercial storage and diversion projects. Nor will it conflict with any of the existing committed uses of waters in the Middle Rio Grande including but not necessarily limited to federal non-Indian reserved rights, if any, and Indian Primary and Paramount aboriginal water rights (as they may be proven to exist) or Indian reserved water rights created under federal law, if any, and water rights reserved under state law, and the Middle Rio Grande Conservancy District (MRGCD), Pursuant to N.M. Stat. Ann. § 72-5-17 Lion's Gate will deliver water as required by existing users under reasonable rates because, under this Application, Lion's Gate will become the trustee of such rights. This Application will not create any new water rights and will be subject to the prior appropriation of the waters of the Rio Grande and its tributaries as it has been or will become adjudicated.

Downstream deliveries and deliveries of "Usable water" at San Marcial as defined and required by Article IV of the Rio Grande Compact and the Endangered Species Act and decisional law will be made by pumping that amount of water back to the Rio Grande from ground-water-storage facilities in the amounts as would have been required under the Rio Grande Compact or as would have been available and had the water been stored in Cochiti, Elephant Butte and Caballo Reservoirs less the accumulated evaporative losses as those losses were contemplated by the Elephant Butte Project and actually experienced by the Project, whichever is less. Despite any existing over-appropriation that may be claimed by existing users upstream of San Marcial, those over-appropriations suffered natural historical shortages that did not include any of the water evaporated from Elephant Butte and Caballo Reservoirs that had already by-passed the upstream users without use. As for Cochiti, it was originally contemplated as a flood control project and should not have resulted in impairment of any downstream user. Any claim of upstream users to the water lost by evaporation must fail for many decades of prior non-use, abandonment, and historical shortages.

This Application will improve the quality of water within the Rio Grande and the quality of water delivered along the Rio Grande because the existing evaporation from reservoirs concentrates dissolved solutes in the water that remains behind in the reservoir which remaining water with an enhanced salt content is delivered for irrigation and other beneficial uses. The higher salt content results in salination of the irrigated soils which then requires additional applied water to leach the salts into the underlying shallow ground-water system from whence

the poorer quality ground water flows and drains back to the Rio Grande further degrading the quality of the water in the Rio Grande.

The water sought has been unappropriated prior to the arrival of man in North America, since time immemorial, and for at least 800 years since the arrival of the Pueblo Peoples as sedentary agriculturists and at least 80 years since the construction of Elephant Butte Dam and other more recent impoundments and was unappropriated for other uses at those times. The right to the evaporated water has never been subject to ownership by any person of public or private law including the MRGCD and the U.S. Bureau of Reclamation (BOR) because a water right only ripens into a real property right when it is beneficially used and the rules and regulations of the State Engineer are pursued as to become a perfected right.(Sun Vineyards Inc. v. Luna County Wine Development Corp., 107 N.M. 524, 760 P.2d 1290 (N.M. 09/13/1988)) Furthermore, the ownership of the water rights belongs to the person placing the water to beneficial use pursuant to N.M. Const. Art. XVI § 3 which states: "The beneficial use of water shall be the basis, the measure and the right to the use of water." and the opinion of Judge Harl D. Byrd in Opinion Re Threshold Legal Issue No. 3 in State of New Mexico ex rel. State Engineer and Pecos Valley Artesian Conservancy District v. L.T. Lewis, et al., United States of America, Nos. 20294 & 22600 Consolidated filed with the Fifth Judicial District Court on November 4, 1997 at 8:35 AM. The BOR and irrigation districts are the storers and con veyancers of water whose only rights are arguably a levy against property served for payment of the costs for the amortization of the civil works and the annual operation and maintenance costs. A right to the use of water for agricultural purposes enacted into law cannot be sustained in the face of extreme shortages for human consumption and non-use. In such cases, the laws of the past must be found to be in violation of the public welfare and hence unconstitutional.

Though the MRGCD has claimed ownership of water rights, their claim is incorrect as the MRGCD is only authorized to store, divert, and convey water under its permits SP-620 and SP-1690. Permit 1690 is allows storage of 198,110 acre feet in El Vado and the diversion of only 123,000 acre feet per annum from all of its diversion works. Supporting Document Number 15 of the Middle Rio Grande Water Assessment[15] indicates a rather stable actually irrigated acreage of about 49,000 acres from 1935 through 1993. Even though agricultural acreage is more, the difference between agricultural acreage and actually irrigated acreage is fallow land. Most of these are pre-1907 water rights. So the MRGCD diversion is required to serve the pre-existing water rights. It is the beneficial users that have the ownership of the water rights after Proof of Beneficial use has been filed with the New Mexico State Engineer and a license issued pursuant to the Rules and Regulations of the State Engine(*See,* Sun Vineyards, Inc. v. Luna County Wine Development Corp., 107 N.M. 524, 760 P.2d 1290 (Sept. 13, 1988) Additionally, the MRGCD took over operation of private ditches and acequias that were in place prior to creation of the MRGCD in 1925 that had served farmers for many years. What the MRGCD did not and does not own, it could not have contracted away and can not contract away or assign to the BOR and any claim of the BOR to water rights claimed by the MRGCD is *nul tiel* because it is unlikely that the MRGCD owns any water rights. Its diversion rights are clearly serving those who had pre-district water rights. However, the BOR may have had a prior application and prior rights to the water

On March 21, 2001, in a letter to the BOR and the MRGCD, State Engineer Thomas C. Turney asked these agencies to submit a Proof of Beneficial Use, because he did not recognize ownership

[15] U.S. Bureau of Reclamation, Albuquerque Area Office, 1997, Prepared by Ground-Water Science, 1995

by these agencies of any water rights and gave them a deadline to do so. The request was filed for the purpose of reviewing earlier permits issued to these agencies and to quantify their actual usage. They have not, as of the date of this amended Application, filed any Proof of Beneficial Use by which any claim of water rights might be determined. However, this Application is not for any water rights of native or non-native water now or heretofore in use. It is for wasted water that has never been beneficially used and is available for appropriation subject to N.M. Stat. Ann. § 72-1-1. Wasted water is not a beneficial use and confers no perfected usufructuary, real property right in or to the diversion and capture and beneficial use of water.

The State Engineer was correct in his request of MRGCD and BOR for Proof of Beneficial Use. Permanent sovereignty and regulatory control over natural resources is a prerequisite condition for economic development and environmental protection that this Application seeks to further. Investment and development cannot occur unless there is certainty and security in access to the resource that Applicant seeks to develop for commercial purposes in much the same way that the BOR contracts for the sale of water throughout the West.

This Application seeks to conserve and preserve the wasted water and to commercialize it as a trade good and direct it towards multiple beneficial uses including the future water security of the Middle Rio Grande Valley. Applicant will not contract the sale or lease of any of the applied for water to any entity of public or private law that is not utilizing best available water use and water conservation practices including irrigators and municipalities in the Middle Rio Grande. As the waste of water by evaporation from Cochiti, Elephant Butte and Caballo Reservoirs is as unconscionable as the inefficient and wasteful use of water by irrigators and others along the Rio Grande.

To the extent that storage of water in Elephant Butte and Caballo Reservoirs opened up new lands for irrigation or improved historical usage in the Lower Rio Grande, those uses and improvement in historical supply may be junior to many pre-existing uses and are artificially supported uses created by the civil works of man and which depend for their continuance upon the acts of man which under New Mexico law confer no right of continuance of supply. (N.M. Stat. Ann. § 72-5-27) The evaporative losses have been inequitably and unfairly imposed on the Middle Rio Grande and the remainder of the river by the Territorial Engineer, Acts of Congress, and the shift in the delivery point from San Marcial to the crest of Elephant Butte Dam approved by the Rio Grande Compact Commission. The charge of the evaporative losses at Elephant Butte to the Middle Rio Grande portion and "…against the Middle Rio Grande users' interests." is confirmed by the Hon. Jerald A. Valentine in his Order on United States Motion to Amend Complaint entered on April 2, 1903, in State of New Mexico *ex rel.* Office of the State Engineer v. Elephant Butte Irrigation District, *et al.* Cause No. CV 96-888, ¶ 4. (http://www.ose.state.nm.us/water-info/CourtOrders/order-cv-96-888.pdf) It is clear the water that evaporates from Elephant Butte belongs to the Middle Rio Grande under present measures and decisional law and not the Lower Rio Grande and could never have been put to beneficial use by the BOR in the Lower Rio Grande based upon its antiquated historical system of water management.

This Application and the potential uses of the water applied for herein will benefit from the New Mexico water planning effort slated for completion by the end of 2003. The planning efforts within the Rio Grande surface-water catchment area will identify and quantify alternative

potential uses. This will create long-term water planning objectives and water-budgeting alternatives. It will facilitate the survival of rural communities and traditional life-styles along the Rio Grande. This will assist the Applicant in seeking markets that match those identified in the Water Plan and as a guide to implementation of the Water Plan even as local and state priorities may shift. Applicant intends to seek continuing input from the communities and users served including government agencies and those agencies with responsibility for wildlife and habitat. Where environmental assessments may be required prior to implementation of a sale or lease or project including water storage and other water management projects, Applicant will either conduct the assessments itself or require those assessments of the buyers, lessees, or assignees of any water subject to this Application.

This Application offers a solution to the harm to the environment and endangered species caused by the unforeseen consequences of acts of the Federal Congress and the U.S. Department of Interior based on old technologies which technologies have been surpassed with new technologies that have significantly changed and improved our ability to manage our limited water resources in a holistic manner. Elephant Butte Dam and Reservoir were constructed for the purpose of providing storage of water only for irrigation with no consideration or set asides or any other Congressional authorizations for any recreational uses a fact confirmed by State Engineer John D'Antonio in his remarks to the Water 2025 Conference in Albuquerque, New Mexico on August 12, 2003 where he stated: "Recreational uses don't have a water right."

Territorial Engineer Application for Permit No. 8 is only for storage of flood waters. No diversion or specified uses are indicated on the face of the Application. Judge Valentine states that "The storage right of the United States is not the right to apply water to beneficial use." State of New Mexico, *Id*. ¶ 13. Also, we may reason that because State of New Mexico *Id* ¶ 15 states: Water stored in the reservoir is committed to uses below the dam." that water that evaporates escapes and cannot be used below the dam and is, therefore, not stored or captured but is a fugitive resource and may be committed for uses above the dam and it is that water for which this application is made and it is water that is not comprehended within the general adjudication of the Lower Rio Grande, which evaporative water will be reclaimed by placing the stored water beneath the ground surface.

The evaporative losses represent egregious waste of our natural resources that is anathema in western water law. (See Jicarilla Apache Tribe v. United States , 657 F.2d 1126 (10th Cir. July 29, 1981) In Jicarilla at 1113, the court looked to New Mexico law to define beneficial use, noting that water conservation and preservation are "of utmost importance," and the prevention of "waste of water" entered prominently into state court discussion of the definition.

Elephant Butte has a 63-year old hydro-turbine 27,945-kilowatt electrical plant that operates seasonally 34.43 percent of the time. A present court order prevents any power generation during irrigation periods. In effect, the power generation from the facility is unreliable and the facility requires major rehabilitation. Furthermore, as power plants are concerned this is a small facility.

This Application contemplates the use of Cochiti and Elephant Butte as settling basins for sediment and temporary retention facilities from which water will be fed into ground-water storage and retrieval facilities. and the storage of water applied for by the U.S. Government in 1906 and 1908 including that volume of water that would be otherwise evaporated underground, as sound conjunctive active water management practices and modern technologies allow. The present Application calls for new thinking and

new civil works. This will provide the sustainable environmental and societal benefits sought by this Application and the commercialization of the water resources by Lion's Gate Water. The use of Cochiti and Elephant Butte Dam and Reservoir as a settling and temporary storage basins will cause no long-term hardship or loss because the reservoir volume is already filled to one-third of its storage volume by silt and is nearly empty a fact which has already adversely affected real property values in nearby communities that may depend on the lakes for recreation. The natural life cycle of lakes whether man-made or natural is that they fill with sediment and lose storage capacity until the impounding barrier is breached and what is left of the lake or reservoir drains.

Additionally, the Elephant Butte Reservoir as of the date of this Application and Sixth Amended Application has less than 219,912 acre feet of water in it or only 11 percent of its presently available storage capacity[16] The State Engineer has estimated the storage in 2004 at only 7 percent.[17] Under the 2003 Relinquishment Agreement with Texas that allows New Mexico release 217,500 acre feet from Elephant Butte Reservoir over the next two years so that Rio Grande water can be saved in upstream reservoirs when the storage in Elephant Butte is below 400,000 acre feet. When this water is released, storage likely will fall below 219,912 acre feet in 2004. Finally, we believe from Pacific Decadal Oscillation (PDO) data that we are in for another 15 years of drought conditions with below average precipitation. This will further reduce water available to Cochiti, Elephant Butte, and Caballo Reservoirs and instead of the 8 inches of water released to farmers in the EBID in 2003, they will likely get much less. Any recreational use in Elephant Butte that benefits Truth or Consequences will be reduced to *nil.* Under this likely scenario, the Oasis Golf Course presently under consideration for purchase by the New Mexico Department of Tourism will become a worthless stranded investment.

The removal or drainage of Elephant Butte Dam is adumbrated in Rio Grande Silvery Minnow, *supra*. in its citation of Tennessee Valley Auth. v. Hill, 437 U.S. 153 (1978) as well as the court in Catron County, 75 F.3d at 1440, which may be paraphrased to say: "The 'enduring or permanent nature' of the extinction of the silvery minnow tips the balance in favor of removal of Elephant Butte Dam." Neither the BOR nor the courts can come along now and say that the heretofore sacred cow of irrigated agriculture below Elephant Butte dam that produces such small economic returns to the economies of New Mexico and Texas justifies the egregious waste of water through evaporation. In citing Jicarilla *supra*, in which the Trustee of the Applicant was the expert witness at trial in the U.S. District Court in 1979, the Rio Grande Silvery Minnow court agrees that the waste of 93% of SJCP water stored in Elephant Butte cannot be justified by the minimal recreational benefit.

The removal or drainage of Elephant Butte Dam would not be inconsistent with developing federal policy and court orders. In 1999, the Edwards Dam on the Kennebec River in Maine was breached. The Four dams on the Snake River in Idaho are under pressure for removal to preserve the wild Snake River Salmon from extinction. In May 2003, Federal Judge James Redden ruled that a government plan for saving the salmon with measures short of dam breachings on the Snake was inadequate. A Bill now in the U.S. Congress (H.R. 1097) sponsored by Jim McDermott (D. WA 7th) with 85 co-sponsors, introduced on March 5, 2003, would give the approval of Congress to breach the dams. Removal or Cochiti Dam was advocated at the 47th Annual New Mexico Water Conference. On July 30, 2003, the KRQE Channel 13 Evening News ran a story on the Rio Grande bosque restoration that briefly mentioned removal of dams in New Mexico.

In the alternative, if the Lower Rio Grande water users wish to continue the use of Elephant Butte Dam and Reservoir, this Application seeks to appropriate from uses downstream of Elephant Butte Dam and

[16] Albuquerque Journal, August 7, 2003
[17] John D'Antonio, Water 2025 Conference, August 12, 2003

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Reservoir the water that creates the storage volume and surface area that leads to the wasted evaporative loss which loss must be equitably charged to and born by downstream users who benefit from the Project. This charge against the Lower Rio Grande water users will not necessarily result in reductions in irrigated acreage because new operational rules will develop to maintain their beneficial use of water to which they are entitled.. However, their egregious waste of water from evaporation from upstream reservoirs that is the subject to of this Application, serves no direct benefit to them and is hereby applied for commercial beneficial uses of the water as a trade good and environmental uses in the Middle and Upper Rio Grande region. In this case the doctrine of equitable apportionment as between legally defined reaches of the Rio Grande must assume primacy and there is no equity in the egregious waste of water foisted by the Parties to the Rio Grande Compact, as confirmed by the Congress in favor of Lower Rio Grande water users, upon Middle and Upper Rio Grande users and for which wasted, non-beneficially used water this Application is made. The doctrine of equitable apportionment is applicable to the reaches of the Rio Grande because the Court of Appeals in Elephant Butte Irrigation Dist. v. Board of Regents of New Mexico State Univ., 115 N.M. 229, 849 P.2d 378 (1993) has the reaches of the river are divisible for adjudication purposes which is cited with approval by Judge Valentine in State of New Mexico *Id.* ¶ 2.

Because the cornerstones of the doctrine of equitable apportionment require the demonstration that the reach of the Rio Grande seeking the water must demonstrate best available water conservation, preservation, and technology and the parties in the reach of the river seeking the water must demonstrate that the water is of greater economic value and need to them than to another reach. It is unquestioned that water conservation measures within the Middle Rio Grande have been Herculean and continue to improve. It is unquestioned that the highest and best use of water is the sustenance of human life and that the need for water in the Middle Rio Grande far exceeds the need for irrigation in the Lower Rio Grande. As to both of these tests, Lower Rio Grande agricultural water uses and water users for which the Project was authorized can not establish a *prima facie* case. The egregious and unconscionable waste of evaporated water, the subject of this Application, is the salvation of human survival and progress in the Middle and Upper Rio Grande and the salvation of a sustainable environment, abnegates their ability to do so.

To further this Application, Applicant, its lessees and their contractors and assignees may use water leased from Applicant to offset in-stream depletions or they may divert water directly from the Rio Grande with the specific approval of the State Engineer or they will be required to apply for the necessary Ground-Water Storage and Retrieval Permit(s) pursuant to N.M. Stat. Ann. § 72-5A-1 *et seq.,* so as to most efficiently utilize the waters of the Rio Grande while complying with all requirements of the Rio Grande Compact as it exists or as it may be modified including instream flows based upon studies to determine the best management methods.

Or, in the alternative, Congress may appropriate funds for the creation of ground-water-storage and retrieval facilities pursuant to State Law in which Applicant may join for the storage of water heretofore and otherwise lost to evaporation.

Ground-water-storage and retrieval facilities were contemplated by the New Mexico State legislature to promote the "conjunctive use and administration of both surface and ground water to promote the "effective and efficient use of the state's limited water supplies" and promote conservation of water within the state; and serve the public welfare of the state; and, lead to a more effective use of the state's water resources. The concept of ground-water storage and retrieval is an important adjunct to the concept of water banking that has begun to find its way into New Mexico water law. The present problem with water banking as it is practices by the MRGCD is that there is no "extra" water in their water bank. The problem with Rio Grande water banking as it is envisioned is that there is no unappropriated "extra" unused water to place in a water bank. This Application contemplates the storage of the water applied for as "extra"

unappropriated water that would be placed or "water banked" in the subsurface. As a new appropriation adequate laws and regulations are already in place for the storage, transfer, and use of the water.

In addition to the matters discussed in this Application and given the heightened state of security within the United States today, the storage of water in open reservoirs is to be discouraged in favor of more secure storage. As recently as the evening television news on September 4, 2003, the general public has been notified that terrorists seek to strike water supplies. This Application and applications for ground-water storage and retrieval projects that will follow from this Application will place the water underground where it is in a significantly more secure location. Additionally, there will be multiple ground-water storage and retrieval facilities creating a redundancy unlike a surface reservoir where all of our eggs are in one basket so-to-speak. Ground-water storage and retrieval facilities are contemplated in closes proximity to the place of final use. The locations may or will be within the Santa Fe Group aquifer from Elephant Butte to Espanola and within the Hueco and Mesilla Bolson deposits in the Lower Rio Grande within New Mexico and Texas for both irrigation and other beneficial uses and to meet the growing demands of Juarez provided suitable international agreements are put in place and the transboundary sale of water to Juarez or elsewhere within the Republic of Mexico is not prohibited under principles of international law and customary measures..

The sole enterprise of the Applicant is the commercial development, commoditization, free trade and sale or lease of water for profit through the acquisition of investment capital and investment of said capital for the diversion, capture, storage, conservation, marketing, distribution, sale, lease of the unappropriated water within New Mexico to existing and future customers for agricultural, industrial, environmental, commercial, dairy and dairy processing, municipal uses, domestic, construction, mining, and other beneficial uses as well as the sale or lease of water to beneficial users for dedication to in-stream flow, sustenance of riparian habitat, restoration of the riverine ecosystem, and other uses that benefit the environment all to inure to the benefit of New Mexico, its citizens and its environment. The unappropriated surface water is a natural resource capable of sustainable use in an environmentally sound manner in amounts dependent upon annual replenishment, carry over storage, and active water management within river basins.

Water is recognized as a "mineral" (albeit an unlocatable mineral under the General Mining Act of 1872, 30 U.S.C. 2 § 21 *et seq*.) in Andrus v. Charlestone Stone Products Co. 1978.SCT. 41935, 436 U.S. 604, 98 S. Ct. 2002, 56 L. Ed. 2d 570. Water is recognized as a trade good and an article of interstate commerce in Sporhase v. Nebraska *ex rel*. Douglas, 458 U.S. 941 (1982) and like other natural resources and mineral resources, is a "good" capable of measure and monetary valuation in Commission v. Italy, (*Case 7/68*,1968 E.C.R. 617) where goods include not only the sale of goods, but goods and materials that are supplied in the context of the provision of services as recognized in Commission v. Ireland Re Dundalk Water Supply (Case 45/87, 1987 E.C.R. 783.). Water is, therefore, an "economic good" and a commodity in the same manner as other fugitive resources such as oil and gas. The rights to capture, possession, and delivery are similar to contracts for commodities that are also capable of being bought and sold.

Applicant will conduct or cause to be conducted hydrologic and other engineering studies, services, and design, and integrated engineering and project management services for the surface water diversion and distribution infrastructure in compliance with all applicable measures. Applicant may construct civil works for surface water diversion, wells, storage facilities including ground-water storage and retrieval facilities, pipelines and conduits, pumping stations, water-treatment facilities, and provide efficient operation and maintenance of said civil works. Applicant and its investors will assume or share the risk or cause lessees or buyers of water to assume or share both the investment in and the operation and maintenance of infrastructural improvements for the commercial sale and provision of water produced and diverted under the permit issued pursuant to this Application.

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Applicant believes it has established by a preponderance of evidence and authority the sound rationale for the approval of this Application and the need for the water that is presently wasted and for the reasons above expounded and has demonstrated its good faith in making this Application and that this Application should be approved subject to the continuing oversight and authority of the State Engineer. This Application can be approved without adjudication of the Middle Rio Grande because the surface water applied for has never been beneficially used by man and is above and beyond that necessary for sustenance of endangered species and the riverine habitat and there can be no existing claims against it though in other respects, the Rio Grande may be over-appropriated which matter must be dealt with by a general adjudication of the Middle Rio Grande an action that the State Engineer has had 96 years to initiate but has not which is arguably a dereliction of his legislatively mandated *parens patriae* public duty to administer the waters of the State of New Mexico and a violation of the public trust doctrine. As stated above, the rights of any prior appropriators will not be adversely affected and there are no other applications for the water applied for in this Application that are prior to this Application.

This Application and Amendment is filed September 5, 2003 and is filed pursuant to 19.27.1 NMAC and comprehends, corrects, expands and amends the Applications originally filled on June 16, 2003 and amended on June 19, 2003, July 8, 2003 , July 17, 2003, July 25, 2003, all in an effort to make the Application more descriptive, quantitative, and all inclusive and in an effort to describe fully its intention and to describe the overall framework of water concerns in New Mexico and the ways in which this Application can contribute to the resolution of these issues that are permitted and not proscribed by existing federal and state common law, civil law, and statutory Laws of New Mexico.

Applicant expects the State Engineer to treat this Application in accordance with all existing measures and international law, including fair and equitable treatment and principles of reciprocity and with full protection and security in the same manner as applications by any other domestic or foreign person of public or private law Applicant requests of the State Engineer that this Application be processed in a reasonably short period of time which it accords, in like circumstances, to other Applicants and investors with respect to their private or public enterprises and which period of time is measured in terms of months[18] rather than years subsequent to submittal of any supporting information requested by the State Engineer in evaluating this Application and in making its determination. Review and action shall not be frustrated by administrative delay or hindrance or the creation of *ex post facto* measures by any governmental or non-governmental entity or the imposition of discriminatory Administrative, Legal, Technical, or Financial Barriers to the processing of the Application or the imposition of discriminatory policies or *ex post facto* measures either written or unwritten, as arbitrary or discriminatory measures and restrictions and barriers to trade that are contrary to liberalization and transparency of transactions, where Barriers means Administrative, Legal, Technical or Financial regulations and requirements and arbitrary and capricious policies, actions, measures and personal preferences, captured or promulgated or conducted by bureaucrats and politicians or by existing industries, institutions, or public monopolistic competitors that are able to frustrate and/or prevent market access by businesses and exclude competitors including but not limited to business registrations, investment regulations, business and trading permits, unreasonable increases in fees for necessary permits, unreasonable holding fees where none existed, reporting requirements, land access permits and fees where none existed, approval of Water-Rights transfers or leases, unjustified and unreasonable delays in processing applications for permits of any kind or new fees and permit requirements

[18] Statement on the record by Jonathan E. Sperber, Esq., Staff Attorney for the State Engineer Water Resource Allocation Program (formerly Water Rights Division) or Staff Attorney for the State Engineer Administrative Litigation Unit (or both) to Judge H.R. Quintero in Lion's Gate Water v. D'Antonio; Case No. CV 2003-73, at hearing on July 15, 2003)

for particular types of water-related civil works where none existed, including health and safety permits, municipal, county, and state licensing and permitting, certificates of occupancy, construction inspections, electricity and power connections, water and sewerage unavailability, or to apportion the unappropriated waters of the State of New Mexico that are a result of either *a priori* or *a posteriori* unwritten policy conceived or formulated either prior to or subsequent to this Application but not legally promulgated such as switches in policy from one stage in the process of treating this Application to another that catches the Applicant in a situation from which there is no path such as the denial of Applicant's Application for water from the Gila River that plunged the Applicant into Court [19] to protect its rights only to have the denial of that Application rescinded with direction for the matter to be sent to the State Engineer Hearing Unit where this Applicant then has no grievance and no reason to seek a hearing and the State Engineer, having reversed himself, cannot be aggrieved by his own decision yet a hearing is sought, such practices constituting an Administrative Barrier to trade.

Legal Barriers are laws and substantive regulations created by legislative bodies or an executive agency of government at any level to frustrate investment and commercial project including the protection of a public monopoly such as the prohibition of private enterprise from conducting activities that are only permitted to publicly owned enterprises. Such measures, as this Application, may forfeit privately owned water rights but allow non-forfeiture of water rights owned by publicly owned utilities, universities and mutual domestic water associations even though private entities fulfill the same water supply functions, or measures that do not disallow the operation of ground-water storage and retrieval facilities by private entities but State Engineer agency regulations that do prevent private ownership of such facilities , or by prohibiting private entities from engaging in water banking activities and reserving those activities only to publicly owned entities such as exist in the Pecos River Water Banking Regulations. Legal Barriers are discriminatory and restrictive to free trade.

Financial Barriers are existing or *ex post facto* scheme of fees, imposts, duties, taxes, proof of financial capability, or other financial measures that have been created legislative bodies and administrative agencies at any level of government for the purpose of frustrating a lawful enterprises such as this Application that are unjustified and intended be constructively fraudulent and intended to defeat any legitimate and permitted commercial purpose. Such measures are inimical to free trade and international principles of equity.

Administrative Barriers are discriminatory regulatory policies and measures promulgated to frustrate and prevent any lawful commercial enterprise such as this Application and such as may be practices by the State Engineer (Such as the prohibition against private entities constructing and operating a ground-water storage and retrieval project whereas the statutes do not disallow private entities from this activity) or other regulatory agency at any governmental agency and that are used and intended to perpetuate public water supply monopolies rather than the unbundling of public water supply monopolies, which includes the control and use of water by publicly owned entities such as universities, publicly-owned water supply systems, and mutual domestic water users associations, and in ways that are contrary to existing measures or contrary to free trade.

Technical Barriers are any existing or *ex post facto* technical measure imposed to discriminate against private commercial activities such as this Application that though they may have been promulgated for seemingly sound reasons their promulgation has been triggered by an intention to cause hardship in carrying out commercial purposes.

[19] In The Matter of the Application of Lion's Gate Water for Permit to Appropriate the Public Surface Waters of the State of New Mexico Under File GSF-General v. John R. D'Antonio, Jr., No. CV 2003-73

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Tortious Interference, is an action by any agency of government or any employee acting to frustrate the commercial purposes of an enterprise such as this Application by engaging in any tortious act such as interference with publication of notice when notice has been prepared by Applicant when the State Engineer fails to act which is a violation of State Law and a violation of the due process clauses of the Fifth and Fourteenth Amendments.

All actions under the law are permissible unless specifically disallowed. *Ex post facto* measures are measures enacted or promulgated after a permissible action is initiated with the intent of creating Administrative, Legal, Technical or Financial Barriers of some kind in response to the action so as to frustrate or prevent the action and which are specifically prohibited by U.S. Const. Art. I §10

A public water supply monopoly means that water can only be appropriated and used by publicly owned and operated entities rather than privately owned and operated entities carrying out commercial activities that serve either the public or private commercial interests.

Any Barriers and discriminatory policies created at any level of government from local government to national government and by any branch of government including, legislative, judicial, or executive will frustrate the commercial purpose of Applicant and will constitute an impediment and bar to the Applicant's private investment and private enterprise and a deprivation and a regulatory taking of operating income, profit, and future profits of the Applicant and/or its investors. Any *ex post facto* measures or actions are unconstitutional under the American scheme of government and may constitute the proximate cause of financial loss as determined by measures calculable from local circumstances and customary international law and shall constitute unfair and inequitable treatment and expropriation of future opportunity and discrimination in violation of international law. Any permits or permissions, other than the approval of this Application by the State Engineer, required to accomplish the commercial purposes of Applicant's enterprise and to comply with all existing measures, will be obtained provided no inequitable and unfair Administrative, Technical or Financial Barriers are erected or existing or *ex post facto* Legal Barriers all of which are contrary to free trade, are promulgated or Tortious Interference is committed.

This Application and the plans formulated constitutes the only plan ever developed that protects the environment, plans for environmental recovery and reconstruction, protects and augments existing water rights, and guarantees water for future beneficial uses including the potential to make more water available to the Republic of Mexico.

In the trustees experience over the past 40 years and as the expert witness in Jicarilla v. United States and as a member of the Governor's Blue Ribbon Task Force on Water from 1997 to 2003, and as the Natural Resource Trustee for the State of New Mexico from 1995 to 2003, he has never heard of any concrete or conceptual plans for utilization of water that has been evaporating for so long. In fact, the water plans now being formulated for the State of New Mexico and the Rio Grande valley make no plans to include such a concept. Nor do any plans presented at the Water 2025 presentation in Albuquerque on August 12, 2003 where neither the State Engineer not BOR Commissioner Keys made not a single reference to the egregious waste of water from Cochiti, Elephant Butte, Caballo Reservoirs and the need to save, salvage, and use that water. Since the United States, the State of New Mexico, and the City of Albuquerque lost their plan to store SJCP water in Elephant Butte in the Jicarilla case because of the egregious evaporative loss of the SJCP water, there has never been a plan voiced to salvage and use the lost water. Nor has there been any suggestion offered in any litigation the water evaporated could be beneficially used.

This Application must be considered under principles of non-discrimination, fair and equitable treatment, environmental restoration and sustainable environmental objectives, commercial objectives, and customary principles of international law and the international treaty obligations of the United States of America.

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Applicant believes that this Application is correct and as complete as possible bearing in mind that specific diversion points and specific points of use and specific beneficial uses other than generic types of uses cannot be determined at present but will be identified as water applied for hereunder is contracted and leased for beneficial uses in the same manner that specific points of diversion and places and purposes of use were not identified by any of the parties that contracted for SJCP water but rather were identified in subsequent applications to the State Engineer such as the bladder dam identified for the diversion of SJCP surface water for use by the City of Albuquerque or the construction of wells within the Buckman Well Field that divert SJCP water by inducing infiltration of the surface water of the Rio Grande for the City of Santa Fe all of which projects were initiated years after completion of the SJCP transmountain diversion works during which time, the City of Albuquerque, for example, sub-leased its water for vineyards near Truth or Consequences and other commercial activities up and down the Rio Grande for which Applicant seeks similar fair and equitable allowances and treatment.

As a foreign business trust, Lion's Gate Water attempted to register with the Public Regulatory Commission after its creation in Vancouver, British Columbia on April 22, 2002 pursuant to N.M. Stat. Ann. §52-20-1 *et seq*., **(**Laws 2001, ch. 200, § 84) and was unable to because the definition of a foreign business trust included only business trusts created in other states and not in other foreign countries. An *in pari materia* reading of the statute suggests that foreign countries are included. On July 24, 2003, Lion's Gate Water again tried to regis ter with the PRC but was informed by Mr. Avelino Gutierrez, Staff Counsel in the Legal Division of the PRC, that registration was not possible. Lion's Gate subsequently wrote Mr. Gutierrez on August 11, 2003 seeking written determination. By letter dated August 14, 2003 Mr. Gutierrez informed Lion's Gate that it cannot register with the PRC. With regard to Canadian registration, "There is no requirement for settlors or trustees to register [business trusts] or to disclose its existence in any general way [in Canada]" (36 Alberta L. Rev. 630, 630, July 1998)

If the State Engineer determines that it lacks sufficient information, Applicant requests the State Engineer to notify the Applicant of the defects within a reasonably short period of time. Applicant requests the State Engineer to prepare a Notice for Publication within a reasonably short period of time, not to exceed one month from the date of submittal hereof, after which, Applicant may prepare its own notice in compliance with N.M. Stat. Ann. § 72-5-4 and § 14.11.1.

Prior to issuing written notice for publication, the State Engineer rejected all prior applications and amendments on August 25, 2003 by stating: "In fact, the evaporation loss from Elephant Butte Reservoir is accounted for and charged against accrued credits and/or debits." Such accounting would, in other circles, be called ENRON accounting. The fact is that accounting cannot hide the fact that the evaporative losses are "real water" and an egregious loss of our precious water resources which is a sustenance to the environment and mankind. If such accounting seeks to justify the egregious waste of water, the accounting rules must be either changed or rendered nugatory in the same manner that the contract to store SJCP water in Elephant Butte Reservoir was voided by the Federal Court and it is the parens patriae duty of the State of New Mexico to wage litigation to vitiate and void any rules that result in the wastage of our water resources and preserve the water for all beneficial uses including in-stream flow. New Mexico suffers under the persistence of obsolete paradigms that dominate the minds of many water policy decision makers. This Application is a serious attempt to commercialize the valuable water resources of New Mexico currently being wasted and to create new water management paradigms. Third World countries have practiced more advanced water management policies than New Mexico for decades. Even the Nabateans, the finest farmers to cross the pages of history in the Negev desert of Israel 2000 years ago, husbanded and managed their water resources more effectively by virtually eliminating evaporation losses. This Application seeks to do the same.

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CERTIFICATION

I, William M. Turner, Trustee of Lion's Gate Water, affirm that the foregoing statements are true to the best of my knowledge and belief and that this Application is correct and complete and that the information contained herein conforms to the standard of substantial credible information and that all of the necessary parts of the form requiring the information have been filled in with the required information where substantial credible information means probable, believable facts and authorities that are sufficient to support Applicant's reasonable legal theory upon which the State Engineer should proceed with the action requested by Lion's Gate Water.

_____ _____
Applicant Signature Date

ACKNOWLEDGEMENT FOR A BUSINESS TRUST

STATE OF NEW MEXICO)
) ss.
COUNTY OF BERNALILLO)

Subscribed and sworn to before me by William M. Turner, known to me to be the sole Trustee of Lion's Gate Water, a Canadian discretionary, limited liability, common-law, business trust acting in his official capacity and not individually for and on behalf Lion's Gate Water created in Vancouver, British Columbia and within his powers as authorized by the Contract and Declaration of a Trust of Lion's Gate Water dated April 22, 2003 this the 5th day of September 2003.

_____
Notary Public

My Commission Expires:_____
(SEAL)

ACTION OF STATE ENGINEER

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

_____
_____
_____
_____

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

By: _____