



**MONTGOMERY  
& ANDREWS**  
LAW FIRM

**STEPHEN S. HAMILTON**

Direct: (505) 986-2649  
Cell: (505) 690-5291  
Email: shamilton@montand.com  
Reply To: Santa Fe Office  
www.montand.com

August 23, 2010  
**VIA FEDERAL EXPRESS**

Kurt Wihl, Esq.  
Keleher & McLeod, P.A.  
201 Third Street NW  
Suite 1200  
Albuquerque, NM 87103

Marcia B. Driggers, Esq.  
Senior Assistant City Attorney  
City of Las Cruces  
700 North Main Street  
Las Cruces, NM 88001-1120

**Re: *Moongate Water Company Condemnation***

Dear Mr. Wihl and Ms. Driggers:

Moongate Water Company ("Moongate") has retained this firm to represent it in regard to its prospective acquisition by condemnation by your client, the City of Las Cruces (the "City").

Our client requests that the City immediately state its intentions in regard to this condemnation. Moongate is of the view that the City is not serious concerning the condemnation and is merely using the threat of condemnation as another means to injure Moongate and obtain some competitive advantage at Moongate's expense. This belief is based on a number of factors. First, the City on several occasions has "cherry-picked" high-density development in Moongate's service territory. Second, the press has reported on numerous occasions statements by the Mayor and other City officials that the threat of condemnation was going to be used as a negotiating tool to give the City "leverage" in its negotiations with Moongate. Third, the City Council has never authorized an actual offer to Moongate as required by NMSA 1978 § 42A-1-4A, nor has it asked Moongate for a waiver of negotiations pursuant to NMSA 1978 § 42A-1-7A, and has made no effort to bring closure during the term of this Mayor and Council, which the NMUI condemnation showed was necessary. Finally, although one of the supposed reasons for a condemnation is the continuing legal expenses caused by the ongoing litigation between the City and Moongate, the City has made no effort to stanch this flow by seeking a stay of this currently active litigation pending the conclusion of the eminent domain case.

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**REPLY TO:**

325 Paseo de Peralta  
Santa Fe, New Mexico 87501  
Telephone (505) 982-3873 • Fax (505) 982-4289

Post Office Box 2307  
Santa Fe, New Mexico 87504-2307

6301 Indian School Road NE, Suite 400  
Albuquerque, New Mexico 87110  
Telephone (505) 884-4200 • Fax (505) 888-8929

Post Office Box 36210  
Albuquerque, New Mexico 87176-6210

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Because of the foregoing, Moongate believes that the City has no intent to condemn Moongate but is merely maneuvering to stop growth in Moongate's service area and divert growth to other areas where the City would reap the benefits of providing water services. Moongate also suspects that the City is fearful of the amount a jury might award this family-owned water utility in a condemnation proceeding.

Moongate does not state the foregoing because it wants to be acquired by the City. As you know, it has stated on numerous occasions that it would much prefer to stay in business and resolve its differences with the City with a boundary agreement. However, now that the City Council has voted on the condemnation, the City needs to act quickly to resolve the matter. Continued delay does nothing but injure Moongate as the threat of condemnation creates an obstacle to Moongate obtaining new customers. Please be aware that such a situation may allow Moongate to recover damages for condemnation blight (*See, Richmond Elks Hall Assoc. v. Richmond Redevelopment Agency*, 561 F2d 1327 (9<sup>th</sup> Cir. 1977) and *Amen v. City of Dearborn*, 718 F2d 789 (6<sup>th</sup> Cir. 1983)).

Additionally, please be aware that any action taken by the City in advance of condemnation in an attempt to lower the value of a property being condemned has been repeatedly held to constitute a due process violation (*See, 4 Julius L. Sackman, Nichols on Eminent Domain*, § 12C.03[i] (rev. 3d ed. 2001) and cases cited therein. Any government action "which depresses value or inhibits increase in value" of the condemned property "is deemed an abuse of governmental power." *Id.* In this regard Moongate is particularly mindful of the City's actions in PRC case No. 07-00230-UT where the City sought to use the PRC to limit and hamper Moongate's service in an area outside the City limits where the City had no facilities and served no customers. The City has also intervened in Moongate's State Engineer process and proceedings seeking to interfere with Moongate obtaining water rights. Moongate also believes that the fearmongering sponsored by the City as shown by its August 18, 2010 news release which asserts the demise of the Jornada Basin falls in this category. The City's professional hydrologists have always claimed that the Jornada Basin contains 12,000,000-acre feet of fresh water, of which 8,000,000-acre feet can be pumped and used. The professional hydrologists hired by the City have made those claims on behalf of the City when the City was requesting permission to drill wells in the Jornada Basin. If all of the water rights applied for by Moongate and the City plus other existing users in the Jornada Basin were granted, they would total approximately 20,000-acre feet per year and therefore, without counting the annual 5,000-acre feet of recharge, the basin would last for 400 years.

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Further, the City's claim that the acquisition of Moongate is necessary to preserve the Jornada Basin is simply bogus. The City currently pumps approximately twice as much from that basin as Moongate and has a continuing need to mine that basin to serve customers within the City limits because it cannot pump additional water from its wells in the Mesilla Basin. The City's press release suggesting that the City could "save" the Jornada Basin by serving East Mesa customers with Mesilla Basin water is precisely opposite to what the City actually is doing. In fact, Moongate found it necessary to file a protest in State Engineer File No. LRG-430-S-29 and LRG-430-S-30 specifically to limit the City's export of water from the Jornada Basin.

Consequently, what Moongate asks of the City is simple. If it insists on acquiring the Company, so advise us and provide us a timeline of its immediate intentions as to how it proposes to achieve this goal including a date certain for the filing of a condemnation petition. If not, what Moongate would prefer would be a boundary agreement. We request a response to this letter within 10 days.

Sincerely,

  
Stephen S. Hamilton

SSH/dho

cc: Client  
Kyle Gesswein, Esq.  
William Walker, Esq.